DECISION

Fair Work Act 2009
s.437 - Application for a protected action ballot order

United Firefighters' Union of Australia
v
Ventia Australia Pty Limited
(B2023/459)

DEPUTY PRESIDENT COLMAN MELBOURNE, 5 JUNE 2023

Proposed protected action ballot of employees

[1] The United Firefighters Union (UFU) has made an application under s 437 of the *Fair Work Act 2009* (Act) for a protected action ballot order (PABO) in relation to certain employees of Ventia Australia Pty Limited (company) who are employed as 'range operators' at the Australian Defence Force military training facility at Puckapunyal in Victoria, where the company provides services to the Department of Defence.

[2] Range operators perform various tasks on and in relation to firing ranges, including responding to fires. Their employment is currently covered by the *Broadspectrum Defence Base Services (Land Management, Transport and Range Operations) Victoria Enterprise Agreement 2019* (Base Services Agreement), which reached its nominal expiry date on 9 November 2022. In addition to range operators, the Base Services Agreement covers employees engaged in ground maintenance and transport classifications. The unions covered by the agreement are noted in the relevant approval decision ([2019] FWCA 8172) as being the Australian Workers' Union and the Transport Workers' Union of Australia. The company acquired Broadspectrum in 2020 and is bound by the Base Services Agreement as a consequence of a transfer of business under Part 2-8 of the Act. Since early this year the company has been negotiating a new enterprise agreement to replace the Base Services Agreement. A number of range operators have sought to be represented in bargaining by the UFU. The company has declined to negotiate with the UFU because it does not consider that the union is entitled to represent range operators under its registered rules.

[3] Section 441 of the Act states that the Commission must, as far as practicable, determine an application under s 437 within two working days after the application is made. The application was allocated to my chambers on 16 May 2023. The company advised the Commission that it opposed the making of an order, firstly on the basis that the UFU was not a bargaining representative for the agreement because range operators were not covered by the union's eligibility rule, and secondly because it believed that the union had not been and was not genuinely trying to reach agreement with the company for a new enterprise agreement, as no enterprise bargaining meetings had in fact taken place.

[4] I listed the application for hearing on 17 May 2023. At the hearing, the company submitted that it required a reasonable opportunity to prepare its case in opposition to the granting of the application, and in particular to explain why the UFU was not entitled to represent the industrial interests of range operators and was therefore not a bargaining representative for those employees. The company submitted that in the circumstances it was not reasonably practicable for the Commission to determine the application within two working days. The UFU agreed and submitted that it too required more time to organise its response to the company's challenge to its application. I made directions for the filing and service of materials in accordance with a tight timetable, consistent with the statutory requirement of expedition in relation to applications under s 437, and listed the matter for hearing on Friday 2 June 2023. The Commission is expected to determine applications for protected action ballot orders quickly. Accordingly, this decision is briefer than might have been the case if the question of the UFU's entitlement to represent range operators had arisen in a different statutory context.

[5] Section 443(1) states 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 s 437; and (b) the Commission is satisfied that the applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. The company's objection to the application engages both of these elements.

Is the UFU a bargaining representative for range operators?

[6] The first requirement in s 443(1) is that an application must have been made under s 437. This plainly contemplates that a valid application has been made by a person who has standing to bring it, and that the Commission is satisfied that this is the case. Section 437 states that *'a bargaining representative of an employee who will be covered by a proposed enterprise agreement'* may apply to the Commission 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. Section 176(1)(b) provides that an employee organisation is a *'bargaining representative'* of an employee who will be covered by a proposed agreement if that employee is a member of the organisation. However, s 176(3) then states that an organisation cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

[7] The central controversy in relation to the company's first objection to the UFU's application is whether range operators fall within the eligibility provision in the union's registered rules, specifically, sub-rule 6(b)(1). Rule 6 relevantly states:

> **"6 – ELIGIBILITY**
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> The conditions of eligibility for membership of the Union are as follows:
>
> (a) The Membership of the Union is unlimited in number;
>
> (b) Any person who is employed, or usually employed or appointed in or in connection with –
>
> (1) the prevention, suppression or extinguishment of fires;

(2) the protection of life and property through the provision of rescue services at the scene of accidents, explosions or other emergencies other than in the capacity of a registered Medical Practitioner;

(3) the handling of spillages of toxic or hazardous materials and the disposal of those in emergency situations; or

(4) the sale, supply, installation, maintenance, repair and/or inspection of fire protection equipment other than fixed or semi-fixed fire protection systems

shall be eligible for membership of the Union. Without limiting the generality of the foregoing, membership of the Union shall include persons referred to in paragraph (b) above employed –

(i) by the Australian Public Service, the service of any public institution or authority of the Australian Government whether such service is in the Australian Public Service or not;

(ii) in the service of any public institution or authority of the Australian Capital Territory whether such service is in the Australian Public Service or not;

(iii) by a Fire Brigade Board, Commission, or Authority;

(iv) in the service of any public institution or Authority of a State Government or a Territory Government the duties of which are not materially different to those of persons employed by a Fire Brigade Board, Commission or Authority;

(v) in private industry, in any rank, grade or classification of industrial firefighter or industrial fireman or in any employment the duties of which are not materially different from the duties of one of these employments, or in any position in respect of which the duties are similar to those of persons employed by any Fire Brigade Board, Commission or Authority."

[8] Neither party referred to the subsequent sub-provisions of the rule that address other heads of eligibility and various exclusions. I do not consider them to be relevant.

Submissions and evidence of the company

[9] The company contended that rule 6(b) is an industry eligibility rule rather than a vocational eligibility rule, and that, consistent with established authority governing the approach to the interpretation and application of union rules, range operators would only fall within the provision if the company could be said to operate in the industry covered by the rule. In this regard, it was necessary to ascertain the *'substantial character of the industrial enterprise in which the employer and relevant employees were concerned*' (per Latham CJ in *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* [1948] HCA 9 (*Thiess*), at 17). The company said that this question in turn could not be decided merely by considering the

nature of the particular operation itself, but instead required a consideration of all of the circumstances. The fact that an enterprise might for example carry coal did not mean that it was engaged in the coal mining industry. Further, an employee could not be regarded as being employed in a particular industry unless the business of the employer was in the same industry.

[10] The company submitted that the industry identified in rule 6(b)(1), *'the prevention, suppression or extinguishment of fires'*, was not the industry of its enterprise. The company's substantial character was to provide services to public and private sector clients in various industry sectors including defence. Further, the work undertaken by range operators comprised a broad array of duties pertaining to military firing ranges of which fire response was only one small part. In short, the company submitted that it was not in the firefighting industry, and that its range operators were not engaged to work in or in connection with that industry.

[11] The company relied on the evidence of Jennifer Lloyd, its national manager for training areas and range management. Ms Lloyd said that the company is an essential infrastructure service provider, operating across a broad range of industry segments, including defence, social infrastructure, environmental services, resources, telecommunications and transport. She said that the company employs 15 range operators across the four levels of the range operator classification in Appendix C of the Base Services Agreement. Ms Lloyd said that the purpose of the range operator role was to support the military in the operation of their training areas and ranges, and that of the numerous tasks and competencies of range operators identified in the Base Services Agreement, fire response was only one item. She said that common tasks of range operators included the following:

- escorting military personnel and other range users to training areas;
- inspecting training areas and range facilities;
- cleaning and basic maintenance;
- coordinating contractors;
- ensuring ranges are in good condition and ready for the next user;
- constructing targets out of plywood;
- undertaking target system inspections;
- mounting targets on movers and operating movers;
- operating pop-up targets at small arms ranges;
- inserting safety flags in training areas;
- providing induction training and daily safety briefings for range users;
- performing administrative duties, including booking range facilities;
- monitoring range operations in the control room through computers and radios;
- reporting any unexploded ordinance;
- providing a first response to fire during any live fire activity;
- carrying out boundary checks and repairs;
- liaising with emergency personnel if there is an incident;
- carrying out land management tasks such as weed mitigation.

[12] Ms Lloyd said that range operators spend most of their time carrying out duties other than attending to fires, and that most of the training they received did not relate to fire. She said that only some range operators provided a first response to fires and that others were not trained to fight fires, and were not authorised to do so. Some operators provide a 'first eyes' service, whereby they report and monitor fires. Others can be asked to attend to fires if this is required.

[13] Ms Lloyd said that the company has a contract with the Department of Defence for the provision of training area and range management services, referred to as the 'Defence Base Services contract', and that this contains 21 deliverables, only one of which relates to fires. This requires the company *'to provide first response bushfire fighting capability to designated training areas and ranges, including the provision of designated firefighting vehicles, equipment and crews'*. The other deliverables include developing a training area and range management plan, controlling land access, providing watchkeeping functions for training and maintenance activities, recording and notifying unexploded ordinance, providing various range control functions such as inductions and inspections, and installing target systems.

[14] Ms Lloyd said that range operators have been issued with a *'Range and Training Areas Work Instruction'* (the work instruction), which sets out ten areas of duty that employees are required to perform. These relate to ground fuel supplies, control access, administrative support, bookings and allocations, range and training area management, safety and control communications, malfunctioned explosive ordinance, accommodation, the provision of a caretaker, and target towing. Each area has numerous tasks. Firefighting is identified as one task in one area – *'provide a first response spot fire fighting capability'* (item 3.1(13)). Ms Lloyd said that in 2022 and 2023 there had been a total of 23 fires that had been attended to by range operators. The occurrence logs indicated that these occurred in the summer months, and that some attendances lasted less than an hour.

[15] Ms Lloyd said that the company has a separate business unit for *'fire and rescue'*, in which it employs professional firefighters. These employees are not covered by the Base Services Agreement, but by other enterprise agreements. She said that range operators are part of the company's *'training areas and resource management'* business unit.

[16] The company submitted that further support for its contention that range operators were not employed in the firefighting industry was the fact that they are not covered by the *Fire Fighting Industry Award 2020*, clause 4 of which states that it applies to employers in that industry and to employees who are employed in the classifications listed in clause 10, which are *recruit, firefighter levels 1 to 3, qualified firefighter, leading firefighter,* and *station officer*. The company said that it was clear that range operators did not fall within the descriptors of these classifications, which related to professional firefighters. Instead, they were covered by the *Miscellaneous Award 2020* and in some cases the *Clerks Private Sector Award 2020*.

[17] The company submitted that, although rule 6(b)(1) was not a vocational rule, the occupations referred to in subrules 6(b)(i) to (v) were relevant to the interpretation of rule 6(b) as a whole and the parameters of the industry it described. Clearly range operators were not employees of public service entities of the kinds contemplated by subrules 6(b)(i) to (iv), nor could they be described as persons in private industry of any *'classification of industrial firefighter or industrial fireman'* or in any employment the duties of which were not materially different, nor did they perform duties *'similar to those of persons employed by any Fire Brigade Board, Commission or Authority'*. This was a further indication that the work of range operators, and the business of the company, did not fall within rule 6(b)(1).

Submissions and evidence of the UFU

[18] The UFU contended that range operators fell within the scope of rule 6(b)(1) because they are persons who are employed, or usually employed or appointed *'in or in connection with, the prevention, suppression or extinguishment of fires'*. It contended that firefighting and

prevention was a substantial and important part of range operators' work. The Base Services Agreement required them to complete training and demonstrate competency in responding to wildfires, and to complete and pass pre-fire season training, as well as basic fire tower operation training. Range operators are also required to assist with firefighting duties as required, and a leading hand completes training as a fire ground supervisor.

[19] The UFU submitted that although range operators undertake various duties in connection with the services that the company provides to the military, a significant proportion of their daily work consists of or is connected to firefighting and prevention. It relied on the evidence of Peter McLellan, who has been employed by the company and its predecessors as a range safety operator at Puckapunyal since 2006. Mr McLellan said that his role requires him to work on bushfire mitigation, hazard reduction and bushfire response. He said that a typical working week would involve the following: receiving initial fire reports; mobilising fire crews; coordinating fire crews via radio while crews were on the firing ground; completing the communications log; maintaining spatial awareness of crews and firefighting equipment such as the bulk water truck, firefighting pods and quick fills; completing fire reports for the company and the Department of Defence; conducting daily briefs for range users on fire action requirements; and coordinating access for and maintaining communications with firefighting and ambulance authorities in relation to incidents or accidents on the range.

[20] Mr McLellan said that he disagreed with Ms Lloyd's assessment that range operators spent most of their time performing duties other than attending to fires. He said that during the fire season, he spends at least 60% of his time directly involved in work connected to firefighting and prevention activities. He also coordinates and maintains the safe conduct of units conducting live firing, attends to mandatory fire training at the beginning of each fire season, and is available for service as a firefighter when not on watch room duties. Mr McLellan said that some range operators were even more engaged with fire-related activities than he was and that he would conservatively estimate that they spend 80% of their work during the fire season combating range wildfires started by live firing activity and other causes, and conducting fire mitigation works. Mr McLellan said that Puckapunyal is in a bushfire prone area and has seen significant bushfires in the past.

[21] Mr McLellan said that range operators had responded to all fires on the range and that in his 17 years of service, he had only seen three occasions when the CFA had to be called to a fire. He said that in the last fire season there had been some 18 documented fires, totalling some 3000 hectares of burnt area, most of which had burnt over several days.

[22] Mr McLellan said that in the fire season, most of the work performed by range operators and range safety operators involved extinguishing fires or remaining ready to respond to fires. He said that outside of fire season, range operators are ready to respond to fires and are engaged in maintenance of essential firefighting equipment and fire mitigation tasks. Mr McLellan said that operators are required by the company to assist with fuel reduction burns that are attended to by another Ventia entity, and that when the Land Management Department conducts a fuel reduction burn, the company's range operators are present in support.

[23] Mr McLellan's evidence was that the range control team has three fire trucks, two firefighting pods, and two bulk water trucks to combat fires on the range. He said that range operators complete a full week of intensive pre-season fire training comprised of fifteen modules, and that no other training provided to range operators has the same duration, intensity or formality.

[24] The UFU agreed with the company that rule 6(b) was an industry-based eligibility rule, and that in order for range operators to fall within the rule, it was necessary to show that the employer operated in the relevant industry, which was the industry of fire prevention, suppression and extinguishment. It contended that Mr McLellan's evidence demonstrated that the company did indeed operate in this industry, as did the relevant employees, and that this conclusion was not affected by the fact that the company may also operate in many other industries.

[25] The UFU referred to an extract of a page from the company website which stated that Ventia has the country's largest private firefighting service that includes aviation, structural, and bushfire response, as well as hazard reduction services. A copy of this webpage was appended to Mr McLellan's statements. The UFU further submitted that the company employed professional firefighters in another business unit, and that these employees are covered by enterprise agreements that the company has negotiated with the UFU. An example was the *Ventia and UFU Vic and NSW Fire and Rescue Enterprise Agreement 2022* (UFU Agreement). The UFU submitted that these matters further demonstrated that the company operated in, or in connection with, the firefighting industry.

[26] The union contended that Mr McLellan's evidence demonstrated that range operators were engaged in or in connection with the prevention and extinguishment of fires. The volume and substance of their fire-related duties were significant. The training that they received was in many respects the same as that provided to professional firefighters employed by the company who are covered by the UFU Agreement. To further illustrate the substantive fire-related work that was undertaken by range operators, the union produced an article placed on Linked-In by a senior company officer describing the contribution of range operators to the containment of a fire that occurred last summer that extended beyond the boundaries of Puckapunyal, noting that houses and horses were able to be saved. The post showed pictures of range operators and fire trucks in action.

[27] The UFU submitted that, alternatively, if the Commission were to conclude that the company was not a business in the firefighting industry, rule 6(b) should be considered to be a hybrid 'industry-vocational' rule (see *CFMEU v Dyno Nobel* [2005] AIRC 622 at [13]), such that eligibility for membership was conferred either by the industry of the employer or the vocation of the employees, or both. As to the latter, the *'primary purpose test'* was relevant, and when that test was applied, range operators fell within the scope of clause 6(b)(1) because the primary purpose of their role, based on the evidence of Mr McLellan, was evidently the prevention, suppression and extinguishment of fires.

Consideration

[28] The question of whether the UFU is entitled to represent the industrial interests of range operators and is a bargaining representative for those employees turns on whether range operators fall within the scope of its eligibility rule. The principles that are relevant to the interpretation and application of union eligibility rules are well established and need not be restated here. I agree with the parties that rule 6(b) is an industry eligibility rule and that it is therefore necessary to ascertain the industry in which the company operates, which in turn requires a consideration of the substantial character of its business. Ultimately of course, it is necessary to apply rule 6(b) to the facts of the present case.

[29] I accept the evidence of Ms Lloyd about the business that is conducted by the company. I find that the company is a service provider to the private and public sectors in a range of industries connected with infrastructure of different kinds. In my view this is its substantial character. Its business is in the contracting industry.

[30] In many of the cases concerning disputes about the application of union eligibility rules to employees of service providers, the question has been whether the employer is in the industry of its client or the industry of its own line of work. The mere fact that a business provides a service to a particular industry does not identify that business with that industry so as to make it part of that industry. This was the conclusion in *Thiess*. There, an engineering contractor to the coal mining industry was held not to be an enterprise in that industry. There have been many similar cases in which *Thiess* has been applied, including one determined last week (see *Health Services Union v Catering Industries (NSW) Pty Ltd* [2023] FCAFC 82 at [89]). The facts of the present case are rather different from those in *Thiess*. The company has many lines of work that are directed at clients in a range of industries. In my view, it is possible that a multipurpose service provider could, depending on the circumstances, be described as having a substantial character that engages various industries. However, based on the evidence that has been adduced in these proceedings, I am not persuaded that the company is in the industry of firefighting and prevention.

[31] The company submitted a link to its 2022 annual report. The financial data in the report shows that the revenue derived by the company from its fire and rescue business comprised only 1.15% of total earnings, and that revenue from the training areas and range management business unit (in which range operators work) accounted for less than 0.1% of its income. The evidence establishes that in financial terms, fire-related work is a miniscule percentage of the company's business. The union said that the 2022 annual report should be disregarded, as it was hearsay, because Ms Lloyd had no personal knowledge of the financial information on which the company sought to rely in its submissions. I reject this. A link to the 2022 annual report was submitted to the Commission and made available to the union. It is a business record and I accept it. Further, the company employs over 30,000 employees in total, of whom only 300 are engaged in the fire and rescue business unit. Both the financial data and the makeup of the workforce show that firefighting and prevention is a minute component of the company's overall business. In the context of the totality of the evidence, the statement on the company website concerning its private firefighting services, which is evidently a reference, or substantially a reference, to the company's fire and rescue business unit, does not indicate that the company's substantial character reflects such an industry.

[32] Even if I had concluded that the company's substantial character sees it inhabit the industry of firefighting and prevention, I would nevertheless have concluded that range operators are not employed *'in or in connection with the prevention, suppression or extinguishment of fires'*. If the company were to be regarded as a business in this industry, it would be because of its fire and rescue business, and not because of the work undertaken by range operators. It will be recalled that the test formulated by Latham CJ in *Thiess* in respect of the application of an industry eligibility rule involves ascertaining the substantial character of the industrial enterprise in which the employer *and relevant employees* are concerned (see [8] above). If the substantial character of the company's business saw it engaged in many different industries including firefighting, it would be necessary for range operators to work in that particular industry in order to be covered by rule 6(b). The company's range operations are not in that industry. This is clear from the nature and content of the range services that the company provides to the government, and from the work that is performed by range operators, which

comprises a variety of tasks connected to the operation of firing ranges. Some of this work involves firefighting and prevention. But that does not make range operators firefighters, or workers in the firefighting industry, and it does not make the company's business one that operates in that industry. In my view, this would be the case even if the volume of fire-related work they perform were greater. In *CFMMEU v DuluxGroup (Australia) Pty Ltd* [2021] FWCFB 6020, the fact that a worker drove forklifts all day long did not make him a forklift driver (see [63]). That case involved a vocational rather than an industry eligibility rule, but it illustrates a basic principle of logic that is applicable to the interpretation and application of union eligibility rules: a particular activity may be a necessary condition for a particular status, but not a sufficient condition.

[33] I accept that range operators undertake many of the same training units as firefighters. But range operators perform a limited function in connection with fire. They provide a first response service, not a comprehensive response. Critically, fire-related tasks are only one component of the variety of different duties that range operators have. In cross-examination, Mr McLellan agreed that he did all of the many things that are set out in his classification in the Base Services Agreement. The UFU did not dispute the accuracy of the company's work direction or contend that employees could not be required to perform these duties, or that they did not in fact do so.

[34] I do not accept Mr McLellan's assessment that 60% of his work during fire season is related to fire. If he is required to do the many other relevant duties set out in the classification structure of the agreement and the work directive, it is implausible that this would leave 60% of his time available, let alone the 80% that he estimated for some of his colleagues. I note that Mr McLellan is currently not authorised to fight fires and that he has only personally fought fires on two occasions in the past. Moreover, I find that Ms Lloyd's evidence establishes that there have been only 23 fires in the past 2 years, and that these have occurred in the summer months. Mr McLellan produced incident report logs that catalogued many more incidents but most of these related not to fire responses but instead to other matters, such as incidents involving unexploded ordinance. I also find that, contrary to Mr McLellan's evidence, range operators do not undertake substantial hazard reduction work because this is performed largely by a contractor. Range operators do many things: they repair targets, put up flags, conduct battle runs, make bookings and attend to a range of administrative tasks. It is obvious that their role is much broader than one related to fire. This is confirmed by the deliverables that the company is to provide to the government: only one of 21 relates to fire.

[35] The company referred to various unlikely consequences if too broad a reading of rule 6(b)(1) were to be adopted. The UFU contended that many of the examples were 'straw men'. However, they illustrate the point that the words of the rule should not be given an *'impossibly wide operation'* (see *CFMEU v CSBP Ltd* [2012] FCAFC 48 at [47]) and should be read in the context of the rule as a whole. In my opinion, the rule cannot sensibly be read as conferring eligibility for membership of the union on anyone who may in the course of their work be called on to put out fires or take measures to minimise or avert a fire safety risk. In this regard, I agree with the company that subrules 6(b)(i) to (v) form part of the textual context. They are preceded by an introduction that makes clear that these sub-provisions do not *'(limit) the generality of the foregoing'*, however if they are merely examples without *any* further implication for the meaning of the rule then they serve little purpose. In any event, subclause (v) marks out an area of private sector firefighting activity that is within the scope of the rule. For the reasons advanced by the company, it is quite clear that range operators do not fall within it. Do they otherwise fall within the bounds of the clause? In my view, they do not. Based on the evidence

before the Commission, I find that range operators are workers who perform a diversity of tasks in connection with the company's provision of services to the government on military firing ranges. They undertake some fire-related work. But they are not employed in or in connection with the prevention, suppression, or extinguishment of fires within the meaning of rule 6(b) and the industry it describes.

[36] None of the above detracts from the value of the work that range operators perform, including in relation to their fire-related duties. That the company was proud of the workers who attended diligently to a fire on the Puckapunyal boundary last summer is not surprising. But in the context of the services that the company provides to the government, the nature of its business, and the many other duties that range operators are required to undertake, the fire-related work of range operators is not sufficient to bring those employees within the eligibility provision in the UFU's registered rules.

Conclusion

[37] In my opinion, there is no valid application before the Commission, and therefore the first requirement of s 443(1) of the Act has not been met. I consider that the UFU is not a bargaining representative of an employee who will be covered by the proposed enterprise agreement, because it is not entitled under its registered rules to represent the industrial interests of range operators. It is not necessary to consider the company's further objection. The application is dismissed.

DEPUTY PRESIDENT

Appearances:
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S. Smith for Ventia Australia Pty Limited

Hearing details:
2023
Melbourne
2 June

Printed by authority of the Commonwealth Government Printer
<PR762819>