



REASONS FOR DECISION

Fair Work Act 2009
s.424—Industrial action

Sydney Trains; NSW Trains
(B2018/50)

The Hon. Dominic Perrottet, Minister for Industrial Relations (New South Wales)
(B2018/51)

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 9 FEBRUARY 2018

Suspension of protected industrial action by employees of Sydney Trains and NSW Trains – industrial action is threatening to endanger the welfare of part of the population – industrial action is threatening to cause significant damage to an important part of the Australian economy – reasons for decision.

Background

[1] On 15 January 2018, the Australian Rail, Tram & Bus Industry Union (NSW Branch) (the RTBU) notified Sydney Trains and NSW Trains (the Employers) pursuant to s.414 of the *Fair Work Act 2009* (the FW Act) that its members would be engaging in indefinite bans on overtime from 12:01 am on Thursday, 25 January 2018. The same day, the Association of Professional Engineers, Scientists and Managers Australia (APESMA) notified Sydney Trains that its members would also be engaging in indefinite bans on overtime from 12:01 am on Thursday, 25 January 2018.

[2] On 16 January 2018, the RTBU notified the Employers that its members would undertake a stoppage of work for a 24-hour period commencing at 12:01 am Monday, 29 January 2018.

[3] On 17 January 2018, APESMA notified NSW Trains that its members would be engaging in indefinite bans on overtime from 12:01 am on Tuesday, 30 January 2018.

[4] On 24 January 2018, the Employers filed an application with the Fair Work Commission (the Commission) for an order for suspension or termination of protected action pursuant to ss.424 and 425 of the FW Act against the RTBU and APESMA (the Unions). On the same day, the Minister for Industrial Relations in New South Wales, the Hon. Dominic Perrottet (the Minister), filed an application with the Commission for an order for suspension or termination of protected industrial action pursuant to s.424 of the FW Act against the Unions. The applications cited the indefinite bans on overtime notified by both Unions, as well as the 24-hour stoppage notified by the RTBU.

[5] The applications were heard on 24 and 25 January 2018. At the conclusion of the hearing on 25 January 2018, I issued a brief decision¹ indicating that I had decided to make an order² suspending the industrial action for a period of six weeks from 6:00 pm that day, ending at 6:00 pm on 8 March 2018, in accordance with s.424 of the FW Act. In the decision, I said that I would publish more detailed reasons at a later date. These are those reasons. Because my decision was based solely on s.424 of the FW Act (rather than s.425), I focus on the evidence and submissions relevant to that section.

The evidence

[6] Steven Charles Issa (Executive Director, Sydney Coordination Office, Transport for NSW (TfNSW)) said that he was involved in coordinating the transport mitigation strategy for the industrial action notified by the Unions. In his written statement,³ he said that rail accounts for 56% of all public transport trips.⁴ He said:

‘From Thursday 25 January 2018, trains will be running on a weekend timetable, which is a reduction in services of approximately 40% to 50%. On Monday, 29 January 2018, trains will not run at all.’⁵

[7] Mr Issa indicated that TfNSW would attempt to mitigate the effects of the industrial action by putting on additional buses, but that ‘*available bus capacity cannot match the full capacity of the train network.*’⁶

[8] Mr Issa said:

‘The lack of trains operating will increase the traffic on the roads considerably. Based on Opal data, I am aware that if everyone who normally catches a train between 8am and 9am on a weekday drives instead, approximately an additional 160,000 cars would be on the road....

On the date of the 24 hour stoppage, it is expected that commuters, particularly in regional and suburban areas, will attempt to drive to the Sydney Central Business District (CBD) which may result in (amongst other things) traffic jams on most major roads and major congestion around the CBD.’⁷

[9] Mr Issa added:

‘Congested roads may also impede essential services workers from attending work. To the extent that essential services staff such as police officers, nurses, doctors, ambulance officers, and fire fighters use trains to get to work, reduced services can be expected to impact their ability to arrive at work on time.’⁸

[10] Gavin Kable (Executive Director, People & Communications, Sydney Trains) gave evidence concerning the progress in bargaining between the Employers and the relevant unions for a new enterprise agreement for Sydney Trains. In cross-examination, he indicated that bargaining was continuing and that some matters had been agreed.⁹

[11] Michael Croning (Director, Service Planning, TfNSW) gave evidence about the potential impact of the proposed industrial action on rail operations. In relation to the proposed 24-hour stoppage, he said:

- If drivers and guards participated in the stoppage, then passenger services could not run;
- If employees in the Rail Management Centre participated in the stoppage, then the entire network would have to be shut down;
- If employees responsible for maintenance, infrastructure or track operations participated in the stoppage, sections of the track could become unusable, which would most likely lead to a shutdown of the network in the interests of safety;
- If employees in the infrastructure control centre participated in the stoppage, consideration would need to be given as to whether Sydney Trains could continue to operate the network safely, and if not, could result in the closure of the network;
- If employees in electrical system maintenance participated in the stoppage, even a relatively minor fault could result in the entire network being shut down; and
- If communications employees participated in the stoppage, this could result in train and maintenance operations being shut down.¹⁰

[12] Mr Croning gave evidence that the effect of the proposed stoppage would be that over one million customer journeys would not take place.¹¹ The approximately 420,000 persons who usually travel by train on the Sydney Trains network in the morning peak period would be unable to make their journey.¹² The approximately 440,000 persons who usually travel during the afternoon peak would be similarly affected.¹³

[13] Mr Croning said that large numbers of persons who use Sydney Trains to travel to major suburban centres ‘*including highly-visited precincts for the education, residential, retail and medical and health sectors*’ would similarly be unable to make their journey.¹⁴

[14] Mr Croning’s evidence was that after work-based travel, the next largest usage of the network is education-related travel and travel by school children. The day of the proposed stoppage was the first day back for most independent schools.¹⁵

[15] Mr Croning also said that the proposed stoppage would prevent the network from being accessed by freight operators, thereby affecting the movement of coal, containers (including ones carrying perishable food), grain, cement and aggregates and waste (from transfer stations at Auburn to Goulburn).¹⁶ Travel to and from Sydney Airport would also be disrupted.¹⁷

[16] According to Mr Croning, because of the need to return trains back to stabling yards etc., the proposed 24-hour stoppage would affect services for an additional two hours prior to the stoppage and three hours afterwards.¹⁸

[17] Mr Croning also gave evidence about the impact of the proposed indefinite ban on overtime by the RTBU and APESMA. His evidence could be summarised thus:

- The ban would have a severe impact on Sydney Trains' service delivery and that impact would likely become more severe as the ban continued;¹⁹
- Overtime is factored into the schedules and rosters for train crew;²⁰
- In order to provide a reliable and consistent level of service in the face of the ban, Sydney Trains would need to operate a Saturday timetable instead of a weekday timetable from the commencement of the ban on 25 January 2018.²¹ This would involve running approximately 50% fewer services;²²
- If the indefinite ban continued during the week commencing Monday, 29 January 2018, running the Saturday timetable would not be sufficient and the impact on commuters would be serious, involving significant delays, serious overcrowding on platforms and attempts made to board already overcrowded trains, which might increase the risk of injury or panic;²³ and
- The inability to use overtime to backfill for employees who take sick leave would create the potential for parts of the network having to be shut down (for example, if a signaller could not work their shift due to illness). Reduced staffing levels at stations could mean that entry to stations would need to be closed for safety reasons.²⁴

[18] Dale Merrick (Director, Network Services, NSW Trains) gave evidence²⁵ of the effect of the proposed industrial action on the services provided by NSW Trains.

[19] Mr Merrick said that while NSW Trains would probably be able to replace all affected regional services with coaches on and around 29 January 2018, it would not be able to do so for intercity train services.²⁶ The effects of the proposed stoppage would likely include:

- Tourists and travellers being prevented from making pre-booked connections with flights, cruise ships and accommodation;
- School children and teachers not being able to attend schools (which, in some cases, might lead to schools having to close);
- Workers not being able to attend work;
- Elderly and ill people not being able to attend medical appointments or obtain necessary medication; and
- A significant increase in road traffic, particularly from intercity service areas such as Wollongong, the Central Coast, the Blue Mountains and Newcastle to Sydney.²⁷

[20] Mr Merrick also gave evidence that the proposed indefinite ban would have a severe impact on NSW Trains' service delivery across the intercity and regional services, and that impact would become more severe as the ban continued.²⁸

[21] Mr Merrick said that NSW Trains would need to operate a Saturday timetable from the commencement of the overtime ban (involving approximately 50% less services than the

weekday timetable). Running the Saturday timetable during the week would lead to overcrowding and an increased safety risk.²⁹

[22] Michael Warlters (Acting Executive Director, Economic Forecasting and Revenue Analysis, NSW Treasury) gave evidence about modelling of the immediate economic impact of the proposed industrial action, which he had overseen.³⁰

[23] The immediate economic impact was calculated by determining the loss of gross state product per hour worked, multiplied by the number of hours lost due to travel constraints. Secondary effects such as loss of leisure time and inconvenience were not included.³¹

[24] According to NSW Treasury's modelling, the proposed 24-hour stoppage would have resulted in an economic loss of \$51.7 million. An additional loss of \$39.1 million was estimated to arise from the overtime ban, making a total loss of \$90.8 million.³²

[25] Dr Warlters outlined the assumptions underlying the modelling for the proposed stoppage. It was assumed that train commuters would modify their behaviour by allowing for longer commute times, working from home or taking annual leave.³³ Dr Warlters outlined the conservative nature of some of the assumptions, for example, that any effect on public sector workers would not have an impact on gross state product (as they would have access to being able to work from home or other flexible arrangements). It was assumed that 55% of private sector workers who normally travel by train to and from work would be able to work a full day (either at home or at work), and a further 10% would access annual leave. This left 10% of workers who normally travel by train who it was assumed would lose one hour of productive time, and 25% who it was assumed would not attend work and would not take annual leave.³⁴

[26] The assumptions underlying the modelling for the overtime ban included that:

- it would have no impact on the output of the public sector;
- 55% of private sector workers who normally travel to work by train would work normal hours and 45% of private sector workers who use the train to get to work would lose one hour of productive work; and
- there would be no loss of output on the public holiday and weekend of 26 to 28 January 2018.³⁵

[27] The modelling also only estimated the cost of the overtime until 31 January 2018 (despite its indefinite nature).³⁶

[28] The estimated cost of the proposed industrial action did not include the costs of increased road congestion on workers who do not normally travel to work by train. The estimates of productivity loss were based using a State average rather than a Sydney average.³⁷

[29] Dr Warlters agreed during cross-examination that the forecast Gross State Product for 2017-18 is around \$600 billion.³⁸

[30] Graeme Loy (Acting Deputy Secretary, NSW Ministry of Health) gave evidence about the likely impact of the proposed industrial action on the health system.³⁹ Based on feedback he had received from Local Health District CEOs as a result of the proposed stoppage, there would be service interruptions including impacts to elective surgery, outpatient services and community health services at a number of major hospitals.⁴⁰ He also warned that there might be delays in hospital emergency departments and a negative effect on surgery waiting times.⁴¹ The Sydney Dental Hospital would be forced to cancel most of its appointments.⁴² He also said it was possible that increased congestion would adversely affect ambulance response times.⁴³

[31] Mr Loy said that the proposed overtime ban could also result in delays in hospital emergency departments and surgery waiting times.⁴⁴ If the overtime ban were to continue to 30 January 2018 and beyond, there would be a cumulative and compounding effect of increased cancellations for surgery and outpatient appointments, impacts on community services availability and greater delays for patients accessing care through emergency departments.⁴⁵

[32] Robyn Bale (Relieving Executive Director, Educational Services Division, Department of Education) gave evidence concerning the impact of the proposed industrial action on student attendance at school.⁴⁶ According to her, around 50,000 trips are taken each day by school students using a Student Opal Card in the Metropolitan and Outer Metropolitan regions.⁴⁷

[33] Ms Bale said that while public school students were not required to attend on the day of the stoppage, they would be affected by the overtime ban. The reduced frequency of services could lead to some students being late for school.⁴⁸ Students might have to spend longer at train stations without supervision, increasing the risk to some students, particularly younger students and those with a disability.⁴⁹

[34] Michael Baldi (Executive Director, Strategic Human Resources, Department of Justice) gave evidence concerning the impact of the proposed industrial action on the justice system.⁵⁰ His evidence included the potential for scheduled court matters and hearings not to proceed on 29 January 2018, imposing costs on both the State and the litigants.⁵¹

[35] Susan Pettifer (Director, Workplace & Information Services, Council of the City of Sydney) gave evidence concerning the impact of the proposed industrial action on the services provided by the City of Sydney.⁵² She referred to a 2016 staff survey which indicated that 49% of respondents travelled to work by train.⁵³ Amongst other things, she said that the proposed industrial action could mean that there would be a reduced ability to pick up household waste due to staff being unable to get to work. Increased road congestion could lead to cancelled or reduced clean-up services, street cleaning, and street litter bin collection.⁵⁴

The legislation

[36] Section 424 of the FW Act states:

‘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;
 - (ia) 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.’

Consideration

[37] At the time of the hearing, it was not in contest between the relevant parties that there was a threat of protected industrial action by the Unions. So much was apparent from the notices served by the Unions on the Employers. Indeed, the indefinite ban on overtime by employees who were RTBU members had already commenced on the second day of the hearing.

[38] Nor was there any challenge to the standing of the applicants to bring the applications. The critical issue was whether the Commission could be satisfied that the protected action threatened to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, or to cause significant damage to the Australian economy or an important part of it. Once the Commission is so satisfied, it *must* make an order suspending or terminating the relevant protected industrial action.

[39] Mr Howell, on behalf of the Unions, emphasised the need for there to be ‘*an appropriate evidential basis*’⁵⁵ before the Commission can be satisfied that the relevant criteria for making an order are satisfied. He also emphasised that the applications were directed towards ‘*very specific applications for industrial action; two unions with very different coverage, two employers, separate legal entities.*’⁵⁶ He submitted that the evidence was too vague to make the required findings: ‘*[e]verything is framed around may do this, may do that.*’⁵⁷

[40] With regard to the economic impact of the threatened industrial action, Mr Howell submitted that the cost impact on the NSW economy produced by the Treasury modelling was ‘*minuscule*’ in the context of a State economy of \$600 billion.⁵⁸

[41] I have had regard to the following observation by Buchanan J in *Australian and International Pilots Association v Fair Work Australia*:⁵⁹

‘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.’⁶⁰

[42] Most of the evidence presented during the hearing distinguished between the likely effect of the proposed 24-hour stoppage and the effect of the proposed overtime bans. It also generally distinguished between the effect of the proposed industrial action on Sydney Trains and on NSW Trains. It generally did not distinguish between the effect of the overtime ban notified by the RTBU and that separately notified by APESMA. In my view, however, in the circumstances of this case, I think that little turns on this. Both unions had notified the same kind of industrial action (indefinite bans on overtime), which would largely take place simultaneously (though I note that APESMA's bans at NSW Trains were scheduled to commence a few days later than those notified by the RTBU). The industrial campaign was clearly coordinated by both unions. Given the close relationship in the work performed by members of both unions (something of which I am aware from my experience as a member of the Commission), it is reasonable to consider the evidence relating to the proposed overtime bans as generally referring to the combined impact of the overtime bans imposed by both unions.

[43] While some of the evidence was inevitably somewhat speculative, much of it was quite specific. The evidence clearly established that the proposed 24-hour stoppage would almost certainly have meant no train services on Monday 29 January 2018. Moreover, the overtime ban would have greatly reduced the level of train services available from 25 January 2018, for an indefinite period.

[44] The evidence also established that the 24-hour stoppage and the overtime bans – taken together – or indeed separately – threatened to endanger the welfare of a part of the population, including the large number of people in Sydney and surrounding areas who rely on the services provided by Sydney Trains and NSW Trains to get to work, attend school or otherwise go about their business, as well as all those who would have suffered from the increased congestion on the roads that would have been an inevitable consequence of the industrial action.

[45] The evidence was also sufficient to establish that the industrial action would have threatened to cause significant damage to the economy of Sydney – the largest and most economically important city in Australia.

[46] This finding was supported by the NSW Treasury modelling that estimated that the cost to the NSW economy would have been in the order of \$90 million. I note that this figure assumed no impact at all on the output of public sector workers, nor on the output of private sector workers who do not usually travel to work by train, even though many of them would have been affected by increased congestion on the roads. It also assumed that the output of the majority of private sector workers who do normally travel by train would have been unaffected. Moreover, the modelling only estimated the cost of the threatened overtime bans until 31 January 2018, even though they were of an indefinite nature. It is quite likely, in my opinion, that the cost to the economy, if the industrial action had gone ahead, would have been significantly more than \$90 million modelled by Treasury. Such a loss of output would represent – in absolute terms – significant economic damage.

[47] In the light of these findings, I was required by s.424 of the FW Act to make an order suspending or terminating the protected industrial action.

[48] No party sought that the protected action be terminated. It was also clear that enterprise bargaining negotiations were continuing. In these circumstances I determined that it

was appropriate to suspend the industrial action for a period of six weeks from 6:00 pm on 25 January 2018 to 6:00 pm on 8 March 2018. This order was made in the expectation that the parties would use this period to conclude their negotiations.



SENIOR DEPUTY PRESIDENT

Appearances:

M Seck, counsel, with *T Woods*, solicitor, for Sydney Trains and NSW Trains.

M Easton, counsel, for the Hon. Dominic Perrottet, Minister for Industrial Relations (New South Wales).

A Howell, counsel, with *M Doherty*, solicitor, for the Australian Rail, Tram and Bus Industry Union and The Association of Professional Engineers, Scientists and Managers, Australia.

Hearing details:

Sydney.

2018.

January 24, 25.

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¹ [2018] FWC 519.

² PR599816.

³ Exhibit 2.

⁴ Ibid [3].

⁵ Ibid [6].

⁶ Ibid [6].

⁷ Ibid [12].

⁸ Ibid [14].

⁹ PN137.

¹⁰ Exhibit 1 [16].

¹¹ Ibid [18].

¹² Ibid [21].

¹³ Ibid [22].

¹⁴ Ibid [23].

- ¹⁵ Ibid [24]-[25].
¹⁶ Ibid [28]-[29].
¹⁷ Ibid [30].
¹⁸ Ibid [40]-[41].
¹⁹ Ibid [43].
²⁰ Ibid [44].
²¹ Ibid [45].
²² Ibid [47].
²³ Ibid [51].
²⁴ Ibid [52]-[59].
²⁵ Exhibit 5.
²⁶ Ibid [23]-[25].
²⁷ Ibid [27].
²⁸ Ibid [33].
²⁹ Ibid [38].
³⁰ Exhibit 7
³¹ Ibid [11]-[12].
³² Ibid [12].
³³ Ibid [14].
³⁴ Ibid [16].
³⁵ Ibid [17].
³⁶ See, e.g. exhibit 7 attachment D, 15.
³⁷ Exhibit 7 [19].
³⁸ PN303.
³⁹ Exhibit 8.
⁴⁰ Ibid [10]-[12].
⁴¹ Ibid [14].
⁴² Ibid [15].
⁴³ Ibid [16].
⁴⁴ Ibid [20].
⁴⁵ Ibid [22].
⁴⁶ Exhibit 9.
⁴⁷ Ibid [9]-[11].
⁴⁸ Ibid [15].
⁴⁹ Ibid [17].
⁵⁰ Exhibit 10.
⁵¹ Ibid [14].
⁵² Exhibit 11.
⁵³ Ibid [10].
⁵⁴ Ibid [14].
⁵⁵ PN661.
⁵⁶ PN634.
⁵⁷ PN663.
⁵⁸ PN670.
⁵⁹ [2012] FCAFC 65.
⁶⁰ Ibid [128].