Senate Standing Committee on Education Employment and Workplace Relations

QUESTIONS ON NOTICE
Additional Estimates 2010-2011

Outcome 5 - Workplace Relations

DEEWR Question No.EW1026_11

Senator Abetz asked on 23/02/2011, Hansard page 121.

Protected action ballots

Question

WR - ANALYSIS OF JJ RICHARDS & SONS PTY LTD V TRANSPORT WORKERS UNION OF AUSTRALIA [2010] FWAFB 9963 AND THE EXPLANATORY MEMORANDUM TO THE FAIR WORK ACT 2009

Senator ABETZ—... Can I take you to the case of JJ Richards and Sons Pty Ltd v Transport Workers Union of Australia [2010] FWAFB 9963.
Mr Kovacic—Yes.
Senator ABETZ—It has been put to me that the case suggests that unions may take protected industrial action before bargaining has commenced, even if no majority support determination has been made. Once again, is this full bench decision, irrespective of how I may have characterised it, one which the government is accepting as a reflection of what was intended in the legislation?
Mr Kovacic—The threshold requirement in terms of the application for a protected action ballot order is that Fair Work Australia needs to determine whether or not the applicant has genuinely been trying to reach agreement, and that is an approach that not only is reflected in the Fair Work Act but was previously reflected in the Workplace Relations Act.
Whether or not that threshold test is met will be determined on the facts of a particular matter. In the JJ Richards case, Fair Work Australia had determined initially that that test was met. On appeal, that decision was overturned on a technicality. More recently, a subsequent application from the TWU has been successful in terms of a protected action ballot order.
In terms of the issue that you raised, it has never been the case under workplace relations law that bargaining has to have commenced before an application for a protected action ballot order could be made.
Senator ABETZ—If that is the case, could the department—and time is getting short—undertake for me, please, an analysis of the explanatory memorandum to the Fair Work Act at paragraphs 1,630 and 1,708, in which we are told that protected action may only be taken after bargaining has commenced.
Mr Kovacic—We will take that on notice.
Senator ABETZ—If that was the legislative intent. The suggestion is that bargaining had commenced justbecause the union had asked the employer to commence bargaining; but, in the absence of the union proposing any specific terms of the agreement or issuing a log of claims on the employer, that seems to be—
Mr Kovacic—Can I just again reiterate that the threshold test that an applicant needs to satisfy Fair Work
Australia of is that they have genuinely been trying to reach agreement, and that is something that is determined on the facts of a matter. But we will take the question

on notice.
Senator ABETZ—Yes, but we are told in the explanatory memorandum 'only after bargaining has commenced'. All that had happened in this case was that the union had said, 'We want to have a chat, but we still don't know what we're going to put in our log of claims and we don't have any specific terms to put to you.'
Ms Paul—We have taken that on notice.
Senator Chris Evans—It was a live question, and this was debated at a meeting I had with some of the industry and union groups. One of the questions that arise there is what you do if an employer refuses to meet or bargain at all.
Senator ABETZ—That is another issue, but in this case the union just took it upon themselves to engage in the activity that they—
Senator Chris Evans—I am just saying that, in terms of your earlier point, it raises that question.
Senator ABETZ—But not if the employer is not given anything to respond to other than being told, 'We want to bargain with you but we don't have a log of claims, we don't have any specific issues.' The full bench of Fair Work Australia tells us that is good faith bargaining, but I do not think any punter in the street would interpret it as such, and it seems to be in conflict with that which was in the explanatory memorandum. As Ms Paul said, you have taken it on notice—
Ms Paul—We have.

Answer

Under section 443 of the *Fair Work Act 2009* (FW Act) Fair Work Australia (FWA) must make a protected action ballot order if it is satisfied that the applicant is, and has been, genuinely trying to reach an agreement with the employer. This was also a requirement under the protected action ballot provisions of the *Workplace Relations Act 1996* (WR Act). Under section 438 of the FW Act, if an existing enterprise agreement covers employees who would be covered by a proposed enterprise agreement, an application for a protected action ballot order cannot be made earlier than 30 days before the nominal expiry date of the existing enterprise agreement.

A considerable body of case law has developed under both the WR Act and the FW Act about what is meant by *genuinely trying to reach an agreement* in the context of protected action ballot applications. Ultimately this is a question of fact that is to be determined by FWA based on the circumstances of particular negotiations.

Section 443 of the FW Act does not require an applicant for a protected action ballot to demonstrate that an employer is under an obligation to bargain. This is because an applicant may be genuinely trying to reach an agreement even though the employer will not enter into discussions.

Federal workplace relations laws have never required, as a prerequisite to employees being able to take protected industrial action,that an employer has first agreed (or been required) to bargain collectively.

Paragraphs 1630 and 1708 of the Explanatory Memorandum to the Fair Work Bill 2008 are part of introductory comments to Division 2 (protected industrial action) and 6 (suspension or termination of protected industrial action) of Part 3-3. In these paragraphs, the reference to bargaining is a reference to the process of pursuing an enterprise agreement. The term is used in these contexts to distinguish between industrial action connected with agreement-making (which may be protected) and industrial action that is not so related (which is not protected).