DECISION

Fair Work Act 2009
s.602 - Application to correct obvious error(s) etc. in relation to FWC's decision

Australian Rail, Tram and Bus Industry Union
v
Transdev Sydney Pty Ltd T/A Transdev Sydney, Great River City Light Rail Pty Ltd
(ADM2024/6)

DEPUTY PRESIDENT WRIGHT SYDNEY, 9 JANUARY 2025

Whether obvious error in decision [2024] FWC 1198 in B2024/512 – protection action ballot order – employer name omitted from application by union – ss. 586 and 602 - whether s. 602 be relied upon to overcome the requirements of Division 8 of the Act so as to make the PABO retrospective – application dismissed

Introduction and outcome

[1] On 23 July 2024 the Australian Rail Tram and Bus Industry Union, NSW Branch (RTBU) made an application under s. 602 of the *Fair Work Act 2009* (the Act) to correct a Protected Action Ballot Order (PABO)[1] issued on 8 May 2024 by Deputy President Hampton and the associated Decision.[2]

[2] The PABO was made in relation to bargaining for an enterprise agreement for employees to be covered by the *Transdev Light Rail Operations Enterprise Agreement 2023* (Proposed Agreement). These employees are working on Light Rail Services operated by either Transdev Sydney Pty Ltd (Transdev Sydney) or Great River City Light Rail Pty Ltd (Great River) in Sydney, New South Wales. Transdev Sydney operates the Inner West Light Rail and the City South East Light Rail and employs the employees working on those services. Great River operates the Parramatta Light Rail and employs the employees working on that service.

[3] The PABO was made in relation to employees of Transdev Sydney only, pursuant to the PABO application made by the RTBU. The RTBU has requested that the Commission correct the PABO and associated Decision to include Great River.

[4] For the reasons that follow, I have declined to make the correction sought by the RTBU and have dismissed the application.

Factual Background

[5] The RTBU relied upon a witness statement of Mr Peter Grech, whose evidence was admitted without objection. Mr Grech is the Assistant Secretary (Road) of the RTBU and the

President of the Tram and Bus Division of the RTBU.[3] Mr Grech has had carriage of bargaining with Transdev Sydney and Great River.[4] Transdev Sydney and Great River did not file evidence but referred to aspects of the PABO application in their submissions. I have had regard to all of this material in determining this matter.

[6] Transdev Sydney and Great River are related employers as they share the same parent company, namely, Transdev Australasia Pty Ltd (Transdev Australasia). Great River is a joint venture between Transdev Australasia (70% ownership) and CAF Rail Australia Pty Ltd (30% ownership).[5]

[7] There are employees with dual roles across both entities. For example, Ms Bronwyn Cox is employed as Head of People and Culture of both Transdev Sydney and Great River and Mr Arsene Durand-Raucher is the Managing Director of both entities.[6]

[8] On 30 May 2023, Transdev Sydney and Great River issued a notice of employee representational rights to employees (NERR) to be covered by the Proposed Agreement.[7]

[9] On 6 May 2024, the RTBU applied for the PABO. Mr Durand-Raucher was copied into the email that the RTBU sent to the Commission attaching the PABO application.[8] The application form requires the applicant to provide '…the details of the employer(s) that will be covered by the proposed enterprise agreement.' In response, the RTBU listed Transdev Sydney as the employer and provided Transdev Sydney's ABN.[9] Paragraph 2.1 of the application form requires the applicant to list the details of the group or groups of employees of the employer who are to be balloted for each employer to be covered by the proposed agreement. In response, the RTBU stated,

> All employees of the Employer who are members of the RTBU, who will be covered by the Applicant's proposed enterprise agreement (for the avoidance of doubt, including Network Officers).[10]

[10] On 8 May 2024 Mr Durand-Raucher sent the Commission an email in which he stated, amongst other things that '…we have decided to not formally contest this application'.[11] The PABO was issued by the Commission on 8 May 2024 and provided that the ballot would close by 17 May 2024.[12] The Decision in relation to the PABO noted that the Commission was advised that Transdev Sydney did not object to the Application.[13]

[11] Paragraph 1 of the PABO stated:

> The Australian Rail, Tram and Bus Industry Union (ARTBIU or Applicant) is to hold a protected action ballot of employees of Transdev Sydney Pty Ltd (Transdev or Employer) described in clause 3 of this order.[14]

[12] Paragraph 3 of the PABO stated:

> In accordance with s.437(5) of the Act, the employees to be balloted are all employees of the Employer who are members of the Applicant who will be covered by the Applicant's proposed enterprise agreement (for the avoidance of doubt, including Network Officers).[15]

[13] Paragraph 6 of the PABO required the Employer to provide to the ballot agent a list of its employees who would be covered by the proposed enterprise agreement, in a specific format. Paragraph 7 of the PABO required the RTBU to provide to the ballot agent a list of its members who would be covered by the proposed enterprise agreement, in a specific format.[16]

[14] Prior to the ballot being conducted, the RTBU and Transdev Sydney (and probably Great River) provided their respective lists to the ballot agent pursuant to paragraphs 6 and 7 of the PABO. The list provided by both parties, included RTBU members at both Transdev Sydney and Great River. Consequently, the ballot agent conducted a ballot of RTBU members who were employed at both Transdev Sydney and Great River.[17]

[15] On 15 May 2024, Deputy President Cross convened a compulsory conference pursuant to s. 448A of the Act. The compulsory conference was attended by representatives of Transdev Sydney and Great River, the RTBU and individual employee bargaining representatives employed by both Transdev Sydney and Great River.[18]

[16] The RTBU provided its summary of bargaining position to the Commission prior to the conference. That summary relevantly provided that lines at Parramatta and Camellia were added to the tram network in early 2024 on a testing basis and noted that 'all new employees in Parramatta and Camellia have commenced on individual contracts'. The RTBU sought 'one Enterprise Agreement for the entire Light Rail Network in Sydney, to the extent of having all employees in the above Lines and locations covered under the same Enterprise Agreement'.[19]

[17] On 15 May 2024, Mr Toby Warnes who was then Director of Organising for the RTBU contacted the ballot agent to advise that he was getting reports that some members had not received a ballot. In that email, Mr Warnes listed the names of two members of the RTBU who worked on the Parramatta Light Rail.[20] The ballot agent's response relevantly provided:

> On further inspection, we have discovered that the data sent from the employer had a separate list within the list sent to us. Our apologies for not picking this up. We are adding those members now, and they should have logins within the next two hours.[21]

[18] Later that day, the ballot agent sent a further email to Mr Warnes which relevantly provided:

> Please note 19 further individuals have been added to the vote.
> Information has now been sent to them.[22]

[19] The results of the ballot were declared on 17 May 2024. A majority of the employees balloted voted in favour of each of the ballot questions.[23] The RTBU notified industrial action on nine dates to 'Transdev Sydney Light Rail' during the period from May to August 2024. Mr Grech said that all actions notified up to 16 July 2024 included RTBU members working on Parramatta Light Rail.[24]

[20] Transdev Sydney and Great River did not raise any issues in relation to the notices until 16 July 2024, when Mr Durand-Raucher sent a letter to the RTBU advising that the Notices of Protected Industrial Action dated 11 July 2024 and 15 July 2024 did not comply with the

requirements of section 414 of the Act as both notices gave notice of protected industrial action to 'Transdev Sydney Light Rail Pty Ltd' which was not the correct employer of the employees as stipulated in the PABO.[25]

[21] On 21 July 2024, Mr Durand-Raucher sent a further letter to the RTBU advising that only employees employed by Transdev Sydney can take protected industrial action in accordance with the PABO and that employees employed by Great River cannot take protected industrial action as industrial action has not been authorised by a protected action ballot order.[26]

[22] Mr Grech's evidence is to the effect that he was unaware that a second employer, namely Great River, was involved in bargaining as he said that he never received a copy of the NERR and the first time that he saw the NERR was when Transdev Sydney filed an application for an intractable bargaining declaration with the Commission on 2 August 2024.[27]

[23] Mr Grech said most of the employer representatives he has dealt with during bargaining are employees of Transdev Sydney or Transdev Australasia including Ashely Dean, Head of Employee Relations, (Transdev Australasia), Yohan Touzard, Operations Manager (Transdev Sydney) and Johnathon Jones, Manager People and Culture (Transdev Sydney).[28] To the best of Mr Grech's memory, all of the employer representatives that he has ever corresponded with use the domain name @transdev.com.au.[29]

[24] Mr Grech said that throughout the bargaining process he has never been involved in any discussion about the difference between the two companies, Transdev Sydney and Great River. In the draft Proposed Agreement, the two entities are referred to in the definitions of 'Employer' and 'Employee" however this was not discussed in any sort of detail in bargaining.[30] The first time that Mr Grech was aware that there was a second employer involved in bargaining was when the RTBU received the letter dated 21 July 2024 from Mr Durand-Racher. Mr Grech said previously, bargaining had only ever occurred with Transdev Sydney in relation to employees working on the Inner West Light Rail and the City South East Light Rail. The Parramatta Light Rail was added to the network in early 2024. Mr Grech said that the parties conducted themselves in a manner which reflected his understanding that he was bargaining for a single agreement for a single employer to operate all Light Rail operations across Sydney including Parramatta Light Rail.[31]

[25] Mr Grech said that throughout bargaining, Transdev Sydney has filed multiple applications with the Commission and has never raised that there was an issue with RTBU members working at Parramatta Light Rail taking industrial action. Two of those applications made no reference to Great River as an employer at all.[32]

Submissions

RTBU

[26] The RTBU submitted that the Commission is both empowered, and it is in the interests of justice, to make the correction to the decision and PABO and allow the amendment to the RTBU's application.

[27] The RTBU submitted that there has been confusion and oversight in relation to the inclusion of Great River as an employer by all parties which can be attributed to the following matters:

a. Transdev Sydney and Great River are related employers as they share the same parent company, namely, Transdev Australasia;
b. there are employees with dual roles across both entities;
c. the representatives Mr Grech was bargaining with all use the same domain name ending in '@transdev.com.au';
d. Transdev has filed applications and submissions arising from bargaining and industrial action between the parties in which it omits any reference to Great River as an employer;
e. neither Transdev Sydney, nor Great River, took any issue with the industrial action notified or taken by Great River employees until they received the RTBU's eighth notice of industrial action on 16 July 2024. This was some eight weeks after industrial action initially commenced on 23 May 2024, and the first time Mr Grech became aware of the distinction between the two entities.

[28] The RTBU submitted that the unequivocal intention of all parties was, and remains, that the scope of the proposed enterprise agreement includes employees of Transdev Sydney and Great River. The failure to include this in the PABO application was simply an inadvertent error that was not drawn to the Commission's attention by either party.

[29] The RTBU submitted that s.602 of the Act is intended to be a statutory analogue of the 'slip rule' used by courts to correct certain errors in orders. The purpose of the slip rule is to avoid injustice. The application of the slip rule is not confined to giving effect to the intention of the judge at the time when the order of the Commission was made, or judgment given. Rather, it extends to the intention the Commission would have had, but for the failure that caused the accidental slip or omission. This includes errors or omissions resulting from the inadvertence of a party's legal representative. Had the error in the PABO application been drawn to the Commission's attention, there can be no doubt that the order would have been made to that effect. This is precisely the mischief the slip rule was directed towards correcting.

[30] The RTBU submitted that not only is the Commission empowered to make the correction, but failing to do so would not accord with the purpose of the slip rule, to avoid injustice, for two key reasons. First, RTBU members at Great River are being deprived of their right to take industrial action under the PABO, despite being balloted and voting in favour of doing so. Second, the position of Transdev Sydney and Great River is that industrial action taken by Great River employees is unprotected so there is a real risk of litigation in respect of the industrial action already taken by Great River employees.

[31] The RTBU submitted that only the RTBU and its members would suffer prejudice if the Commission does not make the orders sought. On the other hand, it cannot be said that there is any prejudice to Transdev Sydney or Great River by correcting this obvious error.

[32] The RTBU submitted that the making of any orders under s.602 would require the Commission to amend the RTBU's application in respect of which the Commission has a broad discretion under s.586 of the Act. The Commission has only refused to allow amendments under s.586 in circumstances where the proposed amendment 'fundamentally changes the kind of

application that was originally made'. The proposed amendment does not change the kind of application that was made and there is no statutory barrier to making the amendment.

[33] The RTBU submitted that s.437(3) sets out the matters to be specified in the PABO application. No reference is made to naming the employer, or employers. That is because the central focus is the group of employees to be balloted. Under s.459, industrial action is authorised by the ballot, not the order. The group of employees to be balloted were those 'who will be covered by the Applicant's proposed enterprise agreement'. This included employees of Transdev Sydney and Great River and the ballot agent was provided with a list of employees from both entities. Those employees overwhelmingly (98.6%) voted in favour of taking action

[34] The RTBU submitted that this is not a situation where the proposed amendment requires the Commission to make a fundamental change to the application. It is strictly limited to an administrative task of adding one employing entity, noting that the statutory prerequisites have been otherwise satisfied. Even if the Commission were to find that the RTBU had not complied with the requirements of the FW Act, it is a technical breach. To that end, s.461(d) provides that a technical breach of Division 8 does not affect the validity of a protected action ballot.

Transdev Sydney and Great River

[35] Transdev Sydney and Great River (the Employers) submitted that the current application is misconceived for two reasons. Firstly, what the Application seeks in substance is a variation to the Commission's decision and order which is expressly prohibited by s.603(3)(f). Section 602 is not capable of being used in a way that permits the retrospective addition of a separate and distinct legal entity to an application filed with, or decision and order made by, the Commission. Secondly, the orders sought are not capable of being made because the statutory preconditions in s.443(1) of the Act to the Commission's exercise of the power to make a PABO in respect of Great River have not been met, and were not capable of being met at the time the Commission made the decision.

[36] The Employers submitted that the orders sought by the Application do not fall within the ambit of s 602 of the FW Act, as they do not contemplate the correction or amendment of an 'obvious error, defect or irregularity'.

[37] The Employers submitted that the High Court in *Esso Australia Pty Ltd v The Australian Workers' Union*[33] has identified that Courts (and by extension, the Commission) should not use the 'slip rule' to retrospectively vary an order to deem that a particular state of affairs existed when such a variation would 'have the effect of altering the substantive rights of the parties'. The "slip rule" (and by extension, s.602) is not capable of being used in a way that permits the retrospective addition of a separate and distinct legal entity to a decision and order made by a Court or Tribunal.

[38] The Employers submitted that the terms of the Commission's decision and order were consistent with the PABO application. Accordingly, there is no room for s.602 to operate because there is no 'obvious error, defect or irregularity' to correct. Simply because the RTBU now considers it should have named Great River as a party to the PABO application is not enough.

[39] The Employers submitted that s.443(1) of the FW Act identifies two mandatory preconditions to the making of a PABO, namely: that an application has been made under section 437 and the Commission 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. When the Commission made the PABO on 8 May 2024, neither of these preconditions had been met in respect of Great River, so a PABO in respect of Great River could not have been made on 8 May 2024.

[40] The Employers submitted that even if the Commission added Great River to the application made by the RTBU on 6 May 2024 by way of an order pursuant to s.602, the Commission could not make any retrospective finding as to the state of satisfaction required by s 443(1)(b) of the Act.

[41] The Employers also noted the requirement in s.440(a) of the Act, which requires an applicant to provide a copy of the protected action ballot to the employer of the employees to be balloted. In the context of the PABO application, this did not occur with respect to Great River, and s 441(2) prohibits the Commission from determining any application for a protected action ballot order unless this step has occurred.

Statutory Framework – Correction of Decisions

[42] The RTBU relies upon ss.586 and 602 of the Act. It contends that the Commission should amend the PABO application to add Great River as a second employer pursuant to s.586 and make the same amendment to the PABO and associated Decision pursuant to s.602. These amendments would ensure that the industrial action taken by employees of Great River pursuant to notices issued to Transdev Sydney will be protected industrial action.

[43] Section 586 provides:

> **Correcting and amending applications and documents etc.**
> The FWC may:
> (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
> (b) waive an irregularity in the form or manner in which an application is made to the FWC.

[44] Section 602 provides:

> **Correcting obvious errors etc. in relation to the FWC's decisions**
> (1) The FWC may correct or amend any obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the FWC (other than an error, defect or irregularity in a modern award, national minimum wage order, minimum standards order, minimum standards guidelines, road transport contractual chain orders or road transport contractual chain guidelines).
>
> Note 1: If the FWC makes a decision to make an instrument, the FWC may correct etc. the instrument under this section (see subsection 598(2)).
> Note 2: The FWC corrects modern awards and national minimum wage orders under sections 160 and 296.

Note 3: The FWC corrects minimum standards orders and minimum standards guidelines under subsections 536KQ(3) and 536KZ(3) respectively, and corrects road transport contractual chain orders and road transport contractual chain guidelines under subsections 536PT(3) and 536QW(3) respectively.

(2) The FWC may correct or amend the error, defect or irregularity:

(a) on its own initiative; or

(b) on application.

[45] The Employers contend that the RTBU's application is in substance, an application under s.603 of the Act, rather than an application under s.602. Section 603 provides:

Varying and revoking the FWC's decisions

(1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

Note: If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection 598(2)).

(2) The FWC may vary or revoke a decision under this section:

(a) on its own initiative; or

(b) on application by:

(i) a person who is affected by the decision; or

(ii) if the kind of decision is prescribed by the regulations—a person prescribed by the regulations in relation to that kind of decision.

(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

(a) a decision under Part 2-3 (which deals with modern awards);

(b) a decision under section 235 or Division 4, 7, 9 or 10 of Part 2-4 (which deal with enterprise agreements);

(c) a decision under Part 2-5 (which deals with workplace determinations);

(d) a decision under Part 2-6 (which deals with minimum wages);

(e) a decision under Division 3 of Part 2-8 (which deals with transfer of business);

(f) a decision under Division 8 of Part 3-3 (which deals with protected action ballots);

(g) a decision under section 472 (which deals with partial work bans);

(ga) a decision under Part 3A-2 (which deals with minimum standards orders);

(gb) a decision under Part 3A-4 (which deals with collective agreements);

(gc) a decision under Part 3B-2 (which deals with road transport contractual chain orders);

(h) a decision that is prescribed by the regulations.

Note: The FWC can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act (see, for example, sections 447 and 448).

[46] The Employers submit that the prohibition in s.603(3)(f) prevents the Commission from making the orders sought by the RTBU with respect to the PABO and associated Decision. The note to s.603 clarifies that the Commission can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act and provides ss. 447 and 448 as examples.

[47] Section 447(1) of the Act permits an applicant for a protected action ballot order to apply to the Commission to vary the order:

- at any time before the date by which voting in the protected action ballot closes; or
- if the ballot has not been held before that date and the Commission consents--after that time.

[48] Section 447(4) of the Act permits the Commission to vary the protected action ballot order in response to such an application.

[49] Section 448(1) of the Act permits an applicant for a protected action ballot order to apply to the Commission to revoke the order at any time before the date by which voting in the protected action ballot closes. The Commission must revoke the order if such an application is made.

Consideration – Correction of Decisions

[50] I accept that the authorities establish the following principles with respect to the 'slip rule' as advanced by the RTBU:

- The purpose of the slip rule is to avoid injustice.
- The application of the slip rule is not confined to giving effect to the intention of the judge at the time when the order of the Commission was made, or judgment given.[34]
- The application of the slip rule extends to the intention the Commission would have had, but for the failure that caused the accidental slip or omission.
- It includes errors or omissions resulting from the inadvertence of a party's legal representative.[35]

[51] I also note in *RotoMetrics Australia Pty Ltd v AMWU*,[36] a Full Bench of the Commission characterised s.602 as follows:

> **[29]** Section 602 is intended to be a statutory analogue of the 'slip rule' used by superior courts to correct certain errors in orders. It must be applied with caution and only in circumstances in which the use of the 'slip rule' is permissible:
>
> • 'where there has been an unintentional omission in an Order or judgement of the Court;
>
> • where an Order or judgment does not conform with the intention of the Court, and would have been made if the issue had been mentioned during the proceedings;
>
> • where there are no material differences of opinion between the parties; it is not suitable to apply this rule where it concerns a matter of controversy; and
>
> • where the error is manifestly clear; where an "officious bystander would reply when asked if the amendment was appropriate: "Of course".'[37]
>
> (footnotes omitted)

[52] I accept that it was the intention of the Employers and their employees (represented by the RTBU and a number of individual bargaining representatives) to bargain for one agreement. I accept that the RTBU intended to make a PABO application in relation to all of the employees

covered by the Agreement, that all of those employees were permitted to vote in the ballot which occurred pursuant to the PABO and that they voted overwhelmingly in favour of taking protected action. I also accept that the Employers did not raise with the RTBU any concerns that the action taken with respect to Great River was unprotected until 21 July 2024, more than two months after it commenced.

[53] It appears that Great River was not named in the PABO application because Mr Grech who had carriage of bargaining on behalf of the RTBU was not aware that there was a different employer in relation to the employees working at Parramatta Light Rail. Although there was a reference to two employers in the Proposed Agreement, Great River had not been involved in previous bargaining rounds and the two employers usually presented as one organisation during bargaining, including by sharing personnel and using the same email address domain.

[54] It appears to me that the omission of Great River could constitute an 'obvious error' within the meaning of s.602 of the Act, however this characterisation is not, by itself, determinative of the matter. The error was caused by Mr Grech, the RTBU's representative in making a PABO application which did not name Great River as an employer. If Great River had not provided a list of its employees to the ballot agent, it is likely that the error would have been identified before the ballot closed. This is because the ballot agent compiles the list of voters by comparing the applicant union's list of names and the employer's list of names and identifying those names which appear on both lists. If Great River had not provided the ballot agent with a list of its employees, these employees would not have been included on the list of voters, because they would not have been on both the RTBU's and the employer's list.

[55] Mr Grech's evidence is that at least some of the RTBU's members who are employees of Great River advised the RTBU that they had not been issued with ballot papers and that the RTBU was proactive in querying members who had not received ballot papers, prior to the closure of the ballot. If Great River had not provided a list of its employees to the ballot agent, it is likely that the ballot agent would have responded to Mr Warnes' queries by stating that the RTBU members who had not received ballot papers were not on the employer's list. I believe that this would have prompted Mr Warnes to contact Transdev Sydney who would have explained that these employees were not included in the ballot because they were employees of Great River. As it is likely that this conversation would have occurred before the ballot closed, the RTBU could have made an application to vary the PABO to include Great River pursuant to s.447(1) or apply to revoke the PABO pursuant to s.448(1) and lodge a fresh application which included both entities.

[56] However, given that the error was identified well after the closing date, it was not possible for the RTBU to make an application under s.447 or s.448. Nor was an application available under s.603. As to whether the RTBU's application under s.602 is in fact an application under s.603, I note the observations of the High Court in *Esso Australia Pty Ltd v The Australian Workers' Union*,[38] that the very considerable breadth of the power accorded by s.603 stands in contrast to the more limited power accorded by s.602 to correct 'obvious errors'[39] and that the broad powers under s.603 of the Act extend to the power to vary or revoke orders retrospectively and where the variation would have the effect of altering the substantive rights of the parties.[40] Further, the Full Bench in *RotoMetrics Australia Pty Ltd v AMWU*,[41] pointed to the need for caution in the use of s.602 of the Act being reinforced by s.603, which

excludes the specific matters provided in s.603(3) from the substantive power of the Commission to vary or revoke a decision.[42]

[57] The RTBU submits that if it was seeking to add an employer to the PABO who had never been involved in bargaining, such an application would be more appropriately made under s.603 as it could not be regarded as one which was seeking to correct an 'obvious error'. However, given that all parties have been acting on the basis that Great River employees were covered by the PABO and entitled to vote, and that Great River did not raise any issues until after receiving the eighth notice of protected industrial action, the amendment will give effect to the intention the Commission would have had, but for the failure by the RTBU that caused the accidental slip or omission.

[58] The RTBU placed particular reliance on the decision of the Full Federal Court in *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (Elyard).[43] This was an appeal upholding a decision of Justice Sheppard in which the slip rule was applied to retrospectively extend time for the determination of an application for a company to be wound up in insolvency. The relevant provision was s.459R of the *Corporations Law* which provided the Court may extend the period if it was satisfied that special circumstances justify the extension, and the order was made within a prescribed period. An application was not made which would have enabled an order for extension during the prescribed period. Section 459R(3) provided that an application for a company to be wound up in insolvency is dismissed if it is not determined as required by s.459R. The Full Federal Court referred to Justice Sheppard's statement that the question before him was whether the Court could overcome the problem which subsection 459R(3) posed by relying on the slip rule, so as to make the order retrospective. In my view this is an appropriate way to consider the application before me. Rather than considering whether the RTBU's application is in substance an application under s.603, I propose to consider whether s.602 can be relied upon to overcome the requirements of Division 8 of the Act so as to amend the PABO with retrospective effect.

Statutory Framework – Protected Action Ballots

[59] To consider the issue of whether s. 602 be relied upon to overcome the requirements of Division 8 of the Act so as to make PABO retrospective, it is necessary to examine the statutory framework underpinning the right of employees to take protected action when bargaining for an enterprise agreement. The Full Federal Court in *EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union*[44] made the following introductory comments about protected industrial action which is a useful starting point:

> The *Fair Work Act 2009* (Cth) ("the FW Act") seeks to encourage the resolution of industrial claims made by employees and employers including by providing a process for enterprise bargaining. That process culminates in the making of an enforceable industrial agreement known as an enterprise agreement. For the purposes of supporting or advancing their claims for an enterprise agreement, employees may take "employee claim action" (s 409). "Employee claim action" is a form of "protected industrial action" (s 408). Division 2 of Part 3-3 of the FW Act identifies the requirements that must be satisfied for industrial action to be characterised as "protected industrial action". The benefit and significance of such a characterisation is identified by s 415 of the FW

> Act which provides a qualified immunity from civil liability to persons who have taken or organised industrial action that is "protected industrial action".[45]

[60] Division 8 of the Act establishes the process that allows employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement. Subdivision B provides for the FWC to make a protected action ballot order, on application by a bargaining representative of an employee who will be covered by a proposed enterprise agreement, requiring a protected action ballot to be conducted.

[61] Section 437 describes the requirements for protected action ballot applications. Sections 437(1) and (3) are particularly relevant to the application before me. Section 437(1) of the Act permits a bargaining representative of an employee who will be covered by a proposed enterprise agreement, or two or more such bargaining representatives (acting jointly), to apply for an order requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

[62] Section 437(3) of the Act provides that the application must specify:

> (a) the group or groups of employees who are to be balloted; and
> (b) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action; and
> (c) the name of the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot.

[63] Section 437(6) of the Act provides that the application must be accompanied by any documents and other information prescribed by the regulations.

[64] Section 440 of the Act deals with service requirements. It provides that within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to the employer of the employees who are to be balloted and the protected action ballot agent. Relevantly, section 441(2) provides that the Commission must not determine the application unless it is satisfied that each applicant has complied with s.440.

[65] Section 443 of the Act sets out the circumstances in which the Commission is required to make a protected action ballot. Section 443(1) provides that the Commission 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 Commission 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.

[66] Section 443(3) of the Act states the matters that the protected action ballot is required to specify. Section 445 provides that the Commission must give a copy of the order to each applicant for the order the employer of the employees who are to be balloted, the employer of the employees to be balloted and the protected action ballot agent.

[67] Section 450(2) of the Act requires the Commission to give a protected action ballot agent who is not the Australian Electoral Commission written directions in relation to the following matters relating to the protected action ballot:

(a) the development of a timetable;
(b) the voting method, or methods, to be used (which cannot be a method involving a show of hands);
(c) the compilation of the roll of voters;
(d) the addition of names to, or removal of names from, the roll of voters;
(e) any other matter in relation to the conduct of the ballot that the FWC considers appropriate.

[68] Section 450(4) of the Act provides that to enable the roll of voters to be compiled, the Commission may direct, in writing, either or both of the following:
(a) the employer of the employees who are to be balloted;
(b) the applicant for the protected action ballot order;
to give to the FWC or the protected action ballot agent:
(c) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and
(d) any other information that it is reasonable for the FWC or the protected action ballot agent to require to assist in compiling the roll of voters.

[69] Section 450(4) of the Act provides that an employee is eligible to be included on the roll of voters for the protected action ballot only if:
(a) the employee will be covered by the proposed enterprise agreement to which the ballot relates; and
(b) the employee is included in a group of employees specified in the order and either:
(i) is represented by a bargaining representative who was an applicant for the order; or
(ii) is the bargaining representative for himself or herself but is a member of an employee organisation that was an applicant for the order.

[70] Section 457(1) of the Act provides that as soon as practicable after voting in the protected action ballot closes, the protected action ballot agent must, in writing:
(a) make a declaration of the results of the ballot; and
(b) inform the following persons of the results:
(i) each applicant for the protected action ballot order;
(ii) the employer of the employees who were balloted;
(iii) the FWC.

Consideration – Application of ss. 586 and 602 to the PABO

[71] I accept the RTBU's submission that there is no reference in s.437(3) to naming the employer or employers in the PABO application, however it is clear from the legislative scheme that an application for a PABO cannot be made, and a PABO cannot be issued in the absence of the identification of the employer or employers of the employees to be balloted. The requirement that the application form specify the group or groups of employees who are to be balloted necessarily involves identifying the employer of those employees for a number of reasons.

[72] *Firstly*, an application for a protected action ballot can only be made in respect of action taken in support of claims made in enterprise bargaining, a process which involves one or more

employer and their employees. The RTBU's description of the employees to be balloted as 'employees of the Employer who are members of the Applicant who will be covered by the Applicant's proposed enterprise agreement (for the avoidance of doubt, including Network Officers)' refers to the entity that the RTBU identified in the application as the 'Employer' namely Transdev Sydney.

[73] *Secondly,* in the event that a PABO is granted, the compilation of the roll of voters usually requires the involvement of the employer as reflected in the power of the Commission under s.450(4) of the Act to direct the employer of the employees who are to be balloted to give to the Commission or the ballot agent the names of the employees included in the group or groups of employees specified in the protected action ballot order.

[74] *Thirdly,* s.441(2) prohibits the Commission from determining the application unless it is satisfied that each applicant has provided the application to the employer of the employees who are to be balloted within 24 hours after making the application.

[75] *Fourthly,* before making a PABO, the Commission must be 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. This involves considering evidence from the applicant and providing an employer with an opportunity to be heard in relation to this matter, which might lead to the employer providing evidence and the matter being listed for a hearing.

[76] In *CFMEU v Brookfield Multiplex Australasia Pty Ltd*,[46] Richards SDP considered a PABO application by the Construction Forestry Mining and Energy Union, as it was then known, (CFMEU) which named 'Brookfield Multiplex Australasia Pty Ltd' as the employer in circumstances where the relevant employees had transferred to a related company. The CFMEU sought to amend the application during the hearing to identify the new employer so that it could proceed with the application. Senior Deputy President Richards observed that the Commission's powers under s.586 may accommodate circumstances where the Commission is faced with a technical or typographical defect in an application which is capable of remedy.[47] In noting that the circumstances before the Commission were the misidentification of the corporate entity which employs the employees, the Senior Deputy President made the following observations which are relevant to the matter before me:

> **[24]** Even if I were to amend the application to identify a different corporate entity to one which employs the employees who are to be covered by the proposed agreement from a legal identity that employs no one I would in effect be re-making the application before me in a substantive manner. That is, by amending the application and identifying a new corporate entity which is the actual employer I would be fundamentally altering the terms of the application itself.
>
> **[25]** It would not be possible, therefore, that a new application brought into existence by the amendment as sought by the CFMEU, could have met the requirements of s.440 of the Act. That is, the amendment to the application would not cure the defect at first instance.

> **[26]** Further, for the purposes of s.441(2) of the Act, because I could not be satisfied that the CFMEU had complied with the requirements of s.440 of the Act, I could not establish jurisdiction to determine the application.
>
> **[27]** If I were to embark, nonetheless, on such a path, as the CFMEU sought that I should, I would not have found the jurisdiction upon which the determination of the application could be made.
>
> **[28]** Any determination that I did make as a consequence would therefore be exposed to uncertainty and challenge.
>
> **[29]** In reaching this conclusion, I have considered the purpose of the legislation. I construe this to be to put the employer on notice of the application, and to enable the employer to respond to the various claims that will be made in support of that application, which may come to have significant consequential effects for its business. Where the various corporate entities involved a part of the same wider set of corporate arrangements it might be contended that irrespective of the irregularities the corporate mind itself would be properly informed in a practical way.
>
> **[30]** That may be the case, though it might not always be so (depending on the degree of separation between the corporate creations).
>
> **[31]** But be that as it may, s.440 of the Act and s.441(2) of the Act are statutory commands. The sections place unavoidable obligations upon both the Applicant and FWA. They appear to me to be particularly resistant to the purposive approach to interpreting the consequences of things done (other than typographical errors etc) in non-compliance with a statutory direction.
>
> **[32]** The compounding effects of these obligations make the intent of Parliament clear: the Applicant must do certain things and FWA must not determine the application unless the Applicant has complied with the statutory requirements by doing these things.[48]

[77] The current application does not deal with the misidentification of the employer but rather the omission of an employer altogether from the PABO application. It my view, this is significant given that Transdev Sydney and Great River employ different cohorts of employees covered by the Proposed Agreement with Great River employing employees working on the Parramatta Light Rail service and Transdev Sydney employing employees working on Inner West and City South East services.

[78] Mr Durand-Raucher was served with the PABO application by email. Given that Mr Durand-Raucher is the Managing Director of both entities, it is unlikely that the RTBU would have effected service differently if the RTBU had included Great River in the application. In other words, if the PABO application had correctly identified Transdev and Great River at the employers, it is likely that the RTBU would have sent one email to the Commission attaching the application, that Mr Durand-Raucher would have been copied into this email, and that the RTBU would be regarded as satisfying the requirements of s.440 with respect to both employers.

[79] On this basis, it cannot be said that Great River was unaware of the PABO application. However, it would be reasonable for Mr Durand-Raucher to believe, based on a plain reading of the PABO application, that it was only intended to cover employees of Transdev Sydney and not Great River, and that he was accepting service on behalf of Transdev Sydney only. The fact that the RTBU was bargaining with both Transdev Sydney and Great River does not necessarily lead to a conclusion that the PABO application was intended to include Great River employees. There could be a range of strategic reasons that a union may wish to apply for a protected action ballot at a particular time for one group of members involved in bargaining but not another. Although Great River's actions in providing the ballot agent with a list of employees may indicate that it believed it was covered by the PABO, and therefore the PABO application, another equally plausible explanation is that the actions of Great River were simply a mistake and not indicative of any specific view in relation to the PABO. The fact that representatives of Great River attended the s.448A conference does not establish that Great River believed it was covered by the PABO as s. 448A requires all bargaining representatives for an agreement to attend such a conference, not just those covered by a PABO.

[80] In the absence of evidence which establishes that the requirements of s.440 were met with respect to Great River, the Commission did not have jurisdiction to make a PABO in relation to Great River because of s.441(2), even if Great River was on notice of the PABO and appeared to believe that it was bound by it.

[81] If I am wrong about this and it can be inferred that Great River was served with the application, a further obstacle to the relief sought by the RTBU is the requirement that the Commission 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. The evidence before the Deputy President was the Form F34B Declaration by Mr Grech which provided details about the bargaining meeting dates and the RTBU's claims. In that declaration there were no specific references to employees who work for Parramatta Light Rail. There was simply no evidence before Deputy President Hampton which would permit him to reach a state of satisfaction that the RTBU has been, and is, genuinely trying to reach an agreement with Great River. Further, it is reasonable to infer that Transdev Sydney decided to 'not formally contest this application' based upon Mr Grech's declaration and I cannot exclude the possibility that Great River's position may have been different, which may have resulted in the Deputy President considering further evidence in determining whether the requirements of s.443(1) had been met.

[82] In my view, these circumstances can be distinguished from those in *Elyard*. In *Elyard*, the Court was required to be satisfied that special circumstances existed to justify the extension. In granting the extension retrospectively, Justice Shephard relied upon affidavit evidence already before the Court which established that there were special circumstances as at the date that the request for extension should have been considered.[49] In the current application, the evidence before the Deputy President in relation to the PABO application provides no basis for me to find that the requirements of s.443(1) were established with respect to Great River or that such a finding would have been available to the Deputy President when he determined the PABO application. In the particular circumstances of this case, which involve an application to add an employer to the PABO after the ballot closed, I find that s.602 cannot be relied upon by the RTBU to overcome the requirements of Division 8 of the Act so as to amend the PABO with retrospective effect.

Conclusion

[83] For the reasons set out in this decision, I decline to make the corrections sought by the RTBU to the PABO application and to the PABO and associated Decision made by Deputy President Hampton on 8 May 2024.

[84] In conclusion, it is appropriate to make two general observations about the RTBU's reasons for making the application, although ultimately it was not necessary for me to take these matters into account in determining the matter. The first of these is so that employees of Great River could take protected industrial action. The RTBU took steps to address this matter on 4 September 2024, by filing a new PABO application which I granted on 9 September 2024.[50] The second of these is the RTBU's concern that Great River will take action against the RTBU and its members for taking unprotected action. In this regard, I draw the parties' attention to s.460 which provides immunity for persons who act in good faith on protected action ballot results.

[85] I dismiss the application.

DEPUTY PRESIDENT

Appearances:

Mr J. *Martin*, Counsel, for the Applicant

Mr M. *Minucci*, Counsel, for the Respondent
Ms S. *Beaman*, Instructing Solicitor from Herbert Smith Freehills, for the Respondent

Hearing details:

2024
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In person, Sydney

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[1] PR774639

[2] [2024] FWC 1198

[3] Statement of Peter Grech dated 22 August 2024, [1], Digital Hearing Book (DHB), 25

[4] Ibid [2], DHB 25

[5] Ibid PG-3, DHB 70-77

[6] Ibid [9], DHB 26

[7] Ibid PG-2, DHB 69

[8] Exhibit 2

[9] Ibid PG-4, DHB 78

[10] Ibid PG-4, DHB, 80

[11] Exhibit 3

[12] PR774639

[13] [2024] FWC 1198, [2]

[14] PR774639

[15] Ibid

[16] Ibid

[17] Statement of Peter Grech dated 22 August 2024 [15], DHB 27

[18] Ibid [11]-[14], DHB 26-27

[19] Ibid PG-5, DHB 96

[20] Ibid PG-6, DHB 99-100

[21] Ibid PG-6, DHB 99

[22] Ibid PG-6, DHB 99

[23] Ibid PG-7, 101-105

[24] Ibid [18]-[20], DHB 27

[25] Ibid [21] DHB 28

[26] Ibid [22] DHB 28

[27] Ibid [3] DHB 25

[28] Ibid [4] DHB 25

[29] Ibid [5] DHB 25

[30] Ibid [6] DHB 25-26

[31] Ibid [7] DHB 26

[32] Ibid [23]-[24] DHB 28-29

[33] *Esso Australia Pty Ltd v The Australian Workers' Union* (2017) 263 CLR 551 at [49] (Kiefel CJ, Keane, Nettle and Edelman JJ)

[35] See discussion in *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385, 391

[36] [2011] FWAFB 7214

[37] Ibid, [29]

[38] (2017) 263 CLR 551

[39] Ibid, [49]

[40] Ibid, [49]

[41] [2011] FWAFB 7214

[42] Ibid, [30]

[43] (1995) 61 FCR 385

[44] [2014] FCAFC 8

[45] Ibid, [1].

[46] [2012] FWA 2817

[47] Ibid, [18]

[48] Ibid, [24]-[32]

[49] (1995) 61 FCR 385, 400

[50] [2024] FWC 2446