[2024] FWC 133

The attached document replaces the document previously issued with the above code on 16 January 2024.

- Paragraph [22] has been updated.
- A typographical error has been corrected in paragraph [35]

Associate to Commissioner Wilson

Dated 16 January 2024

REASONS FOR DECISION

Fair Work Act 2009
s.437—Protected action

Construction, Forestry and Maritime Employees Union
v
DP World Brisbane T/A DP World
(B2024/14)

Construction, Forestry and Maritime Employees Union
v
DP World (Fremantle) Ltd T/A DP World
(B2024/15)

Construction, Forestry and Maritime Employees Union
v
DP World Melbourne Limited T/A DP World
(B2024/16)

Construction, Forestry and Maritime Employees Union
v
DP World Sydney Limited T/A DP World
(B2024/17)

COMMISSIONER WILSON MELBOURNE, 16 JANUARY 2024

Proposed protected action ballot of employees of DP World Brisbane Pty Limited; Proposed protected action ballot of employees of DP World (Fremantle) Ltd; Proposed protected action ballot of employees of DP World Melbourne Limited; Proposed protected action ballot of employees of DP World Sydney Limited

[1] The following are my reasons for decision for the issuing of four Protected Action Ballot Orders applied for by Construction Forestry Maritime Employees Union, known as the Maritime Union of Australia (MUA) and pertaining to entities part of the DP World Australia Ltd group. The Orders[1] were made by me on Friday 12 January 2024, at which time I advised the parties of the findings made by me that led me to issue the orders.[2]

[2] On Tuesday 9 January 2024 at 4:42 PM AEDT the MUA made four PABO applications to the Commission pursuant to s.437 of the *Fair Work Act 2009* (the Act) relating to enterprise bargaining in entities which are each part of the DP World Australia Ltd group (DP World). The applications are respectively;

- B2024/14 – DP World Brisbane;
- B2024/15 – DP World Fremantle;
- B2024/16 – DP World Melbourne;
- B2024/17 – DP World Sydney.

[3] On Wednesday 10 January 2024 solicitors for DP World advised their client objected in part to the making of the orders sought as well as requesting the Commission exercise its discretion under s.443(5) after being satisfied of exceptional circumstances to extend the period of notice required for the commencement of employee claim action. As a result of these objections, the applications were assigned to me for hearing and determination, also on 10 January 2024.

[4] A hearing was held by me on Thursday 11 January 2024 at which Mr Luke Edmonds, Industrial Officer, appeared for the MUA and Mr Dan Williams, solicitor of Minter Ellison appeared for DP World. Mr Williams appeared having sought and been granted permission for his client to be represented by lawyers. Oral evidence was received from Mr Adrian Evans, Assistant National Secretary - MUA and declarant of the Forms F34B, and by Mr Mark Hulme, DP World's Senior Director – Operations, Engineering and Infrastructure.

[5] For reason of efficiency the four applications were listed for hearing in tandem and a single Reasons for Decision is published; however separate Orders have been issued for each application.[3]

[6] Section 441 of the Act provides that the Commission must, as far as practicable determine PABO applications within 2 working days after the application is made. However, determination of the matter within the stipulated time period has not been possible as a result of the need for reasons of procedural fairness to allow DP World to bring forward further evidence and submissions in support of its application to extend the period of employee claim action notice. The Commission's obligation to extend procedural fairness to a party extends, in the absence of any express provision to the contrary, to the exercise of the Commission's powers such as those set out in the Act's protected action ballot provisions.[4]

BACKGROUND

[7] Each application pertains to the replacement of a different location-specific enterprise agreement. According to the MUA bargaining in relation to these replacement agreements has been proceeding since 30 March 2023, with each of the existing agreements having a nominal expiry date of 30 September 2023. The four agreements that are the subject of the bundle of PABO applications before me are;

1. DP World Fremantle Enterprise Agreement 2020;[5]
2. DP World Sydney Enterprise Agreement 2020;[6]
3. DP World Brisbane Enterprise Agreement 2020;[7]
4. DP World Melbourne Enterprise Agreement 2020.[8]

[8] The MUA submits in respect of each of the applications that it is eligible to make an application for a PABO, satisfying each of the criteria within s.437 of the Act. It also submits

that the requirements of s.443 which set out the circumstances in which the Commission must make a PABO, have each been met.

[9] The questions proposed by the MUA to be put to eligible employees vary between each of the four ports. The Brisbane application proposes 7 questions; the Fremantle application proposes 5 questions; the Melbourne application proposes 8 questions; and the Sydney application proposes 5 questions.

[10] Among the questions proposed by the MUA are three which are common to each of the applications, and which are Questions 1, 2 and 4 respectively in each application. The preamble to the proposed questions in each application asks voters in the ballot;

> "Do you, for the purposes of advancing claims in the negotiation of an enterprise agreement to govern the terms and conditions of your employment with DP World, authorise protected industrial action which may be taken separately, concurrently and/or consecutively in the form of:"

[11] The text of Questions 1 and 2 in each application is:

> Q1: An unlimited number of bans on Fixed Salary Employees (FSE's) working any rostered shifts other than in accordance with those rosters identified in Part B of the current enterprise agreement?
>
> Q2: An unlimited number of bans on the performance of work on any roster panel other than the roster panel on which an employee was engaged at the date the application for this protected action ballot was made?

[12] The original text of Question 4 of each application was objected to by DP World, however discussions between the parties has led to an agreed form of the question, and so that part of DP World's original objection is no longer necessary to resolve.

[13] DP World's objection to the making of the PABOs is that the inclusion of Questions 1 and 2 suffers from the problem that industrial action taken by employees consistent with the questions would not be protected industrial action and because of this, the MUA's applications in respect of those questions is not an application pursuant to s.437(1) of the Act. Pointing to the fact of an ongoing dispute with the MUA about the introduction of new or different roster patters, DP World argued that the sole purpose of inclusion of the questions was to coerce it from exercising a workplace right, being the implementation of new rosters in accordance with the current enterprise agreements. DP World's original objection provided to the Commission before the matters were allocated to me also put forward that these circumstances meant the Commission should be satisfied that the proposed industrial action identified in Questions 1 and 2 is not for the genuine purpose of reaching agreement.

[14] DP World also submits that in respect of the orders now contemplated, the Commission should pursuant to s.443(5) extend the period of notice required for the commencement of protected industrial action on the ground that there are "exceptional circumstances" for an extended period, which it says it should be 5 working days instead of the standard period as relevant prescribed by s.414 (2)(a) of three working days.

CONSIDERATION

[15] In considering this application, s.443 of the Act provides the circumstances in which the Commission must make a PABO with that section in turn requiring consideration of s.437 which prescribes eligibility for the making of a PABO application and related matters. The sections are as follows:

> **"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."

"**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."

[16] It is well settled that the Commission's power to make a PABO under s.443 of the Act is not discretionary in nature with s.443(1) imposing "a duty on the Commission to make an order if 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".[9]

[17] DP World challenge the capacity of the Commission to make findings in respect of each provision for the reasons I have referred to earlier.

Rosters question

[18] I first give consideration to the two questions potentially endorsing industrial action over matters associated with rosters (the Roster Questions);

> "1. An unlimited number of bans on Fixed Salary Employees (FSE's) working any rostered shifts other than in accordance with those rosters identified in Part B of the current enterprise agreement?" and
>
> "2. An unlimited number of bans on the performance of work on any roster panel other than the roster panel on which an employee was engaged at the date the application for this protected action ballot was made?"

[19] The Roster Questions were included in earlier PABO orders issued by consent in September 2023.[10] DP World explained that while consent to inclusion of the questions in PABOs was given on the earlier occasions the questions are objected to now since the subject of the questions is now itself the subject of an unresolved dispute application presently before another Member of the Commission.

[20] The Roster Questions are objected to now for the reason that industrial action taken by employees consistent with the questions would not be protected industrial action and because of that situation the MUA's applications in respect of those questions is not an application pursuant to s.437(1) of the Act. In this regard DP World argue;

"4. The key issue is whether the MUA can satisfy the Fair Work Commission that the first and second questions included in the applications, if taken by the employees, would be protected industrial action as required by section 437(1) of the FW Act. If it would not be protected industrial action:

> (a) The application (at least in respect of these items) is not an application pursuant to section 437(1) of the FW Act.
>
> (b) Section 443 does not require the order to be made.
>
> (c) An order containing these items should not be made, because if made it would tend to indicate to the industrial parties and stakeholders that action which would plainly be unlawful under sections 340(1)(b) and section 343 would have the protections and immunity (available only to protected industrial action) pursuant to sections 342(3) and 415 of the FW Act."

…

"7. The factual evidence supports a conclusion that the sole purpose in seeking approval for the action identified in the first and second questions at this time is to prevent DP World, by coercion or adverse action, from exercising a workplace right, namely the lawful implementation of the roster changes through the 'Implementation of Change' clauses in the current enterprise agreements.

8. The key facts are as follows:

> (a) The MUA applied for, and was granted, a protected action ballot in September 2023. The proposed industrial action included action identical to the two challenged items.
>
> (b) However, although much other industrial action has been taken, these two items have not been taken, and the MUA and its members have now lost the right to take such action.
>
> (c) On 16 November 2023, DP World gave its employees notice that it was implementing changed rosters in accordance with provisions in the enterprise agreements permitting it to do so. In accordance with a 60-day required notice period, the new rosters will commence on 5 February 2024.
>
> (d) On 9 January 2023 Mr Adrian Evans, on behalf of the MUA made the clearest admission that the purpose of the current application was not to support or advance claims in the current negotiation but rather to prevent the implementation of the roster, in the following statement:
>
> > "Are you going to withdraw your IOC? I need to know, as I need to know whether I need to file a new PABO so we can take these forms of bans when you implement the IOC."

> 9. The MUA already has the ability, via the original protected action ballot orders, to notify protected industrial action in the form of stoppages of work on any shift. Therefore the inference should be drawn that that the sole reason for the inclusion of these proposed items of industrial action is the reason identified in paragraph [7] above.
>
> 10. There is nothing in the scheme of Part 3-3 of the FW Act which suggests the protections of the scheme should be available to support ancillary agendas which are not directed solely at the process of negotiating enterprise agreements.
>
> 11. The Fair Work Commission should not make an order which would permit the MUA and its members to purport to avail the protections and immunities of the protected action regime for a collateral purpose, particularly when, absent those protections, the proposed action would almost certainly be unlawful."[11]

[21] Mr Evans denies saying the words attributed to him in paragraph 8(d) set out above.

[22] DP World submit primarily that the Roster Questions are put forward for a collateral purpose. The submission is made that the MUA objects to the company's Implementation of Change (IOC) proposal on the subject and has sought to be prevent the change through a dispute notified to the Commission which has yet to be determined. As a means of stymying the proposed change the MUA now seeks to bring it into a fresh PABO with the intention of protected industrial action stopping the new roster arrangements, presumably if the Commission does bring about the same result through consideration of the dispute notification.

[23] This, according to DP World, would be unlawful adverse action put in place because the company has sought to exercise its workplace rights. As such inclusion of the Roster Questions in the proposed PABO;

- Is not an application "requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement" (s.437(1)); and

- Any industrial action taken as a consequence of the Roster Questions being successful in the ballot would not be employee claim action as defined by s.409 for the reason it would not be "organised or engaged in <u>for the purpose</u> of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters" (s.409(1)(a)).

[24] It is said by DP World that the collateral character of the Roster Questions is such that a notification of employee claim action could not be found to be for the ***<u>purpose</u>*** of supporting or advancing claims in relation to an enterprise agreement, since the ***<u>purpose</u>*** of the purported protected industrial action would be to prevent the IOC notification from resulting in any change.

[25] The MUA argues that the Roster Questions are not advanced for a collateral purpose, may be included in the PABOs and do not contravene any requirement, such as the general protections provisions.

[26] The four applications presently before me require determination in accordance with s.443. If I am satisfied that the two requirements within s.443(1) are met then I ***must*** make protected action ballot orders. If these conditions have not been met then the Commission is prohibited from making an order (s.443(2)).[12]

[27] The first requirement of s.443(1) is that the applications have been "made under section 437" (s.443(1)(a)) and the second is that I am satisfied the applicant "has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted" (s.443(1)(b)).

[28] For an application to have been made under s.437 it must have been made in conformity with the section and;

> "That means that the application must specify the matters in s 437(3). We note at this point that, unlike s 443(1)(b), the jurisdictional prerequisite in s 443(1)(a) is not expressed in terms of the Commission's satisfaction as to the requirement. Therefore, whether an application has been made under s 437, including whether it specifies the matters in s 437(3)(b), must be regarded as a matter of jurisdictional fact."[13]

[29] The terms of s.437, including subsection (3) are extracted. For relevant purposes there is no contest that the applications specify, as required s.437(3)(a) (the group or groups to be balloted) and s.473(3)(c) (the name of the ballot agent).

[30] The applications meet in a pro forma sense the requirement in s.437(3)(b) that each specify "the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action", inasmuch each lists the questions to be put to voting employees and states the nature of the proposed industrial action. However, the nature of the objection put forward by DP World means I cannot be satisfied the requirement has been met without more detailed analysis.

[31] At an elemental level satisfaction that the applications state "the nature of the proposed industrial action" invites consideration of whether what is stated is within the definition of "industrial action" in s.19. So far as is relevant to the matters now before me there can be little doubt that what is within the two questions is or could be "the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work" (s.19(1)(a)).

[32] Question 1 relates to bans on "on Fixed Salary Employees (FSE's) working any rostered shifts other than in accordance with those rosters identified in Part B of the current enterprise agreement". The evidence suggests that DP World's IOC is yet to be implemented and is awaiting a conciliation conference before the Commission in late January. Even with the changed rosters not in operation but with a possible future implementation date there is little doubt that bans on "working any rostered shifts other than in accordance with those rosters identified in Part B of the current enterprise agreement" would be industrial action as defined by s.19(1)(a). No other part of s.19 would prevent such a finding.

[33] The same may be said for Question 2 which would authorise bans on "the performance of work on any roster panel other than the roster panel on which an employee was engaged at the date" of the MUA's applications.

[34] The proposition is put that for reason of DP World's collateral purpose submission it cannot be said that the purpose of the PABO applications is to "determine whether employees wish to engage in particular protected industrial action for the agreement" (s.437(1)). The argument is made instead that the purpose of the application is to determine whether employees wish to engage in particular protected industrial action for in order to prevent the IOC being implemented.

[35] The submission invites the Commission to go behind the questions proposed by the Applicant and test its motivation for the question. Such has never been the Commission's approach for determination of PABO applications. To the contrary, the Commission has been at pains to put forward that PABO questions are a matter for the applying party who then bears the risk of industrial action being taken which is not actually authorised because of ambiguity and thereby not protected industrial action.[14] Noting there is a distinction between "what must be specified pursuant to s 437(3)(b) in an application for a protected action ballot order and what must be specified in a notice of employee claim action under s 414(1)"[15] the Full Bench in *NTEU v Curtin University* made plain the task to be undertaken by the Commission in proceedings of the type now before me;

> "[53] In summary, therefore, an application for a protected action ballot order will comply with the requirement in 437(3)(b), and thus will have been "made under section 437" for the purpose of s 443(1)(a), if it specifies a question or questions, capable of being answered "yes" or "no" by the employees participating in the ballot, which propose(s) action of an identified character, kind or sort capable of constituting industrial action within the meaning of s 19(1). A question which meets these requirements can be expressed and understood in ordinary industrial English, and there is no requirement for legalism, technicality or pedantry in the drafting or analysis of such questions. In our view, the proposition that, beyond these requirements, the questions must be interrogated to identify ambiguity in aid of enabling "informed consent" goes beyond the text of the provision and constitutes a gloss on the statute The concept of "informed consent" is inapposite to a protected action ballot since, unlike a vote to approve an enterprise agreement, there is no requirement for genuine agreement and those voting are not bound by the result (in the sense there is no requirement for any employee to actually take industrial action which has been authorised by a ballot and for which a s 414(1) notice has been issued . We therefore affirm that paragraph [19] of the decision in *John Holland* states the correct approach to the construction and application of s 437(3)(b). The statements of principle in *FreshExchange* are not consistent with that approach and should not be followed.
>
> [54] As earlier stated, s 443(1) imposes a duty on the Commission to make a protected action ballot order if the requirements of paragraphs (a) and (b) of the subsection are met. The mandatory nature of s 443(1) is the most important factor governing the construction of s 443 as a whole. It should not therefore be considered that, in respect of a valid application for a protected action ballot order, the Commission is at large as to the terms of the order to be made subject to satisfaction of the content requirements

> in the section. The inference to be drawn from the mandatory nature of s 443(1) is that the order required to be made is one which gives effect to an application validly made under s 437. Thus, in respect of s 443(3)(d), we do not consider that the Commission has a general discretion to determine the questions which will be included in the order, or to simply exclude valid questions, independent of what has been applied for."[16]

[36] No part of these considerations would suggest to me that findings ought to be made to the effect that I should enquire behind any given question for the purposes of ascertaining whether the proposal is to engage in "particular proposed industrial action for the agreement". The question must be capable of being answered "yes" or "no" and must be directed at being industrial action as defined. The phrase in s.437(1) plainly requires the industrial action to be directed in support of efforts for the making of an enterprise agreement. However, there is nothing within the section to suggest that the industrial action has to be tested against either party's claims or how the industrial action may lead to achievement of concessions such that would lead to agreement.

[37] The suggestion that because an employer and the relevant union or employees are in formal dispute about a particular workplace entitlement with the subject and progression of the dispute being tantamount to a workplace right cannot then be the subject of industrial action as defined is given no direct support from the text of the Act. It would be necessary to read words into the relevant sections in order to reach the conclusion advanced by DP World. The representatives of DP World pointed me to no decisions of the Commission or the Court that would lead me to adopt their submission.

[38] DP World's reference to s.409 is not relevant to the considerations requiring determination by me. The section deals with the subject of what is or is not employee claim action. While I agree with DP World that employee claim action must be "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", these matters are considerations to be dealt with after a protected action ballot has been conducted and the relevant questions authorised those employees who voted.

[39] As a whole s.409 contains numerous requirements that are considerations only at the point of notification of employee claim action. The action must be for the purpose of supporting or advancing claims that are permitted matters; it must not be directed to unlawful terms and must have been authorised by a protected action ballot. A bargaining representee of employees must not be engaging in pattern bargaining or to a significant extent relate to a demarcation dispute. To take s.409 as being a reference to something other than a series of requirements after declaration of a protected action ballot would, in my view, be inconsistent with the requirements with the reasoning in *NTEU v Curtin University* set out above, which requires the Commission to be satisfied that the proposed questions must be capable of being answered "yes" or "no" and must be directed at being industrial action as defined.

[40] I find therefore that the applications have been made under s.437.

Genuinely trying to reach agreement

[41] An applicant for a PABO carries the evidential onus of establishing that they have been and are genuinely trying to reach an agreement.[17] The requirement in s.437(1)(b) for the Commission to be satisfied that "each applicant has been, and is, genuinely trying to reach agreement" invites a temporal consideration: in order to be so satisfied the Commission must consider an applicant's conduct not only at the time of the Commission's decision but also at the date of application for the PABO.[18]

[42] Determination of whether an applicant has been genuinely trying to reach agreement "involves a finding of fact applied by reference to the circumstances of the particular negotiations". While all of the circumstances of the case require being considered, which frequently requires consideration be given to the extent of progress in negotiations and the steps taken in order to try and reach an agreement, it is ultimately the test in s.443 that must be applied. There will be consideration given to the extent of progress in negotiations and the steps taken in order to try and reach an agreement [19]

[43] In forming my views on the subject I take into account that the Applicants submit they have been and are genuinely trying to reach an agreement, noting that bargaining commenced on or about 30 March 2023 when the Applicant served a log of claims on the Respondent, with the Respondent then issuing a Notice of Employee Representational Rights (NERR) on 31 March 2023. The NERR states to employees that the Respondent seeks a single agreement to replace the four agreements presently operating. That subject is not conceded by the MUA. There has been significant bargaining between the parties nationally and locally over six rounds on about 18 days. A sixth round of bargaining was facilitated by a Member of the Commission in Perth over 6 days. I understood the parties to say in the hearing that bargaining has continued into this year including on the day before the hearing and the day of the hearing. I am satisfied from the material before me that each side has articulated to the other the matters that are required for agreement to be reached.

[44] I take into account that there have been previous protected action ballots in 2023 and that employee claim action has been taken as a result. I have listened to and considered the evidence from each party with DP World suggesting that agreement may be capable of being achieved in two ports covered by the applications in a relatively short time (and not in the other two) but with the MUA denying that such is the case.

[45] The reported state of the bargaining including the difference of opinion about the proximity or otherwise of possible agreement in two of the applicable enterprise agreements shows that bargaining is continuing with engagement of each side by the other. It cannot be said from the material before me that bargaining is at an impasse or that the MUA in generality is not genuinely trying to reach an agreement with the four DP World entities.

[46] DP World argued, relevant to its objections about the Roster Questions and for the purposes of s.443(1)(b) that the collateral purpose nature of the questions meant a finding could not be made that the Commission is satisfied "each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted". It does not otherwise advance the submission the MUA is not genuinely trying to reach an agreement.

[47] Its argument in this regard is that the MUA is using the dispute about rosters as a lever in bargaining when the rosters subject is not a part of bargaining. There is, however, no

requirement that the questions in a proposed PABO relate to the matters being bargained. There is also no apparent restriction on the use – for industrial action purposes – of disputed matters in PABO questions.

[48] I do not discern DP World's submissions on genuinely trying to reach agreement as preventing a finding that the Applicant has been genuinely trying to reach agreement.

[49] I find therefore that the MUA has been, and is, genuinely trying to reach an agreement with DP World.

Notice period – exceptional circumstances

[50] DP World submit there are exceptional circumstances of the nature referred to in s.443(5) that would justify the Commission extending the period of written notice referred to in s.414(2)(a) to 5 working days.

[51] Discussion of this in the hearing elicited that one of DP World's concerns in respect to the extension of notice period was that as these applications were a second tranche of PABO applications, if an extension is not granted it faced the difficulty of confusion. This is because the first tranche of authorised protected industrial action had the notice period extended to 5 working days. The question therefore arises that given the overlaps in content between the two tranches of PABO applications, and the need for the MUA to notify the taking of specific employee claim action in the manner required by the Act, how would it be known, in relation to any given notification, how much notice was required to be given?

[52] After giving DP World additional time to provide further evidence about its application, a Further Witness Statement of Mr Mark Hulme, its Senior Director – Operations, Engineering and Infrastructure was provided to me on Friday 12 January 2024. As had been foreshadowed in the hearing, the MUA did not seek to be heard in relation to the contents of the Further Witness Statement. The MUA does not consent to the application, but it also does not oppose it.

[53] Mr Hulme's Further Witness Statement goes further than the matter of the potential for confusion and disruption arising from the provisions of overlapping but separate PABO authorisations. In particular, it traverses material which suggests disruption to its operations, its customers and supply chains, not just from the standard notice period but likely from any notice period. Mr Hulme notes that DP World's customers are split between waterside and landside with both dependent upon the arrival and departure of ships within planned windows. If a planned window is missed, DP World suffers consequences including the loss of allocated pilot and tugboat slots and possible delays in berthing and departure. The delays may impact a vessel's subsequent ports of call.

[54] Accordingly, in order to mitigate any serious problems which may arise from protected industrial action, DP World in past practice would attempt to wholly or partially subcontract work to another stevedoring provider. The options in this regard are very limited and vary according to port. Successful subcontracting will depend on the other providers' willingness to take on additional services. A full subcontract, of both loading and discharging requires six

to seven days' notice and a discharge only subcontract will generally require up to five days' notice in order to arrange deliveries, transshipment connections and the like.[20]

[55] In relation to the potential problems associated with the provisions of overlapping but separate PABOs, Mr Hulme stated;

> "… there is the potential for significant disruption and confusion if the notice period required for the particular protected industrial action proposed in these applications differed to the required notice period for the other approved forms of protected industrial action. We would be in a situation where some action might commence after three working days, with that action disrupting and making more complex the mitigation responses in relation to the action notified to start two working days later. I can envisage circumstances where the action commencing after three working days would stymie DP World's ability to take our usual mitigation steps in respect of the action with a five working day notification requirement, which would mean we would lose the practical benefit of the five working day notification period."[21]

[56] The Full Bench in *NTEU v Charles Darwin University*[22] referred to the importance of a careful consideration being given to an application for an extended notification period;

> "[20] The exercise of a discretion under s.443(5) results in an interference with the right of a bargaining representative to otherwise give three working days' written notice of industrial action that is to be organised and engaged in by employees in support of a proposed agreement. That this right should not lightly be curtailed by the imposition of a longer period of notice is evident in the grant of power itself. There must be "exceptional circumstances" in relation to the proposed industrial action the subject of the order justifying a longer period."

[57] The same Full Bench then laid down the approach to be taken in determining such applications;

> "[23] The determination of whether the circumstances in a particular case are 'exceptional' involves an evaluative judgement. A proper approach to the exercise of the Commission's discretion under s.443(5) requires first that a member identify or make findings about the particular facts or circumstances in relation to the proposed industrial action which are said inform the evaluative judgement that such factors or circumstances are exceptional circumstances. The phrase "exceptional circumstances" carries its ordinary meaning.
>
> [24] Secondly, there must be a consideration whether the identified exceptional circumstances are circumstances "justifying" a longer notice period. This also involves an evaluative judgement made on the basis of probative material. The use of the verb "justifying" in s.443(5) signifies that the identified exceptional circumstances must show or prove that it is reasonable or necessary or the circumstances warrant or provide good reason to require a longer period of written notice.
>
> [25] Thirdly, if the member is satisfied there are exceptional circumstances justifying a longer period of notice, there must be a consideration of whether to exercise the

discretion and, if so, the additional period of notice that should be given in the circumstances (noting the maximum period)."[23]

[58] I am satisfied that the combination of the logistical matters to which I have referred, together with the overlapping nature of the PABO authorisations are "exceptional circumstances", that is circumstances which are "out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare".[24]

[59] Protected industrial action of the type to be allowed by the questions dealt with in the applications before me will plainly be disruptive and costly for DP World. Without mitigative efforts of some kind those effects will also likely be disruptive for those to whom DP World provides services and in turn the businesses in those supply chains. I am satisfied that the exceptional circumstances to which I have referred justify an extended notice period and that I should exercise a discretion in favour of an extended period. Nonetheless, it would be inappropriate to extend the period of notice to the maximum of seven working days for two reasons - to do so would in itself be confusing and would not overcome the confusion reasoning put forward by DP World; and DP World's evidence refer to it being able to implement partial subcontracting arrangements in up to five working days.

[60] Accordingly, the Orders issued will provide pursuant to s.443(5) that the period of written notice referred to in s.414(2)(a) will be five working days.

Ballot Agent

[61] The MUA proposes the ballot agent for each PABO, if granted, be Democratic Outcomes Pty Ltd, trading as CiVS. DP World does not dispute the proposal. CiVS is an eligible protected action ballot agent and accordingly will be appointed to conduct the ballots through the Orders issued by the Commission.

CONCLUSION

[62] Consideration of the foregoing matters lead me to make the following findings.

[63] I am satisfied for the purposes of s.443(1)(a) that the MUA applications have been made under s.437 and that all relevant considerations within that section have been met by the Applicant. This finding extends to all proposed ballot questions in each application, including Questions 1 and 2 in each application.

[64] For the purposes of the finding in relation to s.443(1)(a), I am satisfied that all relevant elements of s.437 have been met by the Applicant and in particular;

1. The MUA is the bargaining representative of the employees who will be covered by the proposed enterprise agreements and has applied for PABO orders requiring protected action ballots to be conducted to determine whether employees wish to engage in particular protected industrial action for the proposed agreements (s.437(1));

2. There has been a notification time in relation to the proposed enterprise agreements (s.437(2A));

3. The Applications specify the matters required by s.437(3).

[65] I am satisfied for the purposes of s.443(1)(b) that the MUA has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. This finding extends to all proposed ballot questions in each application, including Questions 1 and 2 in each application.

[66] I am satisfied that for the purposes of s.443(5) there are exceptional circumstances justifying the period of written notice referred to in s.414(2)(a) for the commencement of employee claim action be longer than 3 working days and that it is appropriate for such period to be extended to 5 working days.

[67] Orders consistent with the foregoing were issued by me on Friday 12 January 2024 in each of the applications before me.

s.448A conferences

[68] Section 448A requires that if the Commission has made a protected action ballot order in relation to a proposed enterprise agreement, it must make an order directing the bargaining representatives for the agreement to attend a conference. After discussion of this matter with Deputy President Wright, the Acting National Practice Leader, Bargaining, these files will be referred to her for the programming and conduct of the s.448A conferences.

COMMISSIONER

Appearances:

L Edmonds, A Evans, and E Rowe for the MUA Division of the CFMEU
D Williams, and T Walthall for DP World

Hearing details:

2024.
Melbourne (via Microsoft Teams):
January 11.

Final written submissions:

Applicant, 11 January 2024

Respondent, 12 January 2024

Printed by authority of the Commonwealth Government Printer
<PR770309>

---

[1] PR770199; PR770200; PR770202; PR770203.

[2] Email to Parties on 12 January 2024 at 1:24PM.

[3] See B2024/14 – DP World Brisbane, PR770199; B2024/15 – DP World Fremantle, PR770200; B2024/16 – DP World Melbourne, PR770202; B2024/17 – DP World Sydney, PR770203.

[4] *CEPU v Abigroup Contractors Pty Ltd* [2013] FCAFC 148, [118] – [119], per Katzmann and Rangiah JJ, see also [46] – [48] and [55], per Buchanan J.

[5] AE510672.

[6] AE509906.

[7] AE509915.

[8] AE510700.

[9] *National Tertiary Education Union v Curtin University* [2022] FWCFB 204, [37], see also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Nilsen (NSW) Pty. Ltd* [2023] FWCFB 132, [52].

[10] For example see *Construction, Forestry, Maritime, Mining and Energy Union v DP World Brisbane Pty Limited*, [2023] FWC 2232 and Print PR 765822, 5 September 2023, Questions 17 and 19.

[11] *Respondents' Submissions*, 11 January 2024.

[12] See *NTEU v Curtin University* [2022] FWCFB 204, [37].

[13] Ibid, [40].

[14] *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FWAFB 526, [19].

[15] *NTEU v Curtin University* [2022] FWCFB 204, [51].

[16] Ibid.

[17] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Anor v Kraft Foods Limited* [2010] FWA 4404, [34].

[18] *Coles Supermarkets (Australia) Pty Ltd v The Australasian Meat Industry Employees Union* [2015] FWCFB 379, [44] – [46].

[19] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368, [31] – [32]; see also *Esso Australia Pty Ltd v AMWU, CEPU) and AWU* [2015] FWCFB 210, [35].

[20] *Further Witness Statement of Mark Hulme*, 12 January 2024, [29] – [31].

[21] *Further Witness Statement of Mark Hulme*, 12 January 2024, [50].

[22] [2018] FWCFB 4011.

[23] Ibid.

[24] *CEPU v Australian Postal Corporation*, [2007] AIRC 848, [10]; approved in *NTEU v Charles Darwin University* [2018] FWCFB 4011, [21].