



# DECISION

*Fair Work Act 2009*

s.468A - Application for approval as an eligible protected action ballot agent

## **Democratic Outcomes Pty Ltd T/A CiVS**

(B2023/541)

DEPUTY PRESIDENT HAMPTON

ADELAIDE, 20 JUNE 2023

*Application for Democratic Outcomes Pty Ltd Trading As CiVS to become an eligible protected action ballot agent.*

### **1. What this decision is about**

[1] Democratic Outcomes Pty Ltd T/A CiVS (**CiVS**) has applied under s.468A of the *Fair Work Act 2009* (**Act**) for approval as an eligible protected action ballot agent. This application, and the concept of approved eligible protected action ballot agents, takes place in the context of certain amendments to the Act that have been introduced by virtue of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Amending Act**). These changes commenced on 6 June 2023 and amongst other matters, impact upon the making of Protected Action Ballot Orders (**PABO**) and the approval of protected action ballot agents who might conduct the ballot should a PABO be made.

[2] I deal with the statutory context and the approval requirements below. In short, where an applicant is approved by the Commission as an eligible protected action ballot agent, they will be authorised to conduct the ballots of employees required when a PABO is issued. Further, where named in the PABO application and proposed orders, the Commission will, subject to the Act, be obliged to, in effect, appoint them to conduct the ballot concerned.

[3] The Act sets out the approval requirements, which are in effect, that the applicant is a fit and proper person to conduct protected action ballots.

[4] This application was lodged on 7 June 2023. Shortly thereafter, the Commission stated on its website that CiVS had made the application and that interested parties could make submissions before the closing date of 16 June 2023. Earlier, the President of the Commission issued a public Statement<sup>1</sup> advising that this would be the process for dealing with such applications and that the details would be available on the website.

[5] No submissions have been received in relation to this application. In any event, it remains necessary for the Commission to consider whether CiVS is entitled to apply to be an

eligible protected action ballot agent, is a fit and proper person for that purpose, and to determine whether it should be approved.

[6] For reasons that are set out below, I am satisfied that I should approve the application.

## 2. The statutory context

[7] The context in which the approval of an eligible protected action ballot agent is set in part by the role that such agents play within the scheme of the Act relating to PABOs and protected industrial action more generally.

[8] The function of the PABO is established by Part 3-3 of the Act. Essentially, a PABO is a necessary step for a bargaining representative to ultimately seek the capacity to take protected industrial action in support of bargaining for relevant enterprise agreements.

[9] The PABO is part of the bargaining regime of the Act. The scheme of the Act is outlined in various decisions of the Commission including in *John Holland v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) and The Australian Workers’ Union*<sup>2</sup> and by the Federal Court in *J.J. Richards & Sons Pty Ltd v Fair Work Australia*.<sup>3</sup>

[10] The taking of protected industrial action by both employees and employers, that is designed to advance claims and to persuade the other party to change their position, is part of that scheme. This must be undertaken in the context of the relevant party genuinely trying to reach an enterprise agreement.

[11] Whether any proposed industrial action becomes protected will ultimately depend on compliance with the statutory parameters including whether a relevant question is supported by the ballot,<sup>4</sup> whether the action is notified in accordance with the requirements of the Act,<sup>5</sup> and whether it is industrial action within the meaning of the Act.<sup>6</sup> Further, an employer who is subject to threatened, impending or probable industrial action may seek to have such action suspended or terminated on various grounds including whether it endangers the life, the personal health or safety, or the welfare, of the population or of part of it or causes significant damage to the Australian economy or an important part of it,<sup>7</sup> or causes significant economic harm.<sup>8</sup> Industrial action that is not protected industrial action may be prevented.<sup>9</sup>

[12] The Act as recently amended provides:

### **“443 When the FWC must make a protected action ballot order**

- (1) The FWC 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 FWC 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.
- (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
- (3) A protected action ballot order must specify the following:
  - (a) the name of each applicant for the order;
  - (b) the group or groups of employees who are to be balloted;
  - (c) the date by which voting in the protected action ballot closes;
  - (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action;
  - (e) the person or entity that the FWC decides, under subsection 444(1A), is to be the protected action ballot agent for the protected action ballot;
  - (f) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.
- (3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.
- (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days or 120 hours (whichever is applicable), the protected action ballot order may specify a longer period of up to 7 working days.

Note Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

#### **444 Ballot agent and independent advisor**

- (1) This section applies if the FWC must make a protected action ballot order under subsection 443(1).

##### *Protected action ballot agent*

- (1A) The FWC must, in accordance with subsections (1B) to (1D) of this section, decide the person or entity that is to be the protected action ballot agent for the protected action ballot.

- (1B) The person or entity must be the person or entity specified in the application for the protected action ballot order as the person or entity the applicant wishes to be the protected action ballot agent, unless:
- (a) the person or entity specified in the application does not meet the requirements of subsection (1C) (unless subsection (1D) applies); or
  - (b) the FWC is satisfied that there are exceptional circumstances that justify another person or entity being the protected action ballot agent.
- (1C) The person or entity must be an eligible protected action ballot agent.
- (1D) Subsection (1C) does not apply in relation to a person if the FWC is satisfied that:
- (a) there are exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent; and
  - (b) the person is a fit and proper person to conduct the ballot; and
  - (c) any other requirements prescribed by the regulations are met.
- Note: Other than the Australian Electoral Commission, an entity that is not a person cannot be the protected action ballot agent for a protected action ballot.
- (2) The regulations may prescribe:
- (a) conditions that a person must meet in order to satisfy the FWC, for the purposes of paragraph (1D)(b), that the person is a fit and proper person to conduct a protected action ballot; and
  - (b) factors that the FWC must take into account in determining, for the purposes of paragraph (1D)(b), whether a person is a fit and proper person to conduct a protected action ballot.

*Independent advisor*

- (3) The FWC may decide that a person (the ***other person***) is to be the independent advisor for a protected action ballot if:
- (a) the FWC has decided that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the ballot; and
  - (b) the FWC considers it appropriate that there be an independent advisor for the ballot; and
  - (c) the FWC is satisfied that:
    - (i) the other person is sufficiently independent of each applicant for the protected action ballot order; and
    - (ii) any other requirements prescribed by the regulations are met.”

[13] The new approval requirements for eligible protected action ballot agents are set out in the following terms.

[14] Section 12 of the Act contains the following relevant definitions:

*eligible protected action ballot agent*: see subsection 468A(1).

*protected action ballot agent* for a protected action ballot means the person or entity that conducts the protected action ballot.

[15] Section 468A of the Act provides:

**“468A Eligible protected action ballot agents**

- (1) Each of the following is an eligible protected action ballot agent:
  - (a) the Australian Electoral Commission;
  - (b) a person approved by the FWC under subsection (2).
- (2) For the purposes of paragraph (1)(b), the FWC may, in writing, approve a person as an eligible protected action ballot agent if the FWC is satisfied that:
  - (a) the person is a fit and proper person to be an eligible protected action ballot agent; and
  - (b) any other requirements prescribed by the regulations are met.
- (3) The regulations may prescribe:
  - (a) conditions that a person must meet in order to satisfy the FWC that the person is a fit and proper person to be an eligible protected action ballot agent; and
  - (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to be an eligible protected action ballot agent.
- (4) The FWC must, at least every 3 years after it approves a person as an eligible protected action ballot agent, consider whether the FWC remains satisfied that the person meets the requirements mentioned in subsection (2).
- (5) If, after considering the matter under subsection (4), the FWC is no longer satisfied that an eligible protected action ballot agent meets the requirements mentioned in subsection (2), the FWC must take:
  - (a) any action prescribed by the regulations; and
  - (b) any other action the FWC considers appropriate.”

[16] I observe that no regulations have been made for the purposes of s.468(2)(b) of the Act. This means that the Commission must consider whether the applicant, in this case CiVS, is a fit and proper person by reference to the general concept unaided by additional requirements or considerations. If satisfied, a discretion arises to approve the application.

[17] Although not directly relevant to the present application, I note that regulations have been made for the assessment of whether a non-eligible protected action ballot agent should be appointed under s.444(1D) of the Act.

[18] The *Fair Work Regulations 2009*<sup>10</sup> now relevantly provide in reg 3.11 as follows:

“(1) For the purposes of paragraph 444(1D)(c) of the Act, this regulation prescribes requirements that the FWC must be satisfied have been met before a person becomes the protected action ballot agent for a protected action ballot.

Note: The person must also be a fit and proper person to conduct a protected action ballot.

(2) The person must be capable of ensuring the secrecy and security of votes cast in the ballot.

(3) The person must be capable of ensuring that the ballot will be fair and democratic.

(4) The person must be capable of conducting the ballot expeditiously.

(5) The person must have agreed to be a protected action ballot agent.

(6) The person must be bound to comply with the Privacy Act 1988 in respect to the handling of information relating to the protected action ballot.

(7) If the person is an industrial association or a body corporate, the FWC must be satisfied that:

(a) each individual who will carry out the functions of the protected action ballot agent for the industrial association or body corporate is a fit and proper person to conduct the ballot; and

(b) the requirements in subregulations (2) to (6) are met for the individual.”

[19] The Explanatory Memorandum associated with the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Explanatory Memorandum)* helpfully provides an overview of the purpose of the changes to introduce the notion of an eligible protected action ballot agent as follows:

“841. These amendments remove the AEC as the default PAB agent and empower the FWC to ‘pre-approve’ a person as an ‘eligible PAB agent’. More than one person may be approved by the FWC. The AEC is defined as an ‘eligible PAB agent’. and does not need to be approved by the FWC. In effect, there may be a panel of alternative agents who can be appointed as an alternative to appointing the AEC. The amendments also set out the requirements when appointing a PAB agent that is not the AEC. These amendments would require the FWC to regularly review and consider whether it remains satisfied that the eligible PAB agent or agents meet the requirements at least every three years.

842. This item would amend section 12 of the FW Act by inserting a new signpost definition of ‘eligible PAB agent’. This new definition is particularly relevant to determining who is an eligible PAB agent for the purposes of Division 8 of Part 3-3 of the FW Act. The signpost definition is required due to the creation of a panel of PAB agents proposed by Item IA16.”

### 3. What is a “person” for present purposes?

[20] Section 468A of the Act refers to “a person”. The legislative note in the Act under s.444(1D) (**legislative note**) indicates that other than the Australian Electoral Commission (AEC), an entity that is not a person cannot be a protected action ballot agent. This raises the question as to whether “person” who might be approved as an eligible protected action ballot agent in the present context is intended to be a natural person or a legal person.

[21] Section 12 now provides that a “protected action ballot agent for a protected action ballot means the person or entity that conducts the protected action ballot”.

[22] I observe that the word “person” has different meanings throughout the Act. There are some provisions where it can only (and obviously) mean a natural person – such as the definition of a “child of a person” in s.17. In other provisions, it clearly includes legal persons, such as the prohibition on a “person” taking adverse action provided by s.340.

[23] Another example is s.457 of the Act which requires the ballot agent to notify in writing the following "persons" of the results of the ballot:

- each applicant for the PABO;
- the employer of the balloted employees; and
- the Commission.

[24] The *Acts Interpretation Act 1901* (Cth) (AIA) applies.<sup>11</sup> Section 22(1)(a) of the AIA provides that, “unless the contrary intention appears”, then:

“expressions used to denote persons generally (such as “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” and “whoever”), include a body politic or corporate as well as an individual;”

[25] As a result, the question becomes – does the contrary intention appear in the present context from the terms and scheme of the Act?

[26] There are some contrary indications including a narrow application of the legislative note, and at least at some level, the notion that the concept of a ‘fit and proper person’ requirement sits more comfortably in relation to an individual than a body corporate.

[27] However, the following would appear to support the absence of a contrary intention.

[28] The legislative note is not a part of the Act and should not be taken at face value at least for the purpose of indicating that a contrary intention appears in the statute for the issue at hand.<sup>12</sup> Other than the legislative note, there is nothing in the actual statutory text of Part 3-3 that suggests a contrary intention.

[29] The ballot agents' provisions prior to the commencement of the Amending Act referred to "persons". This has been interpreted to mean both natural and legal (including corporate) persons.<sup>13</sup> There is no evident intention to change that meaning. That is, the word "person" was not changed but, rather, the concept of an "entity" was added in sections 443 and 444 of the Act. Further, s.468A, which deals with eligible protected ballot agents, refers only to the AEC and to "persons". It is reasonably clear<sup>14</sup> that the introduction of the term "entity" was done to permit the AEC to become an eligible protected action ballot agent because the AEC is not a "person" or a body corporate. The AEC is a "Commission".<sup>15</sup>

[30] In this regard I observe that the Explanatory Memorandum associated with the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* described the change to s.12 in the following manner:

"843. This item would insert 'or entity' in the definition of PAB agent to allow for the AEC to be a PAB agent."

[31] Considered in that light, the legislative note should be understood to observe that the type of (non-legal person) "entities" are limited to the AEC.<sup>16</sup>

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[32] Although the concept of a fit and proper person test sits comfortably with a natural person, there is nothing novel about corporate entities being a fit and proper person.<sup>17</sup> This is the case with the persons who might, despite not being eligible within the meaning of s.468A(1), be appointed as protected action ballot agents for a particular protected action ballot under s.444(1D) of the Act and the associated regulation 3.11, which also applies to "persons" acting as protected action ballot agents, and clearly contemplates both natural and corporate persons (industrial associations and corporate bodies).

[33] Other provisions in Part 3-3 of the Act also do not evince a contrary intention to the broader application of "person" for the purposes of an eligible protected action ballot agent.

[34] Section 437(3) sets out the matters that must be specified in a PABO application. Section 437(3)(c) provides that the application must specify "the name of the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot."

[35] Section 440(b) requires PABO applicants to give a copy of their application to "the person or entity that the application specifies as being the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot."

[36] Section 443(3) sets out the details that must be specified in any PABO issued by the Commission. Pursuant to section 443(3)(e), the PABO must specify "the person or entity that the FWC decides, under subsection 444(1A), is to be the protected action ballot agent for the protected action ballot".



[37] Section 444 is set out earlier in this decision. Sections 444(1A) to (1C) refer to protected action ballot agents being a “person or entity” whereas sections 444(1D) to (3), which respectively deal with fit and proper person requirements, regulations, and independent advisors, do not contain the word “entity”. Although this arises from the notion that the AEC is also (directly) an eligible protected action ballot agent and not subject to approval requirements as an Agent, no contrary intention for the purposes of the AIA is evident or implied.

[38] As a result, I do not consider there is a contrary intention per the AIA. A “person” in s.444, s.468A and related provisions includes a body corporate. This means that an eligible protected action ballot agent may be an individual (natural person), a corporation or the AEC, which is, in effect, approved directly by the Act. A non-corporate or non-individual entity cannot be considered for approval by the Commission.

[39] CiVS, as a corporation, is eligible to apply and be approved as an eligible protected action ballot agent.

#### **4. Is CiVS a fit and proper person?**

[40] I begin with the consideration of what is a fit and proper person for present purposes.

[41] Section 444 and associated provisions of the Act aim to protect the interests of the employees participating in the ballot and those of the employer(s) involved. Further, there is a statutory imperative arising from the scheme of the Act that any ballot that might authorise the taking of industrial action be conducted in a proper, democratic, prompt and robust manner by agents that are appropriate to undertake that task.

[42] Accordingly, the assessment of whether a proposed protected action ballot agent is a fit and proper person should take place in that context. Further, the test is whether a person is fit and proper to conduct protected action ballots, not whether they are fit and proper in some abstract sense.

[43] Without being definitive, considerations that might inform whether an applicant is a fit and proper person to be an eligible protected action ballot agent might include (where relevant):

- The qualifications and experience of the individuals that lead the organisations and/or those that are intended to conduct the ballots;
- The experience with conducting ballots and the absence of issues (non-conformances) evident from that experience;
- The systems that are in place to ensure that ballots are conducted fairly, democratically, and expeditiously by fit and proper individuals and which ensure the integrity and privacy of the information provided to them by the parties;
- General standing within the community including whether they have a record of non-compliance with workplace laws and the absence of criminal convictions; and

- Independence, or robust systems to ensure proper separation, from the interests and influence of those whose members are being balloted and their employers.

[44] Reference to “systems” above would include both information processes (technology and security arrangements) and staffing systems. In addition, findings made by the Commission as to whether the applicant is a fit and proper person for some equivalent ballot role or related purpose would also be relevant.

[45] As to the assessment of the fit and proper person requirement in this case, the application was accompanied by a Declaration of Mr Mike Michael, Managing Director of CiVS. I observe that CiVS have previously been found by the Commission to be a fit and proper person to conduct protected action ballots.<sup>18</sup> The material now before the Commission includes confirmation of extensive independent ballot and other professional experience of Mr Michael, his education and attributes, confirmation that all of the staff involved are also appropriate for the function, and the absence of criminal convictions of any kind within the business.

[46] The evidence provided on behalf of CiVS and the earlier findings of the Commission also confirms to my satisfaction consistency with the considerations set out earlier. This includes details about the nature of the information and other systems to be used for the ballots of different kinds, compliance with the *Privacy Act 1988* and related principles, and steps that will be taken to ensure that the ballots are conducted fairly, democratically, and expeditiously by fit and proper individuals.

## **5. Conclusions and approval**

[47] CiVS is entitled to apply, and I have found that it is a fit and proper person to be approved as an eligible protected action ballot agent. I also consider that in all of the circumstances, I should approve them to act in that capacity under the terms of the Act.

[48] The application is approved. CiVS is approved as an eligible protected action ballot agent under s.468A of the Act.

[49] Under s.468A(2) the approval must be in writing and this decision serves that purpose.

[50] This decision will be published, and the identity of CiVS as an approved eligible protected action ballot agent set out on the Commission’s website.

[51] In accordance with s.468A(4) of the Act, this approval will be reviewed by the Commission at least each 3 years to ensure that the Commission remains satisfied that CiVS meets the requirements in s.468A(2).



DEPUTY PRESIDENT

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<sup>1</sup> Statement issued 5 June 2023.

<sup>2</sup> [\[2010\] FWAFB 526](#).

<sup>3</sup> [\[2012\] FCAFC 53](#).

<sup>4</sup> Sections 437, 408 and 409 of the Act.

<sup>5</sup> Section 414 of the Act.

<sup>6</sup> Section 19 of the Act.

<sup>7</sup> Section 424 of the Act.

<sup>8</sup> Section 423 of the Act.

<sup>9</sup> Section 418 of the Act.

<sup>10</sup> As amended by the *Fair Work and Other Legislation Amendment (Secure Jobs, Better Pay) Regulations 2023*, made on 25 May 2023.

<sup>11</sup> As in force on 25 June 2009 – s.40A of the Act.

<sup>12</sup> See, generally, the Full Federal Court in *Adams* [\[2017\] FCAFC 228](#) at [27] – [31] and [46] – [59]) in connection with the applicability of the legislative note in s.19 of the Act.

<sup>13</sup> See for example *United Workers' Union v Silk Contract Logistics Pty Ltd* [\[2021\] FWC 5103](#) and “*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*” known as the *Australian Manufacturing Workers' Union (AMWU) v OS ACPM Pty Ltd T/A BHP Operations Services* [\[2022\] FWC 2850](#). This approach was also consistent with the terms of the former regulation 3.11 which applied to all PABO agents at the time and the approval of the current applicant multiple times prior to the recent amendments.

<sup>14</sup> Consistent with the *Explanatory Memorandum* to the Amending Act at [843].

<sup>15</sup> *Commonwealth Electoral Act 1918*, s 6(1) – (2) and see also s.7A(1).

<sup>16</sup> Such as a non-corporate trust or a partnership.

<sup>17</sup> See for example s.37A of the *National Consumer Credit Protection Act 2009*.

<sup>18</sup> See amongst many examples *United Workers' Union v Silk Contract Logistics Pty Ltd* [\[2021\] FWC 5103](#); *The Australian Workers' Union v Jadestone Energy (Australia) Pty Ltd* [\[2021\] FWC 227](#); *AMWU v Otis Elevator Company Pty Limited T/A Otis Elevator Company* [\[2023\] FWC 1337](#); *AMWU v UGL Rail Services Pty Limited* [\[2023\] FWC 1365](#) (*AMWU v UGL*); *CEPU v UGL Rail Services Pty Limited* [\[2023\] FWC 1381](#) (*CEPU v UGL*).