DECISION

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

Retail and Fast Food Workers Union Incorporated T/A Retail and Fast Food Workers Union Incorporated

v

Coles Supermarkets Australia Pty Ltd T/A Coles Supermarkets, Liquorland (Australia) Pty Ltd T/A Liquorland, First Choice Liquor Market, Vintage Cellars
(B2024/80)

COMMISSIONER YILMAZ MELBOURNE, 8 FEBRUARY 2024

Proposed protected action ballot of employees of Coles Supermarkets Australia Pty Ltd and Liquorland (Australia) Pty Ltd

[1] This is an application by the Retail and Fast Food Workers Union Incorporated (**RAFFWU**), made under s.437 of the *Fair Work Act 2009* (the Act) on 2 February 2024, for a protected action ballot order (PABO) in relation to the employees of the Respondents- Coles Supermarkets Australia Pty Ltd (**Coles**) and Liquorland (Australia) Pty Ltd (**Liquorland**) (collectively, '**the Respondents'**).

[2] RAFFWU is a bargaining representative of workers employed in retail operations (including retail stores) of both Coles and Liquorland. On the morning of 2 February 2024, RAFFWU filed in the Commission and served on the Respondents a Form F34 PABO application, draft order and Form F34b Declaration in support of an application for a PABO. The application and declaration cites the expired enterprise agreements applicable to the two Respondents. Further both forms note that on 22 December 2022, Coles notified RAFFWU of its intention to bargain and issued a NERR, then in early 2023 Liquorland issued a NERR. A further NERR was issued on 1 December 2023 which in correspondence to RAFFWU notified them that the NERR combined the two Respondents as they intended to bargain for one instead of two separate enterprise agreements.

[3] RAFFWU contends that throughout 2023 it did meet to bargain with Coles and sought to meet with Liquorland. RAFFWU contends that it agreed to the proposed coverage of both legal entities in one proposed enterprise agreement as proposed on 1 December 2023, and advised the Respondents that the proposed agreement include coverage of salaried managers, which were not at any time covered by either existing and expired enterprise agreement. It submits that it is genuinely trying to reach an agreement with the Respondents.

[4] On 2 February 2024, the Respondents informed the Commission and RAFFWU that it objected to the PABO application.

[5] On allocation of this contested application to my Chambers on Friday afternoon, the parties were sent a notice of listing and put on notice that should the matter not be resolved at a conference/mention at 9am Monday 5 February 2024, submissions would be required later that day. During the conference/mention on the morning of 5 February 2024, both parties confirmed that no agreement can be reached and agreed to determine this matter on the papers following filing of written submissions. Both parties complied with directions.

[6] The Respondents raised 5 objections to the application:

1. There has been no notification time in relation to the proposed agreement sought by the Applicant as required by s.437(2A) of the Act.
2. The Applicant is not, and has not, been genuinely trying to reach agreement as required by s.443(1)(b) of the Act.
3. In relation to the list of information to be provided to the ballot agent in paragraph 6.2(b) of the draft order attached to the application, the Respondent should have the option to identify employees for whom they have no evidence of their appointment of RAFFWU as their bargaining representative, and object to the level of detail in the list of information to be provided to the ballot agent.
4. The Applicant's list at paragraph 7.1 of the draft order attached to the application should be confined to those to be covered by the proposed agreement, and
5. There appears to be an error in paragraph 8.2.11 of the draft order.[1]

[7] In response, RAFFWU provided an email on 2 February 2024, advising that it agreed to amend its draft order to address objections 3-5, therefore objections 1 and 2 remain and comprise the focus of these proceedings.

Background

[8] Employees to be covered by the proposed agreement include employees of Coles covered by the *Coles Supermarkets Enterprise Agreement 2017*, and employees of Liquorland covered by the *Coles Liquor Group Retail Agreement 2014*. Both Agreements cover wage employees and neither covers salaried employees. Both enterprise agreements have since expired. RAFFWU seeks to include within the scope of bargaining salaried employees in positions of store, store assistant or assistant store and department managers which are currently covered by the *General Retail Industry Award 2020*.

[9] Bargaining with Coles initially commenced in December 2022 following a request by RAFFWU (on 16 December) and the SDA (on 7 December) to commence bargaining. The SDA also requested that bargaining commence in relation to Liquorland.

[10] NERRs for both Coles and Liquorland were issued on 22 December 2022. The NERRs expressed coverage to include employees "engaged as wages-paid team members".

[11] In July 2023 RAFFWU made a PABO application which it subsequently withdrew after objections were raised. The Respondents submit the PABO application did not cover salaried employees.

[12] In August 2023 RAFFWU made a further PABO application to cover Coles Supermarkets. Coles did not object to the application and a decision and order was published granting the application on 30 August 2023.

[13] In December 2023, the Respondents advised the bargaining representatives that it intended to combine coverage of the two expired agreements into one single proposed enterprise agreement covering both Respondents and issued a new NERR accordingly. Other than combining coverage, there was no proposed extended scope.

The Respondents' objections

[14] The Respondents filed submissions and witness statements in support of their objections. The Respondents submit that the application seeks to:

1. ballot all retail employees- wages paid team members covered by the expired enterprise agreements, including salaried employees thus extending the scope of the NERR, noting that salaried employees were not covered by the NERR and not previously covered by the expired enterprise agreements. In doing so they contend that RAFFWU has not complied with s.437(2A) – notification time, and

2. The application is premature as RAFFWU has not genuinely tried to reach agreement in respect to the group of salaried employees that are not covered by the NERR or expired enterprise agreements. They contend the history of bargaining in relation to the proposed agreement concerns wage—paid employees and not salaried employees.

[15] Over 2023, Coles and RAFFWU met in relation to the proposed agreement to cover the Coles supermarket employees. Coles submits that bargaining was for an enterprise agreement covering wages-paid employees in Coles supermarkets before embarking on bargaining in relation to liquor. It submits that no bargaining representative raised claims or sought to bargain in relation to liquor retail stores other than the initial SDA letter of 7 December 2022.

[16] The Respondents wrote to the SDA and RAFFWU on 22 December 2023 and issued a new NERR intending to cover both Respondents and wages-paid employees of Coles and Liquorland. The new NERR was expressed to cover "employees that are engaged as wages-paid team members by Coles Supermarkets Australia Pty Ltd or Liquorland (Australia) Pty Ltd in respect of: (1) retail operations, including supermarkets, online and home delivery; and (2) retail stores (or similar establishments) that sell packaged liquor (including but not limited to those trading as Liquorland, First Choice Liquor Market and Vintage Cellars and those stores that are physically adjacent to a hotel)."

Objection 1 – no notification time

[17] The Respondents contend that s.437(1) of the Act provides that a bargaining representative of an employee to be covered by the proposed agreement may apply for a PABO to determine if those employees wish to engage in protected industrial action.

[18] Further s.437(2A) provides that s.437(1) does not apply unless there has been a notification time, and by "implication" a PABO cannot be made.

[19] The Respondents further submit that s.173(2) of the Act provides a definition of notification time and the new s.173(2)(aa) provides new provisions that require the employer to commence bargaining and these provisions are to be considered in the context of s.173(2A) to trigger a notification time.

[20] The Respondents contend that the history of bargaining for the proposed agreement between the parties is to cover wages-paid team members covered by the expired agreements and not salaried employees, while RAFFWU's PABO application intends to cover both wages-paid and salaried employees. The requirement of a notification time in relation to the salaried employees has not been met.

[21] The Respondents rely on the principles set out by the Full Bench *in Maritime Union of Australia v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894 (*Maersk*). In particular they cite paragraphs [24] – [27] and submit the circumstances of this case are distinguishable. Further they submit the recent changes to the Act in s.173(2)(aa) gives bargaining agents the power to initiate bargaining provided certain circumstances are met and the "parameters" of coverage of the proposed agreement are defined by the application of ss.437(2A), 173 (2) and 173 (2)(aa).[2]

[22] Consequently, the Respondents submit that RAFFWU had the opportunity to initiate bargaining in respect to the proposed agreement identified in the application (to cover salaried employees), however, it did not, instead it elected to pursue a proposed agreement that reflected the same group of employees covered by the existing, but expired supermarket enterprise agreement by sending notice of its intent to bargain consistent with s.173(2A) in December 2022. They further submit that the Act does not allow RAFFWU to broaden the scope of the proposed coverage of the proposed agreement unilaterally in a PABO application despite the group of employees covered at notification time in 2022, the scope of the new NERR issued in December 2023 and the scope of coverage during the one year of bargaining. It submits that it "would be a strange result if the legislation confined the initiation of bargaining under ss. 173(2)(aa) and 173(2A) to a proposed agreement that covered the same, or substantially the same, group of employees as the current agreement, but allowed the bargaining representative the next day to unilaterally, simply by email to the employer, expand that proposed agreement to a fundamentally broader cohort of employees."[3] In addition, they submit that RAFFWU had not availed itself of other mechanisms to broaden the scope such as through a majority support determination or an application for a scope order.[4]

Objection 2 – RAFFWU has not been genuinely trying to reach agreement

[23] The second objection raised by the Respondents is that RAFFWU has not been genuinely trying to reach agreement in relation to the proposed agreement referred to in the

application. They submit that the proposed agreement in the PABO application (which includes salaried employees) is broader than the scope of the existing supermarket and liquor enterprise agreements, broader than RAFFWU's correspondence of 16 December 2022, 'broader than the scope of the first RAFFWU PABO application in July 2023 and broader than what was being negotiated up until the most recent meeting of 19 January 2024.'[5] It is on this basis that the Respondents contend that RAFFWU has not been genuinely trying to reach agreement.

[24] The Respondents, in their evidence of Messrs Barkatsas and Rondinelli describe the bargaining between the parties and say that while RAFFWU in recent times expressed a desire to include all employees in an enterprise agreement, the events inclusive of notification in December 2022, and the notification of intent to combine coverage of employees of Coles and Liquorland in December 2023 does not support RAFFWU's application to broaden the scope and as such, contend that RAFFWU has not been genuinely trying to reach agreement.[6] Mr Barkatsas further details the communication by RAFFWU to Coles on 12 January 2024 advising of its intent to seek to negotiate an agreement to cover "all workers employed in any supermarket store or liquor store" and expressly stated that it intended that salaried employees be covered by the agreement. Mr Barkatsas states that this was the first time since the commencement of bargaining in December 2022 that RAFFWU intended to expand the scope.[7] The Respondents attached the RAFFWU log of claims also received on 12 January 2024, the preamble statement to the list of claims states that its intent is to cover "all store-based employees". They submit that the log of claims did not provide any particular detail in relation to salaried employees and was almost identical to the log received on 13 March 2023.[8] Mr Barkatsas states that in a meeting with RAFFWU of 19 January 2024, there was some discussion regarding coverage of the proposed agreement, however the discussion was brief and did not include any detail regarding how salaried employees could be covered nor any terms or conditions relating to this cohort of employees.[9] He further states that there had not been any further discussion about inclusion of salaried employees in the proposed agreement.[10]

[25] The Respondents submit that the proposal to expand the scope to include salaried employees was raised for the first time 3 weeks prior to this application and indicates that the application is premature. They submit that there was no genuine effort to negotiate on scope and therefore the Applicant is not genuinely trying to reach agreement.[11]

[26] On the matter of genuine agreement, the Respondents submit:

> "Whether parties are genuinely trying to reach an agreement involves a "*finding of fact applied by reference to the circumstances of the particular negotiations*" (*Total Marine Services Pty Ltd v MUA* [2009] FWAFB 368 (***Total Marine***) at [31]). Whether a party is 'genuinely trying' to reach agreement is an assessment of fact to be made by the Commission as against the relevant factual background. All the relevant circumstances must be assessed."[12]

RAFFWU submissions

[27] RAFFWU submit that the jurisdictional prerequisites for the Commission to exercise its power to make a protected action ballot order have been met and it ought to make the order with modifications in light of 3 of the concerns raised by the Respondents (objections 3-5) which RAFFWU agreed to resolve.[13]

[28] In relation to the two remaining jurisdictional objections, RAFFWU submit in relation to the first, that there is no notification time- that it is conceded by witnesses that the Respondents initiated bargaining for an agreement that would cover the employers and in doing so a notification time was created pursuant to s.173(2)(a) of the Act.[14] RAFFWU distinguish this notification time from the notification initiated by the SDA in December 2022 pursuant to s.173(2)(aa). RAFFWU suggest its own correspondence of December 2022 is different again and is not pursuant to ss.173(2(aa) or 173 (2A), nor are the provisions related. RAFFWU further dispute the submissions of the Respondents in relation to the more recent legislative provisions and the authority of *Maersk*. Put simply, it submits that RAFFWU is "seeking a proposed agreement related to the agreement for which the Respondents initiated bargaining on 1 December 2023."[15]

[29] In relation to the second objection- that RAFFWU has not been genuinely trying to reach agreement, it contends that the Respondents "ought to have known RAFFWU had a strategic desire to have an agreement which included salaried employees."[16] In support of this submission, the witness statement of Mr Cullinan states that at 2 or 3 meetings, RAFFWU expressed its intention that "if there was an opportunity to change the coverage sought by RAFFWU our members would almost certainly wish to pursue a coverage which would cover salaried workers. This was an aside though as we were clear in the coverage we sought at the time."[17]

[30] RAFFWU contend that the evidence does not support the contention that it has not been genuinely trying to reach agreement. It makes the observation that the Respondents altered the coverage of the proposed agreement without discussion in December 2023. In particular RAFFWU submit in their witness evidence that at the meeting of 19 January 2024, for about half the meeting the parties discussed the RAFFWU proposal to extend the coverage to cover salaried employees which was repeatedly rejected by the Respondents.[18] RAFFWU also submit that no further communication from the Respondents was made on the matter of scope following this meeting.

The legislative framework

[31] An application for a PABO is made under s.437. A bargaining representative may make an application, and in this instance, RAFFWU made a s.437 application for the purpose of determining whether employees, represented by RAFFWU and who will be covered by a proposed enterprise agreement wish to engage in protected industrial action. An application for a PABO requires a notification time in relation to the proposed enterprise agreement. The note in this provision refers to s.173(2) in relation to notification time and further provides that protected industrial action cannot be taken until after bargaining has commenced. Section 437 includes further requirements such as the requirement to specify the group of employees to be balloted. Relevantly s.437 follows:

> **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.

[32] In relation to notification time, the relevant provisions are reflected in ss.173(2) and s.173(2A) and referred to in submissions in this matter. Section 173 in its entirety follows:

Employers for single-enterprise agreements to notify each employee of representational rights

(1) An employer that will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

(a) will be covered by the agreement; and

(b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

(2) The ***notification time*** for a proposed enterprise agreement is the time when:

(a) the employer agrees to bargain, or initiates bargaining, for the agreement; or

(aa) the employer receives a request to bargain under subsection (2A) in relation to the agreement; or

(b) a majority support determination in relation to the agreement comes into operation; or

(c) a scope order in relation to the agreement comes into operation; or

(d) a supported bargaining authorisation in relation to the agreement that specifies the employer comes into operation;

(e) a single interest employer authorisation in relation to the agreement that specifies the employer comes into operation.

Note: An employer that is required to give a notice under subsection (1) cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

(2A) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:

(a) the proposed agreement will replace an earlier single-enterprise agreement (the ***earlier agreement***) that has passed its nominal expiry date; and

(b) a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement; and

(c) no more than 5 years have passed since the nominal expiry date; and

(d) the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

When notice must be given

(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

Notice need not be given in certain circumstances

(4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

(5) The regulations may prescribe how notices under subsection (1) may be given.

[33] Further, s.443 of the Act concerns when the Commission must make a protected action ballot order. Section 443 follows:

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.

Consideration

[34] The application by RAFFWU pursuant to s.437 of the Act seeks to apply for a PABO in relation to employees covered by existing expired enterprise agreements (agreement covered employees). The application refers to the *Coles Supermarkets Enterprise Agreement 2017, which expired on 30 April 2020*, and the *Coles Liquor Group Retail Agreement 2014*, which expired on 31 December 2017. The relevant employers covered by the enterprise agreements are Coles Supermarkets Australia Pty Ltd and Liquorland (Australia) Pty Ltd respectively.

[35] In addition, I am satisfied that RAFFWU seeks to extend the coverage of the PABO application beyond the agreement covered employees to also include the salaried employees described during proceedings which are currently covered by the *General Retail Industry Award 2020* and employed in various classifications by both Respondents. The application made by RAFFWU seeks to ballot all employees employed to work in retail operations including retail stores for whom they are a bargaining representative.[19] The declaration clarifies that RAFFWU is seeking an agreement which will cover all employees of the two employers

employed in retail operations or retail stores, including salaried managers.[20] The Draft Order prepared by RAFFWU and tendered together with the application and declaration provides that the group of employees to be balloted in section 3 of the Order provides:

> "In accordance with s.437(5) of the Act, the employees to be balloted are those who are employed by Coles Supermarkets Australia Pty Ltd and Liquorland (Australia Pty Ltd to work in retail operations including retail stores and for whom the Applicant is the bargaining representative."

[36] I am further satisfied that in December 2022, both Respondents received a request to bargain, by bargaining representatives of an employee to be covered by a proposed enterprise agreement pursuant to s.173 (2A) of the Act. The SDA wrote to Coles following Royal Assent of the Secure Jobs Better Pay Bill with a formal request in writing to bargain for an enterprise agreement to replace the *Coles Supermarkets Enterprise Agreement 2017*.[21] The SDA also wrote on the same day to Liquorland on the same basis to request to bargain for an enterprise agreement to replace the *Coles Liquor Enterprise Agreement 2014*.[22] Further, on 15 December RAFFWU wrote to Coles pursuant to the new s.173(2A) of the Act formally requesting to bargain as a bargaining representative of employees covered by the *Coles Supermarkets Enterprise Agreement 2017* and attached notifications of appointment as a bargaining representative.[23]

[37] The formal notification pursuant to s.173(2A) of the Act enlivened the notification time for a proposed enterprise agreement. This provision clearly entitles a bargaining representative who will be covered by a proposed single enterprise agreement to give an employer who will be covered by a proposed enterprise agreement a request to bargain where the proposed agreement replaces an agreement that has passed its nominal expiry date and no more than 5 years have passed since the nominal expiry date, and the proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement. In 2022 and during the most part of 2023 both Respondents and the bargaining representatives bargained separately for a proposed enterprise agreement to replace the earlier agreements covering the same group of employees.

[38] The NERR is a requirement of s.173(1) and follows the notification time. The uncontested evidence of the parties is that both Respondents issued a NERR following the notification time which identified that the proposed multi-employer enterprise agreement would cover the employees of each employer that are covered by the existing expired single enterprise agreements. In this case both the notification time correspondence from bargaining representatives and the respective NERRs were consistent in identifying the scope of coverage of employees to be covered by the proposed agreement. I further observe and accept the uncontested evidence that in December 2023, the Respondents proposed a change to the coverage of the proposed agreements, to combine the employees of both employers covered by two separate expired enterprise agreements into one multi-employer agreement. The effect of this proposal maintained the coverage to wage-paid employees and did not extend coverage to salaried employees covered by a modern award (and not covered by either of the expired agreements). This variation was agreed to by the bargaining representatives and the revised NERR distributed to employees represented the change.

[39] RAFFWU further submit that their intention to broaden scope of coverage is unrelated to the notification time in December 2022, but is related to s.173(2)(a) because the Respondents initiated bargaining for a proposed agreement, and by extension RAFFWUs desire to include salaried employees is not a valid jurisdictional objection. On this point I do not agree with RAFFWU and find that despite the new NERR issued in December 2023, the Respondents did notify bargaining representatives of its intention to bargain for a combined, employer proposed, enterprise agreement, but neither the communication or NERR can be interpreted that there was scope to include salaried employees. The evidence shows that the terms wage-paid and salaried employees is clearly understood and these terms are expressly used to describe two distinct categories of employees subject to either coverage under an enterprise agreement (which is the subject of bargaining) or coverage under a modern award which was not at any time subject to a notification to bargain).

[40] Had RAFFWU made a PABO application to cover the wage-paid employees covered by the expired enterprise agreements, the application would not be contested. The Respondents contest this PABO application as RAFFWU intend to expand coverage, through this application, to salaried employees that are not covered by the expired enterprise agreements, but rather are covered by the *General Retail Industry Award 2020*. It is for this specified group of employees that the Respondents contend there is no notification time. While RAFFWU submit that its intentions were to reach agreement covering all employees including the salaried employees, there is an absence of evidence of a clear notification time for this specified group. I do accept that RAFFWU raised the proposition in clear terms on 12 January 2024 and the evidence supports a discussion took place, but no agreement was reached to amend the scope of coverage for the proposed enterprise agreement.

[41] I cannot find that s.173(2)(a) initiated bargaining to incorporate salaried employees under a modern award. There is no basis for the PABO to be used to broaden scope for a proposed enterprise agreement, and the authority of *Maersk* while relevant, the factual circumstances are distinguished.

[42] Both parties addressed the principles in *Maersk* and I make the following observations regarding the relevance of this Full Bench decision in this matter. While this decision predates the amendments to s.173, the decision deals with ss.437(1) and 437 (2A) in terms of notification time which is relevant to these proceedings. The subsequent legislative change in December 2022 to s.437(2)(b) is not relevant to these proceedings. The argument advanced by Maersk Crewing Australia Pty Ltd was that a proper construction of s.437(2A) with s.437(1) meant that a PABO application cannot be made before the notification time for the proposed enterprise agreement, and as the notification time triggers the requirement to issue a NERR. It further contended that a PABO application cannot be made where there is an invalid NERR. The Full Bench accepted the contention that for a PABO to be made there must have been a notification time, but it rejected the contention that a PABO application required a valid NERR within 14 days of the notification time.[24]

[43] The principles of *Maersk* remain relevant to these proceedings in so far that:

- The legal meaning of a statutory provision begins with the ordinary grammatical meaning having regard for their context. [10] – [12]
- That the expression ‘proposed enterprise agreement’ is a generic term and the authorities conclude that the scope of a proposed agreement need not be settled before

a PABO application. Further this may mean that the proposed agreement is no more than the agreement that the bargaining representative proposes at the time it applies for the order under s.447. [13] – [14]

- All that is required at the time of a PABO application is a 'proposed enterprise agreement'. [15]
- Section 437(2A) provides that an application for a PABO under s.437(1) cannot be made unless there has been a notification time, notification time is defined in s.173 of the Act. [18] – [20]
- Section 437(2A) does not require that the notification time is in respect to the proposed agreement proposed by PABO applicant. Nevertheless, the reference to notification time 'in relation to' the proposed enterprise agreement requires no more than a relationship between the two subject matters. [24] – [25]
- Notification time is a single event at a particular point in time. [34] – [35]
- The legislative purpose of s.437(2A) was intended to overcome the effect of the decision in *J.J. Richards.*[25] [42] Meaning that protected industrial action cannot be taken until after bargaining commenced- that is after the time that the employer agrees to bargain or initiates bargaining or one of the other circumstances within the meaning of notification time in s.173(2). Further should s.437(2A) require the notification time to be in respect to an agreement proposed by the applicant would also require the employer to have agreed to bargain or initiated bargaining within the same scope as that sought by the PABO applicant. In effect this would have the effect of removing scope from bargaining and one of the matters for which employees engage in industrial action. [26]
- The construction as proposed by Maersk is that not agreeing to scope of the proposed agreement, the employer can prevent employees from engaging in industrial action. [27]
- On genuinely trying to reach agreement, disclosure of general content of a proposed agreement genuinely solicits a response.[44]

[44] For the Commission to make a protected action ballot order it must be issued if the application is **made** under s.437 and the Commission is satisfied that the Applicant has been, and is, genuinely trying to reach agreement with the employer of the employees to be balloted. The requirement to issue an order is not discretionary, s.443 makes clear that the provisions of s.437 must be met. In *National Tertiary Education Industry Union v Curtin University*[26] (**Curtin**), the Full Bench observed the applicable principles in relation to ss.437 and 443.

> "**[37]** The Commission's power to make a protected action ballot order under s.443 of the FW Act is not discretionary in nature. Section 443(1) imposes 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. If these conditions are not met, then the Commission is prohibited from making an order: s.443(2).

> **[40]** It may be accepted that for an application to have been made "under" s.437, it must have been made in conformity with s.437. That proposition is implicit in all the previous authorities relating to protected action ballot orders…… 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."

[45] While the authority in *Curtin* requires the Commission to be satisfied that the application is made under s.437, there appears from the parties in this matter a tension or a lack of clarity concerning the scope of the notification and the scope of coverage that may be broadened simply through a PABO application by a bargaining agent.

[46] It is helpful to summarise the factual circumstances of this matter in context of the principles. Pursuant to s.437(1), RAFFWU is a bargaining representative of employees who will be covered by the proposed enterprise agreement and may make an application for a PABO. Subsection 437(2) does not apply in the circumstances, however, s.437(2A) clarifies that an applicant may not apply for a PABO unless there has been a notification time to bargain in relation to the proposed enterprise agreement. Proposed enterprise agreement is a generic term, and the notification time does not require the details or the scope of coverage to be confirmed or agreed with any certainty at that time. For notification time for a proposed enterprise agreement, one must go to s.173(2) where it is defined. A notification time is a single event at a particular time. Section 173 states that there are certain circumstances that give rise to a notification time to bargain for a proposed enterprise agreement which demonstrates a relationship between the intent to bargain and an indication of the group of employees to be covered by the notification. Of course, there may be disagreement over the group of employees to be covered by the scope of the proposed enterprise agreement and this disagreement may lead to the matter being bargained and subject to protected industrial action. However, the parameters of s.173 provides guidance in this regard.

[47] In this matter we are clear that the notification time was initiated by the SDA and RAFFWU in December 2022 under s.173(2A) which came into effect on 7 December 2022 as part of the Secure Jobs, Better Pay amendments. The bargaining representatives took advantage of the legislative change, as s.173(2A) enables the bargaining representatives of an employee who will be covered by a proposed single enterprise agreement to give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement, if the proposed agreement replaces an earlier agreement, and no more than 5 years have passed since the nominal expiry date, and the proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement. These exact circumstances applied to the December 2022 notifications by the SDA and RAFFWU. It is noted that this provision does not require the scope in precise terms, the parties may still bargain over coverage in the context of the notification. I observe this notification did not cover salaried employees, and frankly notification under s.173(2A) for salaried employees is not possible as this group were not at any time covered by the enterprise agreements nor had any of the other requirements under s.173 been met to initiate bargaining.

[48] In the context of the amendment of s.173 of the Act, the Revised Explanatory Memorandum at [751] – [752] states the amendment was to simplify the process for initiating bargaining and to reduce the barriers to commence bargaining. Further at [753] it states that

notification time was also expanded to include the time when the employer receives a request to bargain under s.173(2A) and s173(2)(aa).

[49] Consequently, in respect to RAFFWU's intent to include within the coverage of the proposed agreement salaried employees, it must first take steps to commence bargaining with a notification time. RAFFWU presented no evidence of notification time as prescribed by the parameters contained in s.173. Further, the Respondents' notification in December 2023 did not initiate bargaining for salaried employees. The email and discussion in January 2024 do not satisfy the obligations in respect to notification time. From among the options, a majority support determination or scope order, as examples were options open to RAFFWU at any time, noting that multiple notification times to commence bargaining may occur. The factual circumstances do show that a second NERR was distributed following the initiation by the employers to combine bargaining for one proposed enterprise agreement instead of two, noting that this notification was not opposed by the bargaining representatives. However, it is apparent that an email alone without compliance with s.173 cannot expand scope of coverage to bargain for a proposed enterprise agreement and cannot expand the scope of employees to engage in protected industrial action.

[50] Further on RAFFWUs submission that they simply relied on the Respondents notification to commence bargaining for a combined agreement in December 2023. This submission emphasised that even the Respondents' witnesses conceded that bargaining was initiated to cover two **employers**. However, the context of the communication must be considered, and the communication was clear that while the intent was to cover two **employers**, coverage was to only include the group of employees of these two **employers** that were covered by the two expired enterprise agreements. Salaried employees were not contemplated no matter how the communication regarding notification time is read. The only effect of the notification was simply to combine bargaining in relation to two sets of employees covered by the two separate enterprises agreements. The notification did not expand any coverage to include salaried employees covered by different industrial instruments.

[51] It is not in contention that the Respondents accordingly complied with their obligations to issue a NERR and taking into consideration the principles of *Maersk*, the NERR was not necessary to complete the obligations regarding notification time, rather, notification time triggered the requirement for the employer to give employees a NERR. I also observe the NERR scope of coverage for a proposed agreement did not limit nor expand the coverage sought at notification time in 2022 which is demonstrated by the one year of bargaining on matters other than coverage.

[52] Section 443 deals with the circumstances in which the Commission must make a protected action ballot order in relation to a proposed enterprise agreement. The RAFFWU application must be **made** under s.437 of the Act. The construction of this section is such that there is no discretion on the part of the Commission, it must be satisfied that the application was **made**. The use of the word **made** means that the conditions of s.437 must be met including obligations in terms of notification time. I do not find that RAFFWU have made an application under s.437 in accordance with obligations pertaining to notification time to cover salaried employees within the scope of this PABO.

[53] The second required consideration in s.443 concerns s.443(1)(b), that is, that the applicant has been, and is genuinely trying to reach an agreement with the employer of the employees who are to be balloted. There is no rigid test, and all relevant circumstances must be assessed.[27] To reach agreement, the general content of the proposed agreement must be disclosed and until the disclosure occurs it cannot be said that the bargaining representative has tried to reach agreement; further the word **genuine**, emphasises the importance of trying to solicit agreement.[28]

[54] There is no contest that RAFFWU have met this condition regarding wage paid employees covered by the notification time and the expired award. However, RAFFWU seeks to include salaried employees in which the facts do not support the position that bargaining has commenced by initiating a notification time and therefore it cannot be found that RAFFWU are genuinely trying to reach an agreement in respect to this group of employees. RAFFWU rely on the evidence of their log of claims served on 12 January 2024 and the evidence of a short discussion at one meeting on 19 January 2024. On this basis and the absence of more clear genuine attempts to bargain in relation to salaried employees I cannot objectively conclude that the applicant has been genuinely trying to reach agreement. Importantly both (a) and (b) are required to be met in relation to s.443(1) for the Commission to make a protected action ballot order. RAFFWU may have had the intent or strategic desire for a broader coverage than those employees covered by the expired enterprise agreements, and it may have raised this strategic intent in a discussion on 19 January 2024, but the action of bargaining must be initiated in order to commence, and it follows that to genuinely try to reach agreement, the bargaining must be initiated. The factual circumstances do not support a finding that RAFFWU has been genuinely trying to reach agreement in respect to salaried employees.

[55] Subsection (2) of 443 provides that the Commission must not make a protected action ballot order in relation to a proposed enterprise agreement except in circumstances referred to in subsection (1), that is that an application is made under s.437 of the Act and the Commission is satisfied that the applicant is genuinely trying to reach agreement. Accordingly, a protected action ballot order in the terms applied for by RAFFWU cannot be made and the application is dismissed.

[56] An order to this affect has been separately issued in PR771022.

COMMISSIONER

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<PR771021>

[1] Email from Respondent to Registry - 1:11pm 2 February 2024,

[2] Respondents' Outline of Submissions, [27].

[3] Ibid, [28].

[4] Ibid [28] – [29].

[5] Ibid [33].

[6] Witness statement of Mr Robert Rondinelli, [8], [13] – [14], [17] – [18].

[7] Witness statement of Nicholas Barkatsas, [59], attachment 29, and other than briefly stating at the time of the first PABO which was withdrawn that it would seek coverage of salaried employees except for store managers.

[8] Witness statement of Nicholas Barkatsas, [59] – [60] and attachments 29 and 30.

[9] Ibid [61].

[10] Ibid [62].

[11] Respondents' Outline of Submissions, [35].

[12] Ibid [36].

[13] Applicant's Outline of Submissions, [3] and [28].

[14] Ibid [5].

[15] Ibid [11].

[16] Ibid [13].

[17] Witness statement of Josh Cullinan, [6].

[18] Ibid [23] – [32] and Op Cit [17]

[19] Part 2.1 of the Form F34 - Application for a protected action ballot order.

[20] Part 3.2 of the Form F34B - Declaration in support of an application for a protected action ballot order.

[21] Witness statement of Nicholas Barkatsas, attachment 3.

[22]Witness statement of Nicholas Barkatsas, attachment 4.

[23] Witness statement of Nicholas Barkatsas, attachment 5.

[24] *Maritime Union of Australia v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894 [18].

[25] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

[26] [2022] FWCFB 204, [37] and [40].

[27] *Total Marine Services Pty Ltd v MUA* [2009] FWAFB 368, [31].

[28] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53, [58].