



# DECISION

*Fair Work Act 2009*  
s.424—Industrial action

**Concentrix Services Pty Ltd**

**v**

**Association of Professional Engineers, Scientists and Managers, Australia,**

**The**

(B2024/1265)

COMMISSIONER HUNT

BRISBANE, 30 OCTOBER 2024

*Application for an order to suspend or terminate protected industrial action - endangering life etc. – whether interim order should be made final.*

[1] On 25 September 2024, Concentrix Services Pty Ltd (Concentrix) made an application pursuant to s.424 of the *Fair Work Act 2009* (the Act) to terminate protected industrial action notified by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) on the basis that the protected industrial action is threatened, impending or probable and if taken would endanger the life, the personal safety or health, or the welfare, of the population or part of it.

[2] The nature of the protected industrial action the subject of the application was set out in a written notice given by APESMA to Concentrix on 20 September 2024 in accordance with s.414 of the Act. The notice stated that the protected industrial action would commence at 7:00am (AEST) on 26 September 2024.

[3] I listed the matter for an urgent video conference at 9:00am on 26 September 2024. Between 7:00am and approximately 9:00am on 26 September 2024, some APESMA members engaged in protected industrial action. At the conclusion of the conference, APESMA provided an undertaking to Concentrix and to the Commission that until the determination of this application, members would not engage in protected industrial action.

[4] Section 424(3) of the Act requires that where an application for an order under s.424 of the Act is made, the Commission must, as far as practicable, determine the application within 5 days after it is made. If the Commission is unable to determine the application within that period, it must, within that period, make an interim order suspending the protected industrial action until the application is determined.<sup>1</sup>

[5] At the conference, APESMA indicated that due to witness availability, it would be unable to participate in a hearing of the matter that would allow the application to be determined within the 5-day statutory timeframe. Accordingly, on 27 September 2024, being satisfied that the Commission was unable to determine the application within the 5-day period specified by

s.424(3) of the Act, I issued an Interim Order [[PR779724](#)] suspending the protected industrial action. In accordance with s.424(5) of the Act, the Interim Order is in operation until the application is determined.

[6] After issuing the Interim Order, I issued directions to the parties for the filing of written material in anticipation of a hearing to determine the application. The matter was listed for Hearing on 10 October 2024. Concentrix was granted permission to be represented by Mr Troy Spence of Counsel, instructed by Mr Josh Dunn of Franklin Athanasellis Cullen. APESMA was represented by Mr Scott Crawford, Director – Victoria.

[7] The following people gave evidence and were cross-examined:

- Mr Richard Snelling, Operations Manager of the National Relay Service of Concentrix;
- Ms Judith Fletcher, Director People Solutions ANZ of Concentrix;
- Mr Timothy Goulter, Certified Interpreter of Concentrix;
- Mr Brett Milton, Certified Interpreter of Concentrix; and
- Ms Niki Baras, Organiser of APESMA.

[8] Mr Ben Scotcher, Certified Provisional Interpreter of the Applicant, filed a witness statement in the proceedings, but was unavailable for cross-examination. His statement was admitted into evidence, and I have afforded it due weight in determining the matter.

## Background

[9] Concentrix is engaged to provide the National Relay Service (NRS) for people who are deaf or find it hard to hear or speak to hearing people on the phone. The NRS is an initiative of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts. The Video Relay Service (VRS) is a component of the NRS, and is used by deaf individuals who communicate via the Auslan sign language

[10] Concentrix employs Relay Officers who sign and understand Auslan. A portion of the calls (and text messages) made by deaf or hard of hearing people to the NRS are emergency calls. A Relay Officer then provides the relevant interpretation between the deaf person and emergency services to assist in the emergency.

[11] On 20 September 2024, APESMA provided a notice of protected industrial action to Concentrix, notifying 13 items of proposed protected industrial action. Between the making of the application and the hearing on 10 October 2024, APESMA provided undertakings to Concentrix modifying the form of protected industrial action, with the remaining items as follows, and all other protected industrial action either withdrawn or not subject to the application:

<b>Notified protected industrial action</b>	<b>If modified, how?</b>
Item 3: An indefinite ban on responding to any emails or chat groups	“Without concession APESMA members will undertake to continue to utilise email and chat functions to communicate with other interpreters ... However, they will enforce the ban in relation

	to responding to 2 to 6 any email from or chat groups operated by management ... the action does not prevent obligations to read and action directions contained within emails ... the action does not prevent management ... telephoning or teleconferencing and communicating with ... members.”
Item 4: Indefinite action in the form of answering incoming video calls on Skype after 2 minutes and 30 seconds and 3 <sup>rd</sup> prompt (3/3) limits	
Item 5: Indefinite action in the form of interrupting or stopping work to provide an authorised Professionals Australia statement to clients, stakeholders, users or customers.	“Action 5 of the protected industrial actions in issue, without concession, APESMA undertakes that it will advise its members to only provide the authorised Professionals Australia statement at the end of the call, but that if the call required contact with emergency services, mental health services or family violence services the statement would not be provided.”
Item 6: Indefinite actions in the form of interrupting or stopping work to provide an authorised Professionals Australia statement in emails, auto-reply messages and voicemail.	
Item 7: Indefinite action in the form of employees extending their welfare (long call break) to 15 minutes.	“...without concession, APESMA members undertake to only take a 15-minute long call break in Action 7 in the event that there are other Interpreters available to field calls.”

[12] It is apparent that Items 4 and 7 are of most concern to Concentrix in respect of this application.

[13] On 4 October 2024, Concentrix filed a Form F1 application to amend its application in this matter to seek orders that the protected industrial action be *suspended*, rather than *terminated*. Without determining Concentrix’s amendment application, I directed APESMA to address the question of suspension when it filed its material on 7 October 2024.

### Relevant legislation

[14] Section 424 of the Act states as follows:

**“424 FWC must suspend or terminate protected industrial action— endangering life etc.**

*Suspension or termination of protected industrial action*

(1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

- (a) is being engaged in; or
- (b) is threatened, impending or probable;

if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
- (d) to cause significant damage to the Australian economy or an important part of it.

(2) The FWC may make the order:

- (a) on its own initiative; or
- (b) on application by any of the following:
  - (i) a bargaining representative for the agreement;
  - (ii) the Minister;
  - (iia) if the industrial action is being engaged in, or is threatened, impending or probable, 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;
  - (iib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;
  - (iii) a person prescribed by the regulations.

*Application must be determined within 5 days*

(3) If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.

*Interim orders*

(4) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.

(5) An interim order continues in operation until the application is determined.”

## EVIDENCE OF THE APPLICANT

### Evidence of Mr Richard Snelling

[15] Mr Snelling is employed by Concentrix as the Operations Manager of the NRS. He is responsible for managing the NRS relay officers and video relay officers, including rostering, reporting on the performance of the NRS and organising projects to improve the NRS.

[16] The NRS is comprised of multiple communication modes, including NRS Chat, NRS Captions, SMS Relay, Type and Listen Relay and the VRS. The VRS exists for users who communicate via Auslan. Users accessing the VRS will be connected via Skype to an interpreter. The user signs their message to an interpreter, who interprets into spoken English for the hearing party. The interpreter then signs back the spoken response to the user.

[17] The VRS operates Monday to Friday, 7:00am – 6:00pm and on Saturday, 8:00am – 12:00pm.

[18] Mr Snelling referred to 2021 Australian Census data which showed that 16,242 people throughout Australia use Auslan at home. Mr Snelling stated that while some people who use Auslan can communicate in English, others have not learnt or are not proficient in any language other than Auslan. There are approximately 6,000 registered users of the NRS. Concentrix does not know how many of those registered users exclusively use the VRS. The VRS receives approximately 4,500 calls each month.

[19] Mr Snelling described the process of assigning an interpreter when a user places a call on the VRS as follows:

- (a) The first available interpreter in queue of available interpreters on shift is required to answer the call. That interpreter answers the video call and asks the user, in Auslan, who they wish to contact.
- (b) The interpreter then places a voice call to the hearing individual on behalf of the user. The user communicates with the interpreter using Auslan through the Skype video connection, and the interpreter translates the signed message into spoken English for the hearing person.
- (c) When the hearing person responds, the interpreter signs their response back to the user.

[20] At the conclusion of the VRS call, the interpreter logs the call as either “successful”, “unsuccessful”, “genuine emergency”, “not for us” (for mistaken contacts), or “testing”. The number of calls logged as a “genuine emergency” is tracked and reported to the Australian Government monthly.

[21] Between January 2024 and August 2024, three calls were logged as genuine emergencies. In 2023, five calls were logged as genuine emergencies. Concentrix considers that the VRS can “literally be a lifeline”, as users are unable to access voice-based services without

a VRS interpreter. In addition to emergency situations, the VRS is used to make appointments with medical practitioners, banks and schools and to interact with other government services.

[22] Since 2021, the VRS has been regularly used for telehealth consultations. Concentrix had not previously allowed the VRS to be used for telehealth appointments because the VRS is ordinarily used on an ‘as needs’ basis, however the service was expanded to telehealth appointments during the COVID-19 lockdown period. Mr Snelling stated this received a positive reception from users, as it was more convenient than attending an in-person consultation with a paid interpreter. On that basis, Concentrix has continued to allow VRS users to use the service for telehealth appointments.

[23] Mr Snelling gave evidence that it has been reported to him by the team leader of the VRS that the VRS is regularly used to access mental health services such as Lifeline and Beyond Blue. Mr Snelling stated that these calls are often distressing for interpreters, in which case the interpreter will debrief with their team leader following the call, and the team leader will provide a summary to Mr Snelling. Mr Snelling stated that it has been reported to him that VRS interpreters handle an average of at least one mental health-related call per day.

[24] Team leaders have similarly reported to Mr Snelling that the VRS is regularly used to access support for domestic violence matters, including calls to 1800Respect and the police. Mr Snelling stated that these calls are not logged as a “genuine emergency” because they are not Triple Zero calls, and Concentrix does not otherwise record any statistics on those calls.

[25] Surveys provided by Concentrix to users of the VRS indicate that between 32% - 41% of respondents stated that contacting a doctor or medical practice was the purpose of their call, and between 0% - 4% stated that contacting a government department was their purpose.

[26] Mr Snelling gave evidence about the nature of the proposed protected industrial action and its impact. He stated that Concentrix employs 26 interpreters to staff the VRS, with the goal of having 16 interpreters rostered each day, with each interpreter interpreting for an average of 16 minutes per rostered hour. Based on the results of the protected action ballot and a conversation he had with another interpreter, Mr Snelling estimated that 23, or 86% of the VRS interpreters are eligible to engage in the protected industrial action.

[27] Mr Snelling considers that the protected action would threaten to endanger the life, personal safety, health, or welfare of users of the VRS accessing telehealth appointments (including mental health services), emergency services and domestic violence support services. In relation to Notified Action 4, Mr Snelling stated that when a VRS call via Skype is placed, it enters a queue where the first available interpreter is prompted to accept the call. That interpreter is prompted three times in 2 minutes and 30 seconds, and if it has remained unanswered after that time, it is forwarded to the next interpreter in the queue.

[28] Originally, Mr Snelling considered that there could be a perpetual loop of interpreters not answering the same call for in excess of 2 minutes, 30 seconds, and the caller hanging up, however in evidence given during the Hearing, Mr Snelling accepted that would not be the case.

[29] Mr Snelling stated that Action 4, that being interpreters delaying answering calls for a minimum of 2 minutes, 30 seconds, would result in “significant delays and unanswered calls”

which would threaten the safety, health or welfare of VRS users. In response to correspondence sent by APESMA stating that Action 4 “would be within the usual demands and operational experience of the service”, Mr Snelling stated that interpreters ignoring a call could not be within the operational experience of the service, and that he was not aware of any undertaking that could be given by APESMA to mitigate his concerns. Even if the interpreter answered the call immediately to ascertain the nature of the call, and then put the caller on hold, Mr Snelling stated this would still impact the queue, leaving some calls delayed or unanswered.

**[30]** When interpreters engaged in Action 4 for approximately 2 hours on the morning of 26 September 2024, the data reflects the following for the whole day:

- 143 calls made to the VRS;
- 140 calls answered;
- 25.87% of calls were answered within two minutes; and
- 11 mins, 17 seconds maximum wait time.

**[31]** The data for 27 September 2024, where no protected industrial action was being undertaken, is as follows:

- 138 calls made to the VRS;
- 138 calls answered;
- 97.83% of calls were answered within two minutes; and
- 3 minutes, 33 seconds maximum wait time.

**[32]** Mr Snelling concluded that although the protected industrial action was only engaged in for the first two hours of 26 September 2024, the impact on the VRS queue lasted for the entire day and was significant.

**[33]** In relation to Action 7, Mr Snelling stated that interpreters currently receive a 10-minute break after every 25 minutes of interpreting. He stated that extending this break to 15 minutes would reduce the number of interpreters available to answer calls. Mr Snelling stated that APESMA’s undertaking does not mitigate his concerns, as the interpreters available at the start of a 15-minute long call break may be about to take a break themselves, or may otherwise be occupied by an incoming call. Therefore, continuity of service will remain threatened, and calls may be delayed or unanswered. Mr Snelling instead suggested APESMA propose an undertaking that an interpreter’s extended break would cease when a call is received.

**[34]** In relation to Action 6, Mr Snelling estimated that it would take approximately 1.5 – 2.5 minutes to sign the following statement in Auslan:

“Auslan interpreters at the National Relay Service, represented by Professionals Australia, are currently taking lawfully protected industrial action. This is unprecedented for our profession, but our protracted negotiations have not led to agreement. Our profession is not respected and over the last five years, our wages have gone backwards. Our demands are reasonable. We are taking this step because every interpreter deserves a fair wage and decent working conditions.”

### *Mitigation*

[35] Mr Snelling stated that Concentrix does not have any practical ability to mitigate the effects of the proposed industrial action.

[36] To Mr Snelling's knowledge, there is a national shortage of qualified Auslan interpreters. He referred to Volume 6 of the *Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, which stated that in March 2022 there were 654 Auslan interpreters in Australia.<sup>2</sup> While acknowledging that he did not know if that number is correct, Mr Snelling stated it was consistent with his experience in working with and hiring Auslan interpreters at Concentrix.

[37] As the Auslan language has regional dialects, Mr Snelling stated that a VRS interpreter must be highly proficient and able to navigate calls from users across Australia. He stated that the pool of available interpreters with the required proficiency is limited. There is no labour hire provider of Auslan interpreters, and contractors are not suitable as they do not have the required proficiency. While Concentrix is currently advertising a position for an Auslan interpreter, Mr Snelling is not aware of any recent applications, meaning that hiring additional interpreters is not a feasible solution. The effect of this is that Concentrix will be unable to roster additional staff if interpreters engage in the proposed industrial action, and it will be impossible for Concentrix to deliver the VRS at the current level of service.

[38] Mr Snelling rejected the option of text-based NRS services as an alternative. His evidence was that "few" deaf users of the VRS are proficient in English or other languages and that the VRS is the only way they can communicate independently with hearing individuals. Therefore, the industrial action could leave VRS users without any means to contact emergency, medical, legal and government services.

### **Reply evidence of Mr Snelling**

[39] In response to APESMA's submission that the delay caused by the protected action would be within the limits commonly experienced by VRS users and pose no greater threat than what is already operationally acceptable, Mr Snelling referred to the NRS Performance Report for the months of April – September 2024. The September Report indicates that 3.4% of VRS calls were answered within the first 5 seconds, 3.8% within 10 seconds, and 90.27% within 2 minutes, with an average wait time of 1 minute and 8 seconds. Mr Snelling compared this to the minimum 2 minute and 30 second delay that would be experienced while protected industrial action takes place. He stated that the result would be that a much larger proportion of users would experience wait time beyond 2 minutes in circumstances where many users rely on the VRS to access emergency responders, medical professionals and mental health services.

[40] In relation to Action 7, Mr Snelling stated that APESMA's modification such that members will only take a 15-minute break if other interpreters available is insufficient to resolve his concerns about a situation where an interpreter taking a long break coincides with another interpreter taking a scheduled break. He further noted that APESMA had not adopted his proposed modification for interpreters to cease their extended break if a call is received.



[41] In evidence given during the Hearing, Mr Snelling agreed that Concentrix could prepare an Auslan video via Deaf Services Australia, instructing people who use the services of expected delays, and informing users not to rely on VRS in the event of an emergency.

[42] Mr Snelling conceded that the VRS is closed more hours per week than it is open.

### **Evidence of Ms Judith Fletcher**

[43] Ms Fletcher is the Director, People Solutions ANZ of Concentrix. She is responsible for the management of human resources at Concentrix, including recruitment and payroll.

[44] Ms Fletcher stated that APESMA commenced bargaining with Concentrix for an enterprise agreement to cover VRS interpreters on 29 September 2023, but Concentrix did not receive a log of claims until 13 February 2024. On 24 July 2024, APESMA filed an application to the Commission for a bargaining order. A bargaining order was not made.

[45] On 5 August 2024, a bargaining meeting was held. Ms Fletcher stated that many of APESMA's proposed clauses were not applicable to the operations of the VRS. A further meeting was held on 19 August 2024 where a number of clauses were agreed. A third bargaining meeting was held on 3 September 2024, where further clauses were agreed. Ms Fletcher stated that there had not been meaningful movement with respect to remuneration until 13 September 2024 because Concentrix had not secured the contract for the continued operation of the NRS until that time. Bargaining meetings were then held on 16 and 30 September 2024, where remuneration, workload, leave, allowances, and tools and equipment clauses were discussed.

[46] The hourly rates for VRS interpreters are as follows:

- (a) \$52.16 for a provisional accredited interpreter (or \$65.08 with causal loading); and
- (b) \$60.74 for a certified accredited interpreter (or \$75.92 with causal loading).

[47] Ms Fletcher communicated to APESMA on 13 September 2024 that Concentrix proposed to increase the wages of VRS interpreters annually based on the Concentrix Annual Merit Cycle, which is an increase in wages determined by the performance of the NRS applied equally to all interpreters. This scheme resulted in VRS interpreters receiving a 3.75% wage increase from 1 July 2024. APESMA did not provide a counteroffer to the communication before initiating industrial action.

## **EVIDENCE OF THE RESPONDENT**

### **Evidence of Mr Timothy Goulter**

[48] Mr Goulter is employed by Concentrix in the VRS team as a certified interpreter, commencing December 2019. He works as a casual employee, typically for 32 hours per week across six days.

[49] For a sample period 19 – 23 July 2024, Mr Goulter interpreted 54 calls consisting of:

- 9 calls related to the NDIS;
- 6 calls related to telecommunications matters (Telstra/Optus);
- 6 calls related to the client's employment;
- 3 calls related to making or cancelling hospital appointments;
- 3 calls related to Centrelink; and
- 27 calls related to other matters (e.g. insurance, banking, jury duty, travel etc.).

**[50]** Auslan interpreting is done simultaneously on VRS calls. This means interpreters must be both listening and signing at the same time while watching for visual cues from the client and vice versa. The cognitive load can be quite intense, especially for long and complex calls.

**[51]** Mr Goulter stated that some of the deaf people who use the VRS are professionals, yet others have a lower proficiency in the English language than for non-deaf people.

**[52]** For the VRS interpreters, the nature and context of the call is not known until they answer the call. It could, for example, be a call about a legal matter or a mental health episode.

**[53]** During Mr Goulter's employment with Concentrix he has dealt with three Triple Zero calls, but none related to any life-threatening circumstances. His witness statement included those circumstances.

**[54]** On the website used by users wishing to make a VRS call, they are informed of the following:

“Emergency calls using NRS Chat, SMS Relay, NRS Captions, Voice Relay and TTY receive priority in the queue so calls are taken quickly. If you're an Auslan user, it's better not to use Video Relay to make an emergency call. This is because: it's not possible to identify (and therefore prioritise) emergency calls using Skype [and the] Video Relay is only available during limited hours.”

and

“Video Relay calls can be used in an emergency to contact emergency services through the NRS. But it is recommended NRS users contact emergency services through a different NRS call option. Unlike other NRS calls to emergency services – which will automatically be prioritised over other calls in the NRS system – there is no queue for Video Relay calls, and services only operate in limited hours.”

**[55]** Mr Goulter stated that given his experience in the deaf community, in an emergency, deaf people might have available the following options:

- Ask a neighbour or nearby hearing person to make a call;
- Video call a family member or friend who then call emergency services on their behalf;
- If older, have a personal medical alarm that automatically calls a family member and/or an ambulance;
- Call emergency services through the NRS dedicated Triple Zero service.

[56] In the two hours of protected industrial action on 26 September 2024, six calls were received by six different interpreters. The average time to answer the six calls was 3 minutes, 5 seconds and the maximum wait time was 3 minutes, 26 seconds.

[57] Mr Goulter noted that Concentrix has a service level agreement with the Federal Government requiring 80% of calls to be answered within two minutes. The industrial action of waiting 2 minutes, 30 seconds is designed to affect Concentrix's ability to meet its commitment under the agreement, encouraging Concentrix to bargain in good faith with employees. Mr Goulter understands there is a financial penalty if Concentrix does not meet its service level agreement for the month. The industrial action is not taken to affect the users of the VRS.

[58] In cross-examination, Mr Goulter accepted that there are some deaf users who have limited literacy skills.

### **Evidence of Mr Brett Milton**

[59] Mr Milton has been an Auslan interpreter for 27 years, employed by Concentrix since 2019. He works as a casual employee, typically for 18 hours per week across four days.

[60] Mr Milton stated that VRS calls are often complex. For deaf users with limited English literacy skills, they may request sight translation of emails or text messages before calling the sender, and for some types of calls (e.g. insurance, finance) to require simultaneous interpreting of lengthy scripts.

[61] Mr Milton estimated that he has dealt with no more than five or six Triple Zero calls. Most have been non-genuine emergencies, however on two occasions he stayed on the line until paramedics arrived.

[62] Mr Milton noted that the VRS is often understaffed. Where Concentrix would like to roster 16 interpreters per day, on some days there are only 10 available. This results in queueing of calls and increased wait times.

[63] In evidence given during the Hearing, Mr Milton agreed that if a deaf person had low literacy, receiving written advice of delays to the VRS would be of little effect.

### **Evidence of Ms Niki Baras**

[64] Ms Niki Baras is an Organiser for APESMA. She is also a freelance interpreter/translator (Greek < > English).

[65] There are approximately 600 Auslan interpreters in Australia. They are mostly concentrated in Victoria and New South Wales. Due to the nature of the work and how it is organised, interpreters generally work for multiple providers. The demand for Auslan interpreters often outstrips supply.

[66] Ms Baras conducted a survey of Concentrix VRS interpreters. Of the 20 respondents, six said they are NATTI Certified Interpreters, while 14 are NAATI Certified Provisional

Interpreters with non-complex, non-specialised content. The average experience is 14 years. 16 employees said they also worked elsewhere.

[67] In cross-examination, Ms Baras agreed that the media release of APESMA on 24 September 2024 referenced the important work being undertaken by members employed at VRS, including “medical, legal, and government services and emergency situations such as calling Triple Zero.”

## **SUBMISSIONS OF THE PARTIES**

### **Concentrix’s Submissions**

[68] Concentrix submitted that the services it provides are essential phone services that assist Australians who are deaf, hard of hearing and/or have a speech impairment in accessing vital services, including emergency services such as calling Triple Zero. In addition to APESMA acknowledging the important service provided, Concentrix referred to a media release issued by the Hon Michele Rowland MP, Minister for Communications on 24 August 2024, where the Minister described the NRS as an “essential phone service” and a “lifeline for Australians living with a disability”.<sup>3</sup>

[69] In its reply submissions filed after the amendment application, Concentrix submitted that the protected industrial action should be suspended for two months to allow the parties to continue bargaining. It argued that the relevant protected industrial action would endanger the life, personal safety, health or welfare of part of the population, being the users of the VRS who rely on the VRS to access medical, legal and government services and emergency situations such as calling Triple Zero.

[70] Concentrix noted that the relevant criteria for consideration are:

- (a) whether the protected industrial action is threatened, impending or probable;
- (b) whether members of the deaf community who are users of the VRS are a ‘part of the population’; and
- (c) whether the Commission is satisfied that the protected industrial action would threaten to endanger the life, the personal safety or health, or the welfare of the users of the VRS.

[71] Concentrix submitted that the parties agree that (a) and (b) are met. Therefore, the only issue for the Commission to determine is (c).

[72] Concentrix submitted that the Commission is not required to determine the likelihood or probability of the requisite endangerment, and the Commission is only required to be satisfied the protected industrial action would threaten to have the requisite effect.

[73] Concentrix referred the Commission to a number of relevant authorities. In *Serco Australia Pty Limited T/A Serco v United Workers’ Union* [\[2024\] FWC 1275](#) (*Serco*), Deputy President Hampton said the following:

“[14] Accordingly, and stated in general terms, s.424(1)(c) of the Act relevantly provides that the Commission must make an order suspending or terminating relevant protected industrial action if it is satisfied that the action threatens to endanger the life, the personal safety or health, or the welfare of the population or part of the population. Whether an order should be made under s.424 will be a matter to be determined based upon a consideration of all the circumstances and having regard to the evidence and submissions before the Commission.

[15] Further, the statutory scheme is such that the orders preventing protected industrial action are not to be issued lightly and the satisfaction contemplated by s.424 is that the threat must be material, and certainly beyond mere inconvenience, and founded upon a proper basis.

[16] The Commission has previously accepted that measures reasonably available to an employer to mitigate the impact of PIA, are a relevant consideration.”

[74] Concentrix noted that the test is not whether the protected industrial action ‘would’ endanger, but rather whether it would ‘threaten to endanger.’<sup>4</sup>

[75] A Full Bench in *Victorian Hospitals’ Industrial Association v Australian Nursing Federation* (2011) 214 IR 148 (VHIA) at [51] found that even if conduct is not serious enough to endanger life, it might constitute a relevant risk to personal safety or health:

“[51] We were taken in the proceedings to previous decisions of FWA and its predecessors regarding the meaning of the terms in s 424(1), including the references to “welfare” of the population and the concept of endangerment. These are commonly used words and expressions which are widely understood in the community and which should be given their ordinary meaning. Conduct that puts a person’s physical or mental state at risk of material detriment – or that materially hinders or prevents improvement in a person’s poor physical or mental state – may qualify as conduct that endangers personal health or safety. Although the conduct might not be of such a serious nature as to amount to an endangerment to “life”, it might nevertheless be such as to constitute a significant risk to “personal safety or health”. Conduct that delays or puts off the efficient supply of public health services has the capacity to impact adversely upon the welfare of at least some of the persons who require those services. The impact of the conduct must, however, be more than merely to cause inconvenience to the persons concerned – it must be such as to expose them to danger.”

[76] Concentrix noted the Full Bench said in *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982 (NTEU) the following:

“[33] Each of these decisions turned on its own facts, and none of the decisions relieves us of our obligation to determine this case on the facts before us. However, the decisions support at least two conclusions which are highly relevant to the outcome of this case:

- (1) Potential effects upon the academic progression of students produced by a results ban may of such a nature as to constitute a threatened endangerment of students' welfare; and
- (2) Students so affected may constitute a 'part of the population' for the purpose of s 424(1)(c)".

[77] It was submitted that the data for the two-hour period on 26 September 2024 is demonstrative of the deliberate action taken to cause delays to users of the VRS, and if that action is permitted to be taken for longer periods, the delays will be exacerbated exponentially.

### **APESMA's Submissions**

[78] APESMA submitted that the protected industrial action was only initiated after Concentrix failed to make any offer of wages increase in September 2024, contrary to its stated position in bargaining.

[79] APESMA submitted that in applying the decision in *VHIA*, the Commission must consider whether the impact of the protected industrial action

- (a) puts a person's physical or mental state at risk of material detriment;
- (b) materially hinders or prevents an improvement in a person's poor physical or mental state;
- (c) is exposing users of the VRS to danger; or
- (d) is merely causing inconvenience to users of the VRS.

[80] APESMA submitted that the delay caused by the protected industrial action is merely an inconvenience to users of the VRS and it does not materially risk or hinder the physical or mental state and does not expose them to any greater danger than is already within the risk associated with using the VRS.

[81] The delay in answering calls in Action 4, APESMA submitted, is within the types of delay commonly experienced during high demand periods.

[82] Action 7, APESMA submitted, given its relevant undertakings provided to Concentrix, results in interpreters utilising email and chat functionality to communicate with each other, including about taking breaks to maintain service.

[83] APESMA submitted that the protected industrial action does not:

- stop calls from being answered;
- prevent services from being accessed by users of the VRS;
- create a lack of responsiveness;
- stop users of the VRS from receiving timely help;
- leave users of the VRS without any means of contacting vital services including medical, legal and government and emergency services.

## Consideration

[84] At the Hearing on 10 October 2024, I informed the parties that I accepted the amended application of Concentrix to require the Commission to only consider *suspension* of the protected industrial action, not *termination* of it.

[85] In determining this application, the Commission must be satisfied to the requisite standard that the protected industrial action would threaten to endanger the life, the personal safety or health, or the welfare of the relevant users of the VRS.

[86] The Commission heard that there may be a lower literacy standard of some members of the deaf community. The relevant consideration here is whether Concentrix can communicate in a number of ways to those members, including:

- Posting a notification on the screen while VRS users are awaiting an Auslan interpreter to take their call;
- Informing them by email or text of likely delays to their video calls being taken by Auslan interpreters; and
- A lower likelihood of those who typically use the VRS taking up other options, including NRS Chat, NRS Captions, SMS Relay and Type and Listen Relay.

[87] There was no evidence before the Commission of the percentage of the deaf community who have lower literacy rates because this is difficult to ascertain.

[88] It is noted, however, that VRS users need to register, and in doing so, users typically provide an email address and mobile phone number.

[89] The Commission heard that Concentrix could commission, within a relatively short period of time, an Auslan signed video informing VRS users that there are expected delays in the service due to protected industrial action, to stay on the line if they could accommodate those delays, or use other services, and find other means to make emergency calls, calls in respect of domestic violence, or mental health crisis calls.

[90] It is noted that VRS users are already cautioned not to use the VRS in the event of an emergency, and for those who do not have literacy issues, this would be understood. The VRS is closed more hours during the week than it is operative, so in the event a VRS user attempted to call in non-operative times, they would soon learn that it is not open. In the event of an emergency during non-operative times, the VRS user would simply have to find an alternative way to contact emergency services. This is so in respect of typical emergency services, in the event of a mental health crisis of a VRS user, or calling a domestic violence helpline.

[91] In the absence of any mitigation taken by Concentrix to inform VRS users of the potential of a significant delay in taking their call, I consider that the threat to VRS users of endangerment to life, their personal safety or health, or their welfare would be material. The deliberate delay in taking calls would cause a significant delay in wait times as the day went on. Call wait times would grow and grow, based on the evidence of the two-hour period of 26 September 2024.

[92] However, if Concentrix does take all appropriate steps to mitigate the impact of the protected industrial action, the likelihood of a VRS user wishing to use the service for the purpose of an emergency call, mental health crisis or domestic violence event will be significantly reduced. The mitigation Concentrix could choose to take could reasonably include:

- Posting an Auslan signed video on the screen when VRS users call, informing them immediately not to use the service for emergency calls or where they may wish to contact Lifeline or 1800Respect (for example);
- The Auslan signed video can explain the delays to be expected, being no less than 2:30 in length, and probably longer and inviting VRS users to consider, if they are able, to use another service;
- Sending a short Auslan signed video by text and email to VRS recipients whose phone and email accounts will accept a link to a video;
- Writing to Auslan users by post, explaining the potential delays, which may, in the situation of an Auslan user with low literacy levels, necessitate them making inquiries with friends, relatives or neighbours as to the nature of the communication.

[93] If Concentrix were to take appropriate steps to mitigate the impact of delays to VRS users, in my view, the impact of the protected industrial action would be mere inconvenience, and I would not be satisfied that it would expose VRS users to danger. I am not satisfied that the protected industrial action would leave VRS users without ‘any’ means to contact other services such as non-urgent medical, legal and government services. There might certainly be frustration at having to wait a longer than usual time, but on the evidence before the Commission, the calls would likely eventually all be taken.

[94] While above I have dealt with any potential endangerment to a VRS user’s life, and their personal safety or health, I do not consider that having to endure a delay in their call being Auslan interpreted will affect their welfare. For the period that protected industrial action is to be taken, VRS users will, if informed of the delays by the material which I suggest Concentrix produce, have to be patient and decide if they wish to accept the delays to what is typically a very efficient service.

[95] In respect of Item 7 of the protected industrial action, I am satisfied that with the undertakings provided by APESMA in correspondence dated 25 September 2024, members will only take a 15-minute long call break in the event that there are other interpreters available to field calls. I am satisfied that there is appropriate communication between the interpreters to give effect to this undertaking.

[96] In respect of Items 3 and 5 (as modified), together with Item 6, I am satisfied that none of these actions, if taken, would threaten to endanger the life, the personal safety or health, or the welfare of the population or of part of it.

## **Conclusion**

[97] As I am not satisfied that the protected industrial action in respect of Items 3, 5 and 7 (as modified), nor Items 4 and 6 would threaten to endanger the life, the personal safety or



health, or the welfare of the population or of part of it, the requirements of s.424(1)(c) have not been met and the application must be dismissed.

[98] By virtue of dismissing the application, the Interim Order [\[PR779724\]](#) will cease to apply as at the end of the working day on the date of this decision.



COMMISSIONER

*Appearances:*

*T Spence* of Counsel, instructed by *J Dunn* of Franklin Athanasellis Cullen for the Applicant.  
*S Crawford* for the Respondent.

*Hearing details:*

2024.  
Brisbane.  
10 October.

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<sup>1</sup> *Fair Work Act 2009* (Cth) s.424(4).

<sup>2</sup> Statement of Richard Snelling, Annexure O.

<sup>3</sup> Statement of Richard Snelling, Annexure A.

<sup>4</sup> *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [\[2009\] FWA 44](#) at [29] [(2009) 187 IR 119].