DECISION

Fair Work (Registered Organisations) Act 2009
s.18(b) RO Act - Application for registration by an association of employees

Application by the United Nurses of Australia
(D2024/8)

VICE PRESIDENT GIBIAN SYDNEY, 28 JANUARY 2025

Application for registration by an association of employees – Application for a confidentiality order – Contended that document filed by the applicant contained untrue and scandalous allegations in relation to another party to the proceedings – Whether desirable to make non-publication order in relation to the document – Relevance of principle of open justice – Order refused.

Introduction

[1] An association known as the United Nurses of Australia (the **UNA**) has applied to become registered as an organisation for the purposes of s 18(b) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (the **RO Act**). The application attracted objections from the Australian Nursing and Midwifery Federation (the **ANMF**), the Health Services Union, the United Workers' Union, the Australian Workers' Union and the Community and Public Sector Union.

[2] The UNA filed a document entitled "Response to Objections" on 14 January 2025. Its application had previously been listed for directions on 16 January 2025. At the directions hearing, the ANMF made an oral application for a confidentiality order with respect to the "Response to Objections" document pursuant to s 594 of the *Fair Work Act 2009* (Cth) (the **FW Act**). The effect of the order sought would be to prohibit the publication or disclosure of the document outside of the proceedings. In short, the ANMF submits that the document contains serious allegations in relation to the ANMF and some of its officials that are without foundation and should not be publicised through the Commission proceedings.

[3] The application for a non-publication order was made without prior notice to the Commission or the other parties. That is not to suggest criticism of the ANMF on that account. The "Response to Objections" had only been filed two days previously. In the circumstances, the Commission made directions for submissions to be filed in relation to the non-publication order application. An interim order was issued to apply pending the receipt of those submissions and the determination of whether an order should be made to operate for a longer period. For the reasons that follow, a non-publication order should not be made and the interim order revoked.

Power to make non-publication orders

[4] Section 594 of the FW Act enables the Commission to make an order prohibiting or restricting the publication certain documents or information associated with proceedings before the Commission. The section provides:

> **Confidential evidence**
>
> (1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason: Article I.
>
> (a) evidence given to the FWC in relation to the matter;
>
> (b) the names and addresses of persons making submissions to the FWC in relation to the matter;
>
> (c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;
>
> (d) the whole or any part of its decisions or reasons in relation to the matter.
>
> (2) Subsection (1) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

[5] The power to make an order prohibiting or restricting the publication of the specified types of information or documents under s 594(1) arises if the Commission is satisfied that it is desirable to do so "because of the confidential nature of any evidence, or for any other reason…".

[6] In addition to the power conferred by s 594(1) to make non-publication orders, s 593(3) provides that the Commission can, if it is satisfied that it is desirable to do so, make orders that a hearing be held in private, as to who may be present at the hearing, prohibiting or restricting the publication of the names and addresses of persons appearing at the hearing or evidence given at the hearing or matters contained in documents before the Commission. Otherwise, the default position dictated by s 593(2) is that, if the Commission conducts a hearing, the hearing must be held in public.

[7] The power conferred on the Commission to make non-publication orders has the potential to conflict with the open administration of justice. The principle of open justice has been described as a venerable and indispensable part of the justice system.[1] The function of open justice is to ensure that the justice system operates appropriately and with integrity and that the public can have confidence that it does so. As Gibbs J observed in *Russell v Russell* (1976) 134 CLR 495 at 520:

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character.

[8] The application of the principle of open justice in the court system requires that the circumstances in which orders will be made prohibiting the publication of documents or

evidence before a court will be limited. Generally speaking at least, such orders will only be made if it is necessary to do so in the interests of justice and to secure the proper administration of justice in a particular case.[2]

[9] It has been observed that the power conferred by s 594(1) (and s 593(3)) to make orders prohibiting or restricting the publication of information or documents prepared in connection with proceedings before the Commission presents a different standard to that applied by the courts at common law or, frequently, pursuant to statutes or rules governing the operations of the courts. In *Santos WA Energy Ltd v Whittaker* [2024] FWCFB 231 (***Santos v Whittaker***), for example, the Full Bench recently said:[3]

> Self-evidently, s 594(1) of the Act vests the Commission with the power to make an order prohibiting or restricting the publication of certain things in relation to matters before the Commission if satisfied that it is desirable to do so "because of the confidential nature of any evidence, or for any other reason…". The test is one of satisfaction as to the desirability of a confidentiality order because of the confidential nature of the evidence in respect of which the order is sought or for any other reason. Unlike other jurisdictions or at common law, the test is not one of necessity. For example, s 37AG(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) empowers the Court to make a suppression or non-publication order on the ground that the order is necessary to prevent prejudice to the proper administration of justice or to the interests of the Commonwealth or a State or Territory in relation to national or international security, to protect the safety of any person, or to avoid causing undue distress or embarrassment to a party to or a witness in a criminal proceeding involving an offence of a sexual nature. Moreover, s 37AE of the FCA Act provides that in deciding whether to make a suppression order or non-publication order, the Court "must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice".
>
> Section 594 of the Act imposes a very different standard of satisfaction for the making of a suppression or non-publication order than that imposed by the FCA Act in relation to evidence and information put before the Court.[32] Although a course of action that is "desirable" can include a necessary course of action, the adjective is not so confined and is apt to include a course that is useful, wise, sensible, prudent or worth doing.

[10] As the Full Bench observed, it is apparent that the legislature intended the Commission to have a broad power to make orders prohibiting or restricting the publication of evidence or documents in proceedings before the Commission. A test of desirability, rather than necessity, contemplates a wider scope for exercising the Commission's discretion to make a non-publication or non-disclosure order than the common law dictates for the courts.[4] It would be an error to approach consideration of whether to make a non-publication order on the basis that there need to be exceptional circumstances, or that it be strictly necessary for the conduct of the proceedings, to make such an order.

[11] However, the basis of, and justification for, the principle of open justice is, in my opinion, significant in the context of the exercise of the Commission's discretion as to whether to make an order under s 594(1).[5] The Commission is conferred with various types of jurisdiction. It includes the determination of disputes between individual parties, disputes involving groups of employees and/or employers and setting minimum terms and conditions of employment for industries and occupations across the country. Although it does not, and cannot, undertake a judicial role, many functions of the Commission are carried out in a quasi judicial manner and involve a process which is akin to a judicial process.[6] It is critical to the work of

the Commission that the public can have confidence in the integrity and independence of its decision-making. Public confidence in the Commission's processes is aided by the those processes being conducted in a transparent manner and exposed to public scrutiny in a manner similar to court proceedings.

[12] It is true that the FW Act permits or requires some of the Commission's functions to be conducted in private. Conferences conducted by the Commission either can or must be held in private.[7] The Act recognises that it is necessary, and consistent with the proper conduct of matters before the Commission, for some matters to be conducted in private. In most instances, the purpose of the provision that conferences be conducted in private is likely to be to encourage the resolution of disputes and other matters being dealt with by a member of the Commission. Nonetheless, other aspects of the FW Act contemplate that at least the adjudicative functions of the Commission will be conducted in public and exposed to public scrutiny. As has been observed, where the Commission conducts a hearing, the hearing is required to be held in public unless the Commission determines it is desirable to make an order limiting access to the proceedings.[8] With some exceptions, the Commission is required to publish its decision on its website or by other means the Commission considers appropriate.[9]

[13] That is not to suggest that some different standard is to be applied other than that set out in s 594(1). The question is simply whether the Commission is satisfied it is desirable to make a non-publication order because of the confidential nature of the document or evidence or for any other reason. In making that assessment, it is appropriate for the Commission to take into account the desirability of the Commission's processes being open and transparent whilst keeping in mind that other considerations may, nonetheless, mean it is desirable to restrict the publication of evidence or documents produced in Commission proceedings. In my opinion, that consideration will be relevant to all Commission proceedings. It will perhaps have greater significance in some Commission proceedings, such as those which potentially affect the rights or interests of large groups of employers, employees or other persons.

[14] The courts have observed that one consequence of the principle of open justice is that untested allegations of an embarrassing or potentially damaging to individuals or organisations may become public. In *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW* (1991) 26 NSWLR 131, Kirby P observed:[10]

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging, and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may care to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[15] Mere embarrassment or distress has not been regarded as sufficient to justify a non-publication order even on the lower standard of whether it is desirable to make such an order.[11] This Commission has adopted a similar approach. In *Mac v Bank of Queensland* [2015] FWC

774; (2015) 247 IR 274, Hatcher VP (as his Honour then was) said in relation to proceedings in the Commission's anti-bullying jurisdiction:[12]

> In relation to the anti-bullying jurisdiction established by Pt 6-4B of the FW Act, it is apparent that the purpose of the legislation, namely to ensure that workers can continue in their engagements at work free from the risk to health and safety caused by workplace bullying, would be defeated if the public disclosure of sensitive information during the course of anti-bullying proceedings would be likely to have the effect of rendering the relevant worker's continuing engagement unviable. However it is equally apparent that, in accordance with the open justice principle, it is not sufficient to justify the making of a non-disclosure order merely that allegations have been made which are embarrassing, distressing or potentially damaging to reputations. In an anti-bullying matter, as with other types of proceedings before the Commission such as unfair dismissal remedy applications, the findings of the Commission concerning allegations which have been made will usually appropriately resolve concerns about embarrassment, distress or damage to reputation. If findings are made that an applicant's allegations of bullying behaviour are unfounded, then the position of persons alleged to be the perpetrators of such bullying will be vindicated and the outcome will redound upon the applicant. However if allegations of bullying are found to be substantiated, then public identification of the perpetrators of that bullying is normally appropriate. In either case, the public scrutiny involved will have a deterrent effect that is in the public interest — in the former case against the making of unfounded allegations and in the latter case against engagement in bullying behaviour.

[16] Some authorities have suggested that the principle of open justice has less force with respect to the availability of pleadings or other documents in advance of the trial in proceedings in circumstances in which embarrassing or distressing allegations are untested.[13] More recent decisions of the Federal Court have suggested that a general reluctance to allow public access to pretrial documents on the basis that the allegations contained in those documents are untested and may cause prejudice to those involved is not justified. In *Llewellyn v Nine Network Australia Pty Limited* [2006] FCA 836; (2006) 154 FCR 293, Rares J said:[14]

> The proposition that untested allegations in civil proceedings are somehow to be shielded from public view merely because they are untested allegations and could not possibly be properly understood in the context of a fully contested hearing is, in my opinion, not one that can sit with the principle of open justice or the right of any one fairly to report proceedings in a court of justice.

[17] His Honour observed:[15]

> Members of the public, as Mason J made clear in *Mirror Newspapers v Harrison* (1982) 149 CLR at 300-301, understand that it is fundamental to the open administration of justice that, as a routine, courts have allegations made in them which are untested at stages in the course of proceedings. At the end of the day the ordinary reasonable member of the community understands that it is the responsibility of the court, be it a judge or jury, to make findings about those allegations and then to decide cases. Ordinary members of the community understand that those matters are part of the administration of justice. Members of the media generally have a similar understanding.

[18] These considerations appear to me to be relevant to the application made by the ANMF for a non-publication order with respect to the "Response to Objections" document filed by the UNA.

Consideration

[19] The ANMF submits that a non-publication order should be made as a result of the content of the "Response to Objections" document. It does not suggest that the document contains confidential material. Rather, it submits that a non-publication order is justified by the fact that the document contains allegations in relation to the ANMF and some officials of the ANMF. The ANMF emphasises that allegations of fraud and other like serious misconduct should not be made without a reasonable basis and should be properly particularised. It says that there are no professional obligations which apply to non-lawyer parties or advocates in the Commission such as those which apply to legal practitioners. The ANMF submits that s 594 provides a mechanism for the Commission to ensure parties and people have some protection against having serious allegations of impropriety, including in circumstances that would otherwise be a breach of professional obligations, being disseminated.

[20] As set out above, s 594(1) permits the Commission to make a non-publication order if satisfied it is desirable to do so for any other reasons. It is possible that the nature of allegations raised in documents filed with the Commission in a particular case may make it desirable to make a non-publication order. However, in my opinion, consistent with the authorities referred to above, the mere fact that allegations, even allegations of a serious nature, have been made in documents filed with the Commission will not ordinarily, of itself, justify a non-publication order being made. In many proceedings before the Commission, allegations of misconduct, or even criminal conduct, might be made. Many unfair dismissal cases, for example, will involve allegations that the dismissed employee has engaged in misconduct of one form or another. The same can be said of proceedings in the Commission's anti-bullying and sexual harassment jurisdictions. The public exposure of allegations of misconduct by an individual in the course of proceedings of that nature has not itself generally been treated as justifying non-publications orders. The question is whether the circumstances of these proceedings, and the nature of the allegations made, warrant a different course.

[21] The "Response to Objections" document is lengthy, rambling and, to some degree, intemperate. It refers to an array of material which is of debatable relevance to the UNA's application for registration. For example, it extracts media articles and other reports in relation to misconduct, or alleged misconduct, by officials in other unions. To the extent this involves an attempt to suggest officials of the ANMF might have engaged in similar conduct by association, on the face of it, the document appears to be unfair and unjustified. In other respects, the document criticises the industrial representation provided by the ANMF to its members and contains material that the ANMF has interpreted to constitute allegations of misconduct on the part of officials of the ANMF.

[22] Although I can understand why the ANMF was prompted to make the application for a non-publication order, on balance, I am not persuaded that it is desirable to make an order under s 594(1) with respect to the "Response to Objections" document. A number of considerations appear to me to be significant in reaching that conclusion.

[23] First, this is an application for registration by an association which, it says, seeks to represent nurses throughout Australia. It claims to have something above 50 members. The objectors are a number of large trade unions which themselves have many thousands of

members. Although the UNA is itself small, this type of proceeding has the potential to be of interest to, and affect the industrial representation of, a large number of employees. It is undesirable that proceedings of that nature be conducted in a manner that is other than fully transparent. The making of non-publication orders with respect to matters sought to be put forward by the UNA has the potential to provoke unjustified suspicions in relation to the proceedings. The course most likely to ensure that any interested parties can be confident in the manner in which the proceedings are being conducted is for the proceedings to be subject to public exposure and scrutiny.

[24] Second, the justification given for the order sought is that allegations made in relation to the ANMF and its officials, which are said to be without foundation, should not be publicised. The submission comes close to relying on embarrassment or damage to reputation it is feared will be caused by such allegations being made public. As discussed, such a concern has not been regarded as sufficient to justify non-publication orders.

[25] Third, the allegations said to justify a non-publication order relate to the conduct of an industrial organisation and its officials. Industrial organisations are representative and democratic bodies. It is in the nature of the operation of industrial organisations that the actions of the organisation, and its senior officials, will be the subject of criticism from time to time. Such criticism may be legitimate. Not infrequently, it will be unfair, misconceived or even malicious. That is the reality for any democratic body. In my opinion, although it will depend on the circumstances of any case, the Commission will generally require a high threshold to be met before it would prohibit the publication of a document filed in proceedings before it because it contained allegations about an organisation.

[26] Fourth, the objection of the ANMF raises the question whether the persons who would become entitled to join the UNA if it were to become registered could more conveniently belong to and would be more effectively represented by the ANMF for the purposes of s 19(1)(j) of the RO Act. The adequacy of the representation provided by the ANMF to its members is relevant to that question. The matters raised by the UNA may be unfounded or misconceived. The subject-matter of the conduct of the ANMF, and particularly its representation of members, is not irrelevant to the proceedings.

[27] Fifth, the ANMF identifies a number of allegations as justifying the order it seeks. It is not appropriate or necessary to set out the allegations referred to at length. It is also not possible, or appropriate, for me to form any final view as to the veracity of any allegation raised by the UNA at this stage of the proceedings and I have not done so. It is sufficient to note that some of the allegations are capable of simple factual correction. For example, the ANMF complains that the UNA alleges that officers' remuneration increases annually on the basis of the consumer price index whereas, in fact, their remuneration is increased based on nursing salaries. In other respects, the UNA asserts disagreement with actions taken by the ANMF during the COVID-19 pandemic. Those assertions do not appear to me to allege any wrongdoing so much as disagreement over industrial strategy. That disagreement might be wrong or misconceived but it does not appear appropriate to prohibit disclosure of the statements. There are also certain assertions made about the use of ANMF funds. It is unclear what allegation, if any, is made in that respect. It is regrettable that, on one view, vague insinuations of impropriety are made without apparent basis being disclosed in the document itself. However, in light of the other

considerations I have mentioned, I do not believe that is sufficient to justify a non-publication order with respect to the document.

[28] For these reasons, I am not satisfied it is desirable to make a non-publication order under s 594(1) of the FW Act. The "Response to Objections" document raises a number of matters which are of questionable foundation. On balance, however, if baseless allegations have been raised by the UNA, the better course is for them to be answered in the course of the proceedings. For that purpose, I propose to issue a direction that the ANMF be granted leave to file a document, if it wishes to do so, to correct any assertions in the "Response to Objections" document it regards as false to be placed on the Commission's file. It is, of course, also open to the ANMF to reagitate an application for an order under s 594(1) if it believes there are consequences of the matters raised by the document that have not, as yet, been brought to the Commission's attention.

[29] The interim order I made on 16 January 2025 will be revoked. An order to that effect will be issued together with this decision.

VICE PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR783689>

---

[1] *Farrell v Super Retail Group Limited (Confidentiality Applications)* [2024] FCA 954 at [1] (Lee J).

[2] *John Fairfax & Sons Pty Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 (McHugh JA); *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 161B (Mahoney JA).

[3] *Santos WA Energy Ltd v Whittaker* [2024] FWCFB 231 at [23]-[24].

[4] See also *Day v Smidmore (No 2)* [2005] NSWIRComm 406; (2005) 149 IR 80 at [29]-[31] (with respect to s 164A(2) of the *Industrial Relations Act 1996* (NSW)).

[5] As the Full Bench acknowledged in *Santos v Whittaker* at [25].

[6] *Edwards v Justice Giudice* (1999) 94 FCR 561 at [43] (Marshall J); *One Tree Community Services Inc v United Workers' Union* [2021] FCAFC 15; (2021) 284 FCR 489 at [56] (Bromberg and Kerr JJ).

[7] *Fair Work Act 2009* (Cth), ss 368(2), 374(2), 398(2), 448A(4), 527R(2), 536NF(2), 536LY(2), 592(4) and 776(2).

[8] *Fair Work Act 2009* (Cth), s 593(2).

[9] *Fair Work Act 2009* (Cth), s 601(1) and (4).

[10] *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW* (1991) 26 NSWLR 131 at 142-143 (Kirby P).

[11] See, for example, *Day v Smidmore (No 2)* [2005] NSWIRComm 406; (2005) 149 IR 80 at [30].

[12] *Mac v Bank of Queensland* [2015] FWC 774; (2015) 247 IR 274 at [9]. See also *Re Corfield* [2014] FWC 4887 at [21]-[32]; *Hankin v Plumbers Supplies Co-Operative Ltd T/A Plumbers Supplies Co-Op* [2014] FWC 8402 at [24]-[27]; *Zirk-Sadowski v The University of New South Wales* [2022] FWCFB 188 at [12]-[14].

[13] *eisa Ltd v Brady* [2000] NSWSC 929 at [18] (Santow J); *Australian Securities and Investments Commission v Rich* [2002] NSWSC 198 at [15] (Barrett J).

[14] *Llewellyn v Nine Network Australia Pty Limited* [2006] FCA 836; (2006) 154 FCR 293 at [27] (Rares J). See also *Rush v Nationwide News Pty Ltd* [2018] FCA 357; (2018) 359 ALR 473 at [189]-[194] (Wigney J); *Ferguson v Tasmanian Cricket Association (t/as Cricket Tasmania)* [2021] FCA 1507 at [5]-[6] (Mortimer J); *Vardy v Titan Cranes and Rigging Pty Ltd* [2024] FCA 1410 at [34]-[39] (Shariff J).

[15] *Llewellyn* at [37] (Rares J).