



REASONS FOR DECISION

Fair Work Act 2009

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

G4S Custodial Services Pty Ltd

v

CPSU, the Community and Public Sector Union

(B2024/1473)

COMMISSIONER WILSON

MELBOURNE, 26 NOVEMBER 2024

Application for an order to suspend or terminate protected industrial action pursuant to s.424

[1] These are my reasons for a decision, advised to the parties on Saturday 16 November 2024, to issue an order suspending protected industrial action at the Port Phillip Prison (PPP) operated by the Applicant, G4S Custodial Services Pty Ltd (G4S). The suspended protected industrial action is in relation to bargaining for a proposed agreement replacing the *G4S Custodial Services Pty Ltd (Port Phillip Prison) Correctional Services Workplace Agreement 2021* (the 2021 Agreement) and is being taken or threatened by the Community and Public Sector Union and its members (CPSU).

INTRODUCTION

[2] An application was made to the Fair Work Commission by G4S on Thursday 14 November 2024 at 6:19 PM seeking an order pursuant to s.424 of the *Fair Work Act 2009* (the FW Act) that would terminate or suspend protected industrial action being taken by members of the CPSU.

[3] As the protected industrial action was notified to be taken by members of the CPSU on Monday 18 November 2024, the application was the subject of an urgent hearing before me on Friday 15 November 2024. At the conclusion of the hearing, I advised I would consider all relevant material and evidence and advise my decision to the parties on Saturday 16 November 2024. On that day I advised the parties I would grant the application and issue an order with my reasons for decision to follow.

[4] At the hearing, Mr Leigh Howard of Counsel appeared for G4S and Mr Andrew White of Counsel appeared for the CPSU, with each party being granted permission by me for representation by lawyers, pursuant to s.596(2)(a) of the FW Act. Evidence was received on behalf of G4S Custodial Services from Mr Peter Maa, General Manager of the Port Phillip Prison and Ms Amanda Smith, the prison's Offender Services Manager, with the latter's witness statement being admitted to the evidence unopposed. Mr Adrian Trait, a CPSU Industrial Organiser gave evidence on behalf of the union.

[5] The Order issued by me on Saturday 16 November 2024 was in the following terms;

“[1] Pursuant to s.424 of the *Fair Work Act* 2009 (Cth), the Fair Work Commission orders that all protected industrial action notified by the Community and Public Sector Union (CPSU) in relation to bargaining to replace the *G4S Custodial Services Pty Ltd (Port Phillip Prison) Correctional Services Workplace Agreement 2021 (Proposed Agreement)*, is suspended for a period of 2 months from the date of this order.

[2] This order binds:

- (a) the CPSU; and
- (b) all employees of G4S Custodial Services Pty Ltd (G4S) who will be covered by the Proposed Agreement.

[3] The CPSU is ordered to distribute a copy of this Order to its respective members who will be covered by the Proposed Agreement, and advise members of the effect of this Order, by using the most expeditious mean(s) possible, including by electronic means.

[4] G4S is ordered to distribute a copy of this order to all employees who will be covered by the Proposed Agreement, and advise them of the effect of this Order, by using the most expeditious mean(s) possible, including electronic means.

[5] This Order commences at 11:59 PM on Saturday, 16 November 2024.”¹

APPLICABLE LEGISLATION

[6] An order for suspension or termination of protected industrial action may be made upon application by the persons identified in s.424(2), which includes a bargaining representative, which in this case is G4S. Section 424(1), which deals with the making of an order, provides 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.”

BACKGROUND

[7] The Port Phillip Prison at Truganina is operated by G4S Custodial Services, with approximately 554 employees. The prison itself presently houses 660 male prisoners, with a maximum capacity of 1087 prisoners.

[8] G4S operates the prison on behalf of the Victorian Government, which announced in June 2024 that it would close by 31 December 2025. Mr Maa, the General Manager says the closure announcement “has created a level of uncertainty surrounding PPP's ongoing operations and staffing requirements”.²

[9] Many employees working at the prison are covered by the the 2021 Agreement, the nominal expiry date of which was 31 December 2023. Bargaining for a replacement agreement has been slow and lengthy, having started in July 2023. The principal matters not yet agreed in bargaining are wage rates and redundancy entitlements. An employer proposal for a replacement agreement was put to employees in a ballot in May 2024 but was not successful.

[10] Bargaining has been the subject of two protected action ballot orders, both of which were approved by eligible employees. The first order was made on 19 April 2024 and declared on 13 May 2024, and the second order was made on 20 September 2024 which in turn was declared on 10 October 2024. Although the orders do not extend the required time for notification of subsequent protected industrial action (as envisaged by s.443(5)), correspondence from the CPSU to G4S in May 2024 states that the union intends to provide a period of notice greater than the minimum three days notice and to instead provide a minimum of five days’ notice.³ The notification which is the subject of this application was given on 8 November 2024 for protected industrial action to commence on 18 November 2024.⁴

[11] An application by G4S to suspend protected industrial action stemming from the first ballot was dismissed by consent and “without adjudication of the merits” by Deputy President Gostencnik on 11 June 2024, on the basis of undertakings given by the CPSU. The application and subsequent undertakings were triggered by a notification of protected industrial action on 4 June 2024, which was to take place in the form of a 6 hour stoppage on 13 June 2024 between 2 PM and 8 PM.

[12] The undertakings given by the CPSU in June 2024 are in these terms;

“Undertaking

Adrian Tait, Industrial Organiser, undertakes for and on behalf of the CPSU that:

1. The CPSU will use its best endeavours to procure that sufficient of its members will continue to work as normal during the stoppage notified for 13

June 2024 to ensure that there are 30 custodial officers available (plus custodial officers for bed sits as required) and that these persons have the skills, licensing and qualifications appropriate for their roles / areas of the prison. "Best endeavours" includes that the CPSU will, to the extent necessary to ensure agreed minimum staffing, inform its members of this Undertaking and requiring those identified pursuant to paragraph 2 below to work during the stoppage.

2. Upon G4S providing the CPSU with the roster for 13 June 2024 which identifies the staff rostered per area, the CPSU will identify the 30 staff from the roster plus bedsit staff as required who will work through the stoppage in each area so as to meet the skills mix and minimum staffing. Minimum staffing for each area will be in accordance with paragraph 73 of the Statement of Peter Maa filed in this proceeding save that there will be at least 6 custodial officers made available to perform external escorts.

3. In the event that any of those identified staff are absent from work on 13 June 2024, then G4S can alert the CPSU to the fact of that absence and the CPSU will use its best endeavours to provide a replacement.”⁵

[13] The 8 November 2024 protected industrial action notification is in these terms, notifying a 12 hour stoppage by the CPSU’s members;

“Notice of intention to take protected industrial action

Pursuant to s 414 of the Fair Work Act 2009 (Cth), the Community and Public Sector Union (CPSU) hereby gives G4S Custodial Services Pty Ltd (G4S) notice of employee claim action (Action).

Employees who will engage in the Action

The employees who will engage in the Action are those employees of G4S who will be covered by the proposed G4S Custodial Services Pty Ltd Enterprise Agreement 2024 and for whom the CPSU is a bargaining representative (Relevant Employees).

Commencement and nature of the Action

1. On 18th November 2024, each Relevant Employee will engage in stoppage of work for the duration of 12 hours. This stoppage will commence at 7:30am and last until 7:30pm.

The previously agreed undertaking is agreed to. If insufficient staff are available as per the undertaking, contact CPSU Organiser/Delegates.

The previously commenced and current running actions will continue”⁶

[14] Mr Trait estimates that approximately 70% of “the PPP workforce” are members of his union, meaning that “more than 150 of its staff will not be participating in the stoppage” on 18 November 2024.⁷

[15] The size of the CPSU's membership is significant, as it informs the response actions available to G4S in the event of a 12 hour stoppage by CPSU members. The union argued that the size of the non-union workforce is such that G4S is able to put in place measures which would avoid threatening the endangerment of prisoners or employees. G4S disputes that there is a sizable non-union workforce available to it in order to manage the effects of the notified protected industrial action.

[16] G4S argue that the threat of endangerment that would flow from a 12 hour stoppage by CPSU members is to be evaluated through the context of its operations and its experience, including with a previous stoppage on 4 June 2024, notified as a 5 ½ hour stoppage but experienced as 6 hours.

Context

[17] The context of the Port Phillip Prison pointed to by G4S is lengthy, and not disputed by the CPSU. In short, G4S note that the prison is one of several Victorian prisons housing maximum security male prisoners having all "been charged with or convicted of serious criminal offences including murder, other acts of violence including armed robbery and sexual assaults, drug offences and dishonesty offences".⁸ Prisoners are housed across several different units and provided with different services according to their needs and status.

[18] Ms Smith noted a series of features within the prisoner population;

"14. PPP accommodates some of the most complex and vulnerable prisoners in the Victorian prison system with the prison population at PPP comprising, on average:

- (a) 16% of prisoners identify as First Nations;
- (b) 25% of prisoners are on Medication Assisted Treatment for Opioid Dependence;
- (c) 50-60% of prisoners are on remand;
- (d) 20% of prisoners are youth;
- (e) 10% of prisoners are registered as having an acquired brain injury or intellectual disability (noting that 25% of all intellectually disabled prisoners across Victoria are located at PPP);
- (f) 50% have a psychiatric rating (that is, a diagnosed mental illness); and
- (g) 50% have a medical rating (that is, a diagnosed chronic medical condition).

15. The general health status of members of the prison population at PPP can be generally classified into three broad categories, namely:

- (a) prisoners who are usually well and in good health;
- (b) prisoners who are in good health but could easily be triggered by disruption to their usual routine, sending them into a downwards spiral where their mental or physical health deteriorates (which we sometimes refer to colloquially as prisoners who are "worried well"); and
- (c) prisoners who have complex health issues and high medical needs."⁹

[19] G4S also note that the groups potentially faced with a threat of endangerment are both prisoners and employees. Prisoners are faced with extended lockdowns and the potential for further physical isolation and impact on their health and wellbeing. Prisoners may experience harm as violence from other prisoners or may harm themselves. Employees who work during the stoppage are faced with the potential for prisoner violence and other anti-social behaviours. This may be either because of there being insufficient staffing, or due to staff being insufficiently trained or experienced to deal with worsened prisoner behaviour as a result of lockdowns and isolation, with employees then in turn inadvertently escalating the severity of the circumstances because of their inexperience.

Experience

[20] G4S put forward that its experience with stoppages of work by union members shows the risk presented by further stoppages, and especially one of 12 hours duration.

[21] In June 2024 several notifications of protected industrial action were given by the CPSU, including the stoppage on 4 June 2024. Originally notified as a 12 hour stoppage commencing at 7:30 AM, the CPSU modified its finish time to 1:00 PM, a period of 5 ½ hours, but with Mr Maa observing that “normal work was in fact disrupted for over 6 hours by the time participating employees moved through security and attended their posts”.¹⁰

[22] The parties dispute the impact of the 4 June 2024 stoppage.

[23] The CPSU put forward, through Mr Trait’s witness statement, that he was informed immediately after the stoppage by the G4S’ Head of Human Resources “that everything went really well, aside from a couple of minor incidents”.¹¹

[24] Mr Maa and Ms Smith however put forward a very negative experience of 4 June;

- Two prisoners almost missed their chemotherapy treatment;¹²
- The discussions that led to the CPSU’s changed notification about the duration of the stoppage also discussed minimum staffing, with commitments not being delivered upon, with Mr Maa giving this evidence;

“63. Despite the CPSU effectively guaranteeing the presence of 16 correctional staff for particular agreed important roles during the 4 June Stoppage, this did not occur. Only 12 correctional staff attended for work as part of the CPSU's guarantee that they would provide staff for Control Room, TOG, St Augustine’s and Bed Sits.

64. A remaining 18 correctional staff who decided on that occasion to not engage in the work stoppage attended on-site during the period of industrial action, meaning that there was a total of 30 correctional staff available. This is out of a normal workforce on day shift of around 200. Approximately 35 employees called in sick at the last minute. The remainder participated in the stoppage.”¹³

- Of those who attended for work on 4 June, many were inexperienced, with most having less than 6 months service with G4S.

- Delays were reported in the conduct of morning welfare checks; the provision of breakfast; the return of prisoners to cells after court appointments and the like; the provision of prescribed medicines. G4S also reported delays in issuing radios and keys to custodial officers; supervision of nurses while seeing prisoners; and a requirement to use non-custodial staff to assist with certain custodial duties.

[25] One of the attachments to Mr Maa’s witness statement records “notable incidents” in the 24 hour period on 4 June 2024. He says the following about these matters, pointing to the unpredictability of the situation;

“70. All of the above occurred in an already volatile environment. By way of example, on 4 June 2024, there were a total of 16 recorded incidents that occurred, including medical incidents and self-harm incidents. A number of these incidents occurred during the work stoppage and could have been much more serious without sufficient staff available to respond. In particular, I note that there were three medical incidents during the period of the stoppage where medical response and assessment was required – while each prisoner involved in these incidents was OK, if similar circumstances arose and we were unable to respond in a timely manner, the risk to prisoner welfare is clear. ...

71. Reflecting on the experience from the 4 June Stoppage, I believe we were extremely fortunate to avoid any serious incidents, even with 30 correctional staff working.”¹⁴

[26] Mr Maa’s evidence includes the stoppage effectively running longer than expected and that fewer union members attended in response to the undertaking than expected;

“Despite the CPSU effectively guaranteeing the presence of 16 correctional staff for particular agreed important roles during the 4 June Stoppage, this did not occur. Only 12 correctional staff attended for work as part of the CPSU’s guarantee that they would provide staff for Control Room, TOG, St Augustine’s and Bed Sits.”¹⁵

[27] G4S also found, on Mr Maas’s evidence, that it could not rely on the non-unionised workforce to attend either;

“A remaining 18 correctional staff who decided on that occasion to not engage in the work stoppage attended on-site during the period of industrial action, meaning that there was a total of 30 correctional staff available. This is out of a normal workforce on day shift of around 200. Approximately 35 employees called in sick at the last minute. The remainder participated in the stoppage. ”¹⁶

[28] In relation to the notified 18 November 2024 stoppage, Mr Maa held the view that the prospect of obtaining a sufficiently sized and experienced workforce is not guaranteed;

“65. G4S has no guarantee or reasonable expectation that the employees who chose to attend on 4 June will do so for any future stoppage. These people were typically new employees still in their probationary period. However, I believe that at least some (and possibly all) are eligible to participate in the stoppage.

66. As above, of the employees in attendance for work on the morning of the 4 June Stoppage, many were very inexperienced correctional officers, with most having less than 6 months of service with G4S. During normal operations, inexperienced correctional officers are paired with a more senior correctional officer to provide guidance in relation to the handling of specific incidents in line with specific unit protocols. This was obviously not able to occur during the 4 June Stoppage due to the staff shortages. This meant that some inexperienced correctional officers were unsure of how to respond to certain incidents. For example, one correctional officer was unsure of how to respond to a prisoner who did not respond when visited at their cell for a welfare check, and had to radio for further assistance. As a non-responsive prisoner could be suffering from a medical issue, a 'Code Black' was eventually called to deal with the incident. A more experienced officer would have called a Code Black immediately.”¹⁷

[29] G4S are concerned that actual staffing on the day may be insufficient, and that the length of a likely lockdown will propel adverse reactions.

[30] Having received notification of the 18 November stoppage, G4S sought, but did not obtain an amended undertaking from the CPSU that the union ensure that 42 members be made available to operate the prison’s day shift. Further consideration by Mr Maa of the needs of G4S and PPP led him to later amend the minimum number of people needed to safely operate the 18 November day shift to between 53 and 58 employees.

[31] Both Mr Maa and Ms Smith believe the stoppage will mean prisoners will be subject to a 36 hour lockdown. Mr Maa’s evidence is that the prison environment is inherently precarious, managed by a strict daily routine. Even small changes to the routine can “quickly shift the dynamic in the prison as a whole, and lead to violence and insecurity”.¹⁸ The length and timing of the stoppage would be unprecedented in his time at the prison and would require a lengthy lockdown with negative effects on prisoners;

“77. As mentioned above, the Proposed Stoppage will require prisoners to be locked down during the day on 18 November 2024. The effect of this is that prisoners will spend at least 36 hours continuously locked in their cells. This is because prisoners will be locked down at approximately 8pm in the evening of 17 November 2024, will not be unlocked from their cells the following morning for their usual daily activities as a result of the Proposed Stoppage, and will remain locked in their cells during the evening of 18 November 2024. This is in circumstances where prisoners are already experiencing a reduction in time outside of their cells each day due to the indefinite early locking and late unlocking actions previously notified by the 15 October Notice and the 16 October Notice.

78. Within the corrections sector, it is well known that there are significant negative effects on prisoners associated with being placed in lock down. This includes impacts on both the physical and mental health of prisoners (who are already vulnerable to physical and mental health problems due to a range of factors).”¹⁹

[32] When it notified protected industrial action on 18 November, in the form of a 12 hour stoppage, the CPSU pre-emptively put forward that the “previously agreed undertaking is

agreed to”, being a reference to the undertakings given at the time of the proceedings before Deputy President Gostencnik. From G4S’ view though, the June undertakings were insufficient for the 18 November notification, taking into account not only the matters of context and experience referred to earlier, but also the fact a stoppage the length of 12 hours had not been experienced before. Mr Maa believes that, based on his experience, the prisoners’ mental health will suffer “as a result of such a lockdown” with exacerbation “if they think there is a prospect of similar lockdowns in future”. His witness statement elaborated;

“82. Further, based on my experience, I consider there is a high likelihood that this may result in physical harm to one or more persons. There will be an increased potential for prisoner on prisoner and prisoner on custodial officer violence during the lead up as anxiety levels will be increased. There is an even higher likelihood in my experience of violence coming out the other end of the lockdown, due to the affect the lockdown will have on prisoner mood. Further, while I hope this will not occur, it is almost certain that there will be instances of prisoner self- harm caused by such a lengthy lockdown. Prisoners may well be motivated to self-harm just to be removed from their cell and have contact with others during this period.

83. Earlier in my career, in approximately 2006, I was employed at the Metropolitan Special Program Centre, a maximum security prison in New South Wales, when prisoners were required to be locked down in their cells for an extended period of 36 hours due to ongoing industrial action. During and in the lead up to that lock down, there were a number of threats of self-harm made by prisoners. A portion of these threats manifested into actual self-harm and several prisoners required urgent medical assistance during the lockdown as a result.

84. I consider the risks presented by the lockdown could be significantly mitigated if we are able to inform the prison population that they will have at least one hour out of their cells on 18 November. This will allow them time to socialise, exercise and use the phones to contact family, friends and/or legal representatives. In my experience, these opportunities are crucial to ensuring prisoner wellbeing and reducing the risk of harm. However, G4S will need a guarantee of significant staff numbers to facilitate all sections of the prison having at least one hour out of their cells.”²⁰

[33] In cross-examination by Mr White, Counsel for the CPSU, Mr Maa accepted that, with sufficient staffing on the day, prisoners could be allowed time out of their cells and that the lockdown would be less than 36 continuous hours;

“In order to ensure that all prisoners are able to be provided at least one hour out of their cells through a staged unlock of the respective accommodation units, G4S has determined that it will need an additional 12 Corrections staff in order to facilitate this mitigation?---That's correct.

So that addition 12, that's 12 addition to the 30 that are already promised by the undertaking. Is that what you meant by that?---That's correct.

So a total of 42 staff. Is that what you said?---Yes.

What you've got in mind by allowing prisoners to be out of their cell for one hour at a time through a staged lockdown, is that also known as a rolling lockdown? Have I got the terminology right?---That's correct.

So the point would be that during that rolling lockdown with that minimum staff of 42, that prisoners would not be confined to their cells for the full period of any stand-down. They would be allowed out for at least one hour each day?---At least one hour, yes.

Could it be more than one hour?---It could be, depending on how operations progress, and also depending on the number of staffing that we actually get on site during the actual industrial action.”²¹

[34] Ms Smith’s evidence goes further on the likely significant impact of an extended stoppage on prisoners. About 300 prisoners are receiving treatment for opioid dependency, with about 120 requiring daily methadone treatment. If that treatment is delayed, the prisoner may experience significantly increased anxiety and/or withdrawal symptoms.²² During a lockdown self-harm is more likely and she is aware of a suicide in a NSW prison that occurred during a lockdown due to industrial action.²³ Further;

“30. ... In this case, I understand that prisoners would be locked down from Sunday evening until Tuesday morning, which is substantially longer than what occurred during the 4 June Stoppage or 7 November Stoppage. Accordingly, the associated risks are higher. In particular, I am concerned about:

(a) the potential physical and psychological wellbeing impacts of those prisoners who would normally be able to freely seek assistance from healthcare staff during their unlocked period during the day;

(b) the ability of correctional and/or other operational staff to actively monitor the wellbeing of prisoners, whilst they are locked in their cells.

31. The role of correctional staff in the day to day monitoring and engagement with prisoners whilst they are out of cell is pivotal to the early identification and intervention with prisoners whose physical or mental health is deteriorating. Whilst arrangements will be in place for welfare checks, staff will be reliant upon prisoners self-reporting any health concerns. Typically, in a heightened state or period of low mood, where self-harm is a risk, it is the staff, rather than the prisoner who escalates their concerns for health staff assistance.

32. In my experience an extended period of lockdown such as that proposed on 18 November 2024 will have an adverse outcome to the overall physical and mental wellbeing of all prisoners, due to their inability to readily access fresh air, social supports, exercise and available services and programs.

33. If the action proceeds such that it is necessary to keep prisoners locked in their cells for at least 36 hours then I consider it is reasonably likely this will result in physical harm either as the result of self-harm, prisoner on prisoner harm or prisoner on custodial

officer harm. While of course I cannot predict the future, this is my professional opinion having regard to my knowledge of the prisoner population and experience working in prisons, as well as my health qualifications. Considering that lockdowns of this length are extremely unusual and may not have been experienced by some of the population before, I expect that the lockdown will have a significant negative impact on the prisoners' mental health and general wellbeing. This in turn increases the risk of physical harm in the future.”²⁴

OPERATION OF SECTION 424

[35] Deputy President Slevin recently summarised the operation of s.424 and the considerations to be taken into account in *Endeavour Energy Network Management v CEPU*, an analysis with which I concur;

“[35] Section 424(1) requires the Commission to consider two things. First, whether protected industrial action is being engaged in or is threatened, impending or probable. Second, if it is, whether it is satisfied that the industrial action had threatened, is threatening or would threaten to have the effects set out in s 424(1)(c) or (d).

[36] A recent Full Bench of the Commission in *CEPU v Transgrid* [2024] FWCFB 333 (*Transgrid*) described s. 424(1) as calling for an exercise of discretion in the broad sense in that the threat as to which the Commission must be satisfied for the purposes of s 424(1)(c) involves a degree of subjectivity or value judgment. The Full Bench went on to observe that s.424(1) requires the Commission to initially identify whether particular protected industrial action is being engaged in or is threatened, impending or probable. If so, the Commission must then determine if it is satisfied that the particular protected industrial action has threatened, is threatening or would threaten to have consequences of the type set out in s 424(1)(c) or (d).

[37] Subsection 424(1) requires that the Commission must make an order suspending or terminating the protected industrial action that is being engaged in, or is threatened, impending or probable if satisfied that it has threatened, is threatening or would threaten to endanger the personal safety or health, or the welfare, of part of the population. As the Full Bench in *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 (*ANF*) said:

[49] It is clear that there must be an appropriate evidential basis to found such a satisfaction. As the High Court said in *Coal and Allied Operations Pty Ltd v AIRC* in considering somewhat similar provisions in the Workplace Relations Act 1996:

“... the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment... [A] decision under s 170MW(3)(b) that industrial action is ‘threatening... to cause significant damage to the Australian economy or an important part of it’... 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”.

[38] As to endangerment, the Full Bench in *ANF* said:

[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.

[39] In *Re Svitzer Australia Pty Limited* [\[2022\] FWCFB 213](#) the Full Bench said:

[29] The terms “endanger” and “welfare” used in s 424(1)(c) are not defined in the FW Act, however they bear their ordinary meaning, and it is a matter for the Commission, in each case before it, to determine whether or not it is satisfied that industrial action is threatening to endanger the welfare of the population, or a part of it.”²⁵ (endnotes omitted)

CONSIDERATION

[36] Suspension or termination of protected industrial action requires the Commission to be satisfied of the matters in s.424(1) and, particularly relevant to this matter, that the protected industrial action has threatened, is threatening or would threaten to endanger the life, the personal safety or health of the welfare of the population or a part of it.

[37] Mr Howard, Counsel for G4S, advocated that the disposition of its application involved four issues;

- “(a) Issue 1: Is protected industrial action threatened, pending or probable?
- (b) Issue 2: What is the nature of the protected industrial action?
- (c) Issue 3: Will the protected industrial action threaten to endanger the life, personal safety, health or the welfare of part of the population?
- (d) Issue 4: Should a suspension or termination order be made?”

[38] The first and second matters are relatively straightforward and align with the findings the legislation obliges the Commission to make.

[39] A finding is available that at least the protected industrial action notified in the form of the 12 hour stoppage on 18 November 2024 is “threatened, impending or probable” (s.424(1)(b)).

[40] The 8 November 2024 notification was to the effect that, on “18th November 2024, each Relevant Employee will engage in a stoppage of work for the duration of 12 hours. This stoppage will commence at 7:30am and last until 7:30 pm.” The industrial action would be tempered by the undertaking given by the CPSU in its notification that “the previously agreed undertaking is agreed to. If insufficient staff are available as per the undertaking, contact CPSU Organiser/Delegates”.²⁶ The “previously agreed undertaking” is a reference to the undertaking given by the union in June and included in the consent order made by Deputy President Gostencnik on 11 June 2024, the text of which is set out at paragraph 12 of this decision. It follows that the nature of the protected industrial action is a 12 hour day time stoppage by CPSU, with the impact potentially offset by the measures set out in the June undertaking.

[41] I am also satisfied that the stoppage notified for 18 November 2024 threatens to “endanger the life, the personal safety or health, or the welfare, of the population or of part of it” (s.424(1)(c)).

[42] The threatened endangerment arises because of the circumstances of the prison: a controlled environment which undertakes the incarceration of prisoners charged with or convicted of serious crimes. I accept the evidence of Mr Maa and Ms Smith that changes to the routine needed to keep order heighten the risk of violence to employees or other prisoners, may harm the already diminished mental health of the prisoners and may escalate the possibility of self-harm.²⁷

[43] These risks and their intersection with each other are unusual and possibly unique risks. The consequences of the risks are also profound in the sense that if the risk of violence or self-harm came to be that either employees or prisoners could face lifelong consequences.

[44] There was previously the stoppage of between 5 ½ and 6 hours duration on 4 June 2024, about which Mr Maa reported difficulties in obtaining an acceptable number of staff, notwithstanding the CPSU’s undertaking. The union had undertaken 16 of its members could be found, however Mr Maa’s evidence was that only 12 attended for work, who were supplemented by a further 18 staff who did not engage in the stoppage.²⁸ Mr Maa further reported that on the day “we were extremely fortunate to avoid any serious incidents, even with 30 correctional staff working”.²⁹

[45] In considering whether there is a threat of endangerment arising from the notification about 18 November 2024, I take into account not only that the notified stoppage is twice as long as that on 4 June, but also that G4S’ estimation of staff needed to safely run the day shift is very different from the earlier occasion. I also take into account G4S’ concern that the CPSU undertaking may not mean that the expected number of employees will actually attend for the shift; with the implication that if they do not, the risks it faces rise considerably.

[46] Mr Maa’s evidence was that, to run the day shift safely, G4S would need variously 42 employees³⁰ or between 53 and 58 employees.³¹ The differences in the estimates are not fully

explained, however I note that he makes references in other parts of his evidence to needing to take account of the impact of other industrial action in estimating staffing needs, as does Mr Howard in submissions.³² The CPSU undertaking provides for it using its best endeavours to “ensure that there are 30 custodial officers available (plus custodial officers for bed sits as required) and that these persons have the skills, licensing and qualifications appropriate for their roles / areas of the prison with the necessary skills”.³³ The CPSU suggest the 42 employees referred to in the G4S correspondence of 13 November 2024 as the more reliable of the estimates, with Mr White submitting the lower number of 42 had been unambiguously accepted in cross-examination by Mr Maa.³⁴

[47] The two estimates are not necessarily in conflict with each other, and likely speak to the uncertainties associated with a depleted staffing on a day when the workload remains the same.

[48] Both parties estimate there are about 150 non-union employees, with the CPSU arguing that there are several mechanisms available to G4S in order to draw upon that pool to supplement the employees delivered by the CPSU. In particular, in order to deal with the fact that not all of the 150 would be rostered for work on the 18 November day shift, it is said that the non-union pool could be accessed through ad hoc overtime allocated after an employee places their name on a “Call In List”. Mr Maa’s evidence is that volunteering for ad hoc overtime requires an employee to notify G4S by 10 AM the day prior to availability for work, after which the person’s name is placed on the list and requested to perform overtime if required. He makes the point though that “We are not able to anticipate how many employees may volunteer to be on the "Call In List" on any one day”. He also expects that filling overtime shifts would be more difficult “where there is industrial action on foot and the employees were being asked to work to mitigate the effects of the action”.³⁵

[49] In cross-examination, Mr Maa maintained that use of the Call In List was possible as a means of arranging additional staff, while continuing to point to its limitations;

“At paragraph 99 you refer to a system of G4S seeking staff to perform overtime, and that they’re drawn from a call-in list. You can see that beginning at paragraph 99. In that paragraph you say that the call-in list is made up of staff who notify G4S on the day prior of their availability to perform overtime. Do you accept that there's no reason why G4S couldn't seek volunteers in advance to perform overtime on a particular day?---Yes. A couple of things to consider is that first of all we don't know who is a CPSU member or not. So we don't have any visibility across, you know, what members or non-members we have, and secondly, with regards to the on-call system it is up to the staff to make themselves available, you know, to put themselves on your on-call list to be able to be provided the opportunity or to be called for overtime. So - - -

Yes, and that on-call list only appears the day before, is what you've said?---Yes, well, people can make themselves available a few days in advance leading up to their days off.

You received notification of this stoppage on 8 November. I showed you that letter notifying the proposed industrial action?---Yes.

So you, as of today, have been aware of the proposed stoppage for about a week?---Yes.

And you or - nobody at G4S has made any announcement requesting volunteers for the call-in list on Monday?---Well, the staff are very well aware of the process for making themselves available for overtime.

Yes?---So people understanding that there's industrial action on Monday, if they choose to make themselves available for overtime they will make that availability on the system.

The answer to my question, though, is no, is it, that you've not put out an announcement requesting volunteers?---No, in answer to your question, that as we progress to the period of the industrial action we will be taking - we're exhausting all options to provide access for staff to be able to come into duty.

So you accept that there are other options that you can pursue to fill the staff then?---Well, that's an option that already exists, in terms of normal operations.

Yes?---Yes.”³⁶

[50] The G4S evidence suggests that the overall circumstances are fraught and highly uncertain. In June, G4S found that the commitment by the CPSU to provide a minimum number of staff was unreliable. Drawing upon the pool of non-union employees is problematic, with experience in June showing that a significant number of the employees called in sick. It is also the case that G4S has no knowledge of who may be a union member or not, meaning that its capacity to use the overtime roster to supplement the number of staff provided by the union is limited.

[51] As things stood at the time of the hearing, there was considerable uncertainty faced by G4S because of the notified protected industrial action planned to be taken on 18 November 2024. It would need to go into that shift with the assumption that the planned protected industrial action would take place for the entirety of the notified period, a 12 hour shift, with the consequential expectation that prisoners would be locked down for an extended period, commencing at or around 8 PM the previous evening.

[52] It would have some visibility after 10 AM the day prior as to the number of non-union members who put themselves forward for nomination for ad hoc overtime on the Call In List. It would not know until the commencement of the 7 AM shift on 18 November as to how many CPSU members would attend for work or how many on the Call In List would present for work and if it had at least 42 employees.

[53] If sufficient employees attended for work on 18 November, either because of the union's undertaking or because of G4S' capacity to roster and marshal for work sufficient numbers of the non-union workforce, the safety risk presented by the day would be heightened from an otherwise normal day, but not as badly than if it had fewer employees for the day. With an acceptable number of employees for the day (being at least 42), prisoners could be allowed time out of their cells. If however, insufficient employees attended for work it would be difficult to arrange for prisoners to have time out of their cells and it may not happen at all, in which case the safety risk presented from the day would be well beyond the situation if sufficient employees attended for work or what could reasonably be anticipated.

[54] Both these circumstances amount to a threat to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. The threat may reasonably be predicted to be either of violence from one prisoner to another; prisoner to an employee; or from the circumstance of prisoner self-harm.

[55] The foregoing conclusions satisfied the thresholds required for an order to be made pursuant to s.424. The mandatory nature of that consideration in turn requires consideration of whether the protected industrial action is to be terminated or suspended.

[56] In the matter of *Re Svitzer Australia Pty Limited*, the Full Bench observed the following about the matter of suspension or termination;

“[38] Having made the above findings, we are required by s 424(1) to make an order suspending or terminating Svitzer’s protected industrial action. As to the selection of the alternatives of a suspension order or a termination order and, in the case of the former, as to the period of the suspension, the discretion conferred by s 424(1) is unfettered save by the subject matter and objects of the FW Act. Considerations which have been taken into account in previous decisions made under s 424(1) include the following:

- that the system of bargaining under the FW Act encourages enterprise bargaining and permits protected industrial action;
- the length of time negotiations have been going on;
- the progress that has been made in negotiations;
- whether there has been prior industrial action;
- the views of the parties (especially where both parties agree on the appropriate course of action); and
- the potential for further industrial action that would enliven s 424(1) and the need to make further orders.

[39] 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.”³⁷ (citations omitted)

[57] For its part, the Applicant in this matter, G4S, argued that upon making the requisite threshold findings, the Commission should determine to suspend the protected industrial action and to do so for a three month period. It submitted in this regard;

“This period will allow for Corrections Victoria to provide the bargaining unit with information about redeployment opportunities (noting the pending closure of Port Phillip Prison by 31 December 2025) and time to bargain over that information. A 3-month suspension order also appropriately accounts for upcoming end of year leave and associated interruptions. Objectively analysed, there is no prospect of an agreement being reached during this period.”³⁸

[58] The CPSU submitted that if the Commission were to find that the conditions in s.424 (1) are met, any subsequent order made should be in favour of termination of the protected industrial action rather than suspension.³⁹ It reasoned that “the negotiations are intractable as they stand”, with bargaining having gone on for 18 months. If there were to be a suspension, rather than termination of the protected industrial action “[t]here is a high prospect that any future action by the union would again come before this Commission for its response, it's supervision under section 424”.⁴⁰

[59] The disruptive externality which impacted on midyear bargaining is the announcement by the Victorian government that the Port Phillip prison would close by 31 December 2025. Not unsurprisingly, the announcement focused the minds of both G4S and the CPSU, with concerns crystallising for both about the two bargaining claims which are presently unresolved; wage increases and redundancy payments. Each party argues in these proceedings that further information is required from the government, being the ultimate contractor, as to its intentions including timing and the like. There is apparently no reliable timetable as to when that information would likely be available to the bargaining parties.

[60] In many respects, that is not an unusual situation for bargaining parties working in connection with an enterprise that is a contractor to another. There are often uncertainties as to the ultimate contractors' intentions about tendering or renewal of contracts. Sometimes those externalities are resolved before bargaining is concluded and in other cases they are not resolved. Those matters of themselves do not prevent bargaining from taking place in a timely and orderly manner.

[61] Having regard to the matters referred to in *Re Svitzer* that have been taken into account in applications for suspension or termination of protected industrial action, I consider overall that some space remains for orderly bargaining which does not then threaten to endanger the population or part of it.

[62] There have been two protected industrial action ballots undertaken in relation to the Port Phillip prison, each of which has voted up a range of protected industrial action measures, some of which have been the subject of protected industrial action notifications by the CPSU. To date, there have been the two occasions where the protected industrial action notifications have rippled into concerns on the part of G4S such that applications need to be made pursuant to s.424. The first was dealt with by Deputy President Gostencnik and concluded with the undertaking previously referred to for provision of employees. The second is this matter. Overall, this consideration suggests that notifications about protected industrial action have so far been somewhat conservative, albeit testing the boundaries. There is nothing before me that would suggest that future protected industrial action notifications would automatically be at the higher end of potential engagement with the provisions within s.424(1). Of course, if they were, the CPSU's prediction would likely be accurate that the parties would return to the Commission under s.424(1).

[63] In relation to the length of time and progress of bargaining, it is of course the case that bargaining has been proceeding for an extended period, with the notification time for the commencement of bargaining being 28 July 2023. The notification date though was five months prior to the nominal expiry date of the 2021 Agreement, being 31 December 2023. While the

overall bargaining period is extended, such is not unusual in the publicly funded sector. The parties were also close to concluding agreement for a replacement enterprise agreement, with further progress being disrupted by the announcement by the Victorian government on 26 June 2024 that the Port Phillip prison would close by 31 December 2025. While disruptive, the announcement cannot be seen as preventing further negotiations, albeit that both parties seek to have further information from the government as to intentions and timing. It must also be observed that, even if there was no further information from government, that situation does not prevent the formulation of claims and provision of responses, and the parties do not appear to have exhausted those possibilities at this time.

[64] I refer also to my earlier observations with respect to prior industrial action and the potential for further industrial action. There has been some, with at least two occasions of testing the boundaries, and with the possibility of further protected industrial action, which does not necessarily engage the provisions of s.424 or the related provisions of Part 3 – 3 of the FW Act.

[65] The views of the parties as to the appropriate course of action are referred to above.

[66] Consideration of these matters leads me to the view that it would be inappropriate at this time to terminate the protected industrial action. To do so would be unnecessary within the scheme of the protected industrial action that has taken place so far, and may potentially deprive employees of the opportunity for further industrial action for the purpose of advancing their industrial claims.

[67] Suspension of the protected industrial action is certainly warranted, as it enables the parties to engage in appropriate dialogue with each other about information required from government in order to conclude bargaining or approaches needed to be made to government to solicit that information; to bargain without the prospect of further high level protected industrial action; but to have there be a real opportunity for further protected industrial action within a defined period. G4S press for suspension of the protected industrial action for a period of 3 months, which would mean the potential for the reinvigoration of protected industrial action being from mid to late February 2025. That is against the context of the Port Phillip's prisons closure at the end of 2025 and likely reductions in staff and prisoners from some time earlier than close date. I would be concerned that, if a 3 month suspension were to be granted, that should bargaining flounder in the meantime, or not otherwise progress for some reason, including an information gap about the government's intentions and timings, employees might be disadvantaged in their bargaining.

[68] At the same time a very short suspension, perhaps of 1 month or less would likely not assist bargaining, with G4S in particular having to then focus on the likelihood of a resumption of protection industrial action within a short period.

[69] In all, I consider that a midpoint of suspension, for a period of 2 months, is appropriate. The suspension for that period will allow intensive negotiations over the remaining part of November and into December and the early part of January. Not only in that time can negotiations take place, but the necessary representations to government can be made by G4S and the CPSU about their need for timely and decisive information relating to the reduction in functions of the Port Phillip prison and its ultimate closure at the end of 2025. A period of two

months will also allow proper progression of the CPSU's application pursuant to s.240 for assistance with a bargaining dispute which has been allocated for dealing with by myself.

[70] I determined that for these reasons an order should be issued suspending the protected industrial action for a period of two months. The order is published separately in Print [PR781321](#)



COMMISSIONER

Appearances:

Mr L. Howard, for the Applicant

Mr A. White, for the Respondent

Hearing details:

15 November.
2024.

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<PR781596>

¹ [PR781321](#).

² Exhibit G4S 3; *Witness Statement of Peter Maa*, [31]

³ Exhibit G4S 3, Attachment PM – 7

⁴ Exhibit G4S 3, Attachment PM – 23.

⁵ Print [PR775854](#), 11 June 2024.

⁶ Exhibit G4S 3, Attachment PM – 23.

⁷ Exhibit CPSU 1, *Witness Statement of Adrian Trait*, [31].

⁸ Exhibit G4S 3,, [10].

⁹ Exhibit G4S 2, *Witness Statement of Amanda Smith*.

¹⁰ Exhibit G4S 3,, [62].

¹¹ Exhibit CPSU 1, [24].

¹² Exhibit G4S 2, [42].

¹³ Exhibit G4S 3.

¹⁴ Exhibit G4S 3.

¹⁵ Exhibit G4S 3, [63].

¹⁶ Exhibit G4S 3, [64].

¹⁷ Exhibit G4S 3, [65] – [66].

¹⁸ Exhibit G4S 3, [76].

¹⁹ Exhibit G4S 3.

²⁰ Exhibit G4S 3, [82-84].

²¹ Transcript, PN 88 – 93.

²² Exhibit G4S 2, [27].

²³ Exhibit G4S 2, [29].

²⁴ Exhibit G4S 2.

²⁵ [\[2024\] FWC 2285](#).

²⁶ Exhibit G4S 3, Attachment PM – 23.

²⁷ See Exhibit G4S 3 [12](f), (g), (k) and (l), [76] and [88]; Smith [10], [15].

²⁸ Exhibit G4S 3, [62] – [63].

²⁹ Exhibit G4S 3, [71].

³⁰ Exhibit G4S 3, Attachment PM – 25, correspondence to CPSU 13 November 2024.

³¹ Exhibit G4S 3 [93].

³² Transcript, PN 242.

³³ Exhibit G4S 3, Attachment PM – 15.

³⁴ Transcript, PN 270.

³⁵ Exhibit G4S 3, [99] – [100].

³⁶ Transcript, PN 109 – 117.

³⁷ [\[2022\] FWCFB 213](#), (2022) 320 IR 91.

³⁸ Exhibit G4S 1, *G4S' Outline of Submissions*, [33]

³⁹ Transcript, PN 132.

⁴⁰ Transcript, PN 316.