[2024] FWC 1282 [Note: An appeal pursuant to s.604 (C2024/3143) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.426—Industrial action

Shoalhaven Starches Pty Ltd T/A Manildra Group
v
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
(B2024/530)

DEPUTY PRESIDENT SAUNDERS SYDNEY, 16 MAY 2024

Application by Shoalhaven Starches Pty Ltd T/A Manildra Group to suspend protected industrial action under s 426 of the Fair Work Act 2009 (Cth)

Introduction

[1] Shoalhaven Starches Pty Ltd t/a Manildra Group (***Manildra***) has made an application under s 426 of the *Fair Work Act 2009* (Cth) (***Act***) for an order that protected industrial action currently being taken by members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (***ETU***) who are employed by Endeavour Energy be suspended for 72 hours.

[2] The suspension is sought to enable the 'unlocking' of power switches at Manildra's site at Nowra/Bomaderry (***Site***) to enable Manildra to fully utilise two large gas turbines which it recently installed at the Site to generate power for the Site. This work can only be carried out by employees of Endeavour Energy. Endeavour Energy has agreed to carry out this work. However, it is unable to do so because of protected industrial action currently being taken by members of the ETU who work for Endeavour Energy (***Protected Action***). Endeavour Energy and the ETU (as bargaining representative for its employed members) are currently bargaining to replace the Endeavour Energy Enterprise Agreement 2021.

[3] In support of its application, Manildra called evidence from:

a. Ian Hanrahan, Chief Financial Officer of the Manildra Group;

b. Josh Coburn, Electrical Engineering Manager at the Site;

c. Tertius Jones, Site Manager of the Site; and

d. Emma Murison, Head of People & Culture, Endeavour Energy.

[4] The ETU relied on a witness statement made by James Miranda, Policy and Research Officer of the ETU. Mr Miranda was not required for cross examination.

[5] I have had regard to all the evidence relied on by the parties, together with their submissions.

[6] The matter was listed for final hearing quickly in light of the harm being suffered by Manildra. I heard the matter from 2pm until about 6:30pm on 15 May 2024.

[7] Given the urgency of the matter, my reasons for decision are somewhat shorter than would otherwise be the case.

Background

[8] The Manildra Group is an agribusiness with operations across Australia. The Site (operated by Manildra) is the largest wheat, starch and gluten plant of its type in the world. There is also an ethanol distillery at the Site. The Site mills about 45% of the flour used in Australia and is the biggest supplier in Australia of gluten and starch used in baking; glucose and starch used in confectionary production; and starch used in paper and cardboard production. It is the biggest supplier of ethanol used in petrol in Australia.

[9] Manildra employees 513 fulltime equivalent employees at the Site and is the third largest employer in the Shoalhaven region.

[10] Manildra recently completed construction of two gas turbines at the Site designed to provide all the power required by the operations conducted on the Site. The cost of construction of the turbines was approximately $250,000,000, about $180,000,000 of which was borrowed from an external funder (at a current interest rate of about 5.2%) and the balance was funded internally. The turbines have been fully commissioned and are ready to operate to their full capacity.

[11] Currently, the turbines at the Site are only able to supply the power requirements of about two-thirds of the Site. This is because of a transitional arrangement whereby there is in place a physical 'lock' on top of a 'locked open' switch (together, the ***Lock***). The locked open switch precludes the provision of power to the rest of the Site. As a result of the Lock, Manildra must purchase power for the other one-third of the Site from the electricity spot market.

[12] This Lock needs to be 'lifted' and re-installed at another position (just a few metres away) and then certain switches reset. Part of this work, including the moving of the physical lock, can only be carried out by authorised employees of Endeavour Energy. Once this work is completed, Manildra will be able to power 98% of the Site with the turbines.

[13] Endeavour Energy has informed Manildra that Endeavour Energy cannot perform this work because of the Protected Action and that it will require the Protected Action to be suspended for three days in order to prepare for and undertake the required work.

[14] The required work has been scheduled on 4 occasions – on 9 April 2024, 12 April 2024, 3 May 2024 and 9 May 2024 – but, on each occasion, was not carried because of the Protected

Action. The required work has been further rescheduled for 15, 16, and 17 May 2024, but is unlikely to be carried out because of the Protected Action. In addition, a recent safety issue has arisen whereby Manildra has been required to procure and lay more blue metal, as a safety measure, in the switch yard at the Site. This work is planned to be undertaken on 16 May 2024. The work needs to be supervised by an Endeavour Energy employee, but this task of supervising the work will not be impacted by the Protected Action.

[15] Manildra has been provided with copies of notices by the ETU of intention to take Protected Action up until 22 May 2024.

Legislative framework

[16] Section 426 of the Act provides:

> *Suspension of protected industrial action*
>
> (1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.
>
> *Requirement—adverse effect on employers or employees*
>
> (2) The FWC must be satisfied that the protected industrial action is adversely affecting:
>
> (a) the employer, or any of the employers, that will be covered by the agreement; or
>
> (b) any of the employees who will be covered by the agreement.
>
> *Requirement—significant harm to a third party*
>
> (3) The FWC must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:
>
> (a) a bargaining representative for the agreement; or
>
> (b) an employee who will be covered by the agreement.
>
> (4) For the purposes of subsection (3), the FWC may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to:
>
> (a) damage the ongoing viability of an enterprise carried on by the person; or
>
> (b) disrupt the supply of goods or services to an enterprise carried on by the person; or

(c) reduce the person's capacity to fulfil a contractual obligation; or

(d) cause other economic loss to the person.

Requirement—suspension is appropriate

(5) The FWC must be satisfied that the suspension is appropriate taking into account the following:

(a) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;

(b) any other matters that the FWC considers relevant.

Order may only be made on application by certain persons

(6) The FWC may make the order only on application by:

(a) an organisation, person or body directly affected by the protected industrial action other than:

(i) a bargaining representative for the agreement; or

(ii) an employee who will be covered by the agreement; or

(b) the Minister; or

(ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or

(bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or

(c) a person prescribed by the regulations.

[17] Section 427 provides:

Application of this section

(1) This section applies if the FWC is required or permitted by this Division to make an order suspending protected industrial action.

Suspension period

(2) The FWC must specify, in the order, the period for which the protected industrial action is suspended.

Notice period

(3) The FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

[18] In *CFMEU v Woodside Burrup Pty Ltd*,[1] a Full Bench of the Commission made the following observations in relation to the proper construction of the expression "significant harm" in s 426(3) of the Act:

> **[21]** In construing a provision of an Act, the task is to ascertain the intention of the parliament. The starting point is always the ordinary English meaning of the words of the provision. However, a provision of an Act must always be construed in the context of the Act as a whole and account must always be taken of the purpose of the Act: a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. Resort may be had to extrinsic materials, including the explanatory memorandum, to assist in ascertaining the purpose of an Act (the mischief it was intended to overcome and its purpose or objects) and in the particular circumstances identified in s.15AB of the *Acts Interpretation Act 1901* which, relevantly for present purposes, include to determine the meaning of a provision when the provision is ambiguous.
>
> **[22]** In *CIC Insurance Ltd v Bankstown Football Club Ltd* Brennan CJ, Dawson J, Toohey J and Gummow J observed:
>
> > "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."
> >
> > (footnotes omitted)
>
> **[23]** In *Project Blue Sky v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said:
>
> > "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*,

> Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."
>
> (footnotes omitted)

[24] As to the ordinary English meaning of the word "significant", as noted, by the Deputy President, the relevant ordinary English meaning, as defined in the Macquarie Dictionary, is "important; of consequence".

[25] Turning to the context of the Act as a whole, we note first that for many decades prior to the WorkChoices amendments to the *Workplace Relations Act 1996* (**WR Act**), the Australian Industrial Relations Commission and its predecessors had the power to settle (interstate) industrial disputes through compulsory arbitration. Where a dispute over terms and conditions of employment was resolved by arbitration this occurred through the making of an award, binding the disputants, that had statutory effect. That long standing power to settle disputes by compulsory arbitration was essentially removed by the WorkChoices amendments to the WR Act and has not been restored by the FW Act. Rather, enterprise bargaining may now be seen as a central component of the industrial relations regime provided for in the FW Act by which employees may act collectively to secure improvements in their terms and conditions of employment.

[26] Industrial action is defined broadly in s.19 of the FW Act. Section 408 defines "protected industrial action". Subject to various requirements, industrial action taken for the purpose of advancing claims for a proposed enterprise agreement is "protected industrial action". FW Act which confers immunity from civil action in relation to protected industrial action (s.415). The taking of industrial action that is not protected industrial action is effectively proscribed. Once an enterprise agreement has been made and approved, any industrial action taken by employees covered by the agreement before the nominal expiry date of the agreement will be unprotected (s.417). A person affected by unprotected industrial action that is happening, threatened pending, probable or being organised can apply to FWA for an order that the industrial action stop, not occur or not be organised. If FWA is satisfied that industrial action, that is not, or would not be, protected industrial action, is that happening, threatened pending, probable or being organised then FWA *must* make an order that the industrial action stop, not occur or not be organised (s.418). Contravention of such an order is prohibited and both civil remedies and injunctive relief are available for such a contravention (s.421) and, in the case of injunctive relief, with all the consequences that flow from breaching an injunction.

[27] Protected industrial action in support of claims for an enterprise agreement, as authorised by the FW Act, is the only lawful mechanism available to employees to achieve improvements to wages and conditions that an employer is not otherwise prepared to agree to.

[28] The FW Act makes provision for the suspension or termination of protected industrial action in certain circumstances. FWA has been given the power to suspend or terminate protected industrial action where such action

> (a) is causing or threaten to cause "significant economic harm" to any employer or employees who will be covered by the proposed enterprise agreement, provided such harm is imminent (s.423); or
>
> (b) has threatened, is threatening or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or to cause "significant damage" to the Australian economy or an important part of it (s.424); or

(c) is threatening to cause significant harm to a third party (that is, a person other than a bargaining representative for the proposed agreement or an employee who will be covered by the proposed agreement) (s.426).

[29] FWA also has the power to suspend protected industrial action to facilitate a 'cooling off'- that is, where the suspension would be beneficial to the bargaining representatives for the proposed agreement because it would assist in resolving the matters in dispute (s.425).

[30] Division 7 of Part 3-3 of the FW Act makes provision for the Minister to terminate protected industrial action by making a declaration that the industrial action is threatening, or would threaten, to endanger the life, the personal safety or health, or the welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it (s.431). When such a declaration is made the Minister may, for the purposes of removing or reducing such threat, give a direction that specified bargaining representatives or employees take, or refrain from taking, specified actions (s.433). Contravention of such a direction is prohibited and civil remedies are available (s.434).

[31] When protected industrial action is terminated, either by FWA pursuant to s.423 or s.424 or by the Minister pursuant to s.431, and agreement cannot be reached during a post-industrial action negotiating period, FWA is obliged to make a "workplace determination" in accordance with Part 2-5 of the FW Act whereby FWA arbitrates the improved terms and conditions that will apply for the period of operation of the workplace determination. Thus, a workplace determination represents a benefit that accrues to employees when the 'right' to take industrial action is removed through a termination of protected industrial action pursuant to s.423, s.424 or s.431.

[32] The power conferred by s.426 of the FW Act is a power to *suspend* protected industrial action on the basis of significant harm to a third party. There is no power conferred on FWA to *terminate* protected industrial action the basis of significant harm to a third party. Importantly, there is no provision for a workplace determination where an order suspending protected industrial action is made under s.426.

[33] The absence of a power in FWA to terminate protected industrial action on the basis of significant harm to a third party (as distinct from suspend protected industrial action on that basis) and the fact that only one suspension on that basis may be ordered are matters of particular significance in the present context. It is to be inferred that Parliament did not intend that protected industrial action should be terminated on the basis of harm to third parties unless that harm, actual or threatened, can be brought within the circumstances in identified in s.423 or s.424 or unless the Minister can be persuaded to make a declaration pursuant to s.430. This suggests, as is emphasised in the Explanatory Memorandum, that Parliament intended that a suspension under s.426 to provide a single instance of temporary respite for third parties from the adverse effects of protected industrial action.

[34] The objects of the FW Act are set out in s.3:

> **"3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

[35] The objects in (a), (f) and (g) are the objects most obviously engaged in the present context with the object in (f) of particular relevance.

[36] Since protected industrial action is confined to the process surrounding the making of agreements Section 171 which sets out the object of Part 2-4 of the Act is also relevant. Section 171 provides:

"**171 Objects of this Part**

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

[37] The objective to "facilitate good faith bargaining and the making of enterprise agreements" is of particular relevance. Like the Workplace Relations Act 1996 before it, the FW Act creates what the Explanatory Memorandum justifiably describes as a "right" in employees to take protected industrial action in support of claims for an enterprise agreement. That legislation may properly be seen as the means by which Australia has given effect to its important obligations under the International Labour Organisation Conventions particularly Convention no. 87

Freedom of Association and Protection of the Right to Organise 1948 and Convention No, 98 Right to Organise and Collective Bargaining 1949, both ratified by Australia in 1973.

[38] Viewed in the context of the Act as a whole, and having regard to the legislative purpose behind the regime in the FW Act for the taking of protected industrial action as a means of advancing claims for an enterprise agreement as the vehicle through which employees are able to seek to achieve improvement in their terms and conditions of employment, the precise meaning intended by the Parliament in using the expression "significant harm" in s.426(3) is unclear. The ordinary meaning provides insufficient guide to distinguish what harm is significant for the purposes of Section 426 since most industrial action threatens harm which is "important" or "of consequence" to the bargaining parties and also often to third parties. This ambiguity activates an entitlement to have regard to the Explanatory Memorandum pursuant to s.15AB(1)(b)(i) of the Acts Interpretation Act 1901.

[39] The Explanatory Memorandum for the FW Act includes the following in the introductory remarks in relation to Part 3-3 which deals with "Industrial Action":

> "**Division 6 – Suspension or termination of protected industrial action by FWA**
>
> 1706. Division 6 sets out the grounds upon which FWA may suspend or terminate protected industrial action organised, or engaged in, in relation to a proposed enterprise agreement.
>
> 1707. Suspension or termination of protected industrial action brings to an end the right to take protected industrial action. Protected industrial action may be resumed after any period of suspension, but will be subject to any requirements for the giving of notice before any action may be taken. A termination of protected industrial action may lead to FWA making a workplace determination under Part 2-5.
>
> 1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.
>
> 1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.
>
> 1710. Under the Bill, FWA:
>
> - may suspend or terminate protected industrial action if the action is causing (or threatening to cause) significant economic harm to the employer and/or employees (clause 423);
>
> - must suspend or terminate protected industrial action if the action has threatened, is threatening or would threaten to endanger life, personal safety or the health of the population or cause significant damage to the economy (clause 424);

- must suspend protected industrial action to provide for a cooling-off period (clause 425); and

- must suspend protected industrial action if the action is adversely affecting the employer and its employees and is threatening to cause significant harm to a third party (clause 426).”

(emphasis added)

[40] The Explanatory Memorandum contains the following in relation to s.426:

“1726. FWA is required to suspend protected industrial action if action is being engaged in and it is satisfied that (subclause 426(1)):

- the industrial action is adversely affecting any employer or any employee who will be covered by the proposed enterprise agreement (subclause 426(2));

- the industrial action is threatening to cause significant harm to a person other than a bargaining representative for the agreement or an employee who will be covered by the agreement (subclause 426(3)); and

- it is appropriate to make the order, taking into account whether the suspension would be contrary to the public interest as well as any other relevant matters (subclause 426(5)).

1727. The factors that FWA may take into account when determining whether protected industrial action is threatening to cause significant harm to a third person are specified in subclause 426(4). They are:

- any potential damage to the ongoing viability of an enterprise carried on by the third party;

- any threatened disruption to the supply of goods or services to an enterprise carried on by the third party;

- any threatened reduction to the third party's capacity to fulfil a contractual obligation; or

- any threatened economic loss to the third party.

> 1728. FWA may make the order on application by an organisation, person or body directly affected by the industrial action, the Minister, or a person prescribed by the regulations (subclause 426(6)). The Bill provides employees with right to take protected industrial action in support of a proposed single enterprise agreement. The purpose of this clause is to provide FWA with a means to address significantly serious impacts that industrial action is having on the welfare of third parties. It allows for a respite from industrial action which is causing them significant harm. The harm to the third party would need to be significant, that is a more serious nature than merely suffering of a loss, inconvenience or delay. Therefore, it is anticipated that FWA would suspend industrial action on this basis only in very rare cases.
>
> 1729. Protected industrial action cannot be terminated on this ground."
>
> (emphasis added)

[41] As members of a specialist industrial tribunal, we observe that effective industrial action will almost always cause harm to the employer's business which, in turn, will frequently adversely affect third parties being the customers, clients or other persons who depend upon the timely supply of goods or services by that employer. This was recognised by Drummond J in *FH Transport Pty Ltd v TWU* where his Honour observed:

> "It is inevitable... that action engaged in directly by unions against very many kinds of employer will, by disrupting the business operations of those employers, also have a direct or indirect disruptive impact on the business and other activities of third parties."

[42] In *National Tertiary Education Industry Union v University of South Australia* a Full Bench was concerned with an appeal against a decision suspending protected industrial action pursuant to s.424 of the FW Act. The Full Bench observed:

> "[8] Within the scheme of the Act, the powers in relation to the suspension or termination of protected industrial action are intended to be used in exceptional circumstances and where significant harm is being caused by the action. This is clear from the Explanatory Memorandum to the Fair Work Bill 2008:
>
> The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.
>
> It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining." [paras. 1708-1709]"
>
> (emphasis added)

[43] Just as that Full Bench considered that the power in s.424 was intended to be used only in "exceptional circumstances", we consider that the power in s.426 is likewise intended only to be used in exceptional circumstances. That outcome is determined by a proper construction of the expression "significant harm' and also by a proper appreciation of when it will be "appropriate" to make an order within the meaning of s.424(5). It is also consonant with the

approach taken by the majority of the Full Court of the Federal Court in relation to s.170MW of the Workplace Relations Act 1996 in *Re Polites; Ex parte Construction, Forestry, Mining and Energy Union* and paragraphs 1709 and 1728 of the Explanatory Memorandum in particular.

[44] When regard is had to context of the FW Act as a whole and to the explanatory memorandum, the expression "significant harm" in s.426(3) should be construed as having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. In this context, the word "significant" indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under s.426 in very rare cases, as contemplated by the Explanatory Memorandum. It follows that it will not, of itself, be sufficient that the harm, viewed in isolation, can be characterised as "substantial". Substantial harm to third parties is a common consequence of effective industrial action. Unless the harm is out of the ordinary then suspension would contrary to the legislative intention that suspension should not be able to used generally to prevent legitimate protected industrial action in the course of bargaining. In assessing whether there is "significant harm" context is also important. A particular quantum of financial loss may constitute "significant harm" in one context but not in another.

[45] In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* the High Court was concerned with whether a decision of a Full Bench of the AIRC allowing an appeal against a decision of Boulton J making an order pursuant to s.170MW of the *Workplace Relations Act 1996*, as it then stood, suspending a bargaining period. Pursuant to s.170MW(1) the AIRC had a discretion to suspend or terminate a bargaining period (which necessarily involved a suspension or termination of industrial action) if, but only if, it was satisfied as to one of the circumstances set out in subsections (2) to (7) of s.170MW. Section 170MW(3) provided:

> "A circumstance for the purposes of subsection (1) is that industrial action that is being taken to support or advance claims in respect of [a] proposed agreement is threatening:
>
> (a) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
>
> (b) to cause significant damage to the Australian economy or an important part of it."

[46] Gleeson CJ and Gaudron and Hayne JJ held:

> "[27] For reasons that will be given shortly, it is not necessary to decide whether the Full Bench of the Commission was correct in ascribing error to Boulton J. However, it may conveniently be noted that the process by which the Full Court concluded that Giudice J "[identified] errors that, in truth, were not errors" is not beyond criticism. For example, the Full Court considered that Giudice J mistook the nature of the exercise involved in forming the satisfaction that industrial action is threatening "to cause significant damage to the Australian economy" for the purposes of s 170MW(3)(b) of the Act because he implied "that a measurable likely effect on the economy must be identified and then an assessment made whether that was 'threatening ... to cause significant damage'." In the view of the Full Court, Giudice J was in error because all that was necessary was that "there [be] some material that might reasonably found that satisfaction".
>
> [28] As already explained, the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value

> judgment. A decision under that sub-section would involve appealable error if, for example, regard was had to irrelevant material, relevant material was disregarded, or, although there was some factual material by reference to which the decision-maker might be satisfied, he or she mistook those facts. If the Full Court intended to suggest otherwise, it was wrong. More to the point, however, is that a decision under s 170MW(3)(b) that industrial action is "threatening ... to cause *significant* damage to the Australian economy or an *important* part of it" (emphasis added) is not simply a matter of impression or value judgment. The presence of the words "significant" and "important" in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question. That was the point of the observations of Giudice J with respect to the absence of economic data."
>
> (footnotes omitted)

[47] In the same way, the presence of the word "significant" in the expression "significant harm" s.426(3) of the FW Act, and the attention that s.426(4) directs to the "extent" of harm of the kind expressly identified in s.426(4), means that a member at first instance must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question. That is not to say that, in relation to financial loss, the evidence must precisely quantify the amount of a loss. Rather, there must be evidence that allows for an assessment of the order of magnitude of any financial harm relied upon by an applicant. Contrary to the submissions of the CFMEU, we accept that there was some evidence of that sort in this case. The decision in *Coal and Allied* reinforces our view that the expression "significant harm" when properly construed has a meaning that in truth accords with the Explanatory Memorandum.

Adverse effect on employer or employees (s 426(2))

[19] The Protected Action is being notified by the ETU on a 'rolling' or ongoing basis and is, relevantly, for each day notified:

a. A 24 hour ban on field staff switching for workgroups, contractors, ASPs, supply authorities or Ausconnex jobs, except to make safe in a fault.

b. A 24 hour ban on using physical or digital locking systems, including (but not limited to) locking or unlocking of phones, iPads, tablets, computers, switchboard, switch rooms, electrical cabinets, access gates, airbrakes switches, circuit brakers, switching stations and sub stations.

c. A 24 hour ban on writing or approving switching plans for planned switching at short Notice (72 hours or less).

d. A 24 hour ban on answering work calls and emails out of hours.

e. A 24 hour ban on the use of electronic devices.

[20] There is no dispute between the parties, and I am satisfied on the evidence, that the Protected Action is adversely affecting Endeavour Energy. Accordingly, s 426(2)(a) of the Act is satisfied.

Threatening to cause significant harm (s 426(3) & 4)

[21] Manildra is not a bargaining representative for the enterprise agreement being negotiated by the ETU and Endeavour Energy, nor is it an employee who will be covered by that agreement. It follows that Manildra is a third party which may be considered within the scope of s 426(3) of the Act.

[22] I need to assess whether protected industrial action is threatening to cause significant harm to Manildra. This requires an assessment as to the likelihood of protected industrial action happening in the future, the likely duration of such action, and the extent of harm which such action is likely to cause Manildra to incur.

[23] Bargaining for the proposed enterprise agreement between the ETU and Endeavour Energy commenced in September 2023. Numerous bargaining meetings have taken place but it is clear from Ms Murison's evidence that there is a significant gulf between the parties' current bargaining positions on a number of key matters. Further, Protected Action has been happening since 1 February 2023 and the ETU recently obtained another protected action ballot order for a wide range of industrial action.

[24] In about April 2024, the ETU asked Endeavour Energy to participate in an intensive period of bargaining in an effort to reach an agreement. Endeavour Energy was not willing to participate in such an intensive bargaining period unless the ETU agreed to call off its Protected Action. In the result, no agreement was reached to participate in intensive bargaining.

[25] Bargaining for the Endeavour Energy Enterprise Agreement 2021 took about nine months. Having regard to this fact, coupled with the fact that the current round of bargaining has been ongoing since September 2023, Ms Doust submitted that the most likely outcome is that bargaining and protected industrial action will continue for only a few more months. I do not accept this submission. The parties remain a significant distance apart in their bargaining for a new agreement, as is evident from Ms Murison's evidence, and protected industrial action is ongoing. My assessment is that bargaining and protected industrial action which affects Manildra is likely to be ongoing for at least 3-4 months, as a minimum, and perhaps up to 6 months or more. One party may, of course, make an application for an intractable bargaining declaration at an appropriate time.

[26] As to the extent of harm which may be caused to Manildra in the future by protected industrial action taken by Endeavour Energy's employees who are members of the ETU, it is relevant to look at what harm Manildra has suffered to date by such protected industrial action. This harm may be summarised as follows:

- The turbines enable Manildra to supply power to the Site at a cost of approximately $70 per megawatt hour.

- Because of the Lock, Manildra has needed to purchase, on average, about 280 megawatt hours of power from the spot market each day since 9 April 2024.

- Manildra has calculated the extra cost it would have incurred in purchasing and supplying gas to the turbines at the Site to produce the power it instead had to purchase on the spot market because of the protected industrial action being taken. In the period from 9 April 2024 until 8 May 2024 this figure was $633,190. I accept Mr Jones's evidence that it would not have cost Manildra any extra money in labour costs or running costs to run the turbines for longer to produce this extra power. The cost Manildra incurred to purchase this power from the spot market was $1,809,507. Accordingly, the protected industrial action cost Manildra an additional $1,176,316 in electricity costs in the period from 9 April 2024 to 8 May 2024.

- On 7 and 8 May 2024, there were significant spikes in the spot market prices, with the price reaching $16,599.99 per megawatt hour. On these days the cost to Manildra to purchase electricity from the spot market was:

    - 7 May 2024 = $153,090; and
    - 8 May 2024 = $500,919

- These additional costs were incurred after Manildra scaled back its production on 7 and 8 May 2024 to the extent that it could. This scaling back resulted in reduced output of goods and a subsequent loss of revenue, resulting in a production loss of $45,600.

- The figures of $153,090 and $500,919 for 7 and 8 May comprise part of the total cost of $1,176,316. Taking the dates of 7 and 8 May out of the analysis, there is still an additional cost of $522,307 in the period from 9 April until 6 May 2024.

- Manildra cannot realistically 'mitigate' the cost by reducing its power consumption on an ongoing basis, as it can only do this by reducing production. I accept that this is not practicable as it would lose the value of the lost production, whilst continuing to incur fixed and operating costs, jeopardise the supply chains of its customers, and create a backlog or blockage in its own supply chains. However, I do not consider it likely that protected industrial action being taken by the ETU's members would cause Manildra to shut down the Site.

- Manildra is also experiencing a revenue loss of approximately $8,220 per day because of it not obtaining Carbon Credit Units for the power which it is purchasing on the spot market, which it would obtain if it was generating the power from the turbines.

- Manildra has considered trying to fix or cap the amount it pays its electricity provider, Momentum Energy, for electricity, so as to hedge against extreme price rises. However, such an arrangement would cost about $2,500,000 for three months, in addition to the cost of the electricity itself.

- Putting to one side the extreme price spikes on 7 and 8 May 2024, the net cost to Manildra of importing from the grid electricity which it could otherwise have produced by the turbines on the Site was, during the period of 9 April 2024 to 6 May 2024, an average of almost $19,000 per day plus a loss of approximately $8,220 per day due to not obtaining Carbon Credit Units. If the price spikes on 7 and 8 May 2024 are taken into account, the net excess cost is about $40,000 per day plus a loss of approximately $8,220 per day due to not obtaining Carbon Credit Units.

- It is also relevant to have regard to the fact that Manildra has invested a large capital sum ($250,000,000) to purchase the turbines for the Site, and as a result of the protected industrial action being taken, it is only being able to partially use these very expensive assets. The repayment costs being incurred by Manildra on the turbines are about $6,000,000 per quarter.

[27] The evidence shows that in the period since 2019, there have been:

- 17,484 occasions (of five minute intervals) where the electricity spot price has exceeded $300;

- 816 occasions (of five minute intervals) where the electricity spot price has exceeded $1,000;

- 390 occasions (of five minute intervals) where the electricity spot price has exceeded $5,000;

- 344 occasions (of five minute intervals) where the electricity spot price has exceeded $10,000;

- 65 occasions (of five minute intervals) where the electricity spot price has exceeded $15,000.

[28] It follows that extreme price spikes do not happen often, but they do happen from time to time. Over the next three to six months it is likely, in my view, that there will be numerous price spikes in excess, perhaps well in excess, of $300 per megawatt hour.

[29] Manildra did not adduce any evidence of the costs it incurred in purchasing electricity before the turbines at the Site were operational. I do not consider the absence of any such evidence to have a material bearing on the matters I need to consider in this case. The fact is that the turbines have been purchased, they are operational, and there is an almost certain likelihood that ongoing protected industrial action will cause Manildra to incur significant additional costs in the future by reason of its need to purchase electricity from the spot market when it is capable of producing that electricity itself at a much lower cost.

[30] In considering the extent to which Manildra has suffered harm and is likely to suffer ongoing harm by reason of the protected industrial action, it is relevant to have regard to both (a) the amount of the additional costs being incurred and likely to be incurred and (b) those amounts as a proportion of Manildra's business. Manildra is a large and profitable business. It had a revenue of about $1.9 billion in the financial year ending 30 June 2023 and the Manildra

Group, of which Manildra is a part and generates about 80-85% of the Group's revenue, made a profit after income tax expense of about $203 million in the financial year ending 30 June 2023. It follows, in my view, that the protected industrial action which is likely to be taken in the future in this case is unlikely to damage the ongoing viability of the enterprise being carried on by Manildra (s 426(4)(a) of the Act). Similarly, I do not consider it likely that such action will disrupt the supply of goods or services to an enterprise carried on by Manildra or reduce Manildra's capacity to fulfil a contractual obligation (s 426(4)(b) and (c) of the Act).

[31] I am satisfied that the protected industrial action which is likely to be taken in the future in this case threatens, and is very likely, to cause economic loss to Manildra (s 426(4)(d) of the Act). The economic loss will take the form of higher costs for Manildra to purchase electricity from the spot market than it would have incurred if it had been able to run its turbines to their capacity and use the turbines to power the Site. Those ongoing costs are likely to be in the vicinity of about $190,000 per week ($19,000 per day plus a loss of approximately $8,220 per day due to not obtaining Carbon Credit Units), together with higher daily costs if the spot prices on the market spike, as they did to a significant extent on 7 and 8 May 2024. On any view of it, and even having regard to the size and profitability of Manildra's business, the fact that Manildra is likely to incur ongoing additional costs of at least about $190,000 per week as a result of protected industrial action being taken by members of the ETU is significant. Over three months this equates to at least $2,470,000. Over six months it equates to at least $4,940,000.[2]

[32] In my assessment, this is one of the very rare cases where the impact on a third party (Manildra) of protected industrial action is above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. The harm being incurred, and likely to be incurred, by Manildra is, in my view, exceptional in its magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context.[3]

[33] For the reasons explained above, I am satisfied that the protected industrial action in this case is threatening to cause significant harm to Manildra.

Is suspension appropriate? (s 436(5)

[34] Having regard to all the circumstances, I am satisfied that the proposed suspension of the protected industrial action for 3 days is appropriate, is not contrary to the public interest, and is not inconsistent with the objects of the Act. The protected industrial action has caused, and is very likely to continue to cause, significant economic harm to Manildra. This harm is significantly beyond the harm which might ordinarily be expected to be caused by protected industrial action. Further, the fact that only a very short period of suspension (3 days) will resolve Manildra's problem is relevant to my assessment of the appropriateness of ordering a suspension. Such a suspension will be to the detriment of the ETU and its members who are employed by Endeavour Energy because their planned protected industrial action will not have as much impact as it would if the suspension were not ordered and Manildra continued to suffer significant harm, which it would no doubt put pressure on Endeavour Energy to resolve. However, a short suspension of three days is unlikely, in my assessment, to cause significant disadvantage to the ETU and its members employed by Endeavour Energy in their bargaining for a new enterprise agreement because they will be able to resume their protected industrial

action after three days and broaden the action if they wish to continue to put pressure on Endeavour Energy during the balance of the negotiations. This may be contrasted to cases such as *Woodside* where the protected industrial action was suspended at first instance for a period of three months in circumstances where a suspension of that duration almost certainly had the practical effect of terminating the protected industrial action rather than merely providing a temporary respite from the effects of that action.[4]

[35] That Endeavour Energy did not agree to the ETU's suggestion of an intense period of bargaining unless the ETU agreed to call off its planned protected industrial action is not, in my view, relevant to my assessment of the appropriateness of making a suspension order. The evidence did not reveal much about the conduct of the ETU or Essential Energy in their bargaining for a new agreement. I do not know whether the ETU or Essential Energy are being reasonable or unreasonable in those negotiations. In any event, any such unreasonable conduct does not bear on the appropriateness of making an order to suspend protected industrial action where such action is threatening to cause significant harm to a third party.

[36] It is apparent from the evidence that the work required to be undertaken by Endeavour Energy at the Site will only take three Endeavour Energy employees (a District Operator, a System Operator, and a Senior System Operator) one day to complete. In addition to the work at the Site, preparation work is necessary, particularly the preparation of switching instructions. Switching instructions have been prepared in preparation for work at the Site on Friday, 17 May 2024. However, if it were necessary to delay the work proposed to be taken at the Site on Friday, 17 May 2024 by Endeavour Energy's three employees, because for example the laying of additional blue metal was delayed, then new switching instructions would need to be prepared for the Site work to be done on a different day. It is for this reason that Manildra has sought a suspension for a period of 72 hours, rather than, say, one day. Given the potential for such small delays and the flow-on effects of such delays, I consider that a period of three days for a suspension to be appropriate. Three work days rather than 72 hours is appropriate in my view because it will give the relevant employees all day on Friday, Saturday and Sunday to complete the required work. 72 hours would take the period of the suspension through until Monday morning, which is not required on the evidence.

[37] The suspension order proposed by Manildra identifies the five types of protected industrial action in respect of which the ETU has provided Endeavour Energy notice for the period from 17 to 19 May 2024. Ms Murison gave evidence, which I accept, that the bans detailed in paragraphs (a), (b) and (e), and potentially (c), would prevent Endeavour Energy's employees from undertaking the work required to complete the necessary work for Manildra. As to paragraph (c), it concerns a ban on writing or approving switching plans for planned switching at short notice (72 hours or less). Given the potential for a need to prepare new switching instructions, I consider that it is appropriate for this ban to the subject of the suspension order. In addition, paragraph (d) concerns a 24 hour ban on answering work calls and emails out of hours. Given that the proposed suspension would operate on Friday, 17 May, Saturday, 18 May, and Sunday, 19 May, I consider it appropriate to make this ban the subject of the suspension order so that any necessary work calls and emails can be dealt with over the weekend if required to complete the work for Manildra on 18 or 19 May 2024.

[38] The order proposed by Manildra seeks the suspension of all protected industrial action by members of the ETU who are employed by Endeavour Energy regardless of whether they

may be required to work on the small task required by Manildra. I do not consider it appropriate that the order extend that far. It is appropriate, in my view, that the order be limited to work at or in connection with the unlocking of power switches at the Site for Manildra. This will reduce the prospect of any employees of Endeavour Energy who are members of the ETU inadvertently breaching the suspension order. Both parties accepted that I have the power under s 426 to limit the order in this way. I do accept, however, that an order suspending protected industrial action means that one of the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement will not be satisfied while the suspension order is in operation, with the result that all protected industrial action authorised by the protected action ballot would, in effect, be suspended (s 413(1) & (7) of the Act).[5] I have taken this into account in assessing the appropriateness of making a suspension order.

[39] For the reasons given, I will make a suspension order in the following terms:

> "1. Pursuant to ss 426 and 427 of the *Fair Work Act 2009* (Cth), the following protected industrial action by members of the Communications, Electrical Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (***ETU***) employed by Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy for whom the ETU is the bargaining representative and who will be covered by a proposed enterprise agreement to replace the Endeavour Energy Enterprise Agreement 2021 is suspended in the period from 6am on Friday, 17 May 2024 until 6pm on Sunday, 19 May 2024:
>
> (a) a 24 hour ban on field staff switching for workgroups, contractors, ASPs, supply authorities or Ausconnex jobs, except to make safe in a fault;
>
> (b) a 24 hour ban on using physical or digital locking systems, including (but not limited to) locking or unlocking of phones, iPads, tablets, computers, switchboard, switch rooms, electrical cabinets, access gates, airbrakes switches, circuit breakers, switching stations and sub stations;
>
> (c) a 24 hour ban on writing or approving switching plans for planned switching at short Notice (72 hours or less);
>
> (d) a 24 hour ban on answering work calls and emails out of hours; and
>
> (e) a 24 hour ban on the use of electronic devices
>
> insofar as any such action concerns the switching related work required to be undertaken by Endeavour Energy for the Manildra Group of companies at, or in connection with, its Shoalhaven Starches plant in Nowra (Bomaderry), New South Wales.
>
> 2. This order is binding on:
>
> (a) Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy

(b) the Communications, Electrical Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and

(c) All employees of Endeavour for whom the ETU is the bargaining representative and who will be covered by a proposed enterprise agreement to replace the Endeavour Energy Enterprise Agreement 2021.

3. This order comes into operation at 6am on Friday, 17 May 2024 and ceases to operate at 6pm on Sunday, 19 May 2024."

DEPUTY PRESIDENT

Appearances:

Mr G Fredericks, of counsel, for the Applicant

Ms L Doust, of counsel, for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

Hearing details:

2024.

Sydney:
15 May.

Printed by authority of the Commonwealth Government Printer

<PR775067>

[1] [2010] FWAFB 6021

[2] $190,000/ week x 52 = $9,880,000. Therefore, 6 months = $4,940,000 and 3 months = $2,470,000

[3] *Woodside* at [44]

[4] Ibid at [50(b)]

[5] *TWU v Broadspectrum (Australia) Pty Ltd* [2019] FWCFB 663 at [30]