



REASONS FOR DECISION

Fair Work Act 2009
s.424—Industrial action

Australian Rail Track Corporation Limited T/A Australian Rail Track Corporation

v

Australian Rail, Tram and Bus Industry Union, Australian Municipal, Administrative, Clerical and Services Union

(B2023/668)

COMMISSIONER CRAWFORD

SYDNEY, 5 JULY 2023

Suspension or termination of protected industrial action – endangering life etc – economic impact of industrial action

Introduction

[1] On 30 June 2023, the Australian Rail Track Corporation Limited (**ARTC**) filed an application pursuant to s 424 of the *Fair Work Act 2009* (**FW Act**) seeking an order for the suspension or termination of protected industrial action. The first respondent to the application was the Australian Rail, Tram and Bus Industry Union (**RTBU**), the second respondent was the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) and the third respondent was the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**).

[2] The application arose after the RTBU, ASU and CEPU each provided ARTC with written notice on 30 June 2023 of protected industrial action pursuant to s 414 of the FW Act. The respective actions identified in the notices were:

(a) RTBU¹

- An unlimited number of consecutive 72-hour stoppages of work commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on intervening in movement planner train plans commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on viewing, using or otherwise engaging with Paper Graphs commencing at 12:01am on 6 July 2023 and continuing indefinitely.

- An indefinite ban on being On-Call commencing at 12:01am on 6 July 2023 and continuing indefinitely.

(b) ASU²

- A 24-hour stoppage of work commencing at 12:01am on 6 July 2023.
- An indefinite ban on intervening in movement planner train plans commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on viewing, using or otherwise engaging with Paper Graphs commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on being On-Call commencing at 12:01am on 6 July 2023 and continuing indefinitely.

(c) CEPU³

- A 24-hour stoppage of work commencing at 12:01am on 6 July 2023.
- An indefinite ban on intervening in movement planner train plans commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on viewing, using or otherwise engaging with Paper Graphs commencing at 12:01am on 6 July 2023 and continuing indefinitely.
- An indefinite ban on being On-Call commencing at 12:01am on 6 July 2023 and continuing indefinitely.

[3] There was no dispute that the notified actions were approved in accordance with protected action ballot orders (**PABOs**) for each union: RTBU - [PR763139](#), ASU - [PR763352](#) and CEPU - [PR763360](#) and that the various elements necessary for the actions to be protected under the FW Act were satisfied.

[4] The notified action relates to bargaining for an enterprise agreement to replace the existing *Australian Rail Track Corporation New South Wales (NSW) Enterprise Agreement 2019*⁴ (**Proposed Agreement**) which nominally expired on 11 June 2023. Although the nominal expiry date is reasonably recent, negotiations commenced in December 2022 and at least nine bargaining meetings have been held since 16 February 2023.⁵ The Commission also conducted a conciliation conference in accordance with s 448A of the FW Act on 27 June 2023 which was completely unproductive. The witness statement of Wayne Johnson (ARTC Group Executive – Hunter Valley Network) indicates as of 27 June 2023 there were only three material issues remaining in dispute: the scope of the Proposed Agreement, wage rises and sick leave conditions.⁶ However, having determined the three PABO applications and through conducting the s 448A conference, I am aware these three issues are highly contentious and the ARTC and the three unions are quite apart in their respective positions.

[5] ARTC filed the following material in support of its application on 3 July 2023:

- Outline of submissions;
- Witness statement of Wayne Johnson dated 2 July 2023; and
- Witness statement of Jonathan Peter Teubner dated 3 July 2023.

[6] On 3 July 2023 I issued directions for the three unions to file material in response to the application by 2pm on 4 July 2023 and listed the application for hearing at 9am on 5 July 2023.

[7] At 2:27pm on 4 July 2023 Chambers received an email from ARTC’s legal representative which relevantly stated:

“Please find **enclosed** a proposed amended draft order. The ARTBIU has indicated that it does not contest that the evidentiary material before the Commission is capable of founding the necessary state of satisfaction in respect of the action the subject of the amended order, and otherwise does not oppose the order being made. The ASU and CEPU do not oppose the order and do not otherwise wish to be heard.”

[8] I subsequently proposed some amendments to the proposed draft order and sought consent for the amended terms from ARTC and the three unions. Each party confirmed its consent to the draft order. An Order was issued at 5:44pm on 4 July 2023 which came into operation at 7pm on 4 July 2023.⁷ The parties indicated they were content for the application to be determined on the papers and the hearing was vacated. The following are my reasons for issuing the Order.

Statutory framework

[9] Division 6 of Part 3-3 of the FW Act sets out when the Commission may or must make orders to terminate or suspend protected industrial action. Relevantly, s 424 provides:

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.

Evidence and Submissions

[10] ARTC relied on the witness statements made by Wayne Johnson (ARTC Group Executive – Hunter Valley Network) and Jonathan Peter Teubner (ARTC Head of Economic and Regulatory Development). At a high level, Mr Johnson gave evidence about the background to the matter and in relation to the overall impact of the notified action and Mr Teubner's evidence was focused upon the economic impact. Mr Johnson and Mr Teubner's evidence was not contested by the unions. I have considered all the evidence provided by Mr Johnson and Mr Teubner and have summarised what I consider to be the key elements for present purposes below.

Mr Johnson

[11] Mr Johnson's evidence included the following:

(a) ARTC is an Australian Government-owned corporation and current operator of the Australian freight rail network. ARTC employs around 2,200 workers who help manage the transit of around 440 passenger and freight trains across its rail network daily. Train movements across the NSW track are controlled by Network Control Centres in Junee and Broadmeadow. ARTC's rail operations in NSW, on a mainland track into Melbourne and on a Victorian track that interfaces with the mainland track into Melbourne are collectively referred to by ARTC as its 'NSW Controlled Network'. The NSW Controlled Network provides access for intra-state and inter-state trains providing key links to Queensland, Victoria, South Australia and NSW.⁸

(b) ARTC provides access to the NSW Controlled Network in relation to:

- Freight train operators;
- Passenger train operators; and
- Coal producers and domestic power producers.⁹

(c) ARTC's Hunter Valley heavy haul rail network supports the transportation of coal across the Hunter Valley Coal Network including in relation to the following domestic energy producers in the Hunter Valley: Origin Energy, AGL Energy and Delta Electricity. Coal reserves for these energy producers are replenished solely using the NSW Controlled Network.¹⁰

(d) Thermal coal is the primary fuel source for the generation of electricity in NSW and accounted for approximately 78% of the supply of electricity at 7:10pm on 1 July 2023.¹¹

(e) The Proposed Agreement will cover Network Controllers. Network Controllers are essential to all train movements and track access on the NSW Controlled Network and without involvement and approvals from the accredited Network Controllers, all train movements on the NSW Controlled Network would immediately cease. The RTBU and ASU currently represent Network Controllers. The RTBU also represents Programmers, Integrated Live Run Schedulers and Signal Electricians, the latter of which are also represented by the CEPU.¹²

(f) The impact of the notified protected action would include:

- Energy producers and coal exporters in the Hunter Valley would suffer a disruption to the coal supply chain;
- Passengers will suffer a disrupted service;

- Freight services would be disrupted; and

- ARTC would be required to immediately cease its operations.¹³

(g) There is a strong likelihood the notified action will have a direct impact on the power supply of NSW by reducing the availability of coal in reserve stockpiles to meet fuel needs for power demand.¹⁴

(h) If trains are no longer able to access and move on the Hunter Valley Coal Network or the broader NSW Controlled Network, the coal supply chain in the Hunter Valley and 97% of coal transport in NSW would immediately cease to function.¹⁵

(i) A potential impact of the notified protected action may be businesses or homeowners facing outages of electricity utilised for essential needs such as cooking, heating and lighting and a lasting impact may be that the resilience of the Hunter Valley Power Stations is compromised.¹⁶

(j) The notified action will result in the movement of fast-moving consumer goods (FMCG) across and within the NSW Controlled Network ceasing immediately and altogether. This includes supermarket items and perishable goods.¹⁷ The transport of meat, grain, oilseeds and stockfoods will also be disrupted.¹⁸

(k) There may be an impact on the Australian steel industry in terms of its ability to transport large and heavy steel still using ARTC's networks.¹⁹

(l) Many regional passengers rely on transport using the NSW Controlled Network to access critical appointments only available in capital cities.²⁰

(m) ARTC has estimated the economic impact of a 3-day disruption at approximately \$58 million and a 1-day disruption at approximately \$31 million.²¹

(n) Network Controllers cannot be replaced on short notice and it is not possible for ARTC to engage contractors or source other employees to perform their functions.²²

Mr Teubner

[12] Mr Teubner's witness statement was directed at economic modelling concerning the impact of the protected action. Mr Teubner stated that PriceWaterhouseCoopers (**PwC**) had provided economic modelling concerning the impact of industrial action by ARTC employees in 2016. ARTC updated this modelling in May and June 2023 and then briefed Deloitte Access Economics (**Deloitte**) to independently validate the revisions. The PwC reports and the updated modelling were attached to Mr Teubner's statement. The statement also explained the methodologies used and their limitations.²³

[13] ARTC's modelling calculated the following financial impact of the notified action:

- 1-day stoppage = \$31 million

- 3-day stoppage = \$58 million
- 5-day stoppage = \$86 million
- 10-day stoppage = \$157 million
- 20-day stoppage = \$299 million.²⁴

ARTC outline of submissions

[14] ARTC's outline of submissions summarised its evidence and identified legal principles relevant to the consideration of the application. I have reviewed all the submissions and particularly note the following points for present purposes:

(a) The disposition of ARTC's application involves answering the following four questions:

- Issue 1: Is protected action threatened, and what is its nature?
- Issue 2: Is the protected action threatening, or will it threaten, to endanger the personal safety, health or the welfare of the population?
- Issue 3: Is the protected action threatening, or will it threaten, to cause significant damage to an important part of the Australian economy?
- Issue 4: Should a suspension or termination order be made?²⁵

(b) The word 'welfare' is a separate and distinct concept from 'life', 'safety' and 'health'.²⁶ It conveys 'the state of faring well; well-being'²⁷ and the 'happiness, well-being, good health or fortune'²⁸ of the population (or part of it). The 'population' is that which constitutes the inhabitants of Australia. A 'part' of the population has a collective meaning that is more than an individual or individuals.²⁹ The people of NSW constitute a 'part' for the purposes of s 424(1)(c).³⁰

(c) The Commission interprets the outer limits of the notice based on what can be reasonably understood from it from the perspective of ARTC. It is the RTBU's notified stoppage that is chiefly relevant to this application. An 'unlimited number of consecutive 72-hour stoppages of work' has a plain meaning. This action is a continuous cessation of work by RTBU members commencing on 6 July 2023 for an unlimited and indefinite duration. This stoppage is to be coupled with the cumulative effect of the 24-hour stoppages of the ASU and CEPU and the partial work bans across each union. This is what the Commission uses to quantify the magnitude of threat to the population and the economy.³¹

(d) ARTC submitted that termination of the protected industrial action should be ordered or alternatively a 3-month suspension order should be made.³²

Consideration

[15] Given the draft order agreed by the parties, and the Order made by the Commission, only refer to the unlimited number of consecutive 72-hour stoppages notified by the RTBU, I have confined my consideration to that particular form of industrial action. Although the evidence filed by the ARTC was directed at the impact of the protected industrial action notified by the RTBU, ASU and CEPU, the consecutive 72-hour stoppages notified by the RTBU are the most severe and impactful form of action by a considerable margin. I'm therefore satisfied the evidence cited above, particularly that provided by Mr Johnson, can be relied upon to assess the impact of the RTBU's consecutive 72-hour stoppages considered in isolation.

Threatened, impending or probable industrial action?

[16] It is not in dispute, and I find, that the consecutive 72-hour stoppages notified by the RTBU to commence at 12:01am on 6 July 2023 constitutes protected industrial action, in the form of employee claim action for a proposed enterprise agreement, that is threatened, impending or probable. This engages the prerequisite in s 424(1)(b) of the FW Act.

[17] It is therefore necessary to consider whether I am satisfied as to one or both of the matters specified in paragraphs (c) or (d) of s 424(1). This requires an evaluative assessment of a discretionary nature.³³

Endangerment of the life, the personal safety or health, or the welfare, of the population or of part of it?

[18] The terms “*endanger*” and “*welfare*” used in s 424(1)(c) are not defined in the FW Act, however they bear their ordinary meaning, and it is a matter for the Commission, in each case before it, to determine whether or not it is satisfied that industrial action is threatening to endanger the welfare of the population, or a part of it.³⁴

[19] I am comfortably satisfied based on Mr Johnson's uncontested evidence that the protected industrial action notified by the RTBU, namely the unlimited number of consecutive 72-hour stoppages of work for an indefinite period, threatens to endanger the welfare of the population of NSW.

[20] The evidence demonstrates that a cessation of work by RTBU members and particularly the Network Controllers will bring the NSW Controlled Network operations to a stop. This is likely to jeopardise the supply of electricity to businesses and homeowners in NSW and cause significant disruption to the supply of key supermarket items such as perishable goods. Passengers may not be able to use ARTC's network to travel from regional areas to capital cities to attend critical appointments.

[21] I am satisfied that the protected industrial action would threaten to endanger the welfare of the population or a part of it under s 424(1)(c) of the FW Act and hence that I must make an order suspending or terminating the protected industrial action.

Significant damage to the Australian economy or an important part of it?

[22] Given I have found that s 424(1)(c) of the FW Act is satisfied, it is not necessary that I also make a finding regarding s 424(1)(d). In the absence of necessity, I am reluctant to make a finding on this issue in the absence of a hearing to further assess and consider the evidence and submissions concerning economic impact.

Suspension or termination?

[23] Having made the above finding, I am required by s 424(1) to make an order suspending or terminating protected industrial action for the Proposed Agreement. As to the selection of the alternatives of a suspension order or a termination order and, in the case of the former, as to the period of the suspension, the discretion conferred by s 424(1) is unfettered save by the subject matter and objects of the FW Act.³⁵ Considerations which have been taken into account in previous decisions made under s 424(1) include the following:

- that the system of bargaining under the FW Act encourages enterprise bargaining and permits protected industrial action;³⁶
- the length of time negotiations have been going on;³⁷
- the progress that has been made in negotiations;³⁸
- whether there has been prior industrial action;³⁹
- the views of the parties (especially where both parties agree on the appropriate course of action);⁴⁰ and
- the potential for further industrial action that would enliven s 424(1) and the need to make further orders.⁴¹

[24] I determined it was appropriate to terminate protected industrial action for the Proposed Agreement rather than issue a suspension order. I have considered all of the material and the key factors that influenced the exercise of my discretion are:

- (a) The ARTC, RTBU, ASU and CEPU all support, or do not oppose, a termination order being made.
- (b) Given the uncontested evidence provided about ARTC's operations and the work performed by members of the RTBU, I consider there would be significant potential for further industrial action to enliven s 424(1) if a suspension order is made.
- (c) Although the outstanding matters in bargaining are numerically few, the outstanding claims appear to be the critical ones in relation to this round of bargaining, namely: scope, wage increases and whether the existing unlimited sick leave condition will remain. The parties appear reasonably entrenched in their positions on these issues and I consider it unlikely any significant progress would be made during a period of suspension, whereby protected industrial action could not be taken.

Conclusion

[25] For the reasons outlined above, I issued an Order terminating protected industrial action in relation to the Proposed Agreement on 4 July 2023 and it commenced operating at 7pm on 4 July 2023.



COMMISSIONER CRAWFORD

Matter determined on the papers

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<PR763959>

¹ Attachment WJ-7 to the witness statement of Wayne Johnson.

² Attachment WJ-8 to the witness statement of Wayne Johnson.

³ Attachment WJ-9 to the witness statement of Wayne Johnson.

⁴ AE508157.

⁵ Witness statement of Wayne Johnson at [23] to [25].

⁶ Witness statement of Wayne Johnson at [26].

⁷ [PR763937](#).

⁸ Witness statement of Wayne Johnson at [5], [9], [10] and [11].

⁹ Witness statement of Wayne Johnson at [12].

¹⁰ Witness statement of Wayne Johnson at [17] and [18].

¹¹ Witness statement of Wayne Johnson at [19].

¹² Witness statement of Wayne Johnson at [34] to [36].

¹³ Witness statement of Wayne Johnson at [46].

¹⁴ Witness statement of Wayne Johnson at [49].

¹⁵ Witness statement of Wayne Johnson at [57].

¹⁶ Witness statement of Wayne Johnson at [67] and [79].

¹⁷ Witness statement of Wayne Johnson at [86] and [88].

¹⁸ Witness statement of Wayne Johnson at [90].

¹⁹ Witness statement of Wayne Johnson at [95] to [97].

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- ²⁰ Witness statement of Wayne Johnson at [111].
- ²¹ Witness statement of Wayne Johnson at [120] and [121].
- ²² Witness statement of Wayne Johnson at [123].
- ²³ Witness statement of Jonathan Teubner at [7] to [12] and [15] to [20] and [21] to [31].
- ²⁴ Witness statement of Jonathan Teubner at [13].
- ²⁵ ARTC outline of submissions at [18].
- ²⁶ *State of Victoria v HSUA* (AIRC FB, Print L9810, 3 March 1995) at [15].
- ²⁷ *Ibid.*
- ²⁸ *Ambulance Victoria v LHMU* [2009] FWA 44 at [32]; *Metropolitan Ambulance Service v LHMU* [2004] AIRC 749 at [62].
- ²⁹ *Coal & Allied Operations Pty Ltd v CFMEU* (1998) 80 IR 14 at [33]; *Transit Australia Pty Ltd v TWU* [2004] AIRC 749 at [62].
- ³⁰ ARTC outline of submissions at [15].
- ³¹ ARTC outline of submissions at [21](a) and [22].
- ³² ARTC outline of submissions at [30] to [32].
- ³³ *Coal and Allied v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 at [20].
- ³⁴ *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44, 187 IR 119 at [32]-[33].
- ³⁵ Cf s 425(1).
- ³⁶ *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [14]; see also *Svitzer Australia Pty Ltd v AMOU* [2022] FWC 493 at [103].
- ³⁷ *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 at [60]; *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; 187 IR 119 at [27]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [19] - [22]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [61]; *Qenos Pty Ltd* [2022] FWC 2727 at [63]-[66], [72]; *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930 at [112]-[113].
- ³⁸ *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [19]-[22]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [60]-[62]; *Qenos Pty Ltd* [2022] FWC 2727 at [57], [73] and [76]; *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930 at [114]-[115].
- ³⁹ *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; 187 IR 119 at [27]; *Ausgrid; Endeavour Energy; Minister for Industrial Relations (New South Wales) v CEPU, ASU and AMWU* [2015] FWC 1600 at [59].
- ⁴⁰ *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Ausgrid; Endeavour Energy; Minister for Industrial Relations (New South Wales) v CEPU, ASU and AMWU* [2015] FWC 1600 at [59]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [21]; *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [12].
- ⁴¹ *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [61]; *Qenos Pty Ltd* [2022] FWC 2727 at [57] and [70]; *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [15].