



VICTORIAN BAR

Industrial Bar Association Industrial Law Update 2016

Recent developments regarding applications for
protected action ballot orders under s437

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PABO applications under s.437

- Fair, simple and democratic process...to determine whether employees wish to engage in particular protected industrial action: s436
- FWC must, as far as practicable, determine within 2 working days: s441
- FWC Annual Report FY 2015-16:
 - First listing: 50% w/i 4 days; 90% w/i 8 days
 - Determination: 50% w/i 6 days; 90% w/i 8 days

PABO applications under s.437

- Application cannot be made until Notification Time: s437(2A) [December 2015 amendments]
- Must grant if s443 satisfied (and not otherwise)
- s443(1)(a): application made under s437
- s443(1)(b): FWC satisfied that applicant has been & is genuinely trying to reach agreement (**GTRA**)
- Ballot agent: AEC/alternative ballot agent
- Exceptional circumstances – s414 notice period: s443(5)

s437(2A) - application cannot be made until notification time

- *MUA v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894 (31 March 2016) – disagreement as to scope (and what happens if no valid NERR?)
- *CFMEU v AGL Loy Yang Pty Ltd* [2016] FWCFB 2878 (11 May 2016) – Multiple (related) employers, only one agreed to bargain

s437(2A) - application cannot be made until notification time (cont)

- *Swinburne University of Technology v NTEIU* [2016] FWCFB 6838 (27 Sep 2016) – Employer issued NERR for multi-enterprise agreement (s437(2)(b))
- *AMIEU v Coles Supermarkets Pty Ltd* [2016] FWC 4870 (19 Jul 2016) (Platt C) – agreement made then quashed; no subsequent agreement to re-commence bargaining

s443(1)(b) : “genuinely trying to reach agreement”

- *MMA Offshore Vessel Operations Pty Ltd v MUA* [2016] FWCFB 3957
- *Applied Esso Australia Pty Ltd v AMWU* (2015) 247 IR 5 at [35]; [57]-[59] - No single decision rule. Take account of all of the facts and circumstances of the particular case.
- See also *Total Marine Services Pty Ltd v MUA* (2009) 189 IR 407 at [31]-[32]

s443(1)(b): Application of *Esso* and *Total Marine*

- *CFMEU v AGL Loy Yang Pty Ltd* [2016] FWC 4364 (1 July 2016) (Clancy DP)
- Upheld on appeal: *CFMEU v AGL Loy Yang Pty Ltd* [2016] FWCFB 6332 (21 September 2016)

s443(1)(a): application made under s437

- s437(3)(a): specify group of employees to be balloted
- s437(3)(b): specify question(s), including nature of the proposed industrial action
- Clarity/Ambiguity: applied *John Holland Pty Ltd v AMWU* [2010] FWAFB 526
- *IEUA v All Hallows' School Limited* (2016) 256 IR 244; [2016] FWCFB 262
- *ASU v Launch Housing* [2016] FWC 5685 (Bissett C)
- See also *Ambulance Victoria v United Voice* (2014) 245 IR 375 (Tracey J) and *UFU v Easy* [2013] FCA 763 (Ross J); cf *Mornington Peninsula Shire Council* (2011) 210 IR 419

Ballot agent: AEC or alternative

- s444: FWC may appoint a ballot agent other than Australian Electoral Commission (must be a fit and proper person)
- *CFMEU v AGL Loy Yang Pty Ltd* [2016] FWC 7839 (28 October 2016) (Cirkovic C) - must be a proper basis to displace the AEC as ballot agent
- See also *Grocon Pty Ltd* [2012] FWA 1716; *Pelican Point Power* [2010] FWA 3571; *CFMEU v O'Brien Glass Industries Ltd* [2012] FWA 4500
- AEC conducts postal and attendance ballots, but not electronic ballots

s443(5) – Extension of notice period

- s443(5) – if FWC satisfied that “*exceptional circumstances justifying the period of notice referred to in s414(2)(a) being longer than 3 working days*” ... may specify up to 7 working days
- FWC consistently refers to *CEPU v Australia Postal Corporation* (2007) 167 IR 4 (Lawler VP)

Conclusion

- Most applications result in an order – often on the papers
- Dismissals based on GTRA rare – no ‘decision rule’ - need to look at all of the facts and circumstances
- Problems with questions – amend: ss586, 599
- Filing application before ‘notification time’ is fatal to the application