



# DECISION

*Fair Work Act 2009*

s.468A - Application for an eligible protected ballot agent

## **Crowd Faction Pty Limited**

(B2023/684)

DEPUTY PRESIDENT HAMPTON

ADELAIDE, 24 JULY 2023

*Application for Crowd Faction Pty Limited to become an eligible protected action ballot agent.*

### **1. The nature of this application**

[1] Crowd Faction Pty Limited (**Crowd Faction**) has applied under s.468A of the *Fair Work Act 2009 (Act)* for approval as an eligible protected action ballot agent. This application, and the concept of approved eligible protected action ballot agents, takes place in the context of certain amendments to the Act that were introduced by virtue of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Amending Act)*. These changes commenced on 6 June 2023 and amongst other matters, impact upon the making of Protected Action Ballot Orders (**PABO**) and the approval of protected action ballot agents who might conduct the ballot should a PABO be made.

[2] I deal with the statutory context and the approval requirements below. In short, where an applicant is approved by the Commission as an eligible protected action ballot agent, they will be authorised to conduct the ballots of employees required when a PABO is issued. Further, where named in the PABO application and proposed orders, the Commission will, subject to the Act, be obliged to, in effect, appoint them to conduct the ballot concerned.

[3] The Act sets out the approval requirements, which are in effect, that the applicant is a fit and proper person to conduct protected action ballots.

[4] This application was lodged on 10 July 2023. Shortly thereafter, the Commission stated on its website that Crowd Faction had made the application and that interested parties could make submissions before the closing date of 18 July 2023. Earlier, the President of the Commission issued a public Statement<sup>1</sup> advising that this would be the process for dealing with such applications and that the details would be available on the website.

[5] No submissions have been received in relation to this application. In any event, it remains necessary for the Commission to consider whether Crowd Faction has established that

it is entitled to apply to be an eligible protected action ballot agent and is a fit and proper person for that purpose, and to ultimately determine whether Crowd faction should be approved.

[6] For reasons that are set out below, I am satisfied that I should approve the application.

## **2. The statutory context and the nature of the applicant as an eligible protected action ballot agent**

[7] The Act relevantly provides as follows:

### **“443 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.

#### **444 Ballot agent and independent advisor**

- (1) This section applies if the FWC must make a protected action ballot order under subsection 443(1).

##### *Protected action ballot agent*

- (1A) The FWC must, in accordance with subsections (1B) to (1D) of this section, decide the person or entity that is to be the protected action ballot agent for the protected action ballot.

- (1B) The person or entity must be the person or entity specified in the application for the protected action ballot order as the person or entity the applicant wishes to be the protected action ballot agent, unless:

- (a) the person or entity specified in the application does not meet the requirements of subsection (1C) (unless subsection (1D) applies); or
- (b) the FWC is satisfied that there are exceptional circumstances that justify another person or entity being the protected action ballot agent.

- (1C) The person or entity must be an eligible protected action ballot agent.

- (1D) Subsection (1C) does not apply in relation to a person if the FWC is satisfied that:

- (a) there are exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent; and
- (b) the person is a fit and proper person to conduct the ballot; and
- (c) any other requirements prescribed by the regulations are met.

Note: Other than the Australian Electoral Commission, an entity that is not a person cannot be the protected action ballot agent for a protected action ballot.

- (2) The regulations may prescribe:
- (a) conditions that a person must meet in order to satisfy the FWC, for the purposes of paragraph (1D)(b), that the person is a fit and proper person to conduct a protected action ballot; and
  - (b) factors that the FWC must take into account in determining, for the purposes of paragraph (1D)(b), whether a person is a fit and proper person to conduct a protected action ballot.

##### *Independent advisor*

- (3) The FWC may decide that a person (the *other person*) is to be the independent advisor for a protected action ballot if:
- (a) the FWC has decided that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the ballot; and
  - (b) the FWC considers it appropriate that there be an independent advisor for the ballot; and
  - (c) the FWC is satisfied that:
    - (i) the other person is sufficiently independent of each applicant for the protected action ballot order; and
    - (ii) any other requirements prescribed by the regulations are met.”

[8] The new approval requirements for eligible protected action ballot agents are set out in the following terms.

[9] Section 12 of the Act contains the following relevant definitions:

*eligible protected action ballot agent*: see subsection 468A(1).

*protected action ballot agent* for a protected action ballot means the person or entity that conducts the protected action ballot.

[10] Section 468A of the Act provides:

**“468A Eligible protected action ballot agents**

- (1) Each of the following is an eligible protected action ballot agent:
- (a) the Australian Electoral Commission;
  - (b) a person approved by the FWC under subsection (2).
- (2) For the purposes of paragraph (1)(b), the FWC may, in writing, approve a person as an eligible protected action ballot agent if the FWC is satisfied that:
- (a) the person is a fit and proper person to be an eligible protected action ballot agent; and
  - (b) any other requirements prescribed by the regulations are met.
- (3) The regulations may prescribe:
- (a) conditions that a person must meet in order to satisfy the FWC that the person is a fit and proper person to be an eligible protected action ballot agent; and
  - (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to be an eligible protected action ballot agent.

- (4) The FWC must, at least every 3 years after it approves a person as an eligible protected action ballot agent, consider whether the FWC remains satisfied that the person meets the requirements mentioned in subsection (2).
- (5) If, after considering the matter under subsection (4), the FWC is no longer satisfied that an eligible protected action ballot agent meets the requirements mentioned in subsection (2), the FWC must take:
  - (a) any action prescribed by the regulations; and
  - (b) any other action the FWC considers appropriate.”

[11] I observe that no regulations have been made for the purposes of s.468(2)(b) of the Act. This means that the Commission must consider whether the applicant, in this case Crowd Faction, is a fit and proper person by reference to the general concept unaided by additional requirements or considerations. If satisfied, a discretion arises to approve the application.

[12] The Explanatory Memorandum associated with the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Explanatory Memorandum)* helpfully provides an overview of the purpose of the changes to introduce the notion of an eligible protected action ballot agent as follows:

“841. These amendments remove the AEC as the default PAB agent and empower the FWC to ‘pre-approve’ a person as an ‘eligible PAB agent’. More than one person may be approved by the FWC. The AEC is defined as an ‘eligible PAB agent’ and does not need to be approved by the FWC. In effect, there may be a panel of alternative agents who can be appointed as an alternative to appointing the AEC. The amendments also set out the requirements when appointing a PAB agent that is not the AEC. These amendments would require the FWC to regularly review and consider whether it remains satisfied that the eligible PAB agent or agents meet the requirements at least every three years.

842. This item would amend section 12 of the FW Act by inserting a new signpost definition of ‘eligible PAB agent’. This new definition is particularly relevant to determining who is an eligible PAB agent for the purposes of Division 8 of Part 3-3 of the FW Act. The signpost definition is required due to the creation of a panel of PAB agents proposed by Item IA16.”

[13] For reasons set out in a recent decision<sup>2</sup> of the Commission, I find that a “person” in s.444, s.468A and related provisions includes a corporation. This means that an eligible protected action ballot agent may be an individual (natural person), a corporation, or the Australian Electoral Commission (AEC), which is, in effect, approved directly by the Act. A non-corporate or non-individual entity cannot be considered for approval as an eligible protected action ballot agent by the Commission.

[14] Crowd Faction, as a corporation, is eligible to apply and be approved as an eligible protected action ballot agent.

### **3. Is Crowd Faction a fit and proper person?**

[15] I begin with the consideration of what is a fit and proper person for present purposes.

[16] Section 444 and associated provisions of the Act aim to protect the interests of the employees participating in the ballot and those of the employer(s) involved. Further, there is a statutory imperative arising from the scheme of the Act that any ballot that might authorise the taking of industrial action be conducted in a proper, democratic, prompt and robust manner by agents that are appropriate to undertake that task.

[17] The Commission has found<sup>3</sup> that the assessment of whether a proposed protected action ballot agent is a fit and proper person should take place in that context. The test is whether a person is fit and proper to conduct protected action ballots, not whether they are fit and proper in some abstract sense. Further, and without being definitive, considerations that might inform whether an applicant is a fit and proper person to be an eligible protected action ballot agent might include (where relevant):

- The qualifications and experience of the individuals that lead the organisations and/or those that are intended to conduct the ballots;
- The experience with conducting ballots and the absence of issues (non-conformances) evident from that experience;
- The systems that are in place to ensure that ballots are conducted fairly, democratically, and expeditiously by fit and proper individuals and which ensure the integrity and privacy of the information provided to them by the parties;
- General standing within the community including whether they have a record of non-compliance with workplace laws and the absence of criminal convictions; and
- Independence, or robust systems to ensure proper separation, from the interests and influence of those whose members are being balloted and their employers.<sup>4</sup>

[18] Reference to “systems” above would include both information processes (technology and security arrangements) and staffing systems. In addition, findings made by the Commission as to whether the applicant is a fit and proper person for some equivalent ballot role or related purpose would also be relevant.

[19] As to the assessment of the fit and proper person requirement in this case, I observe that unlike each of the eligible protected action ballot agents approved to date, the Commission has not previously been required to consider whether Crowd Faction is a fit and proper person to conduct protected action ballots. That is, Crowd Faction has not previously been requested to conduct PABO ballots under the Act. I make no adverse finding in that regard; however, this means that the assessment must be made unaided by previous directly relevant decisions of the Commission.

[20] The application was accompanied by Declarations from Mr Martin Cartwright, Director of Crowd Faction. The material now before the Commission includes confirmation of extensive

independent ballot and other professional experience of Crowd Faction including in relation to enterprise agreement approvals and various elections. That material also confirms the processes in place to ensure that all the individuals involved in the conduct of the ballots are, and will be, fit and proper persons for that purpose. This includes evidence that all of the individuals associated with its business, including those who would conduct an PABO ballots, hold police clearances and undertake appropriate training and induction. Further, the Directors of the business have never been charged or convicted of a criminal offence, also hold police clearances, and have not been subject to adverse findings in relevant proceedings. In the case of Mr Cartwright, I observe that he has previously been found by the Commission and its predecessors to be a fit and proper person for various purposes under the Act including right of entry<sup>5</sup> and related matters. There is also no indication that any adverse findings have been made in that connection.

[21] The material before the Commission also confirms to my satisfaction, general consistency with the considerations set out earlier. This includes details about the nature of the information and other systems to be used for the ballots of various types, and steps that will be taken to ensure that the ballots are conducted fairly, democratically, and expeditiously by fit and proper individuals. This involves, amongst other matters, the nature of the data storage systems and associated practices, the supervision and training of staff, and the independence of the organisation and those systems from the parties who are likely to be involved in future PABOs.

#### **4. Conclusions and approval**

[22] Crowd Faction is entitled to apply, and I have found that it is a fit and proper person to be approved as an eligible protected action ballot agent. I also consider that in all of the circumstances, I should approve it to act in that capacity under the terms of the Act.

[23] The application is approved. Crowd Faction is approved as an eligible protected action ballot agent under s.468A of the Act.

[24] Under s.468A(2) the approval must be in writing and this decision serves that purpose.

[25] This decision will be published, and the identity of Crowd Faction as an approved eligible protected action ballot agent set out on the Commission's website.

[26] In accordance with s.468A(4) of the Act, this approval will be reviewed by the Commission at least each 3 years to ensure that the Commission remains satisfied that Crowd Faction meets the requirements in s.468A(2).



DEPUTY PRESIDENT

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<sup>1</sup> Statement issued 5 June 2023.

<sup>2</sup> *Democratic Outcomes Pty Ltd T/A CiVS* [\[2023\] FWC 1400](#).

<sup>3</sup> *Ibid* at [41].

<sup>4</sup> *Ibid* at [42].

<sup>5</sup> Under s.512 of the Act.