DECISION

Fair Work Act 2009
s.418—Industrial action

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
v
Orora Packaging Australia Pty Ltd
(C2024/312)

DEPUTY PRESIDENT CLANCY MELBOURNE, 2 FEBRUARY 2024

Application for order under s.418 to stop industrial action by Employer – industrial action alleged not to meet the common requirements – s.413(5) alleged to have been engaged due to prior contravention of Commission order – Interim order made pursuant to s.420 – Application made by employer pursuant to s.603 to revoke Commission order retrospectively– Section 603 application granted with retrospective effect– accordingly, no prior contravention – no basis to conclude industrial action that is not protected is happening, threatened, impending, probable or being organised– s.418 application dismissed.

[1] At 6.27pm on Wednesday 17 January 2024, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**) made an application under s.418 of the *Fair Work Act 2009* (**the Act**) for an order that unprotected industrial action stop or not occur. The orders sought were directed at Orora Packaging Australia Pty Ltd (**Orora**) and the Australian Industry Group (**AiGroup**). The AMWU and Orora are currently covered by the *Orora Beverage Cans Ballarat Enterprise Agreement 2020* (**the Agreement**).[1] The nominal expiry date of the Agreement is 30 June 2023.

[2] Section 420(1) of the Act requires that as far as practicable, the Commission determine an application under s.418 within 2 days after it is made. Following a Mention held on 18 January 2024, at which I made directions for the filing and service of material, I conducted a hearing at 11:30am on Friday, 19 January 2024. Attendees for the AMWU were Mr Stephen Fodrocy (Industrial Officer) and Mr Lachlan Mullins (Organiser). Orora was granted permission pursuant to s.596(2)(a) of the Act to be represented by Mr Conrad Banasik of Counsel. During the course of the hearing the AMWU advised it no longer sought an order against the AiGroup.

[3] At the hearing of the matter, the AMWU tendered a statement from Mr Mullins[2] and a statutory declaration from Mr Joel Stockdale.[3] Orora tendered statements from Mr Richard Cartledge (Operations Manager)[4] and Mr Lee Buntman(Senior Associate/Principal Adviser – Workplace Relations), from the AiGroup.[5]

[4] Section 420(1) of the Act requires that as far as practicable, the Commission must determine an application for a s.418 order within two days after the application is made. Section 420(2) provides that if the Commission is unable to determine the application within that period, the Commission must make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be). As the circumstances contemplated by s.420(2) arose, I made an interim order on 19 January 2024.[6]

Factual Background

[5] On 10 October 2023, Deputy President Hampton determined an application for a protected action ballot order (**PABO**) made by the AMWU.[7] The Deputy President issued a PABO[8] and determined that a ballot putting forward four questions was to be conducted by the Australian Electoral Commission, with the date by which voting was to close to be 22 November 2023. This established the ballot period for the purpose of s.448A(2) of the Act and the Deputy President further determined that the matter was to be assigned to Commissioner Allison to conduct the s.448A compulsory conciliation conference.

[6] On 17 October 2023, an email from the Chambers of Commissioner Allison was sent to the email address the AMWU had used when filing the application for the PABO (**the AMWU's nominated address**), Mr Mullins, Mr Cartledge and Mr Buntman. This email attached a Notice of Listing for a s.448A conciliation conference to take place on 26 October 2023 and an Order and Directions dated 17 October 2023 (**17 October 2023 Order and Directions**), in which the following was outlined under the heading 'Order':

> " **Order**
>
> Under s.448A of the *Fair Work Act 2009* (the Act), the Fair Work Commission orders:
>
> 1. All bargaining representatives for the proposed enterprise agreement, must attend a conference at **2:00PM (Melbourne Time) on 26 October 2023**, for the purposes of mediation or conciliation in relation to the proposed agreement. The conference will be conducted in-person at the Fair Work Commission.
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> 2. The Employer(s) subject to the above Order will serve a copy of the Order and the notice of listing on any employee bargaining representatives other than the AMWU and alert any such bargaining representative to the obligation to attend the conference specified in the Order **by no later than 4:00pm on Friday 20 October 2023**.
>
> The conference will be conducted in private."

[7] It was further outlined in the 17 October 2023 Order and Directions, under the heading 'Directions', that Orora was to file a list of bargaining representatives, if any, other than the AMWU and evidence of compliance with Order 2 by no later than 5.00pm Tuesday 24 October 2023.

[8] At 12.11pm on 19 October 2023, Mr Buntman sent an email to the Chambers of Commissioner Allison[9] advising that AiGroup was acting for Orora and that it had served the 17 October 2023 Order and Directions, together with the Notice of Listing for the s.448A conciliation conference to take place on 26 October 2023 upon the 7 employee bargaining

representatives in the matter (other than the AMWU). Mr Buntman outlined the names of the 7 employee bargaining representatives and their contact details in this email. He also attached to the email a copy of the 'service email' sent to the 7 employee bargaining representatives which included instructions as to their obligation to attend the s.448A conference listed for 26 October 2023.[10] In response to a request from the Commissioner's Chambers, Mr Buntman sent a further email at 1.36pm attaching a screenshot with the employee bargaining representative email addresses included. Mr Buntman also advised that one of the employee bargaining representatives had withdrawn from bargaining.[11]

[9] At 2.54pm on 23 October 2023, Mr Mullins sent an email to Mr Cartledge (copying in Mr Buntman and the AMWU's nominated address) noting that the 17 October 2023 Order and Directions required Orora to serve all employee bargaining representatives with a copy of the 17 October 2023 Order and Directions.[12] At approximately 6.30pm on 23 October 2023, Mr Buntman sent an email to the Chambers of Commissioner Allison.[13] Copied in were Mr Cartledge, Mr Mullins and the AMWU's nominated email address. Mr Buntman advised that Orora had distributed materials for the commencement of an access period to approve or not approve a proposed enterprise agreement, with a vote to conclude at 7.15pm on 1 November 2023. As such, Mr Buntman sought for the s.448A conference listed for 26 October 2023 to be adjourned to a time on or after 2 November 2023, on the basis that a vote approving the proposed enterprise agreement would obviate the need for the s.448A conference.

[10] The AMWU objected to this proposal. A lengthy email in reply on its behalf was sent by Mr Fodrocy to Mr Buntman and the Chambers of the Commissioner at 1.34pm on 24 October 2023, outlining the AMWU's opposition. Copied into this email were the AMWU's nominated email address, Mr Mullins, Mr Cartledge and Mr Tony Piccolo of the AMWU.

[11] In response, the Commissioner determined that the s.448A conference listed for 26 October 2023 should instead be conducted as a Mention, during which the parties would have the opportunity to address whether or not a s.448A conference might have utility prior to the completion of the voting process, and a suitable new date for a s.448A conference would be discussed. An email outlining these matters and attaching an amended Notice of Listing was sent on 24 October 2023 to the AMWU's nominated email address and Mr Mullins, Mr Fodrocy and Mr Piccolo of the AMWU, and to Mr Cartledge and Mr Buntman.[14]

[12] At 9.55am on Wednesday 25 October 2023, Mr Fodrocy sent a further email to the Chambers of Commissioner Allison.[15] Copied in were the AMWU's nominated email address , Mr Mullins and Mr Piccolo of the AMWU and additionally, Mr Cartledge and Mr Buntman. Mr Fodrocy outlined that it was the AMWU's understanding that in addition to itself, there were seven employee bargaining representatives for the proposed agreement. Further, Mr Fodrocy noted that in the 17 October 2023 Order and Directions, the Commissioner had ordered all bargaining representatives to attend the s.448A conference and Orora was directed to file a list of bargaining representatives and evidence of having complied with "paragraph 2" of the 17 October 2023 Order and Directions.[16] Mr Fodrocy then asserted:

1. The AMWU had been made aware that other than the AMWU, Orora had not served a copy of the 17 October 2023 Order and Directions and original notice of listing on all bargaining representatives; and

2. It was unclear as to whether Orora had sought the views of the other employee bargaining representatives in relation to its adjournment request.

[13] Mr Fodrocy also requested that the Commissioner confirm whether she was satisfied that Orora had complied with the 17 October 2023 Order and Directions. Further, Mr Fodrocy requested that if there had been a failure by Orora to comply with the 17 October 2023 Order and Directions, the other employee bargaining representatives ought to be given the amended Notice of Listing and copies of both Orora's adjournment request and the AMWU's objection.

[14] In an email in reply sent from the Commissioner's Chambers at 11.22am on 25 October 2023,[17] it was detailed that Orora had filed a list of 7 employee bargaining representatives and "sufficient evidence" that they had been served a copy of the 17 October 2023 Order and Directions and the Notice of Listing, "which had been accepted by the Commissioner." This email copied in the employee bargaining representatives (minus the bargaining representative who had earlier revoked his status as a bargaining representative) and indicated they would be given the opportunity to attend the Mention on 26 October 2023 and provide their views.

[15] At 9.06am on 26 October 2023, Mr Mullins sent an email addressed to the Chambers of the Commissioner, the other employee bargaining representatives, Mr Fodrocy, Mr Piccolo, the AMWU's nominated email address, Mr Cartledge and Mr Buntman.[18] In this correspondence, Mr Mullins asserted the other employee bargaining representatives had not been supplied with the abovementioned documents because the email addresses which had been supplied by Orora were incorrect and further, that Orora had not communicated with the other bargaining representatives that the 17 October 2023 Order and Directions would be served via their work email addresses. Mr Mullins also made the request that the Commission "reconsider what constitutes sufficient evidence when determining the service of the commission's orders by employers".

[16] The Mention listed for 2.00pm on 26 October 2023 proceeded. It appears to be common ground that a topic of conversation at the Mention was the issue of serving the employee bargaining representatives, with the outcome being that any further Notice of Listing, Orders and/or Directions issued by the Commissioner would be required to be hand delivered to the employee bargaining representatives. This appears to have been borne out in the Order and Directions dated 26 October 2023 (**26 October 2023 Order and Directions**), which included:

> " **Order**
>
> Under s.448A of the *Fair Work Act 2009* (the Act), the Fair Work Commission orders:
>
> 1. All bargaining representatives for the proposed enterprise agreement, must attend a conference at **2:00PM (Melbourne Time) on 14 November 2023**, for the purposes of mediation or conciliation in relation to the proposed agreement. The conference will be conducted in-person at the Fair Work Commission.
>
> 2. The Employer(s) subject to the above Order <u>will ensure all Bargaining Representatives other than the AMWU, receive a copy of the attached NOL and Directions and are alerted</u> to the obligation to attend the conference specified in the Order **by no later than 4:00pm on Thursday 2 November 2023**.
>
> The conference will be conducted in private." (<u>my emphasis</u>)

[17] It is common ground that all employee bargaining representatives attended the s.448A conference on 14 November 2023.

[18] On 22 November 2023, the Australian Electoral Commission declared the results of the protected action ballot. The majority of voters who cast a valid vote were in favour of the action set out in the four questions. In a Decision dated 19 December 2023,[19] Deputy President Hampton granted an application made by the AMWU to extend the 30-day period in which industrial action is authorised by a further 30 days.

[19] On 10 January 2024, the AMWU gave written notice to Orora of the intention of the AMWU, its officers and employees, and members of the AMWU employed by Orora to take employee claim action comprising various stoppages, an overtime ban and a ban on paperwork and/or data entry.

[20] Mr Mullins stated that, at 8.01pm on 16 January 2024, he received an email from Mr Buntman attaching a document providing written notice of Orora's intention to take employer response action (**16 January 2024 written notice**)[20] in response to the AMWU's notified employee claim action. The employer response action is described as various lockouts from all form of work commencing after the engagement of the employee claim action. Copies of Orora's employer response action notice are said to have been given to employees of Orora on 16 January 2024.[21]

Consideration

[21] There is no dispute that the AMWU has standing to bring this s.418 application.[22] Section 418 of the Act relevantly provides:

> **"418 FWC must order that industrial action by employees or employers stop etc.**
>
> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.
>
> …"

[22] Section 408 of the Act provides that industrial action is 'protected industrial action' if it is, inter alia, 'employer response action'. Section 411 of the Act defines 'employer response action' as follows:

> **"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 mentioned in subsection (2), 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."

(my emphasis)

[23] Having regard to the factual background in this matter, if an employee of Orora was to have engaged in industrial action pursuant to the written notice given by the AMWU on 10 January 2024, Orora (as per the 16 January 2024 written notice) would have taken employer response action.

[24] In the circumstances of this application, the AMWU expressly stated that it was not relying upon there having been a contravention of s.411(3), and instead relies upon there having been a contravention of s.413(5) of the Act. Section 413 of the Act provides:

"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;

…"

[25] As outlined above in [5], Deputy President Hampton made a PABO which enlivened the obligations under s.448A of the Act:

"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)."

[26] Having been assigned the matter to conduct the s.448A compulsory conciliation conference, Commissioner Allison made the 17 October 2023 Order and Directions.

[27] As regards s.413(5) of the Act, I am satisfied the 17 October 2023 Order and Directions was an order applicable to Orora and that it related to a matter that arose during bargaining for the proposed agreement. Further, I agree with the AMWU submission that a contravention of the 17 October 2023 Order and Directions by Orora, with respect to just one of the employee bargaining representatives, is sufficient and I am satisfied on the basis of the evidence before the Commission that at least three of the employee bargaining representatives (Mr Stockdale, Mr Gatens and Mr Clarke) were not served with the 17 October 2023 Order and Directions.

[28] Orora had purported to serve all employee bargaining representatives with the 17 October 2023 Order and Directions by having Mr Buntman send an email to them using "work" email addresses, but I am satisfied this did not satisfy one of the three service requirements in rule 42(2)(f) of the *Fair Work Commission Rules 2013* (**the Rules**). I am not persuaded that email communication to the "work" email addresses of the employee bargaining representatives was a 'common form of communication' between Orora and the employee bargaining representatives (rule 42(2)(f)(ii)) at the material time. This is because the evidence established that the "work" email addresses of the employee bargaining representatives used by Mr Buntman only became operational on 5 October 2023, i.e. only two weeks before he sent emails to them purporting to serve the 17 October 2023 Order and Directions. Further, these "work" email addresses appear to have been established for no other reason than to provide Orora employees with the means to access an "app" through which they could access their payslips.

[29] I also do not consider that the circumstances outlined in rule 42(2)(e) are enlivened and while the question of whether there had been compliance rule 42(2C) was also raised, I ultimately consider it moot because:

1. it is common ground that there was a restriction on the Orora "work" email addresses receiving external email correspondence at the time the 17 October 2023 Order and Directions was purportedly served;

2. there was no attempt to serve Mr Stockdale or Mr Clarke by using a personal email address; and

3. the attempt to serve Mr Gatens via a personal email address failed.

[30] Therefore, as to whether s.413(5) is engaged and operates to prevent the 16 January 2024 written notice from being protected industrial action, I accept the argument of the AMWU that at the time of the hearing before me, Orora had contravened the 17 October 2023 Order and Directions. In terms of whether I can be satisfied that the conditions in s.418(1) are enlivened, the AMWU submitted the employer response action outlined in the 16 January 2024 written notice is industrial action that is:

1. Threatened, in that Orora stated in the 16 January 2024 written notice that if the employees were to take part in the employee claim action, it would take employer response action; and

2. Impending or probable, because there were employees who intended to take part in the industrial action previously notified by the AMWU.

[31] However, at 4.54pm on Thursday 18 January 2024, Orora filed and served a *Form F1- Application* form in which it outlined an application pursuant to s.603 of the Act seeking that "paragraph 2" of the 17 October 2023 Order and Directions be revoked. An amended *Form F1- Application* form was subsequently filed seeking for the revocation to be with retrospective effect to 17 October 2023.

[32] As detailed in [6] above, "paragraph 2" of the 17 October 2023 Order and Directions outlined:

> "The Employer(s) subject to the above Order will serve a copy of the Order and the notice of listing on any employee bargaining representatives other than the AMWU and alert any such bargaining representative to the obligation to attend the conference specified in the Order **by no later than 4:00pm on Friday 20 October 2023."**

[33] Orora submits that a procedural direction or "decision" (using the terminology of the Act) of the kind made by the Commissioner in the 17 October 2023 Order and Directions may be revoked under s.603. Addressing s.603(3)(f) and the prohibition on the Commission varying and revoking a decision under Division 8 of Part 3-3 of the Act, Orora proffered that notwithstanding the notation in the 17 October 2023 Order and Directions, "paragraph 2" is not an order under s.448A of the Act. Orora contends that as the Commission is "a creature of statute", its powers must be derived from the Act and the most likely source of the Commission's powers, to make the direction regarding service, is s.589(1).[23] Orora argued that while s.448A gives the Commission the power to direct bargaining representatives to attend a conference and to conduct the conference, it does not empower the Commission to make a direction that a person serve notice of the s.448A conference on another party.

[34] In broad compass, the grounds upon which Orora seeks the revocation of "paragraph 2" outlined in the *Form F1- Application* form are:

1. "Paragraph 2" is a 'decision' within the meaning of s.598 of the Act and related to service of the FWC's notice for a s.448A conference listed on 26 October 2023;

2. The 17 October 2023 Order and Directions was superseded by events because on 24 October 2023, the Commissioner vacated the conference that was to take place on 26 October 2023 and relisted the matter for a Mention, for reasons unrelated to service;

3. Following the Mention on 26 October 2023, the Commissioner made the 26 October 2023 Order and Directions which provided for its service and a new s.448A conference;

4. There is no allegation of non-compliance with the 26 October 2023 Order and Directions, i.e. the s.448A conference went ahead in accordance with its terms and with all bargaining representatives in attendance;

5. If there was a breach (which is not admitted), Orora has a satisfactory excuse because the persons who were responsible for serving the notice did not know that the employee work email addresses would not receive external correspondence. Moreover, any breach (if any) was minor and had no material impact;

6. Noting that the AMWU alleges a breach of "paragraph 2" of the 17 October 2023 Order and Directions in support of its s.418 application, it would be a perverse outcome for a minor, unintentional, breach of a procedural direction to bar Orora from being able to engage in any industrial action; and

7. In the circumstances, this is an appropriate instance for the Commission to make a revocation order.

[35] In addressing Orora's revocation application, both parties referred to the decision of the High Court in *Esso Australia Pty Ltd v The Australian Workers' Union* (***Esso***).[24] The majority in *Esso* (Kiefel CJ, Keane, Nettle and Edelman JJ) addressed s.603 as follows:

> "The AWU's contention that to construe s 413(5) in the manner contended for by Esso would be productive of capricious, unjust results is also unpersuasive. The Fair Work Commission has broad powers under s 603 of the *Fair Work Act* to vary or revoke orders, including power to vary or revoke orders retrospectively. The very considerable breadth of the power accorded by s 603 stands in contrast to the more limited power accorded by s 602 to correct "obvious errors". Thus, although it has been said that courts should eschew the exercise of inherent power to vary an order *nunc pro tunc* where the variation would have the effect of altering the substantive rights of the parties, the statutory power accorded by s 603 is different. As was observed in *George Hudson Ltd v Australian Timber Workers' Union* in relation to the retrospective operation of the *Conciliation and Arbitration Act*, the provisions of that Act were not to be read down as if confined to a prospective operation at the expense of the "great public policy" which the Act embodied, namely, that of encouraging and maintaining "industrial peace in the Commonwealth". So also, in *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways (NSW)*, the Court held that the Conciliation Commissioner had power to vary the terms of an award that had expired (but continued in force by operation of statute). As Murphy J stated in *R v Gough; Ex parte Key Meats Pty Ltd*, it was clear that the Australian Conciliation and Arbitration Commission was entitled to vary or set aside an award provision in accordance with the Act even if its new provision operated "locally, temporarily,

> prospectively or retrospectively, provided the provision would have been within the scope or ambit of the original dispute". The same considerations informed this Court's decision in *Re Dingjan; Ex parte Wagner* that the power to set aside or vary the terms of a harsh or unfair contract under ss 127A and 127B of the *Industrial Relations Act* could be exercised in relation to a contract that had been discharged. And the same is surely true of the Fair Work Commission's statutory power under s 603 of the *Fair Work Act* to vary or revoke orders relating to a proposed agreement or matters arising during the bargaining for such an agreement. To adopt and adapt the language of Kirby J in *Emanuele v Australian Securities Commission*, it may be inferred that Parliament contemplated that oversight and inadvertence would sometimes occur for which the Fair Work Commission's powers of variation and revocation under s 603 would be available. Hence, if a document cannot be filed within the time specified in an order made by the Fair Work Commission, an application might be made for the time to be enlarged, or alternatively for the order to be revoked and a new order made allowing greater time, and, if there were good reason for the failure to file the document timeously, no doubt time would be enlarged, especially when it is appreciated that to refuse to enlarge time would preclude the possibility of protected industrial action by reason of s 413(5). Similarly, if a document were filed within time but later found not to comply with requirements imposed by the Fair Work Commission, and there was a satisfactory excuse for the failure in compliance, time in which to file a document complying with requirements might be enlarged retrospectively. If, in exercise of the power conferred by s 603, an order were made by the Fair Work Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order. If, however, it appeared that the failure to file the document on time or to file what was required by the previous order was the result of contumaciousness or unacceptably careless disregard for the terms of the order, or if it were thought that to alter the order retrospectively would amount to an inappropriate or unfair interference with the rights of the parties, it might be expected that the Fair Work Commission would decline to exercise the power conferred by s 603 with the effect that the immunity attaching to protected industrial action would not arise."[25]
>
> (references omitted)

[36] Orora developed its position, in relation to the revocation application, by submitting that the majority in *Esso* recognised that a natural reading of s.413(5) of the Act may produce the harsh consequence that a minor breach of an order may prevent a party from taking any further industrial action in relation to an agreement. Orora proffered that the majority had posited that the solution to this problem was that the Commission could use its power under s.603 of the Act to revoke or vary the relevant order, so as to negate the contravention, and had noted that the revocation or variation may be ordered with retrospective effect. While Orora asserted that the test enunciated was whether the party seeking revocation or variation has a reasonable excuse for their noncompliance, the majority used the phrases "good reason" and "satisfactory excuse."[26]

[37] Relying on *Esso,* Orora argued that Mr Cartledge should be the attributed state of mind for Orora and submitted that it has a reasonable excuse. Orora submitted that Mr Cartledge had reasonably assumed, having regard to the way his own work email address operated, that the employee bargaining representatives would be able to receive an email from AiGroup to their work email addresses.[27] Noting that Orora had been requested by the Commissioner to produce

evidence of service, Orora also suggested that the Commissioner had been satisfied on the basis of what was provided.

[38] Orora argued that the discretionary considerations pointed in favour of the relief sought. In particular, Orora submitted:

1. It is probable that 4 out of the 7 employee bargaining representatives (plus the AWMU) received the 17 October 2023 Order and Directions for the s.448A conference;

2. The s.448A conference was adjourned for unrelated reasons;

3. Service of the 26 October 2023 Order and Directions for the adjourned conference was validly effected by hand delivery;

4. The employee bargaining representatives (apart from Mr William Goudappel) have now revoked their instruments of appointment;

5. There is no prejudice to the AMWU, as it was served with both notices for the s.448A conferences;

6. Orora will suffer significant prejudice if the revocation order is not granted, being an inability to engage in any future responsive industrial action relating to the present agreement;

7. The technical matters raised by the AMWU relating to compliance with rule 42 were not raised previously, even though the AMWU was agitating this issue in October 2023; and

8. The AMWU has itself contravened orders that "… *relate to industrial action relating to, the agreement* …" being the directions made for the conduct of the hearing for this s.418 application.

[39] For its part, the AMWU relied on *Esso* to submit that the purpose of s.413(5) is to "deny the immunity of protected industrial action to persons who had not previously complied with a pertinent order or orders and who had thereby demonstrated that they were not prepared, or prepared to take sufficient care, to play by the rules."[28] The position of the AMWU is that Orora did not abide by the rules for service and nor did it take sufficient care to do so. Further, the AMWU argues that as an experienced industrial relations practitioner, Mr Buntman ought to have been aware of the rules pertaining to service and it was incumbent upon someone in his position providing services to Orora to take care in ensuring that the 17 October 2023 Order and Directions was complied with in accordance with the Rules and, as such, his failure to do so was not inadvertent. The AMWU further submitted that Mr Buntman and Orora should have been alerted to there being a potential issue with service by:

1. the form of the delivery receipts ultimately produced to the Commission by Mr Buntman; and

2. The matters raised by Mr Mullins in the email he sent on 26 October 2023, prior to the Mention.[29]

[40] Referencing *Esso*, the AMWU submitted that Orora had failed to provide "good reason" for its failure to comply with the 17 October 2023 Order and Directions and nor had it provided "a satisfactory excuse."[30] Similarly, the AMWU submitted the failure of Orora to comply with the rules for service demonstrated an "unacceptably careless disregard" for the 17 October 2023 Order and Directions.[31]

[41] The AMWU also cited the (then applicable) requirement under s.409(6A) of the Act for bargaining representatives to comply with an order under s.448A directing them to attend a conference and the consequences for them if they did not (i.e. that subsequent industrial action taken by them would not be protected action). The AMWU appeared to argue this weighed against the exercising of the power under s.603 of the Act because altering the 17 October 2023 Order and Directions retrospectively would amount to "an inappropriate or unfair interference with the rights of the parties"[32] and it might be expected that the Commission would therefore decline to exercise the power conferred by s.603.

[42] The AMWU also charged Orora with having failed to act quickly to correct the non-compliance even though it had been drawn to its attention, and it submitted that the changed mode of notifying the bargaining representatives of the obligation to attend the conference, outlined in the 26 October 2023 Order and Directions, did not cure the earlier contravention of the 17 October 2023 Order and Directions.

[43] Orora additionally argued:

1. "Paragraph 1" of the 17 October 2023 Order and Directions is a decision under s.598(3) of the Act, which provides that a decision of the Commission that is described as an order must be made by order; whereas

2. "Paragraph 2" of the 17 October 2023 Order and Directions is a decision under s.598(4) of the Act, which provides that a decision of the Commission that is not described as an order may be made by order.

[44] Orora proffered that there was possibly a question as to whether a decision that is not described as an order but is made by order engages s.413(5) of the Act and that this is a discretionary consideration in favour of granting the application for revocation. In support it argues that the degree of serious or significance attached to a decision that is not an order but rather procedural in nature differs from a decision that must be made by an order, and that this tends to support the exercise of the discretionary power under s.603. Secondly, rather than having to determine the question as to whether s.413(5) is engaged and whether the Commission even has jurisdiction to make the s.418 order sought, which is uncertain, the far neater solution is to revoke the "procedural order" and render this question a non-issue.

[45] While the AMWU agreed that "paragraph 2" of the 17 October 2023 Order and Directions is a decision under s.598(4) of the Act, it disputes the proposition of Orora that, if a decision is made and described as an order or expressed as an order under s.598(4), it is of a different character than if it had been done as required by s.598(3). The consequences that Orora suggests flow in terms of the operation of s.413(5) are also disputed by the AMWU.

[46] The discretionary exercise of the power under s.603 must be exercised reasonably and in the context of the statute as a whole.[33] As regards statutory context, s.3 of the Act enunciates

the object of the Act as being to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion through a number of means, including achieving productivity and fairness through an emphasis on enterprise-level collective bargaining, underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

[47] The system of enterprise-level collective bargaining reserves an important role for bargaining representatives, with their conduct subject to various rules. Industrial action may lawfully be taken by bargaining representatives and eligible employees in pursuit of a proposed enterprise agreement, and by employers in response. Rules governing such 'protected' industrial action include the obligation to obtain a PABO, the regime for the conduct of a ballot, the requirement for the result from the ballot to authorise the taking of industrial action and prior written notice to then be given before it is taken. Recently, an obligation to conduct a post-PABO conference for the purposes of mediation or conciliation in relation to the agreement has been imposed on the Commission. This must occur before voting in a protected action ballot closes.[34] An obligation to attend a s.448A conference has been imposed on bargaining representatives who have applied for a PABO[35] and a failure to do so denies any subsequent industrial action taken by them the status of being protected industrial action under s.408 of the Act. Likewise, an employer must not have contravened any orders that relate to a matter that has arisen during bargaining for a proposed enterprise agreement and which applies to them. Such a contravention renders the employer ineligible to take protected industrial action.

[48] There is no dispute and I am satisfied that paragraph 2 of the Order in the 17 October 2023 Order and Directions is a decision made under s.589 of the Act and was able to be made by order.[36] For the reasons I outline below, I propose to revoke paragraph 2 of the Order in the 17 October 2023 Order and Directions, pursuant to s.603(1) of the Act.

[49] Orora is a member of the AiGroup and has sought its assistance during the bargaining for a replacement to the Agreement. Mr Buntman was assigned by the AiGroup to assist Orora. Upon receiving the 17 October 2023 Order and Directions and Notice of Listing for the s.448A Conference, Mr Cartledge asked Mr Buntman to email them to the 7 employee bargaining representatives. These documents detailed that the s.448A Conference was to be held on 26 October 2023.

[50] On 18 October 2023, Mr Buntman asked Orora to provide him with a list of current email addresses for the 7 employee bargaining representatives held on Orora's system. The Orora 'work' email addresses were provided to Mr Buntman, along with some others. Mr Buntman then sent emails to the Orora 'work' email addresses of the 7 employee bargaining representatives and Mr Cartledge at 11.10am on 19 October 2023. Mr Cartledge recalls receiving the 19 October 2023 email from Mr Buntman. Almost immediately, emails in reply were received by Mr Buntman stating "*Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server.*" By way of contrast, the response Mr Buntman received to an email he sent to the personal address of one of the employee bargaining representatives (Mr Gatens), stated "*Your message to [email address] couldn't be delivered.*" Later, on 19 October 2023, Mr Buntman emailed the Commissioner's Chambers advising that the 7 employee bargaining representatives had been served with the 17 October 2023 Order and Directions and the Notice of Listing. There was also some subsequent correspondence sent to address the Commissioner's enquiries regarding service.

[51] As detailed above at [12], on the day before the s.448A conference was due to take place, Mr Fodrocy sent an email to the Chambers of the Commissioner asserting that Orora had not served all 7 employee bargaining representatives and he sought confirmation from the Commissioner as to whether she was satisfied the Respondent had complied with "paragraph 2" of the 17 October 2023 Order and Directions. The reply email sent from the Chambers of the Commissioner approximately 90 minutes later stated that sufficient evidence had been filed by Orora. Nonetheless, the AMWU, through an email sent by Mr Mullins approximately 5 hours before the commencement of the conference on 26 October 2023, repeated the assertion that the employee bargaining representatives had not been served. At this point, Mr Buntman made an enquiry and was advised that delivery of the emails to the Orora 'work' email addresses would not have been impacted by the scenario Mr Mullins had outlined.[37] The AMWU also raised the issue of service at the conference on 26 October 2023 and in response Orora undertook to hand deliver the ensuing 26 October 2023 Order and Directions and Notice of Listing.

[52] Having regard to these circumstances, I am not persuaded by the contention that Orora was not prepared to comply with the rules for service or take sufficient care to do so. In this regard, I note that Mr Buntman promptly responded to the initial queries raised by the Commissioner's Chambers on 19 October 2023 regarding service and provided documents upon request. Nor am I persuaded that Orora's failure to comply with the Commission's rules for service constitutes an 'unacceptably careless disregard' for the terms of the 17 October 2023 Order and Directions. That Orora asked its adviser, Mr Buntman, to undertake the task of serving the 7 employee bargaining representatives was not unorthodox. Nor was seeking to serve the employee bargaining representatives via what appeared to be 'work' email addresses. Additionally, neither Mr Buntman nor Mr Cartledge knew at that time that there had been a restriction placed on the Orora 'work' email addresses of the employee bargaining representatives that operated to prevent them receiving external email correspondence, such as that from the AiGroup. Further, having received only one return email on 19 October 2023 unequivocally stating that the particular message could not be delivered, amongst other emails suggesting delivery to other addresses had been achieved, it was not unreasonable for Mr Buntman to infer that all but the email he sent to the personal address of Mr Gatens had been delivered. Finally, while the AMWU began asserting on 25 October 2023 that the employee bargaining representatives had not been served, I am not persuaded that at that point Orora was demonstrating 'unacceptably careless disregard' for the terms of the 17 October 2023 Order and Directions. At this point in time, I consider Orora had a satisfactory excuse for shifting its gaze beyond the service requirements pertaining to the 17 October 2023 Order and Direction. By 25 October 2023, the Commissioner had already decided to amend the in-person s.448A conference listed for 2.00pm on 26 October 2023 to a Mention via Microsoft Teams and there had been advice sent from the Commissioner's Chambers to the parties that she was satisfied the employee bargaining representatives had been served. In any event, Mr Buntman made inquiries in relation to the assertions made by Mr Mullins on 26 October 2023.

[53] My conclusion, having regard to the chronology of events and circumstances outlined, is that there was both a good reason and a satisfactory excuse for the failure of Orora to comply with the requirement to serve the employee bargaining representatives in accordance with the Commission's rules of service. It was not suggested and nor am I persuaded that Orora acted with 'contumaciousness or unacceptably careless disregard.'

[54] Additionally, I do not consider that the revocation of the 17 October 2023 Order and Directions with retrospective effect would amount to an 'inappropriate or unfair interference

with the rights of the parties.' While the AMWU raised the requirement under s.409(6A) of the Act for bargaining representatives to comply with an order under s.448A directing them to attend a conference and the consequences for them if they did not (i.e. that subsequent industrial action taken by them would not be protected action), this issue does not arise because the s.448A conference that was listed for 26 October 2023 did not proceed on that day. As such, there are no contraventions by any of the employee bargaining representatives of orders made under s.448A that can be attributed to failings of Orora that might otherwise weigh on the exercise of the discretionary power under s.603. The s.448A conference was not delayed in any material way. It was re-listed for 14 November 2023, the employee bargaining representatives were served with the consequent 26 October 2023 Order and Directions and Notice of Listing and they and the AMWU thereafter attended the s.448A conference before the Commissioner on 14 November 2023. I do not consider there is prejudice to either the AMWU or the now former employee bargaining representatives. By way of contrast, a refusal to revoke the 17 October 2023 Order and Directions would result in prejudice to Orora because it would preclude the possibility of it taking protected industrial action by reason of s.413(5) of the Act, in circumstances where the contravention has not amounted to a material breach.

Conclusion – the Revocation Application

[55] Orora has applied for an order under s.603 revoking Paragraph 2 of the Order in the 17 October 2023 Order and Directions, with retrospective effect to 17 October 2023. *Esso* confirms that the Commission's power to vary or revoke orders under s.603 is broad and able to be exercised with retrospective effect. For the reasons stated, I am satisfied that Paragraph 2 of the Order in the 17 October 2023 Order and Directions should be revoked and I am also satisfied it should be revoked with retrospective effect to 17 October 2023. As such, I will make an order to this effect.

Order

[56] Pursuant to s.603(1) of the Act, Paragraph 2 of the Order in the Order and Directions of Commissioner Allison made on 17 October 2023 is revoked with effect on and from the date on which it was made (17 October 2023).

Conclusion and Disposition– the s.418 Application

[57] As to the impact of my Order on the s.418 application made by the AMWU, the following statement of the majority in *Esso* is illustrative:

> "If, in exercise of the power conferred by s 603, an order were made by the Fair Work Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order."[38]

[58] Accordingly, regardless of the conclusion I reached at [30] above, the effect of the Order I have made is that there was no contravention by Orora of Paragraph 2 of the Order in the Order and Directions of Commissioner Allison made on 17 October 2023. It therefore follows that s.413(5) is not enlivened and there is no basis on the material before me to conclude that industrial action by Orora that is not or would not be protected action:

(a) is happening; or

(b) is threatened, impending or probable; or

(c) is being organised.

[59] As I have concluded that the requirements for the making of an order under s.418 are not met, the AMWU's application under s.418 (C2024/312) is dismissed. Accordingly, the interim order made by me on 19 January 2024[39] ceases to operates as a result of this decision.[40]

DEPUTY PRESIDENT

Appearances:
S Fodrocy for the AMWU
C Banasik, Counsel for Orora Packaging Australia Pty Ltd.

Hearing details:
2024.
Melbourne.
19 January.

Printed by authority of the Commonwealth Government Printer

<PR770931>

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[1] [2020] FWCA 3640, AE508488.

[2] Exhibit A1.

[3] Exhibit A2.

[4] Exhibit R2

[5] Exhibit R1.

[6] PR770477.

[7] [2023] FWC 2613.

[8] PR767037.

[9] Exhibit R1, Annexure LB11– see DCB at 134.

[10] Exhibit R1, Annexure LB4 – see DCB at 121.

[11] Exhibit R1, Annexure LB12– see DCB at 136.

[12] Exhibit A1, Attachment LM2 – see DCB at 29.

[13] Exhibit A1, Attachment LM3 – see DCB at 32.

[14] Exhibit A1, Attachment LM4 – see DCB at 34.

[15] Exhibit A1, Attachment LM5 – see DCB at 39.

[16] Outlined above at [5] and which required Orora to serve a copy of the 17 October 2023 Order and Directions and the notice of listing on any employee bargaining representatives other than the AMWU and alert any such bargaining representative to the obligation to attend the conference that had been listed for 26 October 2023 by no later than 4:00pm on 20 October 2023.

[17] Exhibit A1, Attachment LM6 – see DCB at 45.

[18] Exhibit A1, Attachment LM7 – see DCB at 52.

[19] [2023] FWC 3410.

[20] Exhibit A1, Attachment LM14– see DCB at 72.

[21] Exhibit A1 at [37] – see DCB at 15.

[22] *Fair Work Act 2009* (Cth), s.418(2)(b)(ii).

[23] Section 589 is headed "*Procedural and interim decisions*" and provides "*The FWC may make decisions as to how, when and where a matter is to be dealt with*".

[24] [2017] HCA 54.

[25] Ibid at [49]-[50].

[26] Ibid at [50].

[27] Exhibit R2 at [26] – see DCB at 182.

[28] [2017] HCA 54 at [39].

[29] Exhibit A1, Attachment LM7 – see DCB at 52.

[30] [2017] HCA 54 at [50].

[31] Ibid.

[32] Ibid.

[33] *Application by Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 4120 at [74], citing *Minister for Immigration v Citizenship v Li* (2013) 249 CLR 332 at 362 [63].

[34] *Fair Work Act 2009* (Cth), s.448A.

[35] Ibid, s.409(6A) -in operation since 15 December 2023.

[36] *Fair Work Act 2009* (Cth), s.598(4).

[37] Exhibit R1 at [31]– see DCB at 113.

[38] [2017] HCA 54 at [50].

[39] PR770477.

[40] *Fair Work Act 2009* (Cth), s.420(5).