Federal Court of Australia

Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd [2021] FCAFC 188

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| File number: | NSD 172 of 2021 |
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| Judgment of: | **BROMBERG, WHEELAHAN AND SNADEN JJ** |
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| Date of judgment: | 27 October 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** –third-partyapplication for suppression order prohibiting publication or disclosure of evidence and submissions pursuant to ss 37AF and 37AG of the *Federal Court of Australia Act 1976* (Cth) **–** order sought on the basis that disclosure or publication would undermine confidentiality orders made by the Fair Work Commission, prejudice government tendering processes and cause potential breaches of copyright – order sought found not to be necessary to prevent prejudice to the proper administration of justice  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 172, 593, 594 *Federal Court of Australia Act 1976* (Cth) Pt VAA, ss 37AE, 37AF, s 37AG |
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| Cases cited: | *Hogan v Australian Crime Commission* (2010) 240 CLR 651*Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 23 |
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| Date of hearing: | Determined on the papers |
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| Solicitor for the Applicant: | Hall Payne Lawyers |
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| Solicitor for the First to Third Respondents: | Australian Business Lawyers and Advisors |
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| Solicitor for the Fourth and Fifth Respondents: | The Fourth and Fifth Respondents filed a submitting notice |
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| Solicitor for Transport for NSW (non-party): | Transport for NSW |

ORDERS

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|  | NSD 172 of 2021 |
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| BETWEEN: | AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNIONApplicant |
| AND: | BUSWAYS NORTHERN BEACHES PTY LTD First RespondentBUSWAYS EASTERN SUBURBS PTY LTDSecond RespondentBUSWAYS NORTH WEST PTY LTD (and others named in the Schedule)Third Respondent |

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| order made by: | BROMBERG, WHEELAHAN AND SNADEN JJ |
| DATE OF ORDER: | 27 October 2021 |

THE COURT ORDERS THAT:

1. The interlocutory application of 13 August 2021 made by Transport for NSW is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. In this proceeding, the applicant (**ARTBIU**) seeks judicial review of a decision made by the Fair Work Commission (**FWC**) to approve an enterprise agreement to which the respondents (**Busways**) are parties. The enterprise agreement was approved as a “greenfields agreement” which satisfied the requirements of s 172(2)(b) of the *Fair Work Act 2009* (Cth) (**FW Act**). The central issue in the proceeding is whether a jurisdictional fact required by s 172(2)(b), being whether the “agreement relates to a genuine new enterprise that [Busways] are establishing or propose to establish”, existed. For the purpose of the proceeding, various documents dealing with several “Request for Tender” processes conducted by a New South Wales statutory corporation called Transport for NSW (**request for** **tender documents**) were tendered at the hearing. Some were tendered by Busways and others by the ARTBIU.
2. By an interlocutory application of 13 August 2021, Transport for NSW seeks leave to appear in the proceeding and seeks orders that would suppress (subject to an exception for the legal representatives of the parties) the request for tender documents, as well as extracts of affidavit evidence and written submissions filed in this Court and an unredacted copy of the reasons for judgment of the FWC, each of which refers to information in the request for tender documents (**Documents**).
3. Transport for NSW is or has been in the process of outsourcing bus services in regions of Greater Sydney. To facilitate this, Transport for NSW has been conducting tender processes for several of those regions. Busways tendered for the contract to provide bus services for some of these regions. As part of the request for tender processes, Transport for NSW provided Busways with information about the services that would be required under the relevant bus services contract, information about the tendering requirements and a draft contract. That information was provided to Busways subject to confidentiality undertakings and through a secure virtual “data room” in which all persons who accessed the data room were required to sign confidentiality deeds in favour of Transport for NSW confirming that they would maintain the confidentiality of the documents accessed.
4. Most, but not all, of the request for tender documents were tendered by Busways in the proceeding before the FWC. On the application of Busways, the FWC made an order on 24 November 2020 (**FWC Order**) to the effect that the documents tendered by Busways and those parts of the written outline of submissions filed by the parties in that proceeding which refer to or republish any of the content of the documents tendered not be published or otherwise disclosed other than to the legal representatives of any party to the proceeding and one other named individual.

## Leave to appear

1. The interlocutory application made by Transport for NSW has been made in circumstances where the Court essentially invited it to be made if Transport for NSW considered it to be warranted. At the hearing of the application for judicial review, an application for the Documents to be suppressed pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**Act**) was made by Busways broadly on the basis that the Documents contained confidential information of Transport for NSW. That application was rejected but on the basis that the Court would provide Transport for NSW an opportunity to seek a suppression order in relation to the Documents, should it seek to do so. It follows that leave to appear should be granted in order for Transport for NSW to make its application.

## Should a suppression order be made?

1. The Court is empowered by s 37AF of the Act to make a suppression or non-publication order to prohibit or restrict the publication or other disclosure of information including information that comprises evidence or information about evidence. That power is only to be exercised on the basis of the permitted grounds under Pt VAA of the Act. Relevantly those grounds are set out in s 37AG(1) as follows:

(1) The Court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

1. Furthermore and as s 37AE provides, in deciding whether to make a suppression order or non‑publication order, the Court “must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”.
2. In *Hogan v Australian Crime Commission* (2010) 240 CLR 651, the High Court considered the predecessor provision to s 37AG(1)(a) of the Act. The Court emphasised that the word “necessary” in the phrase “necessary in order to prevent prejudice to the administration of justice” is “a strong word” (at [30]). As the Court further observed at [31], the making or continuation of an order that appears “to be convenient, reasonable or sensible, or to serve some notion of the public interest” is not a sufficient basis for the making of a suppression or non‑publication order.
3. The application made by Transport for NSW solely relies on the ground specified by s 37AG(1)(a) of the Act that the order is necessary to prevent prejudice to the proper administration of justice. There are three bases relied upon by Transport for NSW to contend that the suppression order it seeks is necessary to prevent prejudice to the proper administration of justice:
4. the need to preserve the confidentiality regime created by the FWC Order in respect of so many of the Documents as fall within the scope of that order and, in respect of those of the Documents that do not fall within that regime, the need to avoid confusion and the consequent risk of a breach of the FWC Order;
5. the avoidance of potential prejudice to the request for tender processes being conducted by Transport for NSW; and
6. the need to protect Transport for NSW from the potential that its copyright in the request for tender documents will be infringed.
7. Busways made submissions that were in substantially similar terms to those of Transport for NSW. The following disposal of the arguments of Transport for NSW also addresses the submissions of Busways.
8. The first ground relies upon the FWC Order. That order was made by the FWC pursuant to the power conferred upon it by s 594 of the FW Act. The FWC also relied on s 593 of the FW Act, but for present purposes it is not necessary to distinguish the operation of that provision from s 594. Section 594 provides:

(1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:

(a) evidence given to the FWC in relation to the matter;

(b) the names and addresses of persons making submissions to the FWC in relation to the matter;

(c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;

(d) the whole or any part of its decisions or reasons in relation to the matter.

(2) Subsection (1) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

1. As will be apparent, that provision is directed to evidence or information given to the FWC in proceedings before it. It imposes a very different standard of satisfaction for the making of a suppression or non-publication order than that imposed by Div 2 of Pt VAA of the Act in relation to evidence and information put before this Court.
2. We do not construe that provision as intending to empower the FWC to make an order the scope of which would extend to suppressing or restricting access to information tendered in a proceeding before this Court. This Court has its own power to control the extent of access to be provided to material tendered or otherwise utilised in a proceeding before it. The exercise of that power is regulated by the specific and prescriptive regime established by Div 2 of Pt VAA of the Act. The power conferred on the FWC by s 594 must be construed harmoniously with Div 2 of Pt VAA of the Act. Once that is done, it must be accepted that s 594 was not intended to intrude directly or indirectly upon the operation of the specific regime for restricting access to information received in a proceeding in this Court.
3. Those observations give rise to two conclusions, each of which results in the rejection of the contention of Transport for NSW that the FWC Order provides a justifiable basis for the suppression order it seeks. *First*, because s 594 does not empower the FWC to make an order which would operate in respect of information sought to be, or which is, tendered in proceedings before this Court, we do not consider that the FWC Order has that effect. *Second*, even if the FWC Order does have that effect, we do not consider that it is necessary to prevent prejudice to the proper administration of justice for a suppression order to be made by this Court to protect the effective operation of the FWC’s Order in relation to material placed before this Court. To the contrary, to justify a suppression order made by this Court on the basis of a suppression order made by the FWC under s 594 of the FW Act would undermine the operation of the specific and more restrictive regime for the making of suppression and non-publication orders provided for in relation to proceedings in this Court and would thereby prejudice the proper administration of justice.
4. We turn then to the second ground advanced by Transport for NSW.
5. The point here sought to be made by Transport for NSW is that any unauthorised disclosure of the request for tender documents has the potential to prejudice the ongoing process of outsourcing the provision of bus services.
6. This contention refers to the fact that some or all of the request for tender documents were provided to Busways in confidence. However, there is no submission made that it is necessary for the Court to enforce any duty of confidence owed by Busways as a means of preventing prejudice to the proper administration of justice. Rather, the submission relies on the fact that the request for tender documents have only been disclosed by Transport for NSW subject to confidentiality undertakings as a means of demonstrating that the information in those documents is inherently confidential. The circumstances under which information has been disclosed, however, does not of itself establish that the information is inherently confidential. It does tend to establish that the information is not in the public domain. However, as Edelman J said in *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [9]:

The mere fact that information relevant to a proceeding is not in the public domain will rarely be a sufficient basis to suppress its publication.

1. Nor will the fact that information is truly confidential be of itself sufficient to justify a suppression order. The fact that information is inherently confidential does not provide an answer to the critical question as to whether an order is necessary to prevent prejudice to the administration of justice: *Hogan* at [38].
2. We are not persuaded by the evidence relied upon by Transport for NSW that the disclosure of the Documents is likely to materially compromise the commercial interests of Transport for NSW or the exercise of its statutory functions. The potential prejudice suggested by Transport for NSW is speculative and stated at a high level of generality. Most of the assertions made suggest that prejudice will potentially result because some persons may misunderstand an aspect of the request for tender process or misunderstand the impact of outsourcing upon the future provision of bus services.
3. However, even if the potential for prejudice be real, there is no basis for supposing that adequate measures could not reasonably be taken by Transport for NSW to avoid any potential misunderstanding or prejudice that may flow from the limited extent of disclosure of the Documents, should the order sought not be made.
4. In any event, we are not persuaded that the potential for prejudice, even presuming it to be real and largely unavoidable, is sufficiently substantial to justify the order sought in circumstances where we must be satisfied that such an order is necessary to prevent prejudice to the proper administration of justice, bearing in mind that a primary objective of the administration of justice is to safeguard the public interest in open justice (see s 37AE of the Act).
5. Finally, Transport for NSW relied on its copyright in the request for tender documents. It contended that non-disclosure was appropriate to prevent any potential for its copyright to be infringed as a result of disclosure. The submission is unpersuasive. There are appropriate legal means available to Transport for NSW to protect its copyright in the request for tender documents. A suppression order which would compromise the public interest in open justice is not one of them.
6. For those reasons, the interlocutory application should be dismissed.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromberg, Wheelahan and Snaden. |

Associate:

Dated: 27 October 2021

SCHEDULE OF PARTIES

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|  | NSD 172 of 2021 |
| Respondents |  |
| Fourth Respondent: | TRANSPORT WORKERS' UNION OF AUSTRALIA |
| Fifth Respondent: | FAIR WORK COMMISSION |