DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid
(C2024/5724)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT GIBIAN
COMMISSIONER SLOAN

SYDNEY, 9 SEPTEMBER 2024

Appeal by the CEPU against decision PR778397 of Deputy President Cross at Sydney on 16 August 2024 in matter number B2024/1027 – application for order suspending protected industrial action under s 424(1)(c) of the Fair Work Act 2009 (Cth) – notified industrial action subject to a 'safety commitment' – only protected action relevant for the purposes of s 424(1) – whether non-compliance with 'safety commitment' would render industrial action unprotected – whether decision had regard to the prospect and consequences of unprotected industrial action – permission to appeal granted – appeal allowed – decision and order quashed and application remitted for redetermination.

Introduction

[1] The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU or the appellant) has filed an appeal, for which permission is required, in relation to a decision of Deputy President Cross made on 16 August 2024. On that day, the Deputy President made an order[1] suspending certain protected industrial action in relation to bargaining involving employees of NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid (Transgrid or the respondent) for a period of two months pursuant to s 424(1) of the *Fair Work Act* 2009 (Cth) (FW Act).

[2] The decision of the Deputy President dealt with the third application made by Transgrid in the course of the bargaining for orders suspending or terminating protected industrial action pursuant to s 424(1) of the FW Act and was the second time the Deputy President had suspended protected industrial action. This is the second appeal which has been lodged arising from decisions of the Deputy President made in relation to Transgrid's applications. To understand the present appeal, it is necessary to set out some of the history of the bargaining and the various proceedings it has produced.

[3] Transgrid operates and manages the high voltage electricity transmission network in New South Wales and the Australian Capital Territory. Transgrid employees in classifications of administrative officers, engineering officers, professional officers, operators, power workers, trades persons and apprentices are covered by an enterprise agreement known as the *Transgrid Employees Agreement 2020* (2020 Agreement).

[4] Transgrid has been bargaining with those employees with respect to a replacement enterprise agreement since around July 2023. The 2020 Agreement passed its nominal expiry date on 1 December 2023. The bargaining has not been resolved and remains ongoing. The CEPU is the bargaining representative for many of the employees. The CEPU has notified, and its members have participated in, various forms of protected industrial action in support of its claims in relation to the proposed new enterprise agreement since late 2023.

[5] The CEPU initially filed an application for a protected action ballot order for its members employed by Transgrid to take protected industrial action on 10 December 2023. A protected action ballot order was made on 11 December 2023 which asked members to authorise the taking of various forms of protected industrial action 'subject to the Safety Commitment given below'. The Safety Commitment was in the following terms:

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

[6] On 27 December 2023, the CEPU served notice that it proposed to take protected industrial action in relation to the control room. The notice prompted Transgrid to make its first application under s 424 of the FW Act to suspend or terminate the protected industrial action. That application was resolved on the basis that the CEPU would give an amended safety commitment to be incorporated into future notices of protected industrial action referred to as the 'Extended Safety Commitment'. The Extended Safety Commitment is in the following terms:

> **Extended Safety Commitment**
>
> 1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work or where suspending the action is necessary to perform work affected by and during a "Declared Incident".
>
> 2. A "Declared Incident" will be declared by the Chief Executive Officer of Transgrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.
>
> 3. "Emergency Work" is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.
>
> 4. An Employee who is ordinarily rostered to perform work will keep the mobile device they ordinarily use for communicating with the Employer on their person for the purpose of being

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

[7] Protected industrial action then continued to take place throughout 2024. The forms of protected industrial action included what was referred to as a 'Locking Ban' (effectively a ban on locking or unlocking anything, be it a mobile phone, a laptop, a gate lock) and 'Switching Bans' (which precludes the performance of any switching tasks necessary to safely isolate or de-isolate apparatus). On 16 July 2024, Transgrid demanded that the CEPU agree to changes to the safety commitment in a form referred to as the 'Revised Safety Commitment'. That demand was refused by the CEPU by correspondence dated 18 July 2024.

[8] On 19 July 2024, Transgrid filed its second application to suspend or terminate protected industrial action under s 424 of the FW Act. The Deputy President conducted a hearing in relation to that application on 24 July 2024 and made orders suspending specified protected industrial action for a period of three weeks on that day. The Deputy President gave short oral reasons at the conclusions of the hearing and published more detailed reasons for his decision on 2 August 2024 (First Decision).[2]

[9] In the First Decision, the Deputy President described a number of incidents in which it was alleged that protected industrial action had threatened blackouts and/or load shedding with particular emphasis on two incidents: an incident in the Bega area on 4 May 2024 and a 'First Forecast Lack of Reserve Level 2 Condition' on 18 May 2024.[3] It is significant, for present purposes, to note that both incidents involved disagreement between Transgrid and the CEPU as to whether emergency work was required or whether the circumstances giving rise to a 'Declared Incident' existed for the purposes of the Extended Safety Commitment.

[10] The Deputy President's reasons in the First Decision included the following:[4]

> The evidence regarding the six incidents that have occurred where protected industrial action has threatened blackout and/or load shedding was compelling, and clearly established that protected industrial action engaged in has threatened to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. The most severe example would involve persons on life support equipment but would also involve multiple hospitals and nursing homes left with an electricity network that was not secure.
>
> The actions of the CEPU in the two particular examples of such incidents, and the balance of the six incidents, disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment.

[11] The Deputy President concluded that 'the only protected industrial action to which the required order could apply was that which I found satisfied the s 424(1)(c) criterion relating to

Declared Incidents and Emergency Work, and the operation of the Extended Safety Commitment'.[5]

[12] The CEPU sought permission to appeal from the First Decision. Although the Full Bench accepted that the CEPU had established arguable grounds of error in the First Decision, permission to appeal was refused on discretionary grounds, including because of the short period which by then remained in the period of suspension.[6] The suspension order was then due to expire at 12.00am on 15 August 2024.

[13] On 9 August 2024, the CEPU issued two further notices of protected industrial action anticipating the expiry of the three-week period of suspension imposed in the First Decision. The first notice was for 24 consecutive one-hour stoppages of work commencing at 12.00am on Thursday, 15 August 2024 and for each day following commencing at 12.00am. The second notice notified 25 different types of bans relating to the performance of work also to commence at 12.00am on Thursday, 15 August 2024 and each day following.

[14] In both notices, the industrial action notified is described as 'subject to the Safety Commitment described below'. For example, the notice notifying of consecutive one-hour stoppages recorded:

> The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) gives notice that employees of Transgrid for whom the CEPU is the bargaining representative and who will be covered by a proposed enterprise agreement to replace the TransGrid Enterprise Agreement 2020 intend to take protected industrial action as follows.
>
> **Commencing Thursday 15 August 2024**
>
> On 12.00am Thursday 15 August 2024 and each day following commencing at 12.00am, ***subject to the Safety Commitment described below***, the following bans:
>
> 1. A 1 hour stoppage commencing at 12am
> 2. A 1 hour stoppage commencing at 1am
> …

[15] The Safety Commitment set out in both notices was in the same terms as the Extended Safety Commitment set out at paragraph [6] above with the addition of a further paragraph relating to the Tomago Aluminium Smelter, which is Transgrid's largest customer. The additional paragraph is in the following terms:

> 6. The employees undertake to take all reasonable steps to ensure reliable supply to the Tomago Aluminum Smelter at all times.

[16] Transgrid applied for an order suspending or terminating protected industrial action for a third time on 12 August 2024. Although the application referred to both ss 423 and 424 of the FW Act, Transgrid's submissions concentrated on s 424(1)(c) and (d). Essentially, Transgrid submitted that protected industrial action was threatened, impending or probable by reason of the two notices issued on 9 August 2024, that the Commission would be satisfied that these forms of protected industrial action would prevent or delay maintenance work, including urgent

and emergency work and that the notices had the same, allegedly inadequate, safety commitment.

[17] Transgrid relied specifically on the findings in paragraphs [55]-[56] of the First Decision (which are set out above at paragraph [10]) as the basis for its submission that the Commission can be satisfied that these forms of protected industrial action would threaten to endanger the health, personal safety or welfare of the population of NSW and the ACT for the purposes of s 424(1)(c) of the FW Act. Transgrid also submitted that the Commission could be satisfied of the threat of economic damage in the sense described in s 424(1)(d).

[18] Transgrid expressly relied on the findings made by the Deputy President in the First Decision in relation to the CEPU's conduct in allegedly frustrating the Extended Safety Commitment as a basis upon which the Commission could be satisfied that the effects of the type referred to in s 424(1)(c) were threatened. Transgrid's written submissions included the following:

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

[19] As has been mentioned, the application was heard by the Deputy President on 16 August 2024. At the conclusion of the hearing, the Deputy President announced his decision and made an order suspending specified protected industrial action for a further period of two months. The Deputy President's short reasons given orally at the conclusion of the hearing were as follows:[7]

> The application has been made by Transgrid in this matter seeking orders pursuant to section 424(1) of the Act. There are two notices of protected industrial action that have recently, on 9 August, been issued.
>
> Considering those particular notices, I note particularly the first notice that provides for what has been described as unlimited stoppages and would consider that that notice itself clearly outlines action that is threatened, impending or probable but that will have an effect of such action would have the effect of threatening consequences of the type set out in section 424(1)(c). As to the second notice, I consider that parts of that notice would also – and can be identified as protected industrial action that will have the effect as outlined in section 424(1)(c).
>
> In particular, I note and I find that the bans outlined in that particular notice at (1), (3), (5), (11), (12), (14), (17), (18) and (20) of that notice would have the effect of threatening to have the consequences outlined in section 424(1)(c). I therefore see that there is then the consideration as to the appropriate order as to what should occur in relation to this matter. Contrary to the position that existed at the time of the Full Bench decision in Svitzer, the legislature has disclosed an object or purpose to terminate intractable enterprise bargaining as such.
>
> In light of the fact that there is an application that has been made, I would consider that a short suspension that would allow that process to most likely run its course would be the appropriate

> suspension. It is not exactly clear as to how long those matters will take before the Commission because they are of such novel and recent incarnation. However, I would expect that a suspension of two months would allow for that avenue to run its course.
>
> So in those circumstances, an order will be issued today suspending the industrial action for a period of two months from today's date.

[20] The Deputy President published an order giving effect to his decision in the following terms:[8]

> [1] Pursuant to s 424(1) of the *Fair Work Act 2009* (Cth) (the Act), the Fair Work Commission orders that the following protected action in relation to the proposed agreement replacing the *TransGrid Enterprise Agreement 2020* (Proposed Agreement) be suspended for a period of two (2) months effective from the date of this Order:
>
> (a) one hour stoppages;
> (b) bans on the performance of overtime;
> (c) bans on starting and finishing work anywhere other than at the prescribed Transgrid depot;
> (d) bans on issuing Access Authority and Field Access Authorities to non-TransGrid staff;
> (e) bans on using non-Transgrid toilets, changerooms and showers facilities where those facilities are required;
> (f) bans on having Meal Breaks (Morning Tea, Lunch, Dinner and Afternoon Tea) anywhere other than in a Transgrid meal room;
> (g) bans on training people who are not Transgrid staff;
> (h) bans on the use of equipment used to test high voltage equipment;
> (i) bans on the use of equipment used to test high voltage system protective devices and relays; and
> (j) bans on staff on submitting and processing RFAs (Request for Access) that are submitted within 28 days of planned outages start date.
>
> [2] This Order is binding on:
>
> (a) NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid (Transgrid);
> (b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU);
> (c) all employees of Transgrid who:
> (i) will be covered by the Proposed Agreement; and
> (ii) are a member of the CEPU.
>
> [3] This Order comes into operation at 11:59PM on 16 August 2024.
>
> [4] Reasons for my Decision will follow in due course.

[21] The effect of the order is that all industrial action in relation to the proposed agreement ceases to be protected for a period of two months. That is because the common requirements that apply for industrial action to be protected industrial action include that an order suspending or terminating protected industrial action is not in operation.[9]

[22] As is set out in the transcript, the Deputy President indicated at the conclusion of the hearing that he would publish reasons as soon as possible. The Deputy President subsequently published his reasons for decision on 20 August 2024 (Second Decision).[10] The CEPU filed a notice of appeal on the same day and communicated to the Commission that it sought an expedited hearing of the appeal as well as a stay pending determination of the appeal. The application for a stay was refused,[11] but an expedited appeal was listed for hearing before the Full Bench of the Commission on 2 September 2024.

[23] For the reasons that follow, permission to appeal should be granted, the appeal allowed on the basis set out in ground A1 of the CEPU's amended notice of appeal, and the order made by the Deputy President on 16 August 2024 and the Second Decision quashed. It will be necessary for Transgrid's application to be remitted for redetermination.

Decision under appeal

[24] In his consideration in the Second Decision, the Deputy President commenced by recording that he had found in his earlier decision that the actions of the CEPU 'disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment'.[12] The Deputy President noted that, despite his urgings, the CEPU had rejected the Revised Safety Commitment proposed by Transgrid.

[25] The Deputy President rejected the criticisms made of the Revised Safety Commitment by the CEPU. In particular, the Deputy President rejected the criticism of the Revised Safety Commitment to the effect that it would give the CEPU no role where directions were given to employees to undertake emergency work or in case of a declared incident. The Deputy President observed in relation to the Extended Safety Commitment:[13]

> There is no existing provision that allows for CEPU involvement in determining what are Emergency Work and Declared Incidents. Quite specifically, Declared Incidents are "declared" by the CEO of Transgrid, and Emergency Work is declared by an employee being directed in writing to perform Emergency Work.
>
> Of course, the CEPU could make enquiries in relation to any Emergency Work and Declared Incidents.10 It cannot, however, delay the performance of Emergency Work and Declared Incidents while making those enquiries. …

[26] The Deputy President's consideration was then as follows:[14]

> While the CEPU point to the continued existence of the undertaking not to engage in certain protected industrial action (namely, locking and switching bans) until 30 September 2024, and say that Transgrid mischaracterises the ambit of the protected industrial action under contemplation, it is clear that the action notified in in (sic) both the Stoppages PIA Notice and the Bans PIA Notice facilitate vastly increased levels of action and probable disruption.
>
> Indeed, the Stoppages PIA Notice notifies of 24 consecutive 1 hour stoppages occurring on Thursday 15 August 2024, and each day following. Just how such action could co-exist with the notified safety commitment was the subject of evidence. Mr Murphy stated that when an employee is on a stoppage, they may be at a rally or fishing. Either way, if at such rallies, fishing, or otherwise engaged, those CEPU members would not be standing available, and would not be

> available to deal with issues arising under the safety commitment. Curiously for a registered organisation, the CEPU urged that Transgrid could avail itself of non-union employees and contractors in the case of an emergency arising during a stoppage.
>
> What is abundantly clear is that if action pursuant to the Stoppages PIA Notice is taken, which is impending and probable, that action would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, ***because a large number of employees of Transgrid, who had given a safety commitment would be unlikely to comply with that commitment***.

[27] The Deputy President then listed the forms of industrial action he considered were threatening or would threaten to have consequences of the type set out in s 424(1)(c) of the FW Act.[15] In relation to s 424(1)(c) of the FW Act, the Deputy President concluded as follows:[16]

> A particular factor in my determinations has been the position put clearly by the CEPU that, notwithstanding my conclusion in the First Decision that the actions of the CEPU in the July Application disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment, the CEPU have unequivocally stated they will continue to act in the same manner. That position allows me to conclude that the conduct that formed the basis of the First Decision would, without the Order, certainly continue with the attendant risks.

[28] The Deputy President concluded that a period of suspension of two months was appropriate, including to allow for the intractable bargaining processes under the FW Act to proceed and be determined.[17]

Legislative Framework

[29] Part 3-3 of the FW Act is entitled 'Industrial action' and, amongst other things, makes provision with respect to protected industrial action. Protected industrial action is principally industrial action organised or engaged in for the purpose of support or advancing claims in relation to a proposed enterprise agreement or response action.

[30] Part of the statutory regime dealing with protected industrial action is that Division 6 of Part 3-3 permits or requires the Commission to suspend or terminate protected industrial action if it is satisfied that various circumstances exist or for various purposes. Speaking generally, the provisions are intended to curtail the capacity to organise or engage in protected industrial action if the industrial action is having significant impacts on the employers or employees involved in the bargaining, third parties or the population or economy more generally. Relevantly, s 424 of the FW Act 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.
>
> (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.

[31] The assessment the Deputy President was required to make under s 424(1) involved consideration of two matters: firstly, whether protected industrial action for a proposed enterprise agreement was being engaged in or was threatened, impending or probable and, if so, whether the Deputy President was satisfied that the protected industrial action had threatened, is threatening or would threaten to have the effects set out in s 424(1)(c) or (d).

[32] The High Court has indicated, by reference to a similar historical provision,[18] that the determination of the Deputy President involved 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.[19] As such, error of the type described in *House v The King*[20] is required to be demonstrated, at least in relation to the second limb of the consideration required by s 424(1) as to whether the Commission is satisfied that protected industrial action has threatened, is threatening or would threaten to have consequences described in s 424(1)(c) or (d).

[33] There is a question as to whether the first limb of s 424(1), which concerns whether protected industrial action is being engaged in or is threatened, impending or probable, is also a matter which is dependent on the opinion of the Commission. In the Federal Court Full Court decision in *Australian and International Pilots Association v Fair Work Australia*[21] (*AIPA v FWA*), Perram J expressed the view that the jurisdiction to make an order suspending or terminating protected industrial action under s 424(1) is to be construed as being enlivened when the Commission forms the opinion that there is protected industrial action rather than when protected industrial action exists or is threatened as a matter of fact.[22]

[34] It is unnecessary to consider that question in the present appeal. Even if the question of whether protected industrial action is being engaged in or is threatened, impending or probable is dependent on the opinion formed by the Commission, it is not immune from review on appeal. For example, the formation of such a state of satisfaction would involve appealable error if the member of the Commission had regard to irrelevant material, relevant material was disregarded, or, although there was some factual material by reference to which the decision-maker might be satisfied, he or she mistook those facts,[23] or if the opinion or satisfaction is formed as a result of misconstruing the relevant legislation.[24] As will be apparent below, error of that type is apparent in the Second Decision.

Grounds of Appeal

[35] The CEPU relies on an amended notice of appeal filed on 27 August 2024. The amended grounds of appeal read as follows:

> A1. The Deputy President committed jurisdictional error by taking an irrelevant matter into account (namely a concern that employees would not comply with the terms of a notice including the "Safety Commitment" provided in that notice) when he found, at J[39], that the action set out in the notice would threaten the life, the personal safety or health, or the welfare, of the population or of part of it.
>
> A2. The Deputy President committed jurisdictional error by identifying the wrong issue, asking himself the wrong question and / or failing to address the Appellant's submission that was centrally relevant to the decision being made, in that the Deputy President did not:
>
> (a) properly identify what forms of protected industrial action were being engaged in or threatened, impending or probably in light of the undertakings and safety commitments provided by the Appellant;
>
> (b) properly consider whether the remaining forms of protected industrial action posed a threat for the purposes of s.424(1)(c) in light of the undertakings and safety commitments provided by the Appellant; and / or
>
> (c) address the Appellant's submission that having regard to the actual protected industrial action (including the Extended Safety Commitment and Switching and Locking Undertaking) the Commission could not be satisfied that the planned protected industrial action would threaten the life, the personal safety or health, or the welfare, of the population or of part of it.
>
> A3. Alternatively to A2, to the extent that the Deputy President considered the matters raised in A2(b) above, the Deputy President erred by failing to provide reasons to support any determination as to why he was satisfied that the remaining forms of protected industrial action

posed a threat for the purposes of s.424(1)(c) in light of the undertakings and safety commitments provided by the Appellant.

1. In the alternative to Appeal Grounds A1 to A3 above, ~~T~~the Deputy President erred in issuing the order pursuant to s 424 of the FW Act:

(a) as he failed to take into account the re-examination of Mr Murphy concerning the priority that would be given to Emergency and Declared Incident work as a result of the undertakings to perform switching and locking whenever that work was required;

(b) as he failed to take into account the evidence of Mr O'Malley at (statement) [45] – [78] the substance of which was to the effect that where Emergency Work or Declared Incident work would not be delayed by the protected Industrial Action (PIA).

(c) As he failed to take into account the evidence of Mr Johns to the effect that the proposed bans would not impact upon CEPU's ability to identify and respond to emergencies at (at Ex R3, statement) [12] – [34].

2. The Deputy President erred in issuing the order pursuant to s 424 of the FW Act, as on the whole of the evidence he could not have been satisfied, within the meaning of s 424(1), that the bans set out at (1), (3), (5), (11), (12), (14), (17), (18) and (20) of the Second Notice would have the effect of threatening consequences of the type set out in s 424(1)(c). In this regard the Deputy President did not take into account the statements and oral evidence of Mr O'Malley and Mr Johns, and the statement and re-examination of Mr Murphy.

In the alternative to the above:

3. The Deputy President fell into error when considering the length of the period of suspension. In particular the Deputy President failed to consider that the effect of a 2 month period of suspension would effectively bring to an end the enterprise bargaining.

4. The Deputy President fell into error when he purported to consider the effect of the Respondent's claim that negotiations were intractable in circumstances where the evidence indicated continuing negotiations had resulted in further agreement between the parties.

5. The Deputy President fell into error when considering the reasoning of the Full Bench (of which he was a part) in Re Svitzer Pty Limited [2022] FWCFB 213 at [39].

6. The Deputy President fell into error when:

(a) he said in transcript "Contrary to the position that existed at the time of the Full Bench decision in Svitzer, the legislature has disclosed an object or purpose to terminate intractable enterprise bargaining as such".

(b) he took into account at [45] of the Decision, the amendments to the FW Act which provided power to the Commission to make an intractable bargaining declaration and subsequently an intractable bargaining workplace determination.

7. In the alternative to Appeal Ground 6 above, ~~T~~the Deputy President fell into error when:

(a) he said in transcript "Contrary to the position that existed at the time of the Full Bench decision in Svitzer, the legislature has disclosed an object or purpose to terminate intractable enterprise bargaining as such" in circumstances where s. 234 and 235 are

> not engaged in this matter.
>
> (b) he took into account at [45] of the Decision, the amendments to the FW Act which provided power to the Commission to make an intractable bargaining declaration and subsequently an intractable bargaining workplace determination, when those amendments, sections 234 and 235 of the FW Act had not been engaged, do not inform upon the discretion whether to order a suspension or to terminate protected industrial action under s. 424.

[36] As will be apparent, ground A1 alleges that the Deputy President erred in forming the opinion that effects of the type set out in s 424(1)(c) of the FW Act would be caused by industrial action taken in breach of the Extended Safety Commitment; grounds A2 and A3 allege the Deputy President erred in various ways by failing to address submissions made by the CEPU or properly address the statutory question posed by s 424(1); grounds 1 and 2 allege the Deputy President erred by making an order under s 424(1) by failing to take into account aspects of the evidence relied upon by the CEPU or because the whole of the evidence could not have satisfied the Deputy President that the protected industrial action was threatening to have consequence of the type set out in s 424(1)(c); and grounds 3-7 allege error with respect to the Deputy President's determination of the period of suspension to impose.

Permission to Appeal

[37] We have decided to grant permission to appeal as we are satisfied it is in the public interest to do so for the purposes of s 604(2) of the FW Act. We would, in any event, exercise our discretion to grant permission to appeal. The bargaining involving Transgrid and its employees is itself a matter attracting the public interest given the significance of Transgrid's operations to the community and the importance of the bargaining process to the CEPU and its members. If arguable error exists in the decision of the Deputy President, some injustice has been and will be caused to the CEPU and its members by reason of potential prejudice to its position in the bargaining. The adverse impact it is alleged the threatened protected industrial action may have on the population or parts of it further favours a grant of permission to appeal.

[38] The appeal also raises matters of importance and general application in relation to s 424 of the FW Act. In particular, the appeal raises a question as to the relevance of a safety commitment or proviso which applies to notified protected industrial action in assessing whether the protected industrial action is threatening or would threaten to endanger the life, the personal safety or health, or the welfare of the population or part of it for the purposes of s 424(1)(c). The practice of forms of industrial action for which authorisation is sought in a protected action ballot, or notified instances of protected industrial action, being subject to some form of safety commitment or exception appears to be common.[25] Although the effect of such a commitment or exception will depend on its terms, it is appropriate the Full Bench consider the issue, and provide such guidance as is possible, in this matter.

Merits of the appeal

[39] In light of the conclusions we have reached, it is only necessary for us to address ground A1 of the amended notice of appeal. In terms, that ground alleges that the Deputy President erred by taking into account an irrelevant matter in finding that the notified industrial action would threaten to have consequences of the type referred to in s 424(1)(c), namely, a concern

that employees would not comply with the Extended Safety Commitment set out in the notices of protected industrial action. Another way of putting the ground is as an allegation that the Deputy President failed to identify the protected industrial action that he believed was being engaged in, or was threatened, impending or probable, as opposed to industrial action that would not be protected.

[40] The CEPU submits that the effect of the Deputy President's reasoning is that he was satisfied of the matters set out in s 424(1)(c) of the FW Act because of a concern that employees of Transgrid would not comply with the notice of protected industrial action and, in particular, the Extended Safety Commitment set out in the notices. The CEPU points out that s 424 confines attention to the effects of the particular protected industrial action that is being engaged in or is threatened, impending or probable. The CEPU accepts that, if its members were to take industrial action that did not comply with the notices it had issued, such action would not be protected. It submits that the Deputy President committed clear error by effectively determining that the CEPU would be taking unprotected industrial action and determining to issue orders under s 424 on the basis of the threat said to be posed by unprotected industrial action.

[41] An application under s 424(1) of the FW Act requires the Commission to initially identify whether particular protected industrial action is being engaged in or is threatened, impending or probable at the time of determining the application. 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). In *AIPA v FWA*, Buchanan J explained (at [128]):[26]

> There remains one further matter to be addressed. Section 424 empowers FWA to make an order terminating or suspending "protected industrial action" as identified in s 408. Necessarily, that imports a limitation which confines attention to the particular protected industrial action in question. That is because protected industrial action must satisfy s 409, s 410 or s 411, and also the common requirements in s 413. Those requirements include notice of the nature of the action and when the action will commence (s 414(6)). It follows, in my view, that separate consideration must be given to each of the protected industrial actions which is to be terminated or suspended – i.e. each which has been notified. That may not mean that each must be considered in isolation but that is a question for another day.

[42] As is plain from the text of the section, s 424(1) is concerned only with the consequences of protected industrial action. Other remedies exist under the FW Act, and the general law, in the event of unprotected industrial action. Section 418 of the FW Act, for example, requires that the Commission must make an order that industrial action stop, not occur or not be organised if it appears industrial action that is not protected industrial action is happening, is threatened, impending or probable or is being organised. Section 424, together with the other provisions within Division 6 of Part 3-3 of the FW Act, are directed at the effects of industrial action that is protected industrial action.

[43] It follows that the first step must be to isolate what protected industrial action is being engaged in or is threatened, impending or probable. Whether consequences of the type referred to in s 424(1)(c) or (d) are threatened by the protected industrial action can only be assessed after the relevant protected action is precisely identified. As Buchanan J observed in *AIPA v FWA*, there may be a question as to whether the likely impact of each form of protected industrial action must be considered in isolation. However, it cannot be doubted that, at the very

least, the assessment called for by s 424(1)(c) or (d) is confined to the protected industrial action which, taken collectively, the Commission has found is being engaged in or is threatened, impending or probable. Any threatened unprotected industrial action is irrelevant.

[44] The question is whether the Deputy President undertook that task in this matter. Having regard to the submissions of the parties, that question prompts two inquiries: first, whether industrial action taken in breach of the safety commitment set out in the notices would be unprotected industrial action and, second, whether the reasons of the Deputy President, properly understood, indicate that he relied on the anticipated consequences of a failure by the CEPU or its members to comply with the safety commitment in forming opinion that consequences of the type referred to in s 424(1)(c) were being, or would be, threatened.

[45] As to the first matter, the statutory context is as follows. Industrial action taken by members of the CEPU will only be protected industrial action if, relevantly, it is 'employee claim action'.[27] Employee claim action must, among other things, satisfy the common requirements set out in ss 413 and 414 and the additional requirements set out in s 409 of the FW Act.[28] The common requirements for protected industrial action include that the notice requirements in s 414 must have been met in relation to the industrial action.[29] Section 414(1) requires that, in relation to employee claim action, notice must be given of 'the action' to the employer of the employee. The notice must specify the nature of the action and the day on which it will start.[30] Industrial action which is not notified will not be protected action.

[46] The only protected industrial action that was alleged to be threatened, impending or probable at the time of the Second Decision was that set out in the notices issued by the CEPU on 9 August 2024. Those notices provided notice of stoppages and bans all of which were described as 'subject to the Safety Commitment described below'. The language conveys that the notified industrial action did not include action that would result in non-compliance with the Extended Safety Commitment. Indeed, that was the obvious purpose of including the Extended Safety Commitment in the notices. To the extent that employees engaged in industrial action which involved non-compliance with the Extended Safety Commitment, the action would fall outside the industrial action of which notice had been given and thereby be unprotected.

[47] Transgrid does not dispute that analysis. Rather, Transgrid submits that the alleged failures to, or delays in, compliance with directions to perform emergency work of which it complained, and to which the Deputy President referred in the First Decision and the Second Decision, did not involve any breach of the Extended Safety Commitment. Transgrid submits, somewhat surprisingly, that the Extended Safety Commitment is not breached merely by reason of an employee refusing to comply with a direction to perform what is objectively 'Emergency Work' as defined or to perform work affected by and during a 'Declared Incident'. It suggests that delays in the resumption of work to undertake emergency work or in a declared incident are 'baked in' to the Extended Safety Commitment. It submits that the Extended Safety Commitment contemplates that employees will consult the CEPU as to whether they should comply with such a direction and that a process of clarification and inquiry will ensue concerning whether the work in fact involved an emergency or was appropriately a 'Declared Incident'.

[48] We do not accept that submission. It may be that, as a practical matter, an individual member might seek advice from the CEPU as to whether he or she should comply with a direction to undertake work. If there is a dispute about it, no doubt the CEPU might take that matter up with Transgrid. However, there is nothing in the terms of the Extended Safety Commitment that provides for any role for the CEPU in the determination of what constitutes emergency work or a declared incident, or suggests that the requirement to comply with a direction to undertake emergency work or work in relation to a declared incident is contingent on a process of consultation or inquiry involving the CEPU.

[49] Paragraph 1 of the Extended Safety Commitment contains the operative obligation. The language of paragraph 1 is drafted in clear and mandatory language. It requires that an employee 'will' suspend industrial action if directed in writing to perform emergency work or in case of a declared incident. Paragraph 4 requires that an employee who is ordinarily rostered to work will keep his or her mobile device on their person for the purpose of being notified of emergency work or a declared incident. The intention of the drafting is, obviously enough, to ensure that employees can respond immediately to a direction given in accordance with paragraph 1. That provision is inconsistent with the proposition that the Extended Safety Commitment involves no obligation to comply immediately, or as soon as practicable, to a direction to perform emergency work or in a declared incident.

[50] The definition of 'Emergency Work' in paragraph 3 of the Extended Safety Commitment is cast in objective terms. 'Emergency Work' is work that, if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury. A 'Declared Incident' is similarly an objectively ascertainable event which occurs if the Chief Executive Officer declares an incident in an emergency situation such as storms, bushfires, IT breakdown or major equipment failure. Either work is emergency work or affected by or during a declared incident or it is not. If it is, industrial action taken in defiance of a direction to undertake the work will not fall within the notified protected industrial action. The fact that emergency work is, as the name suggests, work that must be performed imminently to avert risks to human life or personal illness or injury is inconsistent with the proposition that the Extended Safety Commitment contemplates that a direction to perform that work is not required to be complied with immediately or as soon as is practicable.

[51] Transgrid suggests that a period of clarification or inquiry is contemplated by the Extended Safety Commitment because the question of whether particular work is 'Emergency Work' as defined might be contestable. The fact that there might be room for debate as to whether particular work would, if not performed, have the consequences referred to in the definition of 'Emergency Work' does not mean there is not an answer to that question. The Extended Safety Commitment either requires the work to be done or it does not. By way of analogy, s 415 of the FW Act excludes from the immunity otherwise accorded to protected industrial action, industrial action that has involved or is likely to involve personal injury, wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or use of property. There might be debate, in a particular case, as to whether industrial action was likely to have one of the effects set out in s 415. The immunity, nonetheless, turns on whether the industrial action is in fact likely to have one of those consequences. The same approach should be adopted to the Extended Safety Commitment.

[52] Transgrid referred to the decision of the Full Bench in *Victorian Hospitals' Industrial Association v Australian Nursing Federation*.[31] That decision concerned an application for orders under s 424(1) of the FW Act in relation to protected industrial action being engaged in within the public health system in Victoria. The industrial action was implemented following resolutions of the Australian Nurses Federation which included certain measures which were apparently designed to minimise the adverse effects of the industrial action. These included, for example, an exemption for emergency admissions 'subject to the decision of the local campaign bed management committee approval' and that all bans were to be implemented 'subject to the proviso that the ban or refusal will not threaten to, or endanger anyone's personal safety, or their life, health or welfare'.

[53] The Full Bench was ultimately satisfied that the protected industrial action was threatening to have the consequences of the type referred to in s 424(1)(c) of the FW Act and suspended the protected industrial action for 90 days. Part of the reasoning of the Full Bench was as follows (at [57]):

> In reaching these conclusions, we note that considerable efforts are being made by hospitals to minimise the adverse effects of the industrial action on their operations and, in particular, on patient treatment and care. However given the size and wide coverage of the public health system in Victoria, and the likely cumulative effect of the industrial action in reducing over time the capacity of the system, there is a limit to what can be achieved through such measures. There is also only limited capacity to use the resources of private hospitals. We have taken into account the expressed intention of the ANF that the industrial action will be implemented in such a way as not to endanger anyone's life, personal safety or health, or their welfare. However the evidence before us as to the actual and likely consequences of the industrial action across the public health system and for those using the system, has demonstrated that the action being taken is endangering the safety, health or welfare of patients. Further, we are not persuaded that the ANF's exemption and notification processes are working in practice. The evidence from the hospital administrators was that there has been confusion about the processes and that there have been at least delays in the admission or transfer of patients due to the processes with relevant adverse consequences. There is also concern that the processes involve negotiation as to the provision of beds to particular patients, and the making of judgments about patient care other than by clinical staff. The ANF witnesses conceded that there have been some problems with the processes, although they said that the initial problems are being addressed and that the consultative processes are working well in some health services.

[54] Transgrid emphasises that the Full Bench regarded the question of whether the exemption and notification processes were working effectively in practice as being relevant to whether the protected industrial action was threatening to endanger the life, personal safety or welfare, of the population or part of it.

[55] The decision does not assist in the present matter. The decision does not set out the terms of the relevant notices of protected industrial action in full. The extent to which the 'exemption and notification' processes to which the Full Bench refers were contained within the notices of protected industrial action themselves, rather than merely a result of actions taken by the ANF, is unclear.[32] As a result, it is difficult to ascertain the extent to which, if at all, any confusion or delays in the exemption process might have caused the industrial action to exceed that which had been notified. Furthermore, the exemption processes contained within them a process of consultation and negotiation involving the 'bed management committee'. That is not so in the case of the Extended Safety Commitment. Finally, the decision does not suggest the ANF

engaged in conduct involving impermissible attempts to block or delay emergency admissions or work that might prevent danger to a person's personal safety, life, health or welfare. There did not appear to be any suggestion that the ANF was seeking to delay or block emergency work in a manner to contravened any of the commitments it had given.

[56] For those reasons, if industrial action were to be taken by members of the CEPU which did not comply with the Extended Safety Commitment, the action will fall outside the notified protected industrial action. It is appropriate to add that the CEPU rejects the assertion that it or its members will not comply with the Extended Safety Commitment. The CEPU refers to evidence given by its officials to the effect that emergency work or work in relation to a declared incident will be performed. It is not necessary to determine whether those submissions should be accepted. The issue is whether the Deputy President was satisfied that the consequences of the type referred to in s 424(1)(c) of the FW Act were threatened because of the prospect of conduct that would involve breaches of the Extended Safety Commitment.

[57] As to that second matter, Transgrid submits that the reference to employees being 'unlikely to comply' with the Extended Safety Commitment in paragraph [39] of the Second Decision is to be understood as referring to delays that are inherent in resuming work rather that non-compliance with its terms. That reading of the Second Decision cannot be accepted. Paragraph [39] of the Second Decision is unequivocal. The conclusion of the Deputy President was that action contemplated by stoppages notice would threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of it, 'because a large number of employees of Transgrid, who had given a safety commitment would be unlikely to comply with that commitment'. The apprehension that employees would not comply with the Extended Safety Commitment provided the basis for the conclusion that the life, the personal safety or health, or the welfare, of the population or part of it was threatened.

[58] Other aspects of the Second Decision support the conclusion that the Deputy President was satisfied that the consequences set out in s 424(1)(c) of the FW Act were threatened because of the prospect of members of the CEPU not complying with the Extended Safety Commitment. At the commencement of his consideration, the Deputy President recorded his finding in the First Decision that the CEPU's actions in challenging directions given by Transgrid 'disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment'.[33] The Deputy President then recorded that the CEPU had refused to give the Revised Safety Commitment sought by Transgrid and which the Deputy President had urged should be considered.

[59] Having identified the stoppages and bans notified on 9 August 2024 which it was said were threatening or would threaten to have consequences of the type set out in s 424(1)(c) of the FW Act at paragraph [41] of the Second Decision, the Deputy President indicated that the past history of what he viewed as impermissible attempts to block and/or delay Declared Incidents and Emergency Work was 'a particular factor [in his] determination' given that the CEPU had, in his assessment, unequivocally stated that they will continue to act in the same manner. The Deputy President stated that the position adopted by the CEPU 'allowed [him] to conclude that the conduct that formed the basis of the First Decision would, without the Order, certainly continue with the attendant risks'.[34] The asserted 'impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid

pursuant to the Extended Safety Commitment' unequivocally provided the basis for the Deputy President's conclusion.

[60] Transgrid submits that, in the proceedings before the Deputy President, both parties accepted that delays in resuming work in accordance with a direction purportedly issued under the Extended Safety Commitment would not result in industrial action being unprotected. In our opinion, the submission does not assist. It is correct that the CEPU submitted that seeking further clarification or information for the purpose of ascertaining whether a direction was within the safety commitment did not contravene the safety commitment or go beyond the ambit of protected industrial action. That submission is, in our opinion, wrong. However, for present purposes, it is apparent the Second Decision was not based merely on delays occasioned by the CEPU seeking clarification or information. As has been explained, the Deputy President relied on conduct he characterised as 'impermissible attempts to block and/or delay Declared Incidents and Emergency Work'. That finding can only be reading as connoting deliberate non-compliance with the Extended Safety Commitment.

[61] In our opinion, there is no doubt the Deputy President was satisfied that consequences of type set out in s 424(1)(c) of the FW Act were or would be threatened because he was concerned that members of the CEPU would not comply with the Extended Safety Commitment. Given that industrial action taken in defiance of the Extended Safety Commitment would not be protected industrial action having regard to the terms of the notices of protected industrial action, the Deputy President erred in considering the prospect of such action in forming the state of satisfaction called for by s 424(1)(c) of the FW Act.

[62] Finally, and in the alternative, Transgrid contends that, even if the Deputy President was wrong to regard a failure to comply, or a delay in complying, with the Extended Safety Commitment as protected industrial action, that is insufficient to demonstrate error in the decision. The submission is based on the proposition that whether protected industrial action is being engaged in or is threatened, impending or probable for the purposes of s 424(1)(a) or (b) is not a matter of objective fact, but dependent on the satisfaction of the Commission. As we have observed, it is not necessary for the Full Bench to express a view about that question in the present appeal. Assuming, without deciding, that the proposition is correct, the CEPU has nonetheless established error in the Deputy President reaching that state of satisfaction.

[63] The error is capable of being described in a number of ways. Section 424(1) of the FW Act required the Deputy President to identify what protected industrial action was being engaged in or was threatened, impending or probable. The Deputy President identified the prospect of conduct on the part of the CEPU and its members that he concluded would involve non-compliance with the Extended Safety Commitment and would have the type of consequences referred to in s 424(1)(c). Section 424(1) required that the Deputy President consider whether that conduct would be protected industrial action. There is nothing in the decision which suggests the Deputy President turned his mind to that question. Accordingly, the Deputy President failed to address the statutory question posed by s 424(1) of the FW Act.

[64] Another way in which the error may be characterised is that the Deputy President took into account an irrelevant matter. The only protected industrial action the Deputy President considered was threatened, impending or probable was the action set out in the notices issued by the CEPU on 9 August 2024. Those notified forms of industrial action were expressly subject

to the Extended Safety Commitment set out in the notices. In those circumstances, the possibility of non-compliance with the Extended Safety Commitment was irrelevant to the question posed by s 424(1), namely, whether protected industrial action was threatening or would threaten to have consequences of the type set out in s 424(1)(c) or (d). To the extent that such a possibility was considered, the Deputy President's state of satisfaction was formed having regard to an irrelevant matter.

[65] For these reasons, the CEPU is entitled to succeed with respect to ground A1 of the amended notice of appeal.

Notice of contention

[66] Transgrid filed what it referred to as a notice of contention. The notice of contention asserts that, even if there was error in the reasoning process adopted by the Deputy President, the same conclusion would have been reached having regard to the findings of the Deputy President and the submissions of the parties. The submissions advanced in relation to the notice of contention have substantially been addressed in dealing with ground A1 of the amended notice of appeal. The notice of contention set out Transgrid's contentions that the Second Decision should be affirmed because delays in responding to direction to undertake emergency work or in relation to a declared incidents did not contravene the Extended Safety Commitment and that it was open to the Deputy President to be satisfied that conduct delaying or a failure to comply with such a direction was protected industrial action. We have addressed those submissions.

[67] The notice of contention also contained an assertion that the safety commitment is cast in narrower terms than the trigger for an order to be made under s 424(1)(c) of the FW Act. In particular, there is no requirement in s 424(1)(c) for the threat to be 'imminent' and s 424(1)(c) is not confined to threats to life and personal safety and extends to threats to the welfare of the population or part of it. The submission invites the Commission to second-guess the conclusion the Deputy President would have reached had he not adopted the reasoning process he did. In the circumstances of this matter, that is not a course we believe is open. The Deputy President concluded that consequences of the type referred to in s 424(1)(c) were threatened as a result of what would have been unprotected industrial action. It is not appropriate in this matter to speculate as to what conclusion the Deputy President would have reached had he disregarded the prospect of unprotected industrial action.

Disposition of the appeal

[68] As a result of the conclusions set out above, the Deputy President erred in forming the state of satisfaction that required an order to be made suspending or terminating the protected industrial action on the basis covered by ground A1. In those circumstances, it is not necessary or appropriate for the Full Bench to determine the other grounds of appeal. The remaining grounds of appeal, in substance, allege failures to have regard to evidence before the Deputy President, deficiencies in the reasons of the Deputy President and the conclusions of the Deputy President in relation to the period of suspension. In circumstances in which Transgrid's application may need to be redetermined potentially based on different evidence and submissions, it is not appropriate for the Full Bench to express a view in relation to those grounds.

[69] The Second Decision and the order made by the Deputy President on 16 August 2024 must be quashed. The question of whether Transgrid's application should be remitted to the Deputy President is finely balanced. On one view, Transgrid did not advance a case before the Deputy President that consequences of type set out in s 424(1)(c) of the FW Act were threatened or would be threatened if there was strict and timely compliance with the Extended Safety Commitment. However, the CEPU did not object to the application being remitted to a single member of the Commission and it is not clear to us whether Transgrid presses a case that the notified protected industrial action should trigger an order under s 424(1) leaving aside its concerns about compliance with the Extended Safety Commitment. If Transgrid presses its application, it should be remitted to the Deputy President or another member of the Commission to be redetermined.

Conclusion

[70] For the reasons set out above, we order that:

(1) Permission to appeal is granted;
(2) The appeal is allowed;
(3) The decision and order of Deputy President Cross in Matter No. B2024/1027 is quashed; and
(4) The application by Transgrid in Matter No. B2024/1027 is remitted to a single member of the Commission to be redetermined.

PRESIDENT

Appearances:

J Agius SC and *D Mahendra*, counsel, instructed by Maurice Blackburn for the appellant.
R Dalton KC and *A Crocker*, counsel, instructed by MinterEllison for the respondent.

Hearing details:

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[1] PR778397.

[2] *NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid* v *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 1914.

[3] [2024] FWC 1914 at [25]-[42].

[4] [2024] FWC 1914 at [55]-[56].

[5] [2024] FWC 1914 at [58].

[6] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid* [2024] FWCFB 333.

[7] Transcript of Proceedings, 12 August 2024, PN885-889.

[8] PR778397.

[9] *Fair Work Act* 2009 (Cth), s 413(7)(a). See the explanation provided in *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; (2012) 202 FCR 200 at [72] (Lander J), [130] (Buchanan J) and [182] (Perram J) (*AIPA v FWA*).

[10] *NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid* v *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2182.

[11] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid* [2024] FWC 2267.

[12] [2024] FWC 2182 at [30].

[13] [2024] FWC 2182 at [33]-[34].

[14] [2024] FWC 2182 at [37]-[39].

[15] [2024] FWC 2182 at [41].

[16] [2024] FWC 2182 at [42].

[17] [2024] FWC 2182 at [45].

[18] *Workplace Relations Act* 1996 (Cth), s 170MW.

[19] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [20] and [28] (Gleeson CJ, Gaudron and Hayne JJ) (*Coal & Allied (HC)*).

[20] [1936] HCA 40; (1936) 55 CLR 499.

[21] [2012] FCAFC 65; (2012) 202 FCR 200.

[22] Ibid, [147]-[151] (Perram J). See also *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* [2018] FWCFB 4120; (2018) 281 IR 147 at [49]-[50].

[23] *Coal & Allied (HC)* at [28] (Gleeson CJ, Gaudron and Hayne JJ).

[24] *AIPA v FWA* at [147]-[151] (Perram J).

[25] See, for example, *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Essential Energy* [2021] FWC 6128 at [36]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Endeavour Energy Network Management Pty Ltd* [2021] FWC 3533 at [11].

[26] See also at [179]-[180] (Perram J).

[27] *Fair Work Act* 2009 (Cth), s 408(a).

[28] *Fair Work Act* 2009 (Cth), s 409(1)(c) and (d).

[29] *Fair Work Act* 2009 (Cth), s 413(4).

[30] *Fair Work Act* 2009 (Cth), s 414(6).

[31] [2011] FWAFB 8165; (2011) 214 IR 148.

[32] Cf. *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165; (2011) 214 IR 148 at [34].

[33] [2024] FWC 2182 at [30].

[34] [2024] FWC 2182 at [42].