DECISION

Fair Work Act 2009
s.418 - Application for an order that industrial action by employees or employers stop etc.

UGL Rail Services Pty Ltd T/A UGL

v

Jamie Dowling & Others
(C2024/5313)

DEPUTY PRESIDENT BOYCE SYDNEY, 12 AUGUST 2024

Urgent application for orders that industrial action stop or not occur – industrial action being taken by relevant employees of UGL Rail Services Pty Ltd T/A UGL whilst applicable UGL enterprise agreements are within their nominal terms – sick and other forms of leave taken by UGL employees on mass (800 percent increase in sick and other leave taken from June 2024 to July 2024) – UGL employees assert they are too scared to come to work – imminent health and safety issues alleged are unsupported by evidence – stop orders made – ongoing dispute between head contractor and CFMEU over proposed new enterprise agreements – stop orders made until that third party dispute resolved or UGL enterprise agreements reach their nominal term.

[1] At 6.56pm on Monday, 5 August 2024, UGL Rail Services Pty Ltd trading as UGL (**UGL**) filed a Form F14, being an application under s.418 of the *Fair Work Act 2009* (**Act**) for urgent orders that industrial action stop or not occur (**418 Application**) in respect of over 180 UGL employee respondents (**UGL Employees**) working on the Cross River Rail Project (**CRR Project**) in and around Brisbane and the Gold Coast in Queensland.

[2] CPB Contractors Pty Ltd (**CPB**) is the principal contractor for what are termed "TSD works" (Tunnel and Station Development) and "RIS works" (Rail Integration System) on the CRR project. CPB has been subjected to repeated instances of protected industrial action by the CFMEU on the CRR Project, and further notices of protected industrial action moving forward have been issued by the CFMEU to CPB.

[3] The Federal Court has already made orders for, amongst other things, stopping picketing by CFMEU officials and its members that illegally blocks site entrances to the CRR Project, and for any sitting around in groups (or alike) not to occur within 15 metres of site entrances to the CRR Project. There are also other proceedings on foot before the Federal Court to determine whether certain workers should be paid for their non-attendance (for work) on CRR Project sites in late April and early May 2024. [1]

[4] The 418 Application filed in these proceedings was accompanied by a Form F49, being an application for substituted service orders upon named UGL Employees.

[5] The matter was allocated to my Chambers on Tuesday, 6 August 2024.

[6] The Commission received an email at 9.31am on 6 August 2024 from the Electrical Trades Union (Queensland and Northern Territory Branch) of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**), stating that the orders sought by UGL would cover its members, and that the CEPU opposed any s.418 orders being made. In addition, the CEPU's email states:

> "The ETU opposes the Draft Order for substituted service in the terms sought and seeks to be heard in relation to this point."

[7] Following the CEPU's email, I listed the matter for an initial mention/directions hearing before me by telephone at 1:45pm on 6 August 2024 to deal with the substituted service orders, and the programming of the matter for hearing. At the mention/directions hearing, the following appearances were made:

(a) Ms *Shannon Moody*, of Counsel, instructed by Mr *Malcolm Davis*, Solicitor and Director Principal, Ferrous Advisory, appeared with permission for UGL;[2]

(b) Ms *Lisa Midson*, Legal Officer, appeared for the CEPU;

(c) Mr *Daniel Peatey*, Industrial Officer, appeared for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" (known as the Australian Manufacturing Workers' Union) (**AMWU**); and

(d) Ms *Kristen Reid*, Legal Officer, appeared for the CEPU – Plumbing Division (**Plumbers Union**).

[8] Following the mention/directions hearing, the following Directions were issued:

1. By **6.00pm AEST** on **Tuesday, 6 August 2024**, the Applicant (UGL Rail Services Pty Ltd T/A UGL) must file with the Commission and serve upon the Unions (being the Electrical Trades Union Queensland and Northern Territory Branch and the Plumbers Union (together the CEPU), and the Australian Manufacturing Workers' Union) and any individually named employee of the Applicant, an outline of submissions and any further evidence in support of the Applicant's application for orders that alleged unprotected industrial action undertaken by relevant named employees of the Applicant (or any of them) immediately stop.

2. By **10.00am AEST** on **Wednesday, 7 August 2024**, the Unions and any individually named employee of the Applicant must file with the Commission and serve upon the Applicant an outline of submissions, witness statements, and any documents in opposition to the Applicant's application for orders that alleged unprotected industrial action undertaken by relevant named employees of the Applicant (or any of them) immediately stop.

3. The matter is listed for **Hearing** at **2:00pm AEST**, **in-person in Brisbane and Sydney (or alternatively by video on Microsoft Teams upon attendees' notification to Chambers)**, on **Wednesday, 7 August 2024**.

4. Filing of documents is to occur by email to the Associate to Deputy President Boyce at chambers.boyce.dp@fwc.gov.au. Please note that any correspondence sent to Chambers regarding this matter must copy in the Applicant, the Unions and/or their representatives.

5. Service upon any individually named employee of the Applicant in this matter shall be deemed to have been effected if such service occurs in the same manner as described in Order 2(a) of the Orders for Substituted Service issued by Deputy President Boyce on 6 August 2024.

6. Liberty to apply generally upon email notification to the Associate to Deputy President Boyce at chambers.boyce.dp@fwc.gov.au.

[9] An order for substituted service was also made, encompassing service (including on an on-going basis) of relevant documents filed, directions, and notices of listing. The substituted service order reads:

"The Fair Work Commission orders that:

1. Pursuant to Rule 24 of the *Fair Work Commission Rules 2024*, the method of service specified in [paragraph 2] below will be sufficient service of:

(a) the application by UGL Rail Services Pty Ltd (**UGL**) under s 418 of the *Fair Work Act* 2009 (Cth) (**Application**);

(b) this order for substituted service;

(c) any notice of listing in relation to the Application; and

(d) any orders, interim orders, witness statements, submissions or other documents in relation to the Application,

Note: the documents described to in subparagraphs (a) to (d) above are hereinafter collectively referred to as the **Documents**.

2. Valid service of the Documents will occur upon each of the employees of UGL named in Appendix A to these orders (**Employees**) by:

(a) UGL posting the Documents on its Intranet and noticeboards typically used for communicating with the Employees at all CRR Construction Sites where the Employees work (being Northern Portal, Woolloongabba and Roma St); and

(b) UGL sending (or having sent) the following email to the Employees (at the email address relevantly provided to UGL by the Employee/s):

"Dear [Name]

> In response to recent industrial action by employees of UGL Rail Services Pty Ltd (Company) who have not come to work because of the presence of pickets at Cross River Rail Construction Sites, including by taking "leave without pay" and forms of approved personal leave (Industrial Action), the Company yesterday made an application to the Fair Work Commission (Commission) for orders under s 418 of the Fair Work Act 2009 (Cth) that this industrial action stop and not occur (Application).
>
> Because of the widespread and ongoing nature of the Industrial Action, all employees of the Company employed at a Cross River Rail Construction Site – including yourself – have been named personally as a Respondent to the Application.
>
> As you are personally named as a Respondent to the Application, I now attach copies of the following documents filed by the Company in the Commission:
>
> 1. Application under s 418 to stop industrial action;
> 2. Statement of Terrence Prior;
> 3. Statement of Branko Prica;
> 4. Statement of Ryan Farrell; and
> 5. Application for orders of substituted service.
>
> We will serve you again in due course with the Notice of Listing, once one has been issued by the Commission.
>
> As a courtesy, we have also served the three unions entitled to cover UGL's Employees, being the ETU, AMWU and the Plumbers Union (collectively the CEPU).
>
> The Company urges all employees to immediately stop the Industrial Action and resume usual duties.
>
> Yours sincerely.""

[10] In respect of the foregoing order for substituted service, Ms Moody advised at the commencement of the mention/directions hearing that parts of Order 2(b) of the foregoing substituted service order had already been undertaken, such that UGL was seeking that such parts be effectively deemed retrospectively as sufficient (substituted) service upon named UGL employees. As a matter of course, I had no concerns in taking this approach.

[11] Ms *Midson*, supported by the AMWU and the Plumbers Union, raised two concerns, namely:

(a) the CEPU had understood that the application for substituted service was to be dealt with at the mention/directions hearing, and that UGL would not be moving to commence any form of service prior to orders for substituted service being made (noting that the CEPU had proposed some amendments to words used in the email found at Order (2)(b) of the substituted service orders); and

(b) in sending out the email to UGL employees, and in serving the Form F14 (418 Application), UGL had included (in the Schedule to the filed Form F14) UGL Employee names and residential addresses, thus making broad public disclosure of UGL Employee residential addresses. Specifically, Ms Midson stated that one of the CEPU's female members has domestic violence orders in place, giving rise to distress on her part arising from the public disclosure of her residential address.

[12] In response, Ms Moody submitted that the Form F14 specifies that the names of persons to whom orders are sought, and their contact details, is one of the ways in which Form F14 can be completed, and that UGL was simply complying with the terms of the Form F14 in setting out the names and residential addresses of UGL Employees. Further, Ms Moody, on behalf of UGL, advised that UGL would remove UGL Employee addresses in any further documents served or made public going forward, and that the UGL website (upon which materials associated with these proceedings are published) had UGL Employee addresses redacted.

[13] Ms Moody's submission is somewhat not to the point when it comes to service of the Form F14. That said, whilst it is regrettable that UGL issued the email to relevant UGL Employees prior to the Commission determining the final form of Order 2 of the substituted service orders, and prior to the Unions being heard on same in respect of their proposed amendments, and in doing so ended up sending out the Form F14 with the names and residential addresses of UGL Employees included, I considered that there was nothing I was in a position to do to undo, correct, cure or otherwise reverse the publication of the names and residential addresses that had already been distributed, and that the Unions' amendments did not change (in a substantive sense) the form of the email to be issued to relevant employees. I therefore considered it appropriate and essential to immediately move on to progressing the 418 Application to hearing by making the substituted service orders in the form proposed by UGL, and formally issued the Directions set out in paragraph [8] of this decision.

CFMEU involvement

[14] At 9:48am on 7 August 2024, the Construction, Forestry and Maritime Employees Union (**CFMEU**) sent an email to Chambers, which reads: "The CFMEU has a material interest in the above matter due to having members that will be affected by the proposed orders and as such seeks to be heard on the matter."

[15] At 10:27am on 7 August 2024, Chambers responded to the CFMEU's email, as follows:

> "Chambers is in receipt of the request below to be heard in relation to the matter.
>
> The Deputy President directs that by no later than **12.00pm AEST,** the CFMEU is to file:
>
> - submissions outlining the basis upon which it seeks to be heard in this matter;
>
> - submissions in relation to the extent to which it seeks to be involved in these proceedings;

- an outline of submissions, witness statements, or any other documents it would seek to rely upon at today's hearing in relation to its position on the Applicant's application for orders that alleged unprotected industrial action undertaken by the Respondent employees of the Applicant (or any of them) immediately stop.

Filing of documents is to occur by email to Chambers and must copy in the Applicant and the other Unions copied into this email."

[16] In response to the foregoing direction, the CFMEU filed written submissions advising that not enough time had been provided for it to file it materials, that it has a sufficient interest in the matter as it has members who work for UGL on the CRR Project, and that CFMEU members had raised concerns with it directly about the 418 Application and its adverse impacts upon them by any orders made. The CFMEU also stated that it opposed orders being made as no industrial action is threatened, pending or probable, there is no admissible evidence going to any inference (or "the inference of workers"), and no interim orders should be made either. Finally, the CFMEU advised that it would be seeking to make oral submissions at the hearing at 2:00pm that day, and cross-examine witnesses.[3]

[17] I observe that the CFMEU's written submissions fail to identify any named UGL Employee respondent/s on the CFMEU's membership list, and fail to provide even the most basic indication or outline of proposed evidence (that it says it intends to bring but has not had time) in opposition to orders being made. Nor is there any indication of the name of any named UGL Employee who is a CFMEU member who has specifically requested that the CFMEU appear in the proceedings or advance any propositions on their behalf. That said, the CFMEU requested the opportunity to make further oral submissions on those matters at the hearing.

[18] At the hearing, Mr *Elliot Dalgleish*, Industrial Officer, appeared for the CFMEU, and made oral submissions as to the CFMEU's request to be heard. In its written submissions, the CFMEU states that it has members who raised concerns with it directly about the 418 Application and its adverse impacts upon them by any orders made.[4] However, in oral submissions at the hearing, Mr Dalgleish stated that he had "no idea" who of the UGL Employees (i.e. named employee respondents) were CFMEU members.[5] In other words, if Mr Dalgleish has no idea what UGL Employees are CFMEU members as at 2pm on 7 August 2023, there is no foundation for the written submission (filed at 12:17pm on 7 August 2024) that CFMEU members had raised direct concerns with the CFMEU about the 418 Application or orders being made. The CFMEU's written and oral submissions simply do not sit together.

[19] Ultimately, I determined, pursuant to s.590 of the Act, as follows:

"Having heard from the parties, I am prepared to have the CFMEU be heard on a submission only basis to the extent that there might be submissions dealing with the interaction between the decisions in the Federal Court, or the orders made therein, and what we are dealing with today. The grant of leave or permission to be involved in the proceedings only extends to making those closing submissions."[6]

418 Orders made

[20] The 418 Application was listed for hearing at 2:00pm on Wednesday, 7 August 2024. The same representatives appeared at the hearing as identified at paragraph [7] of this decision, along with Mr Dalgleish.

[21] Mr Brendan Johnson, UGL Electrical Leading Hand, and Mr Paul Jackwitz, UGL Electrician, being named UGL Employee respondents, also attended upon the hearing as observers.

[22] The parties tendered the following evidence at the hearing:

(a) Witness Statement of Mr Christopher Newitt dated 6 August 2024 (Exhibit UGL 1);

(b) Further Witness Statement of Mr Christopher Newitt dated 7 August 2024 (Exhibit UGL 2);

(c) Witness Statement of Mr Branko Prica dated 4 August 2024 (Exhibit UGL 3);

(d) Witness Statement of Mr Ryan Farrell dated 4 August 2024 (Exhibit UGL 4);

(e) Witness Statement of Mr Terence Prior dated 5 August 2024 (Exhibit UGL 5);

(f) Pre-Start Briefing Notes dated 7 August 2024 (Exhibit UGL 6);

(g) HSR Consultation Form dated 7 August 2024 (Exhibit UGL 7);

(h) Witness Statement of Mr Chris Lynch dated 7 August 2024 (Exhibit CEPU 1); and

(i) Witness Statement of Mr Daniel Lacey dated 7 August 2024 (Exhibit AMWU 1).

[23] None of the individually named UGL Employees filed any evidence, or made any submissions (in writing or orally) about their own specific individual circumstances. For example, confirming that they had been unfit for work on a particular date/s, advising that they were too scared to come to work, setting out their reasons for not attending work on particular date/s, or giving evidence (that could be tested by way of cross-examination) that they individually held a concern (of a health and safety risk, or of any other kind) about entering CRR Project sites, or working at CRR Project sites, especially post 3 May 2024, and/or post 18 July 2024 (when Federal Court orders were made clearing illegal obstructions to CRR Project site entry points).

[24] I equally note that the evidence of Mr Lynch and Mr Lacey fails to make any mention of any named UGL Employees by their individual name, such that the evidence might be capable of reply, or testing at the hearing.

[25] At the conclusion of the hearing on 7 August 2024, at 8:51pm, I issued an Order (PR777942), in the following terms:

“4. INDUSTRIAL ACTION MUST STOP, NOT OCCUR AND NOT BE ORGANISED

4.1 From the time of this Order:

The Employees must stop, and must not engage in or organise the following types of unprotected industrial action:

(a) an Employee failing or refusing to enter a CRR Construction Site at which the Employee has been rostered for the performance of work;

(b) an Employee failing or refusing to attend for work at a workplace located within a CRR Construction Site where the Employee has been rostered for work; and

(c) an Employee engaging in the conduct in paragraph (a) or (b) above at a CRR Construction Site because of an alleged health and safety concern arising out of:

(i) the existence of a picket at that site, or

(ii) crossing the picket at that site; and

(d) a ban, limitation or restriction on the performance of work:

(i) underneath a point of entry to a CRR Construction Site;

(ii) underneath a picket outside a CRR Construction Site; or

(iii) otherwise.

4.2 For the purposes of this order, the expression “industrial action" does not include:

4.2.1 protected industrial action within the meaning of s.408 of the *Fair Work Act 2009*;

4.2.2 action by an Employee/s that is authorised or agreed to by or on behalf of UGL; or

4.2.3 action by an Employee if:

4.2.3(i) the action was based on a reasonable concern by the Employee about an imminent risk to his or her health or safety; and

4.2.3(ii) the Employee did not unreasonably fail to comply with a direction of UGL to perform other available work,

whether at the same or another workplace, that was safe and appropriate for the Employee to perform."

Reasons for decision

[26] The reasons for decision that follow (in paragraphs [27] to [51] below) were originally made on an *ex-tempore* basis on transcript on 7 August 2024.[7] In now publishing such reasons, and as foreshadowed by me at the hearing,[8] I have taken the opportunity to revise, make additions to, and/or amend same in accordance with the principles stated by Kirby J in *Ex Tempore Judgments - Reasons on the Run* (1995) 25 UWALRev 213 (at 229-230, including the authorities cited therein), and the New South Wales Court of Appeal in *Bar-Mordecai v Rotman & Ors* [2000] NSWCA 123 (at [193]-[195], including the authorities cited therein). This extends, but is not limited, to resolving (what I consider, as the decision-maker) to be infelicities of expression, and the adding of specific references to submissions and evidence. Indeed, revisions made by a decision-maker to ex tempore judgments or decisions, are appropriate and permissible, provided they have no effect upon the core substance of the reasons, and make no difference to the critical issues for determination or the result.[9]

[27] UGL seeks orders that asserted unprotected industrial action stop, or not occur. UGL has filed submissions dated 7 August 2024. It alleges in those submissions that there are four types of industrial action that is happening, threatened, impending and/or probable, namely:

"(a) employees failing or refusing to enter a CRR Construction Site at which the Employee has been rostered for the performance of work (which the Applicant submits is "industrial action" under s.19(1)(c) of the Act); and

(b) employees failing or refusing to attend for work at a workplace located within a CRR Construction Site where the Employee has been rostered for work (which the Applicant submits is "industrial action" under s.19(1)(c) of the Act);

(c) an Employee engaging in the conduct in paragraphs (a) or (b) above at a CRR Construction Site because of an alleged health and safety concern arising out of:

(i) the existence of a picket at that site; or

(ii) crossing a picket at that site (which the Applicant submits, separately or together is "industrial action" under s.19(1)(c) of the Act); and

(d) a ban, limitation or restriction on the performance of work:

(i) underneath a point of entry to a CRR Construction Site;

(ii) underneath a picket outside a CRR Construction Site; or

(iii) otherwise (which the Applicant submits, separately or together is "industrial action" under s.19(b) of the Act).

(collectively, the **Industrial Action**).

> The Industrial Action is not protected pursuant to ss. 408 or 409 of the Act because the relevant UGL Employees are covered by one of three within-term enterprise agreements, each having a nominal expiry date of 31 January 2025."[10]

[28] UGL says that this industrial action is not protected pursuant to ss.408 or 409 of the Act because relevant UGL Employees are covered by one of three enterprise agreements, each having a nominal expiry date of 31 January 2025.

[29] Mr Ryan Farrell, UGL Senior Supervisor, CRR Project, at the Woolloongabba (**Gabba**) site, has given evidence in these proceedings. He identifies that UGL has around 50 employees engaged to work on that site alone.[11] His evidence is that employees did not enter the site on 30 April, 1 May, 2 May and 3 May 2024.[12] Part of that is explained, say the Unions, because of chains and locks on the gates to the site/s (removing the physical ability for employees to enter the site). The evidence also discloses that such chains (and locks) were cut (or removed) to the sites on 2 May 2024, and thereafter picketing or sitting around at site entrances occurred.[13]

[30] Mr Terrence Prior is CPB's Industrial Relations Manager on the Cross River Rail (**CRR**) project. His evidence is uncontested. His evidence sets out some of the background and chronology of the dispute between CPB contractors and the CFMEU concerning bargaining, protected industrial action, unprotected industrial action, and picketing on the CRR project, as it concerns CPB and some subcontractors.[14]

[31] Mr Christopher Newitt is UGL's National Industrial Relations Manager – Projects. He also gives unchallenged evidence. That evidence identifies that relevant UGL employees are covered by three enterprise agreements with a nominal expiry date of 31 January 2025.[15] In his evidence, Mr Newitt includes a schedule of relevant employee attendances.[16] That evidence, in summary, identifies that there's been a substantial increase (of an astounding 800 or more percent) in the various forms of leave being taken by UGL Employees in July 2024 as compared to June 2024.[17] His evidence (as at the date of the hearing before the Commission on 7 August 2024) is that such absenteeism only continues.

[32] By reference to Exhibits UGL 6 and UGL 7, it can be seen that 'some' UGL Employees today attended work, and in doing so walked past the picket lines (or past the same area or entrance where picket lines were previously taking place), signed on to work, raised various concerns or grievances, and then left work without UGL's approval.[18]

[33] Mr Branko Prica, UGL Superintendent (Tunnel Fit-Out) on the CRR Project, based at the Gabba site, has given evidence that is essentially the same as Mr Farrell. However, Mr Prica's evidence as to his interactions with ETU delegates, and his discussions with other named supervisors at the Gabba site, is significantly probative, both in terms of direct evidence and inferences to be drawn from that evidence across sites covering the whole of the CRR Project that UGL is operating or performing work.[19] I note that at least two UGL employees attended the hearing via Microsoft Teams audio, but only observed the proceedings and did not give any direct evidence.[20] In terms of inferences to be drawn, I note that where defendants (such as the relevant UGL Employees in this case, or any of them) fail to give evidence about something in their own purview of knowledge (e.g. as to the real reasons for their leave or absences from

work), but attend upon a hearing in any event, a decision maker is entitled to be "bold" when it comes to making relevant inferences.[21] As Rich J stated in *Insurance Commissioner v Joyce*[22]:

> "… when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."[23]

[34] The evidence identifies that various UGL Employees say that they did not attend CRR Project sites because they were scared to do so, or did not feel safe entering the site, or otherwise texted to say that they were unwell, or that there are insufficient safety measures in place, or that no one was coming outside of the site and onto the street to address their purported concerns.[24]

[35] I note that many of the texts (in evidence) are in identical form with the same or similar wording.[25] Outside of the site/s, where some of the UGL Employees were requesting management to meet, is not the location where workers gather for a pre-start meeting prior to commencing a shift, noting that the site entry point (or gate) is close to the area that was being picketed. One of the questions that's raised in this matter is whether relevant conduct, as identified in UGL's submissions, and otherwise identifiable on the uncontested evidence, is industrial action.

[36] Section 19 of the Act provides that industrial action means any of the following kinds:

> "**Meaning of industrial action**
>
> *(1)* ***Industrial action*** means action of any of the following kinds:
>
> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
>
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
>
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
>
> (d) the lockout of employees from their employment by the employer of the employees.
>
> Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.
>
> (2) However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

(3) An employer ***locks out*** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

Note: In this section, ***employee*** and ***employer*** have their ordinary meanings (see section 11)."

[37] Putting aside the exceptions to industrial action (under s.19(2) of the Act), in my view, and I find relevantly that the evidence discloses that industrial action has been occurring in the form identified in UGL's submissions,[26] by reference to the evidence cited in those submissions that supports same.[27] The CEPU, AMWU, CFMEU and the Plumbers Union all assert, by reference to their evidence and submissions, that the actions of the UGL Employees, to the extent that such actions constitute, or might be inferred or otherwise characterised as, industrial action, are based upon a reasonable concern around an imminent risk to employee health or safety under s.19 of the Act.[28]

[38] Relevantly, in the CEPU's written submissions (adopted by the AMWU and the Plumbers Union), the CEPU refers to the case of *Australian Building and Construction Commissioner and Construction, Forestry, Mining and Energy* [2009] FCA 1092, commencing at paragraph 109 of that decision, but perhaps more relevantly at paragraph 112 of that decision, whereby the CEPU submits that, consistent with this decision, that the issue is not whether certain matters did, in fact, constitute a risk to employee health and safety, but rather, whether any employee reasonably held a concern about an imminent risk to his or her health and/or safety.

[39] The CEPU also submitted that the concerns raised by CEPU members satisfy the 'imminent' aspect of the test in s.19(2)(c) of the Act, being imminent in the temporal sense, noting that the ultimate risk, humiliation or victimisation might not take place until a later point in time. In the witness statement of Mr Daniel Lacey filed in this matter on behalf of the AMWU, Mr Lacey being an organiser for the AMWU, relevantly summarises the unnamed (and unidentifiable) UGL Employee concerns that have been raised with him about relevant conduct constituting a reasonable risk to health and safety.[29]

[40] Firstly, Mr Lacey identifies at paragraphs 45 to 49 of his witness statement, that AMWU members have expressed being scared or fear for their personal safety if they're required to cross a picket line when attending for work. He also identifies the recent case of physical violence at the picket line, as well as media reporting about two individuals apparently attacking a non-union worker outside of their residential address. Mr Lacey further raises concerns surrounding the disclosure of personal information during these proceedings that have led to what the Unions (together) otherwise rely upon as matters covered under s.19(2)(a)(c) of the Act.

[41] As Ms Moody highlighted during her closing submissions, the Unions' contention in relation to UGL Employees having to cross a picket line to enter site is contrary to the evidence, in the sense that Mr Newitt's annexure[30] shows that various employees have actually attended for work, some more than others (and crossed the picket line or otherwise entered site to attend for work). Such UGL Employees have been able to cross the picket line when attending for work, or putting aside the picket line, have been able to enter the CRR Project site/s whether there is a picket in place or otherwise. That is also consistent with the evidence of Mr Farrell and Mr Prica who have also been able to seamlessly attend the CRR Project sites with or without the presence of a picket,[31] and have not been scared to refrain from doing so (i.e. as claimed by the Unions on behalf of their unnamed UGL Employee members).

[42] Section 418 of the Act reads:

> "**FWC must order that industrial action by employees or employers stop etc.**
>
> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the ***stop period***) specified in the order.
>
> Note: For interim orders, see section 420.
>
> (2) The FWC may make the order:
>
> (a) on its own initiative; or
>
> (b) on application by either of the following:
>
> (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;

(ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

(4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:

(a) some or all of which has not been taken before the beginning of the stop period specified in the order; or

(b) which has not ended before the beginning of that stop period; or

(c) beyond that stop period;

the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot."

[43] I note that those words, "if it appears" to the Fair Work Commission (at s.418(1) of the Act), identify that the relevant finding as to industrial action only be apparent, not essentially definitive. Notwithstanding that, in this case I consider (and find on the evidence before me) that the action (or conduct) by UGL Employees disclosed on the evidence, and as specified or summarised in UGL's submissions,[32] is "industrial action" within the meaning of s.19 of the Act, being action (or conduct) that is not to be excused on the basis of it being in response to an imminent risk to health and safety.[33]

[44] I am comforted in that later view (about the exception concerning an imminent risk to health and safety not being sustained on the evidence), having regard to the fact that issues as to imminent risk to health and safety were not raised or properly articulated by any named UGL Employees, at least on the evidence, with the management of UGL at the various times or sites, at least prior to the on-site meeting today (7 August 2024), i.e. beyond what is said or otherwise blandly or broadly asserted in text messages.[34]

[45] I note that Mr Dalgleish on behalf of the CFMEU has pointed to a decision of Cross DP whereby Mr Dalgleish asserts that the relevant text messages contained in Mr Newitt's witness statement should not be relied upon. However, noting that the Commission is not bound by the rules of evidence, but should still observe the rules of evidence where possible, the evidence, to the extent that it can be said to be hearsay, in my view, would form part of the business records of UGL in the sense that it concerns records relating to the attendance of work, which would need to be relevantly kept as part of the UGL's business records.[35] And secondly, the text messages in evidence identify at least the name of the person who is the sender, such that that evidence could have been tested or otherwise contested by the relevant UGL Employee respondents to whom it is asserted to concern or relate or derive from.

[46] In making the findings I have made, I am equally in agreement with UGL's submissions that I should follow and apply the decision in *Adams v Director of the Fair Work Inspectorate* [2017] 258 FCA 257, at [59].[36] In my view, the summary of that paragraph identifies that not

only does the relevant industrial action need not to have a particular 'industrial' character to it, but that it encompasses work that is performed in a manner inconsistent with the relevant employment relationship, that relationship being underpinned by any relevant statutory instrument such as the enterprise agreements applying to UGL Employees in this case, and/or the employees' relevant contract of employment, or any relevant implied employment duty, such as a duty to cooperate with the employer and be loyal to the employer in relation to work to be performed (including UGL Employees turning up to work as rostered at the pre-start meeting on-site each day, and thereafter completing their rostered shift/s in full).

[47] I find that the evidence discloses that the conduct being engaged in by the UGL Employees relevantly falls within the definition of industrial action under s.19 of the Act. Ms Moody also identified the issue concerning employees taking time off because of illness or carer's responsibilities or other forms of approved leave, noting that that will come down to the relevant terms of the enterprise agreement and/or the relevant contract of employment to be complied with. I accept the evidence of UGL's witnesses that whilst this has not been occurring thus far, UGL has recently put in place a new regime to deal with absences associated with forms of leave to be approved.[37]

[48] It follows that given my findings that industrial action by UGL Employees is occurring, and it is not protected industrial action, and that it is occurring right up to the date of this hearing today (especially notwithstanding relevant employees have been notified of these proceedings before the Commission), I consider that it is appropriate to make the orders sought in the terms set out by UGL, save that the issue as to the term or 'end date of effect of the relevant order' is based upon the reasoning that follows.

[49] Firstly, there has been no undertakings or other representations provided by any of the named UGL Employees (or on their behalf) that their current actions or conduct will cease, either immediately, or at any specific time into the future.

[50] Secondly, on the issue of prejudice as the 'term' of any stop orders, the period up until 31 January 2025 is not beyond that to which UGL Employees would (in the ordinary course of their employment with UGL) need to abide by or comply with anyway (i.e. prior to the expiry of their existing enterprise agreements, and the results of a protected action ballot being resulted). The dispute between the principal contractor (CPB) and the CFMEU is ongoing. It is a third-party dispute as far as UGL is concerned (i.e. UGL cannot influence its outcome). I note that there is no evidence that this dispute is going to be resolved in the near future.[38] In particular, I note the evidence, which is uncontested, in relation to the limited potential for an agreement in the next week with the RIS works, but not the TSD works, and no clear indication as to whether or when any agreement is to be reached on 'both' the RIS and TSD works.[39]

[51] I consider that the unprotected industrial action stop orders ought to apply as follows:

> "7.1 This Order shall come into effect at 12.00pm on 8 August 2024 and will remain in force until:
>
> (a) enterprise agreements are approved by the Fair Work Commission between CPB Contractors Pty Ltd (**CPB**) and relevant CPB employees working on the CRR Project in Queensland on both the Rail, Integration and Systems alliance ("RSI

Works") and the Tunnel, Stations and Development public-private partnership ("TSD Works"); or

(b) in the absence of (a) taking place prior to midnight (12:00 pm) on 31 January 2025, then midnight (12:00 pm) on 31 January 2025; or

(c) until further Order of the Fair Work Commission."[40]

DEPUTY PRESIDENT

Appearances:

Ms *Shannon Moody*, of Counsel, instructed by Mr *Malcolm Davis*, Solicitor and Director Principal, Ferrous Advisory, appeared with permission for the Applicant (UGL Rail Services Pty Ltd T/A UGL).

Ms *Lisa Midson*, Legal Officer, appeared for the Electrical Trades Union (Queensland and Northern Territory Branch), of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

Mr *Daniel Peatey*, Industrial Officer, appeared for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as the Australian Manufacturing Workers' Union).

Ms *Kristen Reid*, Legal Officer, appeared for the Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

Mr *Elliot Dalgleish*, Industrial Officer, appeared for the Construction, Forestry and Maritime Employees Union.

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[1] *UGL Rail Services Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FCA 860; Exhibits UGL 4, at [34]; UGL 3, at [25]; CEPU 1, at [13]; UGL 5, at [25], Annexure TP-3, and at [31], Annexure TP4.

[2] I granted permission under s.596(2)(a) of the *Fair Work Act 2009* (**Act**) for UGL to be legally represented generally in these proceedings for efficiency reasons, noting the urgency of the proceedings, the number of parties involved, and the voluminous nature of the evidence to be relied upon. Permission for UGL to be legally represented was not opposed by the Unions who appeared.

[3] CFMEU written submissions, 7 August 2024.
[4] Ibid, at [5].
[5] Transcript, PN41-PN42.
[6] Transcript, PN55 (note also PN18-PN54).
[7] Transcript, PN641-PN667.
[8] Transcript, PN689.
[9] *Bar-Mordecai v Rotman & Ors* [2000] NSWCA 123, at [193]-[195]).
[10] UGL Submissions, 7 August 2024, at [4]-[5] (modified in this decision).
[11] Exhibit UGL 4, at [16].
[12] Ibid, at [6]-[14]. Note also non-attendance of UGL Employees on 16, 17, 18, 22 and 26 July 2024.
[13] Ibid, at [11]; Statement of Daniel Lacey (AMWU Organiser), 7 August 2024, at [32].
[14] Exhibit UGL 5. See especially orders made by the Federal Court on 18 July 2024, reference at [30]-[31] of UGL Exhibit 5. See also UGL 1, at [4]-[17].
[15] Exhibit UGL 1, at [18]-[23].
[16] Ibid, at [48]-[50], and Annexures CN-4 and CN-5.
[17] Ibid.
[18] Transcript, PN166-PN231.
[19] Exhibit UGL 3, at [9]-[12], [15]-[18], [23]-[24], and [39]-[40], Annexure BR-1.
[20] See paragraphs [21] and [23]-[24] of this decision. Various other unidentified persons also came into the hearing via Microsoft Teams audio after the hearing had commenced.
[21] See *Insurance Commissioner v Joyce* (1948) 77 CLR 39, at 49 (per Justice Rich who was part of the majority in that case).
[22] (1948) 77 CLR 39.
[23] Ibid, at 49.
[24] See Exhibits UGL 3, Annexure BP-1; UGL 4, Annexure RF-1; Exhibit UGL 1, Annexure CN-6. Obviously further discovery (by order), including the interrogation of relevant mobile telephone devices for data (including metadata) by a computer expert, and subpoenas to mobile telephone providers identifying specific telephone numbers communicated with via text or telephone (and the time and geographic location at which such telephone calls and text messages were made and received), may see matters such as coordination, and/or further facts identified concerning each individual employee's non-attendance upon CRR Project sites on relevant dates.
[25] Ibid.
[26] UGL Submissions, at [4].
[27] UGL Submissions. Compare evidence in Exhibit AMWU 1, at [35], and Exhibit CEPU 1, at [38] and [40]. See also *Orora Packaging Australia Pty Ltd T/A Orora Bag Solutions v Ahmad (Khodr) El-Chami and Others* [2020] FWC 224, at [22]-[24] (including the authorities cited therein), and *Suez Recycling & Recovery Pty Ltd v Transport Workers' Union of Australia* [2021] FWC 5960.
[28] Statement of Daniel Lacey (AMWU Organiser), 7 August 2024, at [45]-[49]; Exhibit CEPU 1, Statement of Chris Lynch (CEPU Divisional Branch Assistant Secretary), 7 August 2024, at [14]-[29], [31]-[37]. CEPU Written Submissions, as also adopted by the AMWU and the Plumbers Union, at [13]-[24]. Such submissions and evidence appear to depart from, or otherwise diminish, the suggestion on the face of some of the texts from UGL Employees (sent to UGL management), that the UGL Employees' have taken, for example, sick leave because they were actually sick or otherwise unfit for work.
[29] Statement of Daniel Lacey (AMWU Organiser), 7 August 2024, at [45]-[49].
[30] UGL 1, at [48]-[50], Annexure CN-4 and CN-5.
[31] See, for example, UGL 4, at [28]-[33], and UGL 3, at [13]-[14], [19]-[21], [32]-[36].
[32] UGL submissions, at [4]. Also note s.418(3) of the Act.
[33] See, for example, UGL 4, at [17]-[20], [25]-27], [31]-[33], [44]-[47], [50]-[55], and Annexure RF-1 (I note that the pictures attached to text messages show a site entrance clear of picketing or other obstruction).
[34] Compare the contents of Exhibits UGL 6 and UGL 7 to the content of UGL Employee text messages at, for example, UGL 4, Annexure RF-1.
[35] See s.69 of the *Evidence Act 1995* (Cth); *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1083, at [4](3); *ASIC v Rich* (2005) 216 ALR 320, at [190]; *Feltafield Pty Ltd v Heidelberg Graphic Equipment* (1995) 56 FCR 481, at 483. Once hearsay evidence is in for one purpose, it is in for all purposes, i.e. unless otherwise restricted by court or tribunal ruling.
[36] UGL Submissions, at [6]-[16].

[37] Exhibit UGL 1, at [46]-[47].
[38] Note Exhibit CEPU 1, at [18], i.e. it is safe to assume that if (and only if) CPB and the CFMEU reach agreement on a proposed enterprise agreement, there will not longer be a picket line (or presumably any "safety" issues).
[39] Exhibit UGL 2.
[40] Note, Transcript, PN668-PN685.