



DECISION

Fair Work Act 2009

s.424 - Application to suspend or terminate protected industrial action - endangering life etc.

NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid

v

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

(B2024/1027)

DEPUTY PRESIDENT CROSS

SYDNEY, 20 AUGUST 2024

Application to suspend or terminate protected industrial action (endangering life etc) - s.424 threatened, impending or probable – endanger the life, the personal safety, or the welfare, of the population or of part of it.

[1] On 12 August 2024, NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid (the Applicant/Transgrid) applied to the Fair Work Commission (the Commission) requesting orders be made pursuant to section 424 of the *Fair Work Act 2009* (Cth) (the Act) to terminate or suspend protected industrial action. The Applicant has been notified that protected industrial action is planned to be taken commencing at 12.00am on 15 August 2024, by members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) (the Respondent/CEPU) employed within the Applicant’s operations.

[2] A Hearing was conducted on Friday 16 August 2024. At the conclusion of the Hearing, I issued a brief oral decision on transcript and indicated that a more detailed decision would follow. Subsequently an Order was issued in the following terms (the Order):

[1] Pursuant to s 424(1) of the Fair Work Act 2009 (Cth) (the Act), the Fair Work Commission orders that the following protected action in relation to the proposed agreement replacing the TransGrid Enterprise Agreement 2020 (Proposed Agreement) be suspended for a period of two (2) months effective from the date of this Order:

- (a) one hour stoppages;*
- (b) bans on the performance of overtime;*
- (c) bans on starting and finishing work anywhere other than at the prescribed Transgrid depot;*
- (d) bans on issuing Access Authority and Field Access Authorities to non-TransGrid staff;*
- (e) bans on using non-Transgrid toilets, changerooms and showers facilities where those facilities are required;*

- (f) bans on having Meal Breaks (Morning Tea, Lunch, Dinner and Afternoon Tea) anywhere other than in a Transgrid meal room;*
- (g) bans on training people who are not Transgrid staff;*
- (h) bans on the use of equipment used to test high voltage equipment;*
- (i) bans on the use of equipment used to test high voltage system protective devices and relays; and*
- (j) bans on staff on submitting and processing RFAs (Request for Access) that are submitted within 28 days of planned outages start date.*

[2] This Order is binding on:

(a) NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid (Transgrid);

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

(b) all employees of Transgrid who:

(i) will be covered by the Proposed Agreement; and

(ii) are a member of the CEPU.

[3] This Order comes into operation at 11:59PM on 16 August 2024.

[4] Reasons for my Decision will follow in due course.

History of the Proceedings

[3] The background to the operations of Transgrid, and the negotiations between Transgrid and the CEPU, are provided at paragraphs [5] to [43] of my previous decision in *NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*,¹ published on 2 August 2024 (the First Decision).

[4] Importantly for these proceedings, on 19 July 2024, Transgrid applied to the Commission for orders pursuant to section 424 of the Act to terminate protected industrial action (the July Application). In the July Application I made orders suspending particular types of protected industrial action for a period of 3 weeks. That suspension expired at 11:59pm on Wednesday, 14 August 2024.

[5] The issue between the parties in this matter and the July Application has involved safety commitments provided by the CEPU when issuing notices of protected industrial action. In particular:

(a) On 10 December 2023, the ETU applied for protected action ballot orders. The application provided for a safety commitment (the First Safety Commitment) as follows:

Safety Commitment

An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work. "Emergency Work" is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

(b) On 28 December 2023, Transgrid filed an application pursuant to s.424 of the Act to stop industrial action. On 29 December 2023, the parties attended a hearing for Transgrid's application. In negotiations on that date, the parties agreed to an extended safety commitment (the Extended Safety Commitment), resulting in a discontinuance of the section 424 application, in the following terms:

1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work or where suspending the action is necessary to perform work affected by and during a "Declared Incident".

2. A "Declared Incident" will be declared by the Chief Executive Officer of Transgrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.

3. "Emergency Work" is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

4. An Employee who is ordinarily rostered to perform work will keep the mobile device they ordinarily use for communicating with the Employer on their person for the purpose of being notified of Emergency Work and/or a Declared Incident and will answer their phone if contacted by the employer.

5. At all times, a minimum of one Network Control Manager and One Senior System Operator who are ordinarily rostered to work will attend the Control Room and monitor their systems and respond and deal with alarms, hazards relating to system security and/or with requests from AEMO, generators, distributors, other transmission authorities, fire, police and emergency services and direct connect customers, with the exception of all planned and/or commissioning work.

(c) On 16 July 2024, Solicitors for Transgrid sought a revision to the safety commitment (the Revised Safety Commitment) as follows:

- *the unions agree that the 'Extended Safety Commitment' be amended as follows:*
 - *that the unions ensure its members comply immediately with any direction made by Transgrid in relation to work which Transgrid considers is*

'emergency work' or where Transgrid has declared a Declared Incident. If a union considers that a direction does not relate to emergency work or to a declared incident, they should notify the Fair Work Commission of a dispute;

- *that the definition of emergency work be extended to include circumstances where there is a risk of a system outage;*
- *that the unions' members will return to service immediately any assets which are currently switched out; and*
- *to the extent assets are switched out during the operation of this amended Extended Safety Commitment, they will be returned to service immediately, including but not limited to bushfire preparatory work, (together, the Revised Safety Commitment);*
- *the unions agree that the Revised Safety Commitment will apply to all forms of protected industrial action taken from the date of this letter;*
- *your members will suspend protected industrial action to facilitate the connection of any transmission, generation (including new generators) and storage facilities (including BESS projects) to the network to ensure system security.*

[6] In the course of the hearing of the July Application, the CEPU gave the following additional undertakings (the Undertakings):

- (a) An undertaking not to apply locking and switching bans before 30 September 2024; and
- (b) An undertaking that from 24 July 2024, no protected industrial action would interfere with supply to the Tomago Aluminium Smelter.

[7] The CEPU had, however, declined to give the Revised Safety Commitment sought by Transgrid in its letter of 16 July 2024.

[8] At the conclusion of the Hearing of the First Application, I outlined the following basis for what was to become the First Decision, as follows:²

Well, noting the undertakings provided by the respondent union, I nonetheless find that pursuant to section 424(1)(c) that the requisite jurisdictional hurdle has been met in relation to the threat to persons and the public and the like. I intend to order that protected action in relation to the work defined in the required safety commitment declared as - as a declared incident or emergency work and declared as such by the CEO of Transgrid be suspended for a period of three weeks effective from the date of this order. That will be the terms - the first terms - or the first term of the order. Effectively, what that puts in place is the breathing space within which the parties can, what seems to be, resolve issues of undertakings between themselves. Let me be abundantly clear, as I think I was with my questioning of the applicant, and not so much with the respondent, but I thought I'd said enough. I consider the Extended Safety Commitment urged at page 325

of the digital court book to be something that would be productive in the further conduct between the parties. An order will issue with the associated notations as to notification to the parties and it will be - commence operation at 11.59 pm tonight. A decision will be published as soon as possible thereafter giving reasons.

[9] The First Decision outlined the following reasons:

[55] The evidence regarding the six incidents that have occurred where protected industrial action has threatened blackout and/or load shedding was compelling, and clearly established that protected industrial action engaged in has threatened to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. The most severe example would involve persons on life support equipment but would also involve multiple hospitals and nursing homes left with an electricity network that was not secure.

[56] The actions of the CEPU in the two particular examples of such incidents, and the balance of the six incidents, disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment.

[57] The protected industrial action insofar as it affected maintenance within Transgrid did not on the evidence before the Commission, however, threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. That it has resulted in mounting delays in maintenance is undoubted, but such an effect is not proscribed, and is in reality a usual consequence of protracted industrial action.

[58] Upon my conclusion that the s.424(1)(c) criterion has been satisfied in some, but not all, respects, I was required by the Act to make an order suspending or terminating protected industrial action. The only protected industrial action to which the required order could apply was that which I found satisfied the s.424(1)(c) criterion relating to Declared Incidents and Emergency Work, and the operation of the Extended Safety Commitment.

[59] As to the discretion as to whether to make a suspension or termination order, I determined to make a suspension order as, notwithstanding submissions by Transgrid that bargaining was at an impasse, I considered that, particularly where the parties would not be able to access the intractable bargaining provisions of the Act until September 2024, termination would be premature.

[60] Regarding the issue of the duration of the order that I was required by s.427 to specify, I considered, as is apparent from the decision on transcript, that a three-week suspension would allow the parties to resolve issues surrounding the application of the Extended Safety Commitment and the CEPU's undertakings. That was particularly so where once such an order was made, any other industrial action notified ceased to be protected by reason of s.413(7) whilst such order is in operation.

Background for this Application

[10] On 1 August 2024, Transgrid wrote to the CEPU as follows:

We refer to Transgrid's application under section 424 of the Fair Work Act 2009 (Cth) (Application) and the Order made by Deputy President Cross on 24 July 2024 (Order). As you are aware, the Order provides:

[1] Pursuant to section 424(1)(c) of the Fair Work Act 2009 (the Act) the Fair Work Commission orders that protected industrial action in relation to the work defined in the Revised Safety Commitment as a declared incident or emergency work, and declared as such by the CEO of Transgrid, be suspended for a period of three (3) weeks effective from the date of this Order.

At the hearing of the Application, Deputy President Cross made it clear that he expects the parties to use the 3 week suspension of protected industrial action to 'resolve issues of undertakings' and that he considered the safety commitment sought by Transgrid on 16 July 2024 to be 'productive':

Effectively, what that puts in place is the breathing space within which the parties can, what seems to be, resolve issues of undertakings between themselves. Let me be abundantly clear, as I think I was with my questioning of the applicant, and not so much with the respondent, but I thought I'd said enough. I consider the extended safety commitment urged at page 325 of the digital court book to be something that would be productive in the further conduct between the parties.

(PN1132 of the transcript)

A copy of our 16 July 2024 letter is enclosed.

Accordingly, we invite the CEPU to agree - on an indefinite basis - to the measures set out in our 16 July 2024 letter.

Can you please provide your response by midday tomorrow, 2 August 2024

[11] On 2 August 2024, the CEPU responded to the above correspondence as follows:

I refer to the above matter and to your correspondence to the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, (the ETU), dated 1 August 2024. The ETU responds as follows:

1. Transgrid's proposed revised safety commitment is entirely unreasonable. It provides Transgrid, and its CEO, unmitigated discretion to suspend its employees' protected industrial action, with no meaningful recourse for its employees or the ETU. It is contrary to freedom of association and wholly curtails the rights afforded to employees by the Fair Work Act's provisions in respect of industrial action.

2. The ETU maintains that the extended safety commitment, which was agreed by the parties, adequately addresses any legitimate safety concerns and that it is Transgrid's conduct that has been the source of any delayed responses to emergency situations.

3. *On the basis of the above, the ETU does not agree to Transgrid's proposed revised safety commitment.*

If you have any queries, please do not hesitate to contact me.

[12] On 2 August 2024, the First Decision was published.³

[13] On 9 August 2024, the CEPU issued two further notices of protected industrial action, both commencing at 12.00am, Thursday, 15 August 2024. The first notice was for 24 consecutive 1 hour stoppages occurring on Thursday 15 August 2024, and each day following (the Stoppages PIA Notice). The second notice outlined the following bans (the Bans PIA Notice):

1. *A ban on the performance of overtime*
2. *A ban on the use of Transgrid corporate credit cards*
3. *A ban on starting and finishing work anywhere other than at the prescribed Transgrid depot*
4. *A ban on the completion of work orders*
5. *A ban on issuing Access Authority and Field Access Authorities to non-TransGrid staff*
6. *A ban on performing work which is subject to protected action bans by any or all of Professionals Australia, CFMEU, PSA or USU members*
7. *During worktime, attaching union and industrial campaign-related material to outgoing mail and/or emails and adding ETU/CEPU and industrial campaign-related material to Transgrid materials and displays*
8. *During worktime, speaking to members of the public during work related telephone calls about the industrial action and ETU/CEPU campaign for a new enterprise agreement*
9. *During worktime, providing information, in any form, concerning the views of employees about industrial action and the ETU/CEPU campaign for a new enterprise agreement to members of the community including to members of the media*
10. *During worktime, providing the email address of the CEO and Executive General Manager - Delivery and other information to members of the community including to members of the media when communicating about the industrial action and ETU/CEPU campaign for a new enterprise agreement*
11. *A ban on using non-Transgrid toilets, changerooms and showers facilities where those facilities are required*
12. *A ban on having Meal Breaks (Morning Tea, Lunch, Dinner and Afternoon Tea) anywhere other than in a Transgrid meal room*
13. *A ban on cell functions whilst operating the network*
14. *A ban on training people who are not Transgrid staff.*
15. *A ban on completing e-learning modules.*
16. *A ban on Transgrid staff including work orders when completing timesheet.*
17. *A ban on the use of equipment used to test high voltage equipment.*
18. *A ban on the use of equipment used to test high voltage system protective devices and relays.*
19. *A ban on using test equipment to verify the accuracy of high voltage and measuring equipment used in metering systems.*

20. A ban on staff on submitting and processing RFAs (Request for Access) that are submitted within 28 days of planned outages start date.
21. A ban on Field staff amending or rectifying issued designs that would have otherwise required certification from a qualified engineer (Protection, Control, Automation, Secondary, Primary, Transmission Line Design). Including but not limited to Schematic Diagrams, Wiring & Connection Diagrams, Cable Schedules, Label Schedules, Relay Test Instructions, Relay Setting Files, Meter Test Instructions, Control System Databases.
22. A ban on operators performing cell duties unless specifically rostered as a cell resource for that shift.
23. A ban on implementing changes for, commissioning or testing related to new plant and apparatus.
24. A ban on witnessing or accepting contractor delivered work or commissioning.
25. A ban on implementing changes for, commissioning or testing for customers
26. A ban on Transgrid staff completing substation switching familiarisations for other staff

[14] Both the Stoppages PIA Notice and the Bans PIA Notice included the following Safety Commitment, which consisted of the Extended Safety Commitment plus an undertaking as to the Tomago Aluminium Smelter:

Safety Commitment

1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work or where suspending the action is necessary to perform work affected by and during a “Declared Incident”.
2. A “Declared Incident” will be declared by the Chief Executive Officer of Transgrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.
3. “Emergency Work” is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.
4. An Employee who is ordinarily rostered to perform work will keep the mobile device they ordinarily use for communicating with the Employer on their person for the purpose of being notified of Emergency Work and/or a Declared Incident and will answer their phone if contacted by the employer.
5. At all times, a minimum of one Network Control Manager and One Senior System Operator who are ordinarily rostered to work will attend the Control Room and monitor their systems and respond and deal with alarms, hazards relating to system security and/or with requests from AEMO, generators, distributors, other transmission authorities, fire, police and emergency services and direct connect customers, with the exception of all planned and/or commissioning work.
6. The Employees undertake to take all reasonable steps to ensure reliable supply to

the Tomago Aluminum Smelter at all times.

[15] The CEPU's undertakings regarding not to apply locking and switching bans before 30 September 2024, that were given in the July Application, remained in place.

The Evidence

[16] Transgrid relied upon:

- (a) A statement of Mr Adam Hoare dated 13 August 2024; and
- (b) Various evidence from the July Application outlined in the following table:

| | | | |
|---|----------------------------|--------------|---------------------------------------|
| 1 | Statement of Adam Hoare | 22 July 2024 | 31-165 |
| 2 | Statement of Adam Hoare | 24 July 2024 | N/A |
| 3 | Statement of Keiran Tolley | 21 July 2024 | 232-256 |
| 4 | Statement of Greg Houston | 21 July 2024 | 166-218 |
| 5 | Transcript References | | |
| | Adam Hoare | 24 July 2024 | (XN) PN278-298 (RXN) PN481-511 |
| | Keiren Tolley | 24 July 2024 | (XN) PN526-545 |

[17] The CEPU relied upon:

- (a) A statement of Mr Matthew Murphy, National Industry Coordinator – Electrical Trades Union (CEPU), dated 15 August 2024;
- (b) A statement of Mr Paul O'Malley, a Business Systems Analyst employed by the Transgrid, dated 15 August 2024; and
- (c) A statement of Mr Timothy Johns, a Senior Systems Operator employed by Transgrid, dated 15 August 2024.

[18] Mr Hoare, Mr Murphy, Mr O'Malley and Mr Johns were subject to cross-examination.

Submissions of Transgrid

[19] Transgrid submitted the Stoppages PIA Notice, in effect, notifies an indefinite strike. It is stated as an indefinite series of consecutive 1 hour stoppages for the entire 24 hours each day on consecutive days. The Bans PIA Notice notifies an indefinite series of bans, including (but not limited to) bans on the performance of overtime, starting and finishing work anywhere other

than at the prescribed Transgrid depot, using non-Transgrid toilets and meal rooms, training, and use of various equipment required to perform certain repair works.

[20] Transgrid noted that the Stoppages PIA Notice and the Bans PIA Notice contain the Extended Safety Commitment in an unmodified form to that used by the CEPU in earlier protected industrial action notices the subject of the First Decision.

[21] Transgrid submitted the CEPU's undertaking not to apply locking and switching bans are now irrelevant. The Stoppages PIA Notice and the Bans PIA Notice will prevent maintenance work, and importantly emergency and declared incident works.

[22] The protected industrial action notices the subject of the July Application saw a series of incidents where Transgrid directed employees to perform work in line with the Extended Safety Commitment, which was challenged by the CEPU, resulting in a 'tic tac' between Transgrid and the CEPU (including their lawyers) where the CEPU debated whether the work needed to be performed urgently. At paragraphs [55]-[56] of the First Decision, it is clear that the Commission accepted this evidence and found that despite the Extended Safety Commitment, the actions of the CEPU in these incidents disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work.

[23] In the Stoppages PIA Notice and the Bans PIA Notice, Transgrid submitted the CEPU has chosen not to make any modification to the wording of the Extended Safety Commitment notwithstanding the evidence in the July Application and the findings of the Commission at paragraphs [55]-[56] of the First Decision. This is a deliberate strategic choice by the CEPU, consistent with its stated desire to exert maximum pressure on Transgrid. There is no reason to think that the Extended Safety Commitment will work now when to date it has not.

[24] Transgrid characterised the CEPU's industrial agenda as involving a self appointed "gatekeeper" role on emergency work and declared incidents. Transgrid submitted "*history is the surest guide*" and that there would be continued delays in dealing with emergency work and declared incidents, resulting in threats to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, due to the CEPU's continued insistence that it have a role in agreeing whether situations constitute Emergency Work and Declared Incidents.

Submissions of the CEPU

[25] The CEPU noted that in circumstances where, on 9 August 2024, the CEPU gave notice under section 414 of the Act, it is uncontroversial that protected industrial action "*is threatened, impending or probable*" within the meaning of s 424(1)(b) of the FW Act.

[26] The issue in dispute is whether the Commission is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

(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.

[27] The CEPU submitted that Transgrid’s Application mischaracterises the ambit of the protected industrial action under contemplation, and does not meaningfully grapple with the fact that the industrial action notified by CEPU is subject to:

- (a) an undertaking not to engage in certain protected industrial action (namely, locking and switching bans) until 30 September 2024; and
- (b) an undertaking not to engage in protected industrial action that would interfere with the supply to the Tomago Aluminium Smelter.

[28] The CEPU submitted that it is well established that:

(a) Effective industrial action will almost always cause harm to the employer’s business which, in turn, will frequently adversely affect third parties.⁴

(b) The mechanisms in section 424(1) are not 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*”.⁵

(c) There must be an appropriate evidential basis to found the satisfaction required by section 424(1).⁶ That is, whether the decision maker is satisfied of the matters specified to in in section 424(1) “*is not simply a matter of impression or value judgment ... 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.*”⁷

[29] The CEPU submitted that once the ambit of the protected industrial action is identified with precision, having regard to the undertaking given, the Commission should not be satisfied that the protected industrial action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, or to cause significant damage to the Australian economy or an important part of it.

Consideration

[30] In the First Decision, I found that the actions of the CEPU in challenging Transgrid’s determinations that certain situations constituted Emergency Work and Declared Incidents disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment.⁸ In the decision on transcript in the July Application I had urged consideration of the Revised Safety Commitment proposed by the Solicitors for Transgrid on 16 July 2024.

[31] The CEPU have, as is their right, rejected any adoption of the Revised Safety Commitment. In his evidence, Mr Murphy directly addressed the Revised Safety Commitment, and deposed:⁹

The effect of agreeing to the Revised Safety Commitment would be to significantly diminish the ETU members’ ability to engage in industrial action. For example:

(a) There is no agreed definition of an “Emergency” or “Emergency Work”. It provides total discretion for Transgrid to determine what is an emergency and what is a declared incident.

(b) There would be no ability for the ETU to make enquiries when its own safety commitment is being invoked. It would need to file a dispute in the Fair Work Commission. I am not aware of a mechanism in the Fair Work Act for the ETU to do so.

(c) An emergency can just be a “risk of system outage”. Arguably, any incident on the network can create such a risk, so this Revised Safety Commitment would require the ETU’s members to suspend industrial action to attend any incident Transgrid identifies as creating a risk of outage.

(d) The Revised Safety Commitment requires all members to “facilitate” the connection of any transmission, generation and storage facilities. This would mean members would have to suspend industrial action any time Transgrid decides it wants to connect new equipment to the network. The word “facilitate” is broad and would cover everyone from in the control room to field officers.

(e) The Revised Safety Commitment is far in excess of any safety commitment the ETU has with any provider in NSW. The ETU is currently bargaining with, and engaging in industrial action at, Endeavour Energy, Ausgrid and Essential Energy. None of these providers have sought a safety commitment so extensive.

[32] The criticisms of the Revised Safety Commitment by Mr Murphy lack foundation. The Extended Safety Commitment, which is copied into safety commitments included in both the Stoppages PIA Notice and the Bans PIA Notice, provides:

1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work or where suspending the action is necessary to perform work affected by and during a “Declared Incident”.

2. A “Declared Incident” will be declared by the Chief Executive Officer of Transgrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.

3. “Emergency Work” is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

...

[33] There is no existing provision that allows for CEPU involvement in determining what are Emergency Work and Declared Incidents. Quite specifically, Declared Incidents are “declared” by the CEO of Transgrid, and Emergency Work is declared by an employee being directed in writing to perform Emergency Work.

[34] Of course, the CEPU could make enquiries in relation to any Emergency Work and Declared Incidents.¹⁰ It cannot, however, delay the performance of Emergency Work and Declared Incidents while making those enquiries. Mr Murphy confirmed in cross-examination that an application for good faith bargaining orders could be made if there were disputes regarding what were Emergency Work and Declared Incidents.¹¹

[35] There was otherwise no specific evidence of mischaracterisation of Emergency Work and Declared Incidents, and no evidence of other safety commitments with other electricity providers.

[36] In his oral evidence, Mr Murphy confirmed that the CEPU would continue to challenge the determinations by Transgrid of Emergency Work and Declared Incidents. His evidence included the following exchange:¹²

Okay. And when you say that there'll be consideration, well, you can go to page 125, ... of the court book. Would I be correct in understanding that what might face Transgrid is similar correspondence regarding particulars, and how it could be said that it's emergency work?---Yes, Your Honour. I think that's a fair example.

[37] While the CEPU point to the continued existence of the undertaking not to engage in certain protected industrial action (namely, locking and switching bans) until 30 September 2024, and say that Transgrid mischaracterises the ambit of the protected industrial action under contemplation, it is clear that the action notified in in both the Stoppages PIA Notice and the Bans PIA Notice facilitate vastly increased levels of action and probable disruption.

[38] Indeed, the Stoppages PIA Notice notifies of 24 consecutive 1 hour stoppages occurring on Thursday 15 August 2024, and each day following. Just how such action could co-exist with the notified safety commitment was the subject of evidence. Mr Murphy stated that when an employee is on a stoppage, they may be at a rally or fishing.¹³ Either way, if at such rallies, fishing, or otherwise engaged, those CEPU members would not be standing available, and would not be available to deal with issues arising under the safety commitment.¹⁴ Curiously for a registered organisation, the CEPU urged that Transgrid could avail itself of non-union employees and contractors in the case of an emergency arising during a stoppage.¹⁵

[39] What is abundantly clear is that if action pursuant to the Stoppages PIA Notice is taken, which is impending and probable, that action would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, because a large number of employees of Transgrid, who had given a safety commitment would be unlikely to comply with that commitment.

[40] The Bans PIA Notice, while on its face is less disruptive than the Stoppages PIA Notice, in part outlines action that would threaten to have the consequences of the type set out in section 424(1)(c) of the Act. For example:

(a) A ban on the performance of overtime (Ban 1) could disrupt the completion of any required emergency or declared incident work if the emergency or declared incident occurred during overtime hours.

(b) A ban on starting and finishing work anywhere other than at a prescribed Transgrid depot (Ban 3), a ban on using non-Transgrid toilets, changerooms and showers facilities where those facilities are required (Ban 11), and a ban on having Meal Breaks anywhere other than in a Transgrid meal room (Ban 12), could be relied upon to prevent an expedient response to an emergency or required urgent works by an employee electing to travel to a depot rather than directly to the location where the works are required, and may cause unnecessary delay.

(c) A ban on the use of equipment used to test high voltage equipment (Ban 17) would delay the urgent replacement of high-voltage assets which require the use of equipment to test such high voltage devices.

[41] As outlined in the Order, the particular protected industrial action that is impending or probable, that is threatening or would threaten to have the consequences of the type set out in section 424(1)(c) of the Act, were:

(a) The stoppages outlined in the Stoppages PIA Notice; and

(b) The bans in the Bans PIA Notice specified in:

(i) (Ban 1) bans on the performance of overtime;

(ii) (Ban 3) bans on starting and finishing work anywhere other than at the prescribed Transgrid depot;

(iii) (Ban 5) bans on issuing Access Authority and Field Access Authorities to non-Transgrid staff;

(iv) (Ban 11) bans on using non-Transgrid toilets, changerooms and showers facilities where those facilities are required;

(v) (Ban 12) bans on having Meal Breaks (Morning Tea, Lunch, Dinner and Afternoon Tea) anywhere other than in a Transgrid meal room;

(vi) (Ban 14) bans on training people who are not Transgrid staff;

(vii) (Ban 17) bans on the use of equipment used to test high voltage equipment;

(viii) (Ban 18) bans on the use of equipment used to test high voltage system protective devices and relays; and

(ix) (Ban 20) bans on staff on submitting and processing RFAs (Request for Access) that are submitted within 28 days of planned outages start date.

[42] A particular factor in my determinations has been the position put clearly by the CEPU that, notwithstanding my conclusion in the First Decision that the actions of the CEPU in the July Application disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment, the CEPU have unequivocally stated they will continue to act in the same manner.

That position allows me to conclude that the conduct that formed the basis of the First Decision would, without the Order, certainly continue with the attendant risks.

Termination or Suspension

[43] A relevant consideration is that on 7 August 2024, Transgrid filed an application for an Intractable Bargaining Declaration.

[44] In *Re Svitzer Australia Pty Limited (Svitzer)*,¹⁶ the Full Bench of the Commission observed, regarding a matter concerning section 424(1)(d):

It is important to bear in mind, however, that the purpose of s 424(1) is the protection of the population and the economy from the specified types of endangerment and significant damage, not to bring to an end enterprise bargaining which is perceived to be “intractable”. The state of progress, or otherwise, in bargaining is a consideration which may be taken into account in the exercise of the discretion under s 424(1) as to the type of order to be made, but the FW Act does not disclose any object or purpose to terminate “intractable” enterprise bargaining as such.

[45] Since *Svitzer*, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) amended the Act and provided power to the Commission to make an intractable bargaining declaration and subsequently an intractable bargaining workplace determination. I considered the protected industrial action should be suspended for a period to allow for the intractable bargaining processes under the Act to proceed and determined the relevant period to be a period of two months.



DEPUTY PRESIDENT

Appearances:

Mr Dalton of Counsel, on behalf of the Applicant.

Mr Crocker of Counsel, on behalf of the Applicant.

Mr Agius of Counsel, on behalf of the Respondent.

Mr Anward of Counsel, on behalf of the Respondent.

Hearing details:

Sydney.

10AM.
16 August 2024.

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¹ [\[2024\] FWC 1914](#).

² [\[2024\] FWC 1914](#), at [54].

³ [\[2024\] FWC 1914](#).

⁴ *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* [\[2010\] FWAFB 6021](#) at [41].

⁵ *National Tertiary Education Industry Union v University of South Australia* [\[2010\] FWAFB 1014](#) at [8];

⁶ *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [\[2011\] FWAFB 8165](#) at [49].

⁷ *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at 208 (per Gleeson CJ, Gaudron and Hayne JJ).

⁸ [\[2024\] FWC 1914](#), at [56].

⁹ Statement of Matthew Murphy dated 15 August 2024, at [82].

¹⁰ Transcript PN 411.

¹¹ Transcript PN 414 and 415.

¹² Transcript PN 484

¹³ Transcript PN 459 and 474.

¹⁴ Transcript PN 475 to 482.

¹⁵ Transcript PN 496.

¹⁶ [\[2022\] FWCFB 231](#), at [39].