REASONS FOR DECISION

Fair Work Act 2009
s.604—Appeal of decision

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
Nilsen (NSW) Pty. Ltd.
(C2023/4319)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT CLANCY
COMMISSIONER PLATT

BRISBANE, 4 AUGUST 2023

Appeal against decision [2023] FWC 1769 and order PR764414 of Deputy President Hampton at Adelaide on 21 July 2023 in matter number B2023/725

Introduction

[1] On 19 July 2023, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) applied for a protected action ballot order (PABO) under s. 437 of the *Fair Work Act 2009* (FW Act). The group of employees to be balloted are employed by Nilsen (NSW) Pty. Ltd. (Respondent) who are members of the CEPU and will be covered by a proposed enterprise agreement.

[2] The application sought that the ballot be conducted by a ballot agent, Democratic Outcomes Pty Ltd T/A CiVS (CiVS). CiVS has been approved as an eligible protected action ballot agent under s. 468A of the FW Act.[1] The application also specified that the date by which voting in the ballot was to close was "*6 working days from the date of the order*" and a draft order consistent with the proposed closing date was filed with the application. The draft order also provided that the CEPU would file a list of its members and the Respondent would file a list of employees, who would be covered by the proposed Agreement, by 4.00 pm on the working day after the day the Order was issued.

[3] The application was dealt with by Deputy President Hampton. The Respondent did not object to the application and the matter was determined based on the material filed by the parties without a hearing being conducted. On 21 July 2023, the Deputy President issued a Decision[2] and Order[3] determining the application. The Decision recorded that a ballot period of 10 working days from the date of the Order had been approved, rather than the period of 6 working days sought by the CEPU, and the Order issued by the Deputy President specified this period. The Deputy President also extended the time sought in the application for the filing of lists of members/employees by the CEPU and the Respondent to 4.00 pm on the third working day

after the day the Order was issued, rather than the next working day, as proposed by the CEPU in its draft order.

[4] The effect of the Order made by the Deputy President was that the closing date for the ballot was 4 August 2023 rather than 31 July as sought by the CEPU, and the lists of employees to be covered by the proposed agreement and union members were to be provided by 26 July 2023 instead of 24 July as sought by the CEPU.

The appeal

[5] The CEPU filed a Notice of appeal at 5.35 pm on 21 July 2023 and requested that the appeal be heard on an expedited basis on the ground that the relief sought by the CEPU included orders varying the Deputy President's Decision and Order to provide that the protected action ballot close 6 working days after the Order. The CEPU submitted that the appeal would be rendered futile if the hearing and determination was not expedited. The request for an expedited appeal was approved by the President.

[6] Directions were issued requiring the filing of outlines of submissions concerning permission to appeal, the merits of the appeal and permission for the parties to be legally represented. On 25 July 2023, the CEPU filed an amended Notice of Appeal. No material was provided by the Respondent.

[7] We conducted a hearing on 26 July 2023 in respect of both permission to appeal and the merits of the appeal. The CEPU sought, and was granted, permission to be represented by a lawyer in the appeal, on the basis that we were satisfied, pursuant to s. 596(2) of the FW Act, that legal representation would allow the Commission to deal with the appeal more efficiently, taking into account the complexity of the issues raised. We were also satisfied that no unfairness arose from the grant of permission for legal representation on the basis that the Respondent did not oppose the making of the PABO at first instance and did not wish to make submissions in the appeal. The CEPU was represented by Mr P Boncardo of Counsel instructed by the CEPU's Industrial/Legal Officer, Mr A Aghazarian. The Respondent was represented by Mr V Monteleone, Division Manager – Contracting.

[8] In a Decision issued on 27 July 2023[4] we dismissed the appeal. These are the reasons for our Decision.

Procedural history

[9] It is necessary to set out the procedural history of the PABO application. The *Form F34 – Application for a protected action ballot order* (Form F34) was filed in the Commission by the CEPU at 3.43 pm on 19 July 2023. A Form 34B Declaration in support of the application, made by Mr Frederick Barbin, a New South Wales Branch Official of the Electrical, Energy and Services Division of the CEPU, was filed with the application.

[10] At 4.18 pm on 19 July 2023, correspondence was sent to the CEPU from the Commission, pointing out what appeared to be an inconsistency in the description of the group of employees to be balloted in the Form F34 and the description of the employees in the proposed draft order, and requesting an amended Form F34 be filed. The CEPU did not file an

amended application as requested and the Deputy President included the description of employees from the draft order filed by the CEPU in the Order as issued, rather than the description set out in the application. Nothing turns on this.

[11] As we have noted, the CEPU proposed in the application that voting in the protected action ballot close six working days from the date of the Order[5] and this time frame was reflected in the draft order filed with the application.[6] The draft order also proposed that the CEPU and the Respondent provide CiVS with lists of members and employees respectively on the working day after the Order was issued.[7]

[12] At 4.19 pm on 19 July 2023, an email was sent by the Commission to the Respondent, the purpose of which was to ascertain whether the Respondent objected to the application for the PABO. A letter from the Commission dated 19 July 2023 was attached this email and the contact person nominated by the CEPU in the Form F34 was copied into the correspondence. The letter dated 19 July 2023 included the following information:

> "**What happens next**
>
> **If you object to the application —** we will consider your objection before determining how we will proceed. We may give Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia an opportunity to respond to your objection before we refer the application to a Member of the Commission.
>
> **If you do not object to the application** — we will refer the application to a Member of the Commission. They will decide whether to make the protected action ballot order based upon the information provided in the application.
>
> The ballot closing date is likely to be no longer than 10 to 15 working days from the date of the order, as determined by the Commission.
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> **If you do not respond by 11am (AEST) Thursday 20 July 2023** — we will refer the matter to a Commission Member. They will make a decision based on the information in the application. This means that they may not hold a hearing or conference to determine the application.
>
> We will send a copy of this letter to Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia."

[13] The covering email sent with this letter was included in the appeal book by the CEPU,[8] but the letter was not. During the appeal it was confirmed that the letter was received by the CEPU. As there was no response from the Respondent, the Deputy President's Associate sent an email to the Respondent at 12.57 pm on 20 July 2023 seeking confirmation, by 3:30 pm that day, as to whether the Respondent had any objections to the PABO application and advising that in the absence of a response, the Commission would regard the PABO application as opposed and would list it for hearing on 21 July 2023.

[14] Having still not received a response, the Deputy President's Associate sent a further email at 5.11 pm on 20 July 2023 to another email address for the Respondent and again copied in the contact person nominated by the CEPU in the Form F34. Attached to this email was the letter previously sent by the Commission dated 19 July 2023. The email included a request that a reply be provided by the Respondent as a matter of urgency. The covering email for this correspondence was also included in the appeal book filed by the CEPU.[9]

[15] This correspondence elicited a response from the Respondent, firstly via a telephone call and then by email sent at 5.43 pm on 20 July 2023. The advice received from the Respondent was that the PABO application was not opposed.

[16] At or around 12.44 pm on 21 July 2023, the Deputy President determined the PABO application, issued the Decision[10] and made the Order[11] under s. 443 of the FW Act. Relevantly, at paragraph [5] of the Decision the Deputy President said:

> "The ballot is to be conducted by the Democratic Outcomes Pty Ltd T/A CiVS (**CiVS**). CiVS has recently been approved as an eligible protected action ballot agent under s 468A of the Act and consequently is authorised to conduct the ballot. For the purposes of s. 443(3)(c) and s 448A(2) of the Act, a ballot period of ten (10) working days from the date of the Order (21 July 2023) has been approved by the Commission."

[17] At 2.16 pm on 21 July 2023, Deputy President Cross issued an Order and Directions which, *inter alia*, required all bargaining representatives to attend a conference at 10 am on Friday 28 July 2023.[12]

Grounds of Appeal

[18] The three grounds of appeal are set out in the amended Notice of appeal as follows:

> "1. The Deputy President denied the CEPU procedural fairness, which denial was material in the requisite sense, by making a decision pursuant to s 443(3)(c) of the FW Act to extend the date by which voting in the protected action ballot in circumstances where:
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> (a) the CEPU had sought a period of 6 days in its application;
> (b) the respondent had not objected to or otherwise cavilled with the period of 6 days;
> (c) the Deputy President did not raise with the CEPU that he proposed to make an order different to that set out in the application;
> (d) the prospective ballot agent indicated that it could conduct the ballot in 6 working days from the issue of the order.
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> 2. The Deputy President denied the CEPU procedural fairness, which denial was material in the requisite sense, by issuing a direction pursuant to s 450(2) and s 450(4) to require the CEPU and the respondent to provide a list of the relevant employees by the third working day after the day the order is issued in circumstances where:
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> (a) the CEPU had sought a direction that the relevant list of employees be provided by the CEPU and the respondent by 4:00 pm on working day after the order was issued;
> (b) the respondent had not objected or otherwise cavilled with the period of one working day;
> (c) the Deputy President did not raise with the CEPU that he proposed to make directions different to that set out in the application;
> (d) the prospective ballot agent had indicated that it could conduct the ballot in 6 working days from the issue of the order in circumstances where it received the

relevant lists by 4:00 pm the working day after the day the order is issued, which matter the CEPU could have drawn to the Deputy President's attention had the matter been raised.

3. The Deputy President erred in his construction of s 443(3)(c) of the FW Act in his purported exercise of the power to specify the date by which voting in the protected action ballot:

(a) s. 443(3A) obliged the Deputy President to specify a date that would enable the ballot to be conducted as expeditiously as possible. The command contained in s. 443(3A) dictates that the sole inquiry the Commission is to undertake in specifying the date by which voting in the protected action ballot is to close. The Deputy President failed to adhere to that command and otherwise take into account a mandatory consideration;
(b) the Deputy President erroneously perceived that s 448A(2) reposed power in the Commission to specify a date by which voting in the protected action ballot was to close;
(c) properly construed, s 448A(2):
  (i) sets the outer limit as to when a conference envisaged by s 448A is to occur by reference to when voting is to close in accordance with a specification made under s 443(3)(c)
  (ii) is not relevant to specifying the date when voting in the protected action ballot is to close."

Relevant Provisions of the *Fair Work Act 2009*

[19] The statutory regime in relation to industrial action and protected action ballots was recently amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs Act). Part 3-3 of the Act deals with industrial action by national system employees and national system employers.[13] Division 8 of Part 3-3 of the Act relevantly deals with protected action ballots as follows:

"436 Object of this Division

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot."

"**437 Application for a protected action ballot order**

Who may apply for a protected action ballot order

(1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a protected action ballot order) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

(2) Subsection (1) does not apply if the proposed enterprise agreement is:

(a) a greenfields agreement; or

(b) a cooperative workplace agreement.

(2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.

Note: For notification time, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

Matters to be specified in application

(3) 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.

Note: The protected action ballot agent for the ballot must be an eligible protected action ballot agent unless there are exceptional circumstances: see section 444.

(5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:

(a) will be covered by the proposed enterprise agreement; and

(b) either:

(i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or

(ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

(6) The application must be accompanied by any documents and other information prescribed by the regulations."

"**440 Notice of application**

Within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to:

(a) the employer of the employees who are to be balloted; and

(b) 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."

"**441 Application to be determined within 2 days after it is made**

(1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.

(2) However, the FWC must not determine the application unless it is satisfied that each applicant has complied with section 440."

"**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."

[20] Subdivision C deals with the conduct of protected action ballot. Relevantly:

"**449 Conduct of protected action ballot**

(1) A protected action ballot must be conducted by the person or entity specified in the protected action ballot order as the protected action ballot agent for the ballot.

(2) The protected action ballot agent must conduct the protected action ballot expeditiously and in accordance with the following:

(a) the protected action ballot order;

(b) the timetable for the ballot;

(c) this Subdivision;

(d) any directions given by the FWC;

(e) any procedures prescribed by the regulations."

"**450 Directions for conduct of protected action ballot**

(1) This section applies if the protected action ballot agent is not the Australian Electoral Commission.

(2) The FWC must give the protected action ballot agent 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.

Note 1: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

Note 2: A protected action ballot agent must not contravene a term of a direction given by the FWC in relation to a protected action ballot (see subsection 463(2)).

(3) A direction given under subsection (2) may require the protected action ballot agent to comply with a provision of this Subdivision (other than subsection 454(5)) in relation to a particular matter.

Note: Subsection 454(5) provides for the Australian Electoral Commission to vary the roll of voters on its own initiative.

(4) To enable the roll of voters to be compiled, the FWC 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."

"**451 Timetable for protected action ballot**

(1) This section applies if:

(a) the protected action ballot agent is the Australian Electoral Commission; or

(b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

(2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must, in consultation with each applicant for the order and the employer of the employees who are to be balloted:

(a) develop a timetable for the conduct of the protected action ballot; and

(b) determine the voting method, or methods, to be used for the ballot (which cannot be a method involving a show of hands).

Note: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting."

…

"**463 Contravening a protected action ballot order etc.**

(1) A person must not contravene:

(a) a term of a protected action ballot order; or

(b) a term of an order made by the FWC in relation to a protected action ballot order or a protected action ballot.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not contravene a direction given by the FWC, or a protected action ballot agent, in relation to a protected action ballot order or a protected action ballot.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection (1) or (2) by the Australian Electoral Commission."

[21] Additionally, where the Commission has made a PABO pursuant to s. 443 of the Act, Subdivision BA requires the Commission to conduct a private conference within a specified period for the purposes of mediation and conciliation in accordance with the requirements in s. 448A, as follows:

"**448A FWC must conduct conferences**

(1) If the FWC has made a protected action ballot order in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conference:

(a) at a specified time or times during a specified period; and

(b) at a specified place, or by specified means;

for the purposes of mediation or conciliation in relation to the agreement.

(2) The specified period must end on or before the date specified in the protected action ballot order under paragraph 443(3)(c) as the day by which voting in the protected action ballot closes.

(3) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.

(4) The conference must be conducted in private.

(5) At a conference, the FWC may:

(a) mediate or conciliate; or

(b) make a recommendation or express an opinion.

(6) This section does not limit section 592 (which deals with conferences) or 595 (which deals with FWC's power to deal with disputes)."

[22] The relevant provisions of the FW Act relating to protected industrial action are as follows:

"**408 Protected industrial action**

Industrial action is protected industrial action for a proposed enterprise agreement if it is one of the following:

(a) employee claim action for the agreement (see section 409);

(b) employee response action for the agreement (see section 410);

(c) employer response action for the agreement (see section 411)."

"**409 Employee claim action**

Employee claim action

(1) Employee claim action for a proposed enterprise agreement is industrial action that:

(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

Conference orders

(6A) Each bargaining representative of an employee who will be covered by the agreement must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order for the protected action ballot.

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation."

…

"**411 Employer response action**

Employer response action

(1) Employer response action for a proposed enterprise agreement means industrial action that:

(a) is organised or engaged in as a response to industrial action by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who will be covered by the agreement; and

(b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballots

(2) Subsection (3) applies if the industrial action is organised or engaged in by an employer in response to industrial action that is authorised by a protected action ballot.

(3) The employer, and any bargaining representative of the employer for the proposed enterprise agreement, must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order for the protected action ballot."

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"**413 Common requirements that apply for industrial action to be protected industrial action**

Common requirements

(1) This section sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a cooperative workplace agreement.

Genuinely trying to reach an agreement

(3) The following persons must be genuinely trying to reach an agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;

(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee.

Notice requirements

(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;

(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc. passes its nominal expiry date

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;

(b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;

(c) an intractable bargaining declaration in relation to the agreement."

Approach to construction of statutory provisions

[23] In *Australian Workers Union v Oji Foodservices Packaging Solutions (Aus) Pty Ltd*,[14] a Full Bench of the Commission summarised the approach to the construction of a statute and, in particular, provisions of the FW Act, as follows:

> "[35] The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy[15] and the legislative history.[16] In *Project Blue Sky Inc v Australian Broadcasting Authority*[17] (*Project Blue Sky*) the plurality (McHugh, Gummow, Kirby and Hayne JJ) explained the general principles, drawing attention to the need to consider the context:
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> > 'the meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole." In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.'[18]
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> [36] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (*Alcan*),[19] the High Court described the task of legislative interpretation in the following terms:
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> > 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'
>
> [37] Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object (noting that s.40A of the FW Act provides that the *Acts Interpretation Act 1901* (Cth), as in force at 25 June 2009, applies to the FW Act). The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires one to construe the FW Act in the light of its purpose, not to rewrite it."[20]

[24] In addition, the importance of ascertaining a meaning from the language of a statutory provision that accords with the intent of the legislature was articulated by the plurality of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*[21], in the following terms:

> "Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.

> …For the reason already given in the discussion of the literal rule, departure from the ordinary grammatical sense cannot be restricted to cases of absurdity and inconsistency.
>
> In some cases in the past these rules of construction have been applied too rigidly. The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.
>
> …when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."[22]

Permission to Appeal

[25] Section 604 of the Act provides that a person aggrieved by a decision of the Commission may appeal the decision with the permission of the Commission. By virtue of s. 604(2), without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so. In *GlaxoSmithKline Australia Pty Ltd v Makin*, a Full Bench of the Commission identified some of the considerations that may attract the public interest as follows:

> "... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters ..."[23]

[26] Permission to appeal may also be granted where there is an arguable case of appealable error, and the decision is attended with sufficient doubt to warrant its reconsideration.[24]

[27] The CEPU submitted that it is in the public interest for the Commission to grant permission to appeal as this appeal raises for consideration a novel question of general importance about the impact of the new s. 448A(2) on the exercise of the power to make a protected action ballot order that specifies the date by which voting is to occur. This, the CEPU submits, has general and significant implications for the Commission's exercise of its jurisdiction in relation to protected action ballots. It is further contended that the Decision of the Deputy President manifests an injustice to the CEPU as it was denied procedural fairness.

[28] In addition, the CEPU contends that the Deputy President's apparent construction of s. 448A(2) is counter intuitive and is reasonably open to question in circumstances where:

1. s. 448A applies after the Commission has made a protected action ballot order;
2. s. 448A(2), in terms, provides that the 'specified period' detailed in s 448A(1) is that detailed in s 443(3)(c);
3. s. 443(3A) sets out the sole consideration in specifying the date when a protected action ballot is to be conducted.

[29] The CEPU also expressed the view[25] that from its own experience with protected action ballot applications and other decisions of the Commission (including decisions by the Deputy President), the Commission is specifying 10 working day periods in which protected action ballots are to occur notwithstanding that an applicant for a protected action ballot order seeks that a lesser period be specified and the nominated ballot agent is able to conduct a ballot in a shorter period.

[30] We are satisfied that permission to appeal should be granted on the basis that the appeal raises a novel question of general importance regarding new provisions of the FW Act concerning the exercise of power by Members of the Commission to make a protected action ballot order that specifies the date by which voting is to occur.

CEPU Submissions

[31] The CEPU submitted that the appeal specifically concerned whether s. 448A, which was inserted into the FW Act by s. 585 to Schedule 1 to the Secure Jobs Act:[26]

a. permits or authorises the Commission to determine a date when voting in a protected action ballot closes under s. 443(3)(c) by reference to when it considers it administratively convenient or practical to hold a conference under s. 448A; or
b. whether s. 448A(2) itself confers a power to extend the date required to be stipulated by s. 443(3)(c) for the conduct of a ballot.

[32] The CEPU contended that s. 443(3A) imposes an obligation on the Commission to specify a date under s. 443(3)(c) that will enable the protected action ballot to be conducted as expeditiously as possible and that this is the sole criterion guiding the specification of the date under s. 443(3)(c). The CEPU maintained that s. 448A is irrelevant to specification of the time under s. 443(3)(c).

[33] It was also contended that the Deputy President denied the CEPU procedural fairness by deciding to vary the date specified for the close of the ballot and otherwise varying directions as to the provision of information to the ballot agent, without alerting the CEPU that he intended to do so and in circumstances where the PABO was not contested by the Respondent. The CEPU submitted this denial of procedural fairness was material in the requisite sense.

[34] The CEPU referenced the object of Division 8 to Part 3-3, which concerns protected action ballots, and s. 436 of the FW Act. In relation to other provisions of the FW Act, the CEPU referenced s. 437(1), the requirements in s. 437(3) to specify certain matters, the s. 443(1) requirement for the Commission to make a PABO if an application has been made in accordance with s. 437 and it is satisfied the applicant has been and is genuinely trying to reach agreement And s. 443(3), which sets out what a PABO must specify. The CEPU emphasised that s. 443(3)(c) stipulates that the PABO is to specify *'the date by which voting in the protected action ballot closes'*, whilst s. 443(3)(e) requires the Commission to specify the person or entity to conduct the ballot.

[35] The CEPU also referred to the history of s. 443(3A), to which we will later refer, and s. 449(2). The CEPU then referred to s.448A, which it said applies, by operation of s. 448A(1), *if* a PABO has been made. The CEPU argues that s. 448A presumes a PABO has been made.

The CEPU emphasised that s. 448A obliges the Commission *after making a PABO* to make an order directing bargaining representatives to attend a conference for mediation or conciliation in relation to the proposed agreement. The CEPU noted that such a conference must occur '*during a specified period*' as per s. 448A(1)(a) and that the specified period is defined by s. 448A(2) as the period that ends on or before the date specified in the PABO under s. 443(3)(c). The CEPU then outlined the legislative history of s. 448A.

[36] In relation to the approach to the construction of ss. 443(3)(c) and 448A, the CEPU submitted that the principles of statutory construction are uncontroversial. The CEPU contended that the construction of a provision must start with the text of the provision, having regard to its context and purpose, with context to be understood in its widest sense and considered at the outset of the construction task.[27] The CEPU argued that construction congruent with the purpose of a provision is to be preferred and purpose is ascertained from the text and structure of the Act and legitimate and relevant considerations of context, including extrinsic materials.[28] Further, it was put that construction remained a text-based exercise and extrinsic materials cannot displace the meaning of the statutory text or be substituted for the text.[29]

[37] The CEPU submitted that s. 443(3) mandates what a PABO must specify and s. 443(3A) requires that in specifying the date that voting is to close, the Commission must specify a date that will enable the protected action ballots to be conducted as expeditiously as possible. The CEPU argues that s. 443(3A) sets out the universe of considerations and purposes the Commission is to consider in specifying the date by which voting in a protected action ballot is to close under s. 443(3)(c). The CEPU argued that the Commission must therefore specify a date for the close of the ballot that will enable the ballot to be conducted as expeditiously as possible.

[38] The CEPU asserted the purpose of s. 443(3A) is apparent from its terms and confirmed by its legislative history and the applicable extrinsic materials. The CEPU argued that s. 443(3A) was enacted to address the mischief identified in 2012 that the Commission was adopting a "*one size fits all approach*" by specifying a uniform period in which ballots were to close.

[39] The CEPU submitted there is no warrant for the Commission to take into account the time it may take to arrange a conference under s. 448A when determining the date by which voting in the protected action ballot is to close under s. 443(3).for the following reasons.

- *First,* the duty under s. 448A(1) arises *after* the making of a PABO. It is irrelevant to the determination of a date by which voting in the PAB is to close.
- *Second,* the timing of the conduct of a protected action ballot (which will usually be dependent on the ballot agent's capacities, the size of the workforce to the balloted and the capacity of the employer and bargaining representative to provide the ballot agent details of employees to be balloted) it not germane to the conduct of a conference between the bargaining representatives about a proposed new agreement. The subject of s. 448A is distinct from to the subject of s. 443(3)(c).
- *Third,* ss. 448A(1)-(2) utilise the period specified under s. 443(3)(c) as defining the time in which a conference under s. 448A is to occur. Section 448A takes that period as having been set and that period marks out the time in which the Commission is to

arrange a conference under s. 448A. Section 448A(2) is definitional in nature.

- *Fourth*, the legislative history, including the removal of the proposed amendment to s. 443(3A) from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, points squarely against the timing of a conference (or the Commission's administrative capacity or ability to hold a conference) being relevant to the specification of the time when a ballot is to close.
- *Fifth*, s. 448A imposes a duty on the Commission that the Commission must comply with. It does not specify any relevant matters concerning the conduct of a protected action ballot or the organising and taking of protected action after a ballot has been conducted. Conferences under s. 448A are only relevant to protected industrial action insofar as a bargaining representative is not permitted to organise and take protected industrial action if they have not complied with an order or direction made by the Commission under s. 448A: ss. 409(6A) and 411(3).

[40] Appeal ground 1 asserts that the Deputy President misconstrued ss. 443(3)(c) and (3A) and s. 448A. In this regard, the CEPU submitted that the reasons for the Deputy President specifying a ballot period of 10 working days at [5] of the Decision are not pellucidly clear. The CEPU also submitted that it was apparent from his reference to s. 448A(2) at [5] of the Decision that the Deputy President determined that period should be specified so as to enable a conference under s. 448A(2) to occur. . The CEPU argued that it can also be inferred from the question contained at clause 2.3 to the Commission's Form F34, which asks the applicant to specify a date by which a protected action ballot will close and encourages the applicant to '*have regard to both the logistics of conducting the ballot and the fact that a compulsory conference of all bargaining representatives for the proposed agreement must be conducted during the ballot period*'.

[41] According to the CEPU, the Deputy President also erred in failing to have regard to the requirement under s. 443(3A) which required him to specify a date for the close of the ballot that would enable the ballot to be conducted as expeditiously as possible. Highlighting that the fact that a ballot could be conducted within this period was not cavilled with by the Respondent, the CEPU argued that the Deputy President failed to have regard to the object of ensuring that the date specified would enable the ballot to be conducted as expeditiously as possible and instead adopted a "*one size fits all*" model criticised by the Report and which s. 443(3A) was designed to remedy.

[42] Appeal ground 2 in the amended notice of appeal asserted the same errors in relation to the Deputy President's decision to extend the time for provision by the CEPU and the Respondent of the lists of members and employees who would be covered by the proposed agreement. The CEPU also submitted that the result of the Deputy President extending these dates was that the 6 August 2023 date for the ballot to close sought by the Union could not have been achieved.

[43] In support of the assertion that the ballot should and could have been closed by 6 August 2023, the CEPU tendered email correspondence with CiVS, sent by Mr Aghazarian at 7.49 am on 18 July 2023, in the following terms:

> "We are looking to do a PABO involving around 20 members at Nilsen Group in NSW. The ETU will be the only Union involved and there will be no other ballot from other unions for the same group.

> I know it's a bit tricky, but given the small group and one ballot, would you be able to manage a turnaround of 1 week? There is some importance in taking protected industrial action as quickly as possible. With time for the order, that would mean the following expected timeline:
>
> - Application made today
> - Order made 20 July
> - Union and Employer provide lists by 21 July 2023
> - Roll compiled by 25 July 2023
> - Voting opens 26 July 2023
> - Voting closes 28 July 2023"[30]

[44] An email from CiVS in response confirmed that the ballot could be conducted in a similar time frame with the ballot closing on 28 July.

[45] The CEPU Appeal ground 3 concerns the assertion that there was denial of procedural fairness. The CEPU submitted it is a precept of statutory construction that, absent a legislative intention to the contrary, the exercise of a power under an enactment is conditioned by a requirement that a person whose rights or interests may be adversely affected by the power will be accorded procedural fairness by the repository.[31] The CEPU relied on the observation of Kiefel, Bell and Keane JJ in *Minister for Border Protection v WZARH*,[32] that in the absence of a legislative intention to the contrary, administrative decision-makers must accord procedural fairness to those affected by their decisions.

[46] The CEPU submitted there is no textual or other basis to discern a legislative intention that procedural fairness is excluded where the power under s. 443(3)(c) is exercised by the Commission to specify the date by which voting is to close.

[47] The CEPU argues that procedural fairness may require the disclosure of matters by a decision-maker which relate to a critical issue or factor, or which do not obviously follow from an evaluation of the evidence, or where the matter or issue has not otherwise been raised in the proceedings.[33]

[48] The CEPU submitted that in the present case, it was not (and could not have been) apparent to the CEPU that the Deputy President was contemplating specifying a date by which the ballot was to close different to that detailed in the CEPU's application. The CEPU asserted there had been no communication of this by the Deputy President and the Respondent did not object to the date set out in the application. As such, the CEPU argues that in determining to vary the date without notice to the CEPU and without affording the CEPU the opportunity to be heard, the Deputy President denied the CEPU procedural fairness. It was proffered that the denial extended to the variations to the directions for the conduct of the ballot which were, so far as the CEPU apprehended, uncontroversial.

[49] The CEPU asserted that the denial was material in the sense required by *Nathanson v Minister for Home Affairs*[34] as had the issue been raised, the CEPU could have drawn the Deputy President's attention to the fact that the ballot agent could conduct the ballot within 6 working days which was readily practicable given the small voting group involved.[35] It was also asserted by the CEPU that it could have pointed out to the Deputy President that there was no basis or warrant for the variations to the proposed orders requiring the provision of lists of employees by the Respondent and the CEPU. The CEPU argued it was, therefore, deprived of the opportunity of a possibly different outcome.

[50] In its written submissions, the CEPU sought that the Full Bench grant permission to appeal, uphold the appeal, quash the Order specifying that the ballot was to close 10 working days after the PABO (4 August 2023) and vary the Deputy President's Decision in this regard under s. 607(3)(a) to provide that the ballot is to close 6 working days after the order (31 July 2023). The CEPU also sought further variations to the Order in relation to the conduct of the ballot.

[51] In oral submissions, the CEPU sought that the Deputy President's decision be varied to require the lists of member/employees to be provided by 27 July 2023 and for the ballot to close on 2 August 2023.

Consideration

Appeal grounds 1 and 2 – misconstruction of ss. 443(3)(c) and (3A) and s. 448A

[52] As the Full Bench of the Commission held in *National Tertiary Education Union v Curtin University*[36] (*NTEU v Curtin*) the Commission's power to make a PABO under s. 443 of the FW Act is not discretionary in nature and s. 443(1) imposes a duty on the Commission to make an order if the two conditions have been met: first (in paragraph (a)) that an application for such an order has been made under s. 437 and, second (in paragraph (b)), that the Commission is satisfied that each applicant for an order has been, and is, genuinely trying to reach an agreement with the employer of the employees to be balloted.

[53] Section 437 sets out the matters required to be specified by an applicant for a PABO. Those matters, in summary, are the specification of the group to be balloted, the question or questions to be put to employees who are to be balloted and the name of the person or entity that the applicant wishes to be the ballot agent. While the Form F34 asks applicants to specify the date on which it is proposed that the ballot will close, this is not a requirement under s. 437. Nor is the Commission required to make a decision in relation to the protected action ballot application in the terms applied for. Section 599 of the FW Act provides that, except as provided by the FW Act, the Commission is not required to make a decision in relation to an application in the terms applied for and there is nothing to suggest that anything in s. 443 and s. 443(3A) ousts the operation of s. 599.

[54] The requirement in s. 443(3)(c) to specify a date by which voting in a protected action ballot closes arises for consideration by the Commission after determining whether there is an obligation to make an order under s. 443(1), when formalising the content of the order in conformity with ss. 443(3) – (5). The matters set out in s. 443(3) are not discretionary and the Commission must include them in a PABO. However, while s. 443(3)(c) requires the Commission to specify the date by which voting in the protected action ballot closes, s. 443(3A) invests the Commission with a discretion to specify the date by which a protected action ballot will close, provided the date will enable the protected action ballot to be conducted as expeditiously as practicable.

[55] The central premise of the CEPU's construction argument is that s. 443(3A) outlines the universe of considerations and purposes the Commission is to take into account in specifying the date by which voting is to close under s. 443(3)(c). The CEPU submits the Commission

must specify a date for the close of the ballot that will enable the ballot to be conducted as "*expeditiously as possible*".[37] According to the CEPU, the Commission is limited to considering matters such as the size of the voting group, the capacity of the ballot agent and the capacity of the employer and bargaining representatives to provide the ballot agent with the details of employees to be balloted and it has contended the Commission is not permitted to take into account the time it may take to arrange a conference under s. 448(A).

[56] There is no warrant to depart from the settled principle that the text of s. 443(3A) must be considered in the context of the FW Act viewed as a whole. As such, we do not accept the CEPU's construction argument.

[57] As we have stated, the construction of a statutory provision starts with the text of the provision, having regard to its context and purpose. It is clear from a plain reading of s. 443(3A) that it does not require the FWC to specify a date that will enable the ballot to be conducted as "*expeditiously as possible*". Instead, the Commission is required, for the purposes of s. 443(3)(c), to specify a date that will "*enable the protected action ballot to be conducted as expeditiously as practicable*". While it is axiomatic that the time for the ballot to be conducted will determine the closing date of the ballot, these matters are distinct. In this regard s. 443(3A) focuses attention on the process of conducting the ballot, in addition to the closing date.

[58] The relevant phrase in s. 443(3A) commences with the term "*enable*". The plain meaning of that term is to give the ability or means to do something, or to make something possible. The plain meaning of the term "*expeditiously*" is quickly and efficiently. The term "*practicable*" means that something is able to be done or put into practice successfully. Section 443(3A) gives the Commission discretion to specify a date that will enable the conduct of the ballot to be as expeditious as practicable. The text of s. 443(3A) makes clear that the speed at which a ballot will close is not determinative of whether it can be conducted as expeditiously as practicable. The section does not require the Commission to ensure that the ballot closes as quickly as possible or on the date sought by the applicant for the ballot.

[59] The text of s. 443(3A) must be considered in the context of the FW Act viewed as a whole. Consistent with that principle, we observe that s. 443(3A) is found in Division 8 of Part 3 – 3 of the FW Act. The Guide to Part 3 – 3 in s. 406 of the FW Act states that: "*Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement*". This preamble is repeated in the Guide to Division 8 in s. 435. The object of Division 8 is set out in s. 436 and refers to establishing a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

[60] Section 437(1) provides that a bargaining representative may apply for a protected action ballot order. Section 438 restricts when such an application may be made. Section 440 requires that notice of the application be given to both the employer of the employees and the person or entity that the application specifies as the agent for the protected action ballot. Section 441 provides that the FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made. Section 447 applications to vary a PABO may only be made by an applicant for the PABO, while an application to

change the date by which the ballot closes may be made by a ballot agent. An application to revoke a PABO may be made by an applicant for the order (s. 448).

[61] The newly enacted 448A is found in Subdivision BA of Part 3 – 3. The section requires that if the FWC has made a PABO in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conference at a specified time or times during a specified period, and at a specified place or by specified means. The conference is for the purposes of mediation or conciliation in relation to the agreement. The specified period for the conference to be conducted must end on or before the date specified in the PABO under paragraph 443(3)(c) as the day by which voting in the protected action ballot closes. The requirements relating to conferences under s. 448A apply with respect to all bargaining representatives and not just those who are the applicants for the PABO.

[62] Section 408 of the FW Act defines protected industrial action to include employee claim action (s. 408(a)) and employer response action (s. 408(c)). Section 409(1) defines employee claim action for the purposes of such action being protected industrial action. Significantly for present purposes, such action is industrial action organised or engaged in by a bargaining representative of an employee who will be covered by the agreement (s. 409(1)(b)(i)) or an employee who is included in a group or groups of employees specified in the protected action ballot order for the industrial action (s. 409(1)(b)(ii)). Further, s. 409(1)(c) requires employee claim action to meet the common requirements set out in subdivision B, while s. 409(1)(d) requires that such industrial action meets the additional requirements set out in s. 409. These additional requirements include, at subsection (6A), that "*each bargaining representative of an employee who will be covered by the agreement, must not have contravened any order made under s. 448A … that related to the protected action ballot order for the protected action ballot*". It is also relevant that notice of protected industrial action that is employee claim action cannot be given until after the results of the relevant protected action ballot have been declared (s. 414(3)). The required notice period is three working days in the case of a single enterprise agreement, unless a longer period is specified by the Commission if it is satisfied there are exceptional circumstances justifying this (s. 443(5)).

[63] Section 411 deals with employer response action, defined as industrial action that is organised or engaged in as a response to industrial action by bargaining representatives of employees, or employees, and is organised or engaged in by an employer that will be covered by the agreement. To be protected, employer response action must meet the common requirements in Subdivision B and by virtue of s. 411(3), the employer and any bargaining representative of the employer, must not have contravened any order made under s. 448A. The common requirements for Subdivision B are set out in s. 413, which relevantly includes the requirement that bargaining representatives, and employees and their bargaining representatives, must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to the agreement or a matter that arose during bargaining for the agreement.

[64] As we have outlined above, there is no warrant to depart from the settled principle that the text of s. 443(3A) must be considered in the context of the FW Act viewed as a whole. It follows that we do not consider the Commission is limited to consideration of the matters in s. 443(3A) when specifying a date for a protected action ballot to close.

[65] We agree that matters of the kind identified by the CEPU are relevant to the exercise of discretion by the Commission to specify a date for a protected action ballot to close that will enable the ballot to be conducted as expeditiously as practicable. However, there is no warrant to limit consideration to matters of that kind. Other matters relevant to the exercise of the discretion may include the location of the group of employees, their rosters or work patterns, the nature of the work they are performing, their access to the internet or telephone services and the method by which the ballot will be conducted. The employer of the employees who are to be balloted may also have a view about these matters. Given that there is a requirement in s. 440 that a copy of the application for a PABO is given to the employer of the relevant employees, any views of the employer about whether a PABO should be made are a matter to which the Commission would have regard.

[66] We are also of the view that in exercising the discretion in s. 443(3A), the Commission may have regard to the requirements in relation to conducting conferences pursuant to s. 448A. The reference to s. 443(3)(c) in s. 448A(2) makes clear that there is a connection between the specification of the date a protected action ballot is to close and the requirement for the Commission to hold a conference, and that the Commission may have regard to this in exercising the discretion in s. 443(3A) to specify a date that will enable a protected action ballot to be conducted as expeditiously as practicable. It follows that there is no error in the Deputy President's order by virtue of the fact that it refers at [5] to both s. 443(3)(c) and s. 448A(2). The fact that a conference under s. 448A is conducted after a protected action ballot order has been issued does not obviate the need for the Commission to have regard to the requirement to conduct the conference before issuing the order. Given that the Commission must conduct a conference before voting in a protected action ballot closes, it would be illogical to have no regard to that fact before issuing the PABO.

[67] That the Commission may have regard to the requirements in s. 448A when exercising discretion to specify the date by which a protected action ballot is to close, is also consistent with the significance of such conferences to the rights and obligations of bargaining representatives. As we have noted, the Commission must order the bargaining representatives for the agreement to attend a s. 448A conference and not just the bargaining representative making the application for the PABO. While s. 440 requires that notice of an application for a protected action ballot order be given to the employer of the employees to be balloted and the ballot agent specified in the application, there is no requirement that other bargaining representatives for an agreement be given notice of the application. The potential repercussions for bargaining representatives who do not attend the conference are significant. Accordingly, the Form F34 includes the request for an applicant to provide known details of any additional bargaining representatives who are not the applicant or the respondent.

[68] This case does not specifically call for consideration of the impact on the immunity granted by s. 415 of the FW Act if industrial action is taken in circumstances where one or more of the bargaining representatives engaging in the industrial action has not complied with an order under s. 448A. It may however be noted that s. 409(6A) suggests that employee claim action will only be protected industrial action if <u>each</u> bargaining representative of an employee who will be covered by the agreement, which includes officers of employee organisations who are bargaining representatives (by virtue of s. 409(7)) has not contravened a s. 448A order requiring attendance at a conference.

[69] The fact that non-compliance with an order to attend a s. 448A conference by one or more employee bargaining representatives, for example, one who may not have been the applicant for the PABO, could result in any subsequent employee claim action being unprotected for both those bargaining representatives and all other participants, is a significant matter. Similarly, for employer response action to be protected industrial action, the employer and any bargaining representative of the employer for the proposed enterprise agreement, must not have contravened any order requiring attendance at a conference made under s. 448A.

[70] The potential impact of non-compliance with an order under s. 448A can be illustrated by the decision of the majority of the High Court in *Esso Australia Pty Ltd v The Australian Workers Union*[38], which established that the use of the term "*have [not] contravened any orders that apply to them*" in s. 413(5) refers to a state of absence of past contravention of orders. By analogy, the requirements in ss. 409(6A) and 411(3) that bargaining representatives must not have contravened any order made under s. 448A are likely to apply in the same way. Given the significance of compliance with a s. 448A order, we consider the Commission may appropriately have regard to the requirements related to the s. 448A conference in exercising the discretion to specify the date by which the voting in a protected action ballot closes.

[71] A further relevant consideration to which the Commission may have regard in exercising the discretion under s. 443(3A), is the requirement in s. 441 that an application for a PABO, must be determined, as far as practicable, within 2 working days after the application is made. An application for a PABO cannot be determined without the Commission either refusing the application or issuing an order specifying, among other required matters, the date on which voting in the ballot will close. For the reasons we have set out above, there are a range of other relevant considerations that the Commission may consider in exercising the discretion under s. 443(3A) including the requirement that bargaining representatives must be ordered to attend a conference under s. 448A before the vote in the protected action ballot closes. With a range of matters to consider within the short timeframe for the determination of a PABO application, it may be reasonable to specify a later date for the protected action ballot to close than that sought in the Form F34 so as to ensure compliance with the requirements that determine whether or not the industrial action for which authorisation is sought via the ballot process is ultimately protected.

[72] In support of its interpretation of s. 443(3A), the CEPU referred to the insertion of s. 443(3A) by the *Fair Work Amendment Act 2012*. The CEPU argued s. 443(3A) was inserted – together with s. 449(2) requiring a ballot agent to conduct a ballot expeditiously – in response to conclusions reached by an expert panel in producing the report to the then Minister for Employment and Workplace Relations entitled: "*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*". That Report recorded concerns about delays in the ballot process at that time said to have arisen because Fair Work Australia (as the FWC was then known) had adopted a "*one size fits all approach…routinely issuing orders that specify 20 days*". The CEPU submitted that s. 448(3A) was enacted to address this mischief.

[73] No doubt the expert panel considered the timely completion of protected action ballots would be a sound policy outcome. It is, however, significant to note that at the time s. 443(3A) was inserted into the FW Act, it was overwhelmingly the case that the Australian Electoral Commission (AEC) conducted protected action ballots. Further, the then provisions for the

approval of ballot agents other than the AEC were complex and there was a process required to be undertaken on each occasion an alternative ballot agent to the AEC was sought. It was also commonly understood at that time that the AEC conducted postal ballots, routinely required periods of 20 days to conduct them and could not comply with a PABO requiring a shorter ballot period. Accordingly, to the extent that the 20-day time frame could be described as a one size fits all approach, we do not accept the proposition that it was a practice that had been adopted for the convenience of the Commission. Nor do we accept that the Commission had created a mischief requiring a legislative response. As a matter of practicality, Members of the Commission issuing orders requiring the AEC to conduct protected action ballots in a time frame that the AEC had advised it could not achieve, would have been an exercise in futility.

[74] It was the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (FW Amendment Act 2022) that inserted s. 448A and we consider the s. 443(3A) requirement for protected action ballots to be conducted as expeditiously as practicable must now be considered in the light of the requirements imposed on the FWC to hold a conference and order bargaining representatives to attend, as should the significant consequences that might flow from a failure to attend. It is self-evident that these matters were not considerations when s. 443(3A) was first inserted into the FW Act in 2012.

[75] We are not persuaded the abandonment of an initial proposal that a PABO not specify a date for the ballot to close that was earlier than 14 days after the date the order was made, supports the CEPU's construction of the current provision. The Supplementary Explanatory Memorandum to the FW Amendment Act 2022, described the omission of the initially proposed 14-day period in s. 443(3A) as restoring the Commission's discretion to determine the timetable for the conduct of protected action ballots, and confirmed the retention of the requirement that a date be specified for the close of a ballot that enables it to be conducted as expeditiously as practicable. We consider the removal of the 14 days confirms that the discretion of the Commission is not fettered and is capable of accommodating both cases in which 14 days will not be sufficient for a ballot to be conducted as expeditiously as practicable and cases which do not require a minimum period of 14 days.

[76] We reject the assertion that the Deputy President's order is motivated by the convenience of the Commission in relation to conducting a conference under s. 448A. The fact that protected action ballots may be conducted by electronic means such as such as text messages or similar processes has reduced the time needed to arrange and conduct such ballots. If mobile telephone numbers are provided for employees to be balloted, it appears it may be possible to conduct a protected action ballot in two or three days. While advances in voting technology makes the completion of a ballot within such a time period possible, it is not necessarily practicable given the Commission's new obligations to order attendance at, and then conduct, a s. 448A conference within the same period. We consider it is entirely consistent with the objects Part 3 – 3 of the FW Act that the Commission's discretion under s. 443(3A) is broad enough to accommodate the making of a PABO specifying a date for a ballot to close that accommodates the conduct of a s. 448A conference, thereby mitigating the potentially serious consequences that might flow from failure by a bargaining representative to comply with the antecedent order to attend. Further, in circumstances where the Commission may not be immediately furnished with the identity and particulars of all bargaining representatives, it may be necessary to ensure that there is sufficient lead time before the conference to ensure that the

Commission meets its obligation under s. 448A(1) to order attendance of all bargaining representatives and they have a reasonable opportunity to comply.

[77] Employee claim action or employer response action can be notified and taken only after the protected action ballot has closed. Obviously, the shorter the period of time before the close of voting, the earlier it will be possible for any approved forms of industrial action to be notified and taken. We note, however, that the Statement of Compatibility with Human Rights prepared for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, outlined the following in relation to Industrial Action:

> "34. The Bill would promote efficiencies through the establishment of a panel of ballot providers who are 'pre-approved' to conduct Protected Action Ballots (PAB).
>
> 35. The Bill would seek to de-escalate disputes before industrial action is taken and after industrial action has been authorised. The Bill would empower the FWC to require bargaining representatives to attend a conference during the PAB period and enable the FWC to conduct the conference during a 14-day period before voting closes on the PAB."[39](Emphasis added).

[78] While the reference above to the 14-day time frame was subsequently removed, the intent of the amendment introducing the s. 448A conferences remained unchanged. The Supplementary Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* referred to the earlier detailed Statement of Compatibility with Human Rights,[40] which clearly identified that Parliament intended that not only would a conference be conducted before protected industrial action was taken, but also that it would involve a meaningful attempt to de-escalate potential disputes by the Commission employing the full range of its powers to mediate and conciliate.

[79] In our view, the desire of one (or all) bargaining representatives to access protected industrial action in short time frames by seeking the earliest possible closing date for a ballot, must be balanced against the legislative intent behind s. 448A and the practical requirements of arranging and conducting a conference at which all bargaining representatives are able to fully participate and the FWC is able to deploy the range of dispute resolution techniques to assist in reaching agreement or narrowing issues in dispute consistent with ss. 448A(5) – (6). We consider the Commission, in discharging its obligation under s. 443(3A), is empowered to have regard to the statutory context extending beyond the narrow confines contended for by the CEPU. Provided the closing date will enable the ballot to be conducted as expeditiously as practicable, the Commission is empowered, having had regard to this broader statutory context, to specify a date for the voting in a protected action ballot to close that results in there being a longer period than that sought by an applicant for a PABO. Certainly the Commission is not required to specify the shortest possible closing date simply because this can be achieved by the applicant's chosen ballot agent. There is nothing in the contextual or extrinsic material that has persuaded us the construction of s. 443(3A) advanced by the CEPU is correct.

[80] Appeal grounds 1 and 2 are rejected.

Appeal ground 3 – denial of procedural fairness

[81] By appeal ground 3, the CEPU asserts that it was denied procedural fairness because it was not (and could not have been) apparent, that the Deputy President was contemplating

specifying a date by which the ballot was to close different to the date specified in the Union's application.

[82] The requirement for the Commission to "*act judicially*" includes an obligation to afford parties procedural fairness.[41] However, the application and content of the doctrine of procedural fairness is determined by the context. As Mason J (as he then was) observed in *Kioa v West*:

> "What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision - maker is acting."[42]

[83] In terms of the context of the proceedings at first instance the following general observation of Buchanan J (with whom Marshall and Cowdrey JJ agreed) in *Coal Allied Mining Services Pty Ltd v Lawler*, is apposite to this matter:

> "...it is an important aspect of the work of [the Commission] ...that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit...It is not inappropriate to say that the members of [the Commission] have a statutory mandate to get to the heart of matters as directly and effectively as possible."[43]

[84] When the Commission is dealing with an application for a PABO, there are several moving parts that must be balanced. As we have outlined, the Commission has a statutory obligation to, as far as practicable, determine the application within 2 working days after the application is made (s. 441(1)). In that time frame, the Commission must ensure that the employer and any other bargaining representatives are informed of the application and given an opportunity to respond. The Commission must also ensure the statutory requirements in relation to an application are met and if this is the case, must make the order. There is no power to make the order if they are not. As has been extensively discussed, if the Commission has made a PABO it is required to conduct a conference before the closing date of the ballot, and to order bargaining representatives to attend (s. 448A).

[85] The Commission proceeds on the basis that the taking of protected industrial action in the form of employee claim action and employer response action, is a right of bargaining parties under the FW Act. There is now a clear requirement for a s.448A conference to be conducted before the ballot is closed, and as a result, before protected industrial action can be notified or commence. It may be accepted that the timing of the making of an application for a PABO and the exercise of the right to take protected industrial action – particularly employee claim action – will be of significance to the intended bargaining tactics of one or more of the bargaining representatives. However, we consider meeting the requirement to specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable requires the Commission to be cognisant of the purpose of s. 448A conferences and that bargaining representatives must be able to comply with the orders the Commission is required to make relating to s. 448A, to exercise the right to take protected industrial action.

[86] The combination of these circumstances means that the Commission may elect to deal with procedural issues arising from an application for a PABO by email or telephone communications. This should be unsurprising for organisations of employees, which are the applicants in most applications for a PABO and more regularly exposed to the PABO case management processes commonly adopted by Members of the Commission. It is incumbent

upon PABO applicants to have regard to the information they are requested to provide in the Form F34 and read and respond to correspondence from the Commission promptly.

[87] As set out above, the Deputy President sent two letters to the Respondent by email, at 4.19 pm on 19 July 2023 and 5.11 pm on 20 July 2023, stating that the closing date for the protected action ballot was likely to be no longer than 10 to 15 working days from the date of the order, as determined by the Commission. That correspondence was copied to the CEPU's nominated officer who had carriage of their PABO application.

[88] While not definitive, this correspondence indicated that in the event there was no objection to the PABO application, the Commission Member determining the application would likely specify a date for the ballot to close later than had been sought in the Form F34 lodged by the CEPU. We also note, as highlighted in the CEPU's submissions in the appeal, that question 2.3 in the Form F34 is in the following terms:

> **"2.3 On which date does the Applicant propose the vote will close?**
>
> Specify the date on which the Applicant proposes voting in the protected action ballot will close. In considering this aspect, you should have regard to both the logistics of conducting the ballot and the fact that a compulsory conference of all bargaining representatives for the proposed agreement must be conducted during the ballot period."

[89] This statement in the Form F34 indicates that rather than adopting a decision rule in relation to the closing date for voting in a protected action ballot, the Commission will have regard to a range of relevant matters in exercising its discretion to specify a date that will enable protected action ballots to be conducted as expeditiously as practicable. It also indicates that the date proposed by an applicant for a PABO may not be the date ultimately specified in the PABO issued by the Commission.

[90] The CEPU's Form F7 Amended Notice of appeal, in relation to why permission to appeal should be granted, includes the following statement:

> "3. The CEPU is aware, from its own experience with protected action ballot applications and from other decisions of the Commission (including decisions by the Deputy President) that the Commission is specifying 10 working day periods in which protected action ballots are to occur notwithstanding that an applicant for a protected action ballot order seeks that a lesser period be specified and the nominated ballot agent is able to conduct a ballot in such a shorter period. The appeal therefore has general and significant implications for the Commission's exercise of its jurisdiction in relation to protected action ballots."

[91] This indicates that the CEPU knew that there was every prospect a later closing date than that sought in the application for a protected action ballot order, would be specified. It is also commonly understood by organisations of employees applying for PABOs that their applications will be treated with urgency by the Commission, given the requirement in s. 441. The CEPU also knew about the requirement for the Commission to conduct a s. 448A conference from the information contained in the Form F34. The Commission is entitled to proceed on the basis that an experienced industrial party will have read the requisite Commission forms when making an application, together with all resulting correspondence from the Commission. In our view, the CEPU was on notice that a later date than that sought in the Form F34 would likely be specified by the Deputy President and it could have requested to be heard when it became apparent from the Commission's correspondence that the matter

would be dealt with on the papers. The combination of these matters is in our view, sufficient to establish that the CEPU was not denied procedural fairness.

[92] We have considered but do not accept the CEPU submission that it was denied an opportunity to put evidence before the Deputy President of the kind included in the appeal book which would have made a material difference to the Deputy President's determination of the closing date for the ballot. The email from the CEPU to the ballot agent sent at 7.49 am on 18 July 2023,[44] indicates that the primary motivation for its preferred closing date for the ballot, was having the capacity to take industrial action as quickly as possible.

[93] The CEPU also provided a response to that email from CiVS indicating that it could meet the timetable, albeit in a slightly amended form. The CEPU ultimately filed the PABO application on 19 July 2023, with the proposed dates moved by one working day.

[94] Had this material been placed before the Deputy President, either in the original proceedings or in an application to vary the Order (an avenue open under s.447 of the FW Act) the Deputy President may have accepted that the ballot could be closed on the date sought by the CEPU. However, it would also have been open for the Deputy President to determine that the rationale for the dates sought by the CEPU should be balanced against other relevant considerations of the kind discussed above when determining the date by which the protected action ballot should close. For the reasons set out above, it would still have been open to the Deputy President in the exercise of the discretion in s. 443(3A) to specify a later date for the ballot to close than the date sought by the CEPU.

[95] Accordingly, we were not satisfied that there was a denial of procedural fairness by the Deputy President, much less one that was material in the decision with respect to the provision of lists of the relevant employees and the closing date for the protected action ballot.

Conclusion and disposition of appeal

[96] For the above reasons, we granted permission to appeal and dismissed the appeal.

VICE PRESIDENT

Appearances:

P Boncardo of counsel, for the CEPU.
V Monteleone, for the Respondent.

Hearing details:

2023.
By Microsoft Teams:
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[1] *Democratic Outcomes Pty Ltd T/A CiVS* [2023] FWC 1400

[2] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Nilsen (NSW) Pty Ltd* [2023] FWC 1769.

[3] PR764414.

[4] [2023] FWCFB 130.

[5] Appeal Book p. 7- Form F34 at Question 2.3.

[6] Appeal Book p. 12 at 4.

[7] Appeal Book p. 14 at 20.1 and 21.1.

[8] Appeal Book p. 28.

[9] Appeal Book p. 30.

[10] [2023] FWC 1769

[11] PR764414

[12] Orders and directions made by Cross DP on 21 July 2023, Appeal Book p. 43.

[13] *Fair Work Act 2009* s. 406.

[14] [2018] FWCFB 7501.

[15] See *Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [4]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at [408]).

[16] See *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [59]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 at [26]–[37].

[17] (1998) 194 CLR 355 at 381 – 382, [69] – [71].

[18] Ibid at 381, [69].

[19] See (2009) 239 CLR 27 at [47].

[20] *Mills v Meeking* (1990) 169 CLR 214 at [235].

[21] (1981) 147 CLR 297.

[22] Ibid at 320-321 (per Mason and Wilson JJ).

[23] (2010) 197 IR 266 at [27].

[24] *Wan v Australian Industrial Relations Commission and Another* (2001) 116 FCR 481 at [30].

[25] Form F7 Notice of appeal filed 25 July 2023, page 9/12 item 3 paragraph 3.

[26] See s 585 to Schedule 1 to the Secure Jobs Act.

[27] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 at [54] (Gordon and Edelman JJ); *CPB Contractors Pty Limited v CFMMEU* [2019] FCAFC 70 at [50]-[60] (O'Callaghan and Wheelahan JJ).

[28] *CFMMEU v ABCC (The Bay Street Appeal)* (2020) 282 FCR 1 at [4] (Allsop CJ).

[29] *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495 at [70] (Gageler J).

[30] Appeal Book p. 57.

[31] *Kioa v West* (1985 159 CLR 550 at 584-585 per Mason J); *Plaintiff S10/2011 v Minister* (2012) 246 CLR 636 at [97]; *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 at [51] per Gageler J.

[32] (2015) 256 CLR 326 at [30].

[33] *Habib v Director-General of Security* (2009) 175 FCR 441 at [73].

[34] 403 ALR 398.

[35] Appeal Book 11 at p. 56.

[36] [2022] FWBFC 204.

[37] CEPU's Outline of Submissions 25 July 2023 paragraph 33.

[38] (2017) 263 CLR 551; 92 ALJR 106; 271 IR 210; 217 HCA 54 at [35].

[39] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 – Statement of Compatibility with Hunan Rights* page xi.

[40] At page iv.

[41] *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1789) 167 CLR 513 at 519. See also *Re Polites; Ex parte Hoyts Corporation Pty Limited* (1991) 173 CLR 78 and *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583

[42] (1985) 159 CLR 550 at [32]

[43] (2011) 192 FCR 78 at [25]

[44] Appeal Book page 57.