

Article Information

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When is it worth opposing protected action ballot orders in Fair Work Commission proceedings?

Protected Action Ballot Orders (PABOs) involve the Fair Work Commission scrutinising the types of protected industrial action put to a workforce for approval. The Commission has reaffirmed that an employer which anticipates deliberately loose descriptions of industrial action will cause later problems, particularly partial work bans, should be ready to raise their concerns in the Commission armed with the appropriate evidence.

Protected action can arise in many forms and pose a challenge to an employer's operation of their business. The potential for disruption and other risks, such as operational critical or safety risks, are even more clear when that protected action includes proposed partial work bans which are devoid of detail.

In the recent decision of [Transport Workers' Union of Australia v Prosecur Australia Pty Ltd \[2021\] FWCFB 1562](#), the employer successfully defended an appeal against a decision at first instance concluding that a particular ballot question did not describe the proposed industrial action in a way that employees would be capable of responding. The single-member Commission decision in [Transport Workers' Union of Australia v Prosecur Australia Pty Ltd \[2021\] FWC 645](#) had determined that the proposed question failed to express the proposed action with sufficient clarity to enable the employees to make an informed choice as to whether to support the proposed action.

The TWU wanted majority approval from employees to organise a range of protected action including "*an unlimited number of periodic or indefinite partial work bans*". Without more, this did not say anything about what *form* those partial work bans could take.

Prosecur is a cash transportation business which carries with it the risk of significant safety issues. Prosecur employees often carry firearms to mitigate the safety risks. Prosecur argued that the proposed partial work bans proposed by the TWU as being of "*an unlimited number of periodic or indefinite work bans*" did not provide employees sufficient clarity as to enable them to consider whether to support the proposed action being authorised. The description of the proposed bans did not exclude bans on employees undertaking safety and security measures such as the wearing of body armour, carrying of firearms and other procedures relating to cash transportation. Any such bans Prosecur said would pose a significant safety risk in the circumstances where cash transportation is a potential target for criminal activity.

The TWU on appeal argued that the first instance decision was wrong because the *Fair Work Act 2009* only required the proposed action described to include the "nature" of the industrial action. However, the Full Bench confirmed that the scheme under the Act required a question put to employees for approval to describe the industrial action "*in such a way that employees are capable of responding to them*". In turn the Full Bench held that the potential for the ambiguous term "*partial work bans*" to affect safety did not allow employees a proper opportunity to choose to support the authorisation of protected industrial action.

The Commission on appeal has emphasised a key practical consideration for employers. Rather than allowing a PABO to be sought based on ambiguous definitions of protected industrial action (and trying to limit the impact of the action based on safety issues arising as a result of later specific bans), the Commission emphasised that the point at which any concern about ambiguity or safety raised if the action were later approved is when the PABO is first applied for.

If a particular form of question that may lead to later issues is opposed, an employer needs to be prepared to present evidence or other material which demonstrates that because of the nature of work that its employees perform (or other relevant circumstances), employees may not be able to provide a considered response to the proposals.

PABO applications are usually dealt with by the Commission routinely and quickly. The opportunity to point out a problem will be fleeting. Employers need to be in a position to quickly mount a case that identifies problems with deliberately loose drafting that, if allowed to proceed, would give scope for an employee bargaining representative to later 'interpret' that a broad range of protected action has been approved by the workforce.

Key takeaways

- As part of enterprise bargaining planning, identify likely targets for partial work bans.
- Where a ban is anticipated that will impact on employees being asked to approve a PABO, develop material which shows the potential impact and why it should matter to employees
- When or if a PABO is sought, test the proposed definitions of action for whether they could impact employees in these ways and oppose the PABO if those are not clear on what employees are asked.