REASONS FOR DECISION

Fair Work Act 2009
s.424—Industrial action

Lloyd Helicopters Pty Ltd T/A CHC Helicopter (Australia)
v
Australian Licensed Aircraft Engineers Association & The Australian Workers' Union
(B2023/237 & B2023/238)

COMMISSIONER SCHNEIDER PERTH, 24 MARCH 2023

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

[1] This decision concerns two applications made on 14 March 2023 by Lloyd Helicopters Pty Ltd T/A CHC Helicopters (the Applicant) requesting orders be made by the Fair Work Commission (the Commission) under section 424 of the *Fair Work Act 2009* (Cth) (the Act) to terminate protected industrial action.

[2] The Applicant had been notified that protected industrial action was planned to be taken by members of the Australian Licensed Aircraft Engineers Association of Australia (ALAEA) and the Australian Workers' Union (AWU) (collectively, the Unions) employed within the Applicant's operations.

[3] On 15 March 2023, given the urgency of the matters, a brief decision was issued dismissing the applications.[1]

[4] The brief decision noted the Commission was not satisfied the protected industrial action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of the population and that fulsome written reasons would be issued in due course.

[5] What follows are the complete reasons for the decision dismissing the applications.

Background of the applications

[6] The parties are currently bargaining for an enterprise agreement (the Proposed Agreement). The primary point of contention in the bargaining negotiations concerns wage increases under the Proposed Agreement.

[7] The Unions have provided the Applicant with notices of protected industrial action.

[8] The Unions have identified various forms of industrial action, including stoppages of work and communications bans.

[9] The industrial action was planned to commence at midday on 16 March 2023.

[10] The combined impact of this proposed action, if it is all taken, is a 48-hour stoppage of work by members of the Unions, and an ongoing ban on communication with CHC outside of working hours.

[11] The Applicant has filed this application to request the Commission terminate the proposed and impending protected industrial action.

[12] The Applicant contends that the industrial action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of the population.

[13] The Unions submit that the Applicant cannot establish that the proposed industrial action does threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of the population.

[14] Accordingly, the Unions request the applications be dismissed. Or, in the event the Commission must grant the orders, that an order suspending would be more appropriate.

[15] The applications have been dealt with jointly. The previous decision, and the reasons contained in this document, also concern both applications.

[16] The parties attended a conciliation on 14 March 2023.

[17] The conciliation was unsuccessful, and the parties were subsequently directed to file materials in support of their positions.

[18] A Hearing was conducted on 15 March 2023.

[19] At the hearing evidence was provided on behalf of the Applicant by the below witnesses:

- Mr Cameron Dixon – Head of CHC Australia
- Ms Maria Coutinho (Ms Coutinho) – Service Delivery Manager
- Mr Jason Phipps – Regional Maintenance Manager (Asia Pacific)

[20] At the hearing evidence was provided on behalf of the Unions be the below witnesses:

- Mr Douglas Heath (Mr Heath) – Official of the AWU
- Mr Kendall James Harland (Mr Harland) – Licensed Aircraft Maintenance Engineer (LAME) at the Applicant and Delegate of the ALAEA

[21] The statement of Mr Glynn Sowter, witness for the Unions and Industrial Officer at the ALAEA, was accepted into evidence as he was not required for questioning by any party.

[22] Shortly after the conclusion of the hearing, I advised the parties that I had dismissed the Applications.[2]

Legislation

[23] Section 424 of the Act 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:
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> (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, impeding 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."

[24] In carrying out its legislative task, the Commission must first be satisfied that the industrial action meets the jurisdictional requirements under the Act. If those requirements are met, the Commission *must* either terminate or suspend that industrial action. The Commission does not have the discretion to do neither. Whether the protected industrial action should be terminated or suspended is a discretionary decision of the Commission.[3]

[25] The principles surrounding the Commission's consideration in regard to section 424 of the Act are explored in detail later in this decision.

[26] A decision to suspend industrial action is a "*non-permanent conclusion to the disputation*" with the parties free to resume their industrial action at the conclusion of the suspension.

[27] A decision to terminate the industrial action brings with it the processes associated with an industrial action workplace determination.[4] No more industrial action may be taken if the industrial action is terminated.

[28] It is not in dispute that the Unions are eligible to represent, and have members among, the maintenance workers who service helicopters at the Applicant.

Background of the dispute

[29] The enterprise agreement that currently covers the employment of the employees in question is *CHC Helicopters (Australia) AMWU and ALAEA Aircraft Engineers Enterprise Agreement 2020-2022* (The 2020 Agreement).[5]

[30] The 2020 Agreement reached its nominal expiry date on 21 August 2022 and bargaining commenced for the Proposed Agreement in April 2022.

[31] From 26 May 2022 until the date of the applications being filed, the parties had held 14 bargaining meetings.

[32] There are approximately 90 employees covered by the Proposed Agreement.

[33] Between 27 November 2022 and 11 December 2022, a ballot was held in relation to the Proposed Agreement, however, the ballot did not receive majority support.

[34] A second ballot was held between 31 December 2022 and 13 January 2022, this ballot did not receive majority support.

[35] The ALAEA and AWU have both completed the required process to commence Protected Industrial Action (PIA), this action is due to commence at 1200 (AWST) on 16 March 2023.

Submissions - Evidence

[36] The Applicant has two main areas of operation which will be impacted by the PIA planned by the Unions.

[37] The two areas of operation can be best categorised as *Onshore* and *Offshore* operations.

Onshore Operations

Emergency Medical Services

[38] The Applicant provides services to the WA Department of Fire and Emergency Services (DFES) from Bunbury and Jandakot.

[39] These services are provided on a 24/7 basis.

[40] The services include responding to life threatening incidents, search and rescue events, and patient transfers between hospitals.

[41] These services are primarily provided to the WA Government and the Australian Maritime Safety Authority (AMSA).

[42] In 2022, the Applicant performed approximately 392 Emergency Medical Services (EMS) or Search and Rescue (SAR) operations, assisting approximately 426 people.

[43] The majority of those operations were conducted by Emergency Medical Services (EMS) helicopters based at Bunbury or Jandakot.

Search and Rescue (SAR)

[44] The Applicant provides SAR operations for the Australian Department of Defence.

[45] These operations can also include support for the wider community in major weather events such a floods, fires, and other emergency situations.

[46] These operations can also include requests from AMSA and can be conducted on a 24/7 basis.

[47] The Applicant submits that there are two main functions of the onshore operations, being EMS and SAR services.

Impact of PIA on Onshore Operations

[48] During the hearing on 15 March 2023, the Unions confirmed that PIA, in relation to the 48-hour stoppage of work, would not take place at the sites which service the Applicant's onshore operations.

[49] From the evidence submitted by both the Applicant and the Unions, it is evident the main *target* of the PIA will be the Applicant's offshore operations in the oil and gas sector.

[50] Mr Heath, witness for the Unions, confirmed that the AWU did not have any members who were participating in PIA at the Applicant's onshore operations and that his membership was confined to the Applicant's offshore oil and gas operations.

[51] As the AWU confirmed they do not have any members who are engaged in the Applicant's onshore operations, the ban on communication for the AWU Members will also only apply to the offshore oil and gas operations.

[52] Mr Harland, witness for the Unions, confirm that ALAEA members are only proposing to stop operations at the offshore oil and gas operations of the Applicant.

[53] Mr Harland confirmed that members of the ALAEA based at onshore operations would not be partaking in the planned stoppages of work.

[54] Mr Harland confirmed that the ALAEA members who are assigned to the Applicant's onshore business will be involved in the PIA which involves a ban on communications with the Applicant outside the employees' hours of work.

[55] The Applicant submits that the PIA taken by members of ALAEA involving a ban on communications with the Applicant outside the employees' hours of work will have an impact on the Applicant.

[56] However, the Unions submit, the undertaking provided (discussed in detail below) to complement the PIA will ensure there is a means of communication between the Applicant and employees for EMS or SAR service purposes.

Offshore Operations

Broome Base Operations

[57] The Applicant's primary client in Broome is Shell. The Applicant provides two main services to its client in Broome:

- Passenger transfer flights to and from Broome to the Shell Offshore Facility *Prelude*.
- Technical Emergency Flights to and from Broome to the Shell Offshore Facility *Prelude*.

[58] The Applicant advised that it did not have a contract to provide medical evacuations (MEDEVAC) or SAR flights for its client at Broome.

[59] The Applicant explained that, if required, it provides Technical Emergency flights for Shell's Prelude facility.

[60] The Applicant advised that, in 2020, there were two instances of these services being required.

[61] The Applicant also advised that they can be tasked by the WA State Government, under the *Emergency Management Act 2005*, to provide assistance in natural disasters.

[62] The Applicant advised that most recent example of such request was during the recent Kimberly floods, in January 2023.

Impact of PIA on Broome Operations

[63] The Applicant is contracted to provide MEDEVAC or SAR flights for offshore clients out of Broome.

[64] The Applicant submits that, the PIA by members of the Unions, involving a ban on communications with the Applicant outside the employees' hours of work, will have an impact on the Applicant.

[65] However, the Unions submit, the undertaking provided (discussed in detail below) to complement the PIA will ensure there is a means of communication between the Applicant and employees for EMS or SAR activities.

[66] The Unions submit that the undertaking provided would mean, in the event of a serious technical emergency whereby an offshore facility was requiring an evacuation of personnel for safety seasons, the employees participating in the PIA would return to work to complete this work and would respond to communication from the company through the Senior Base Engineer.

Karratha Base Operations

[67] The Applicant has a Helicopter Sharing Agreement (HSA) in place with multiple clients to service eleven offshore oil and gas facilities off the coast of Australia.

[68] The number of facilities supported increases and decreases as some mobile facilities commence or cease operations on the coast.

[69] Services offered to the clients under the HSA include:

- Passenger transfer flights to and from offshore facilities.
- MEDEVAC flights from offshore facilities.
- SAR flights.
- Emergency support; including for natural weather events, such as cyclones.

Search and Rescue (SAR) – Helicopter Sharing Agreement

[70] The Applicant submitted that one of their clients (Woodside) requires SAR coverage, being one helicopter on the ground and in service available to fly at one hours' notice to meet their safety case obligations to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

[71] In her statement, Ms Coutinho (witness for the Applicant) confirmed the below:

> "Offshore Services Australiasia (OSA) are contracted to provide SAR for their own contracted clients from Barrow Island and Karratha… CHC have in the past requested SAR 'Standby' coverage from OSA Barrow Island, OSA Karratha and Petroleum Helicopters International (PHI) Karratha under approval from the HSA customers under strict guidelines and positive confirmation that the SAR aircraft are servicable, have sufficient flight and duty available from the flight crews and rescue crews…"[6]

[72] The Applicant contends that services between CHC and its competitor, Petroleum Helicopters International (PHI), are not readily interchangeable and that there is no guarantee that PHI could cover the SAR requirements if CHC are not available.

[73] The Applicant submits that they do not have a primary support contract with ASMA for maritime SAR or MEDEVAC support, these services are utilised on an ad-hoc basis only.

[74] The Applicant provided that its ad-hoc services to AMSA are only rendered *if* the Applicant's own contractual obligations under pre-existing client arrangements allow for this to occur.

[75] The Applicant submitted that other operators, its competitors, would operate on a similar basis with AMSA.

[76] The Applicant submits that SAR capability is a requirement for their customers and any suggestion that calling AMSA to solve any emergency situation is not a solution.

[77] The Unions submit that, as the duration of the PIA is short, being 48 hours at the longest, the decreased coverage is only temporary.

[78] If the lack of SAR coverage means that passenger transfers to offshore oil and gas facilities are delayed for the period of the PIA, the Unions submit, accordingly there is reduced risk of SAR being required by the client during this period.

[79] The Unions also highlighted that, as the Applicant's commercial work takes priority over AMSA assistance, if the Applicant is not available to provide this support on notice this is no different to circumstances when the Applicant is busy with commercial operations.

MEDEVAC Services

[80] The Applicant submits that it is required to provide MEDEVAC coverage for day and night operations.

[81] The Applicant states these services are provided on the basis of a one hour call out.

[82] The Applicant submits that the CHC, OSA, and PHI cannot arbitrability agree to cover SAR, MEDEVAC, or any other services between the companies. The organisation's aircraft are contracted to customers who have primary usage of the aircraft, regardless of the circumstances facing another customer. Accordingly, the Applicant submits that any change in coverage needs to be agreed with clients, based on risk assessments, and NOPSEMA commitments.

Technical Emergencies

[83] The Applicant submits that they are required to provide 24/7 emergency coverage in case of a technical issue on board a facility of one of the HAS clients. This kind of operation could include delivery of spare parts or evacuation of personnel onboard the facility due to an emergency.

Impact of PIA on Karratha Operations

[84] The Applicant submits that, the PIA notice provided by the Unions will have a direct impact on one client of the Applicant, being Woodside, who require a SAR helicopter to be available to conduct passenger crew change operations.

[85] The Applicant submits that, this PIA by the Unions will impact the Applicant and their client's obligations in relation to SAR coverage and may require passenger transfers via helicopter to be delayed.

[86] The Applicant submits that, this will no doubt have a commercial consequence to the Applicant and their client.

[87] The Unions submit in response that the PIA, by the very nature of industrial action, is precisely meant to adversely impact the operations of the inflicted party.

[88] The Unions have provided an undertaking which they submit will ensure employees of the Applicant make themselves available to complete any SAR and MEDEVAC operations required during the 48-hour period of the PIA.

[89] The Unions submit that they have also provided the Applicant with a means of contacting employees during this period.

[90] The Unions do not dispute that the PIA will have an impact on ensuring a SAR helicopter is immediately available in all circumstances.

[91] The Unions submit that, after a helicopter has completed the required checks and certifications, it can remain on the ground and ready for service for 24 hours before requiring further checks to be completed. The Unions contend that this will mean, in the event of an emergency situation, there is the potential for a *delay* in the response time.

Section 424(1)(c) of the Act

[92] The Applicant submits that, if the PIA is to occur, the test the Commission needs to consider is not the probability of endangering life or wellbeing of part of the population, rather the test is the probability of threatening to endanger the life or wellbeing of the population.

[93] The Applicant submits:

> "that the threat in this case is the threat of no response or an extremely delayed response in an emergency event because the Applicant will have no safe aircraft to deploy, which could very well result in a serious injury or death".[7]

[94] The Applicant submits that the part of the population endangered are the persons requiring evacuations and rescue on its client sites. The Applicant submitted that this is the same logical conclusion as the Commission found in the *Application by Royal Flying Doctor Service of Australia* (*RFDS*),[8] where the part of the population affected was the patients of the Royal Flying Doctor Service.

[95] The Unions submit that the *RFDS* case has significant factual differences to the circumstances of the matter currently before the Commission.

[96] The Royal Flying Doctor Service's *primary* operation is to provide care flights and emergency services to the general population, these services are generally provided where there are no alternative options.

[97] The Unions highlighted that the Applicant's *primary* operation, that will be impacted by the PIA, is commercial passenger flights on behalf of offshore oil and gas clients. The provision of SAR and Medevac services are *additional* to the Applicant's primary operations and are services that are provided on an ad-hoc, as required, basis.

[98] The Applicant submits that the test adopted by the Full Bench, in its reasons for decision, in *Application on Commission's own initiative re Svitzer Australia Pty Ltd* (*Svtizer*):

> "did not involve a quantitative analysis on the probability of an emergency situation actually happening, but whether it was probably that in the event of an emergency situation, there would be a threat to endanger the welfare of the population (or a part of it)". [9]

[99] This, the Applicant submits, is the appropriate test to be applied to the present matter.

[100] The Unions submit that, as with the *RFDS* case, there are significant factual differences between the matter considered by the Full Bench in *Svitzer* and the factual realities of the present matter.

[101] The Unions submit that, in *Svitzer*, the PIA involved a total and indefinite lock out of the employees by Svitzer Australia Pty Ltd.

[102] This form of PIA would have resulted in a prolonged period whereby emergency towage support would be reduced and would have delayed the ability for essential items such as medical equipment or similar to be unloaded.

[103] The Unions submit that the PIA in the present matter involves a stoppage of work for 48 hours only and, unlike in *Svitzer*, there are other operators who could complete the SAR and MEDEVAC duties if required.

[104] The Applicant submits that it is impossible to know when a SAR or MEDEVAC event will occur and that the coverage provided to their clients is on the basis that it will be unpredictable.

[105] The Applicant submits that no party, including the Unions, can predict the likelihood of an SAR or MEDEVAC event occurring in the 48-hour period when the PIA will occur.

[106] The Applicant provided the below data in relation to its offshore operations.

Year 2022 – Offshore Operations	**Year 2023 – Offshore Operations**
155 (including 139 covid related) MEDEVAC	23 (including 18 covid related) MEDEVAC

[107] Over approximately the last 15 months, the Applicant has completed 21 non-covid related MEDEVAC flights from their client's oil and gas operations. This equates to around 1.4 flights per month.

[108] As has been highlighted previously in this decision, the Unions submit that, as they have provided an undertaking, the employees engaging in the action will complete these duties during the period of PIA.

[109] I have also considered the argument raised by the Unions in relation to *Coal and Allied Operations v AIRC*.[10]

[110] The Unions submit that the Commission should consider what the consequences will be if the industrial action is to continue and the impact it could have on the safety of a part of the population.

Union Undertakings

[111] The Unions have provided the below undertaking to complement the PIA:

> "Search and Rescue Operations
>
> During the periods of notified industrial action, employees taking the protected action will comply with a direction from Lloyd Helicopters Pty Ltd (**CHC**) via the Senior Base Engineer to return to work to perform search and rescue operations work that, in the opinion of CHC, must be completed during the periods of action, if the following conditions are met:
>
> (i) the work cannot be reasonably performed by anyone else on site; and
> (ii) the work must be immediately performed in response to a SAR request; and
> (iii) during the duration of the notified industrial action, an employee will only resume work to the extent necessary to avert the serious or imminent threat to safety.
>
> Emergency Events
>
> During the periods of notified industrial action, all employees taking the protected action will comply with a direction from Lloyd Helicopters Pty Ltd (**CHC**) via the Senior Base Engineer to return to work to perform work in response to an unexpected event that, in the opinion of CHC, creates a serious and imminent threat to safety if the following conditions are met:
>
> (i) the work cannot be reasonably performed by anyone else on site; and
> (ii) the work must be immediately performed in response to an emergency event; and
> (iii) during the duration of the notified industrial action, an employee will only resume work to the extent necessary to avert the serious or imminent threat to safety.
>
> Communications Ban
>
> On the basis that the Senior Base Engineer will only contact employees engaging in protected industrial action if work must be performed pursuant to either or both of the above two exclusions, any employee engaging in a ban on communicating with CHC outside of the employee's working hours will take all reasonable steps to respond to a phone call from the Senior Base Engineer. However, employees engaging in this ban are under no obligation to respond to any communication from any other employee or representative of CHC.
>
> Should CHC, The Australian Workers' Union or the Australian Licenced Aircraft Engineers' Association believe that another party is not acting consistently with the

above exclusions, the party may apply to the Fair Work Commission for assistance in resolving the issue."[11]

[112] The Unions contend that employees of the Applicant who are partaking in PIA are experienced and professional employees who understand the importance of the SAR and MEDEVAC services they provide offshore workers.

[113] The Unions note that the staff engaging in the PIA are maintenance staff and, by nature of their roles, safety is at the forefront of their professional lives.

[114] The Undertaking has been provided by the Unions, on behalf of their members, in good faith as a means of ensuring there is clarity in relation to SAR and MEDEVAC options over the period of PIA.

Consideration

[115] In the context of the applications currently before the Commission, and in accordance with section 424 of the Act, the Commission must be satisfied of the following for orders to be granted:

- Firstly, that there exists PIA that is being engaged in; or is threatened, impending or probable;

  AND

- secondly, that the PIA (identified above) has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

Section 424(1)(a)-(b)

[116] This factor was not a notable point of contention between the parties; however, the Commission must be satisfied of its existence to proceed.

[117] The Unions have provided the Applicant with notices detailing the PIA that is to be taken.

[118] At the Hearing, both Mr Heath and Mr Harland indicated that the action was going to commence as per the notices provided to the Applicant.

[119] I am satisfied that there is PIA is threatened, that much is clear from the notices issued by the Unions and the discussions and evidence disclosed within the Hearing.

[120] I am also satisfied the PIA is impending, being that at the time of the Hearing, both parties were acutely aware of the urgency of these applications and the timeliness with which the matters had to progress.

Section 424(1)(c)

[121] Firstly, I accept the Applicant's submission that the relevant part of population would be those individuals requiring emergency evacuation on the sites the Applicant is contracted to provide work for.

[122] The primary issue in contention is the nature of the risk posed and the probability of such risk.

[123] The primary issue for the Commission to consider is whether the PIA has threatened, is threatening, or would threaten: to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[124] The major point of disagreement between the parties is whether any threat to endanger imposed by the PIA is probable.

[125] In regard to the interpretation of threaten to endanger, it has been widely accepted by the Commission in prior decisions that the correct approach is to determine it on the balance of probabilities, rather than possibilities.

[126] In *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (*Ambulance Victoria*), often cited in matters of this nature, the Commission considered the interpretation of the test required under the Act:

> "Both parties referred to F & Others v National Crime Authority 1, on how the expression "would threaten to endanger" should be interpreted. In that case, O'Loughlin J had to consider the meaning of the expression "might tend to incriminate". At page 110 his Honour said:
>
> > "According to the New Shorter Oxford English Dictionary, one of the accepted meanings of the word "will" is to be able to, be capable of, doing, have a specified ability, potential or capacity. According to the Macquarie Dictionary would is often used in place of will."
>
> A little further on:
>
> > "Both may and might are commonly used when referring to a possibility or an opportunity and in that sense they do not impose the same degree of capability as will or would. Something that may or might happen is less likely to occur than something that will or would happen."
>
> Again a little further on:
>
> > "But if the witness must answer the question unless the answer will or would tend to incriminate, one is elevated from possibilities perhaps into the world of probabilities.
>
> I intend to approach this matter on the basis of probabilities rather than possibilities."[12] (citations omitted) (emphasis added).

[127] Further, in *Ambulance Victoria*, the Commission highlighted that the focus of the consideration is to whether the PIA *threatens* to endanger, not endangers alone:

> "It need also be pointed out that I must be satisfied that the protected action would threaten to endanger, not would endanger. The New Shorter Oxford English Dictionary relevantly defines "threaten" as:
>
> *Constitute a threat to, be likely to injure, be a source of harm or danger*.
>
> Threat is relevantly defined as including:
>
> *A declaration of an intention to inflict pain, injury, damage or other punishment in retribution for something done or not done*."[13] (citations omitted) (emphasis added).

[128] Such approach has been recognised by the Commission in subsequent matters. *In G4S Custodial Services Pty Ltd v Health Services Union of Australia*,[14] Commissioner Bissett reinforced the above interpretation, usefully noting:

> "In *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* Kaufman SDP, after considering a decision in *F & Others v National Crime Commission* determined that the approach to such an application should be 'on the basis of probabilities rather than possibilities' and also that he 'must be satisfied that the protected action would threaten to endanger, not endanger.' That is, in determining if the protected action would threaten to endanger life etc it must be on the basis of the probability of the action doing so, not the mere possibility.
>
> This approach was adopted by Spencer C in *Tyco Australia Pty Ltd t/a Wormald v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* and it is the approach I have adopted in this matter.
>
> It is therefore necessary to consider if the bans proposed by the HSU will, in probability, threaten to endanger the life, the personal safety or health, or welfare of a part of the population (there being no claim the action would threaten to endanger the population at large)."[15] (citations omitted) (emphasis added).

[129] The Unions drew the Commission's attention to the Full Bench's decision in *Victorian Hospitals' Industrial Association v Australian Nursing Federation* in which the Commission clarified definitions of the terms included in section 424, stating that:

> "We were taken in the proceedings to previous decisions of FWA and its predecessors regarding the meaning of the terms in s.424(1), including the references to "welfare" of the population and the concept of endangerment. These are commonly used words and expressions which are widely understood in the community and which should be given their ordinary meaning. Conduct that puts a person's physical or mental state at risk of material detriment - or that materially hinders or prevents improvement in a person's poor physical or mental state - may qualify as conduct that endangers personal health or

> safety. Although the conduct might not be of such a serious nature as to amount to an endangerment to "life", it might nevertheless be such as to constitute a significant risk to "personal safety or health". Conduct that delays or puts off the efficient supply of public health services has the capacity to impact adversely upon the welfare of at least some of the persons who require those services. The impact of the conduct must, however, be more than merely to cause inconvenience to the persons concerned - it must be such as to expose them to danger."[16] (citations omitted) (emphasis added).

[130] The Applicant drew reference to *RFDS* which it submits contains the applicable principles for the determination to be made.[17]

[131] In *RFDS*, Commissioner Johns provides clarification on the construction of section 424 of the Act:

> "**Section 424 of the FW Act**
>
> The application by the RFDS is for an order to be made pursuant to s.424 of the FW Act terminating the protected industrial action that the AFAP and its members will resume taking if the current suspension of protected industrial action is lifted.
>
> Section 424 provides that the Commission must make an order suspending or terminating protected industrial action if it is satisfied that the action threatens to endanger the life, the personal safety or health or the welfare of the population or part of the population or to cause significant damage to the economy.
>
> Whether an order should be made under s.424 will be a matter to be determined upon a consideration of all the circumstances and having regard to the evidence and submissions before the Commission.
>
> In *National Tertiary Education Union v University of South Australia* 1 a Full Bench of Fair Work Australia found that:
>
> > Within the scheme of the Act, the powers in relation to the suspension or termination of protected industrial action are intended to be used in exceptional circumstances and where significant harm is being caused by the action. This is clear from the *Explanatory Memorandum to the Fair Work Bill 2008*:
> >
> > > "The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.
> >
> > It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it

> intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining."

The Commission, as presently constituted, adopts the reasoning of the Full Bench. A termination of industrial action should not be granted merely because of some inconvenience the action may cause to the employer. Inconvenience may cause the employer to need to put in place alternative arrangements to ameliorate the effect of any action. The need to do so is no basis for terminating bargaining. Mere economic costs of the industrial action are not sufficient to grant an application to terminate industrial action. The only basis for termination arises when the action is a threat to the life, personal safety or health, or the welfare of the population or a part of it.

In *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* 3 Kaufman SDP, after considering a decision in *F & Others v National Crime Commission*4 determined that the approach to such an application should be '*on the basis of probabilities rather than possibilities*' and also that he '*must be satisfied that the protected action would threaten to endanger, not endanger.*' That is, in determining if the protected action would threaten to endanger life etc it must be on the basis of the probability of the action doing so, not the mere possibility.

This approach was adopted by Spencer C in *Tyco Australia Pty Ltd t/a Wormald v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.* It is this approach that the Commission, as presently constituted, adopts in this matter.

It is therefore necessary to consider if the Remaining PIA, if taken, will, in probability, threaten to endanger the life, the personal safety or health, or welfare of a part of the population."[18] (references omitted – emphasis added).

[132] It is also useful to note the recent decision in *Application by NSW Trains* which provides further clarification on the test required and, relevant to the matter currenlty before the Commission, contains discussion regarding consideration of the potential outcomes of an order to terminate being issued:

> "The endangerment threat is on the balance of probabilities rather than possibilities, and the protected action would be such as to threaten to endanger, rather than would endanger. The assessment of the threat on the balance of probabilities also involves an issue of the requisite standard of proof. In this matter, were the Commission to find just one notified action offended s.424 of the Act, and so must be terminated or suspended, the consequence would be that all notified actions, no matter how innocuous, would lose their protection,30 and all employees and unions, including the AMWU, APESMA, AWU, CFMMEU and ASU would be forced into a Workplace Determination, in which at least the AMWU, APESMA and the ASU do not wish to participate. In that circumstance I agree with the submissions of the Unions that I should take care in determining whether or not the elements of the provision are satisfied taking into account the subject matter of the proceeding and the gravity of the matters alleged."[19]

[133] In relation to the assessment required in such application, the Full Bench in *Svitzer* notes:

> "It is therefore necessary to consider whether we are satisfied as to one or both of the matters specified in paragraphs (c) or (d) of s 424(1). This requires us to undertake an evaluative assessment of a discretionary nature."[20]

[134] The above is noted in reference to the High Court's determination in *Coal and Allied v Australian Industrial Relations Commission* in which the Court provides:

> "In the present case, the decision by Boulton J to terminate the bargaining period involved, in effect, two discretionary decisions. The first was as to his satisfaction or otherwise that the industrial action being pursued posed a threat for the purposes of s 170MW(3) of the Act. Although that question had to be determined by reference to the facts and circumstances attending the industrial action taken in support of claims with respect to a certified agreement, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision. And if Boulton J was satisfied that there was a threat for the purposes of s 170MW(3), that necessitated the making of a further discretionary decision as to whether the bargaining period should be terminated."[21]

Factual comparisons to, and interpretations of, the Reasons for Decision in RE Svitzer

[135] Both parties made reference to, and disagreed over the interpretation of and comparison to, the Commission's recent decision in *Svitzer*.[22] In the circumstances, I believe it is sensible to discuss the issues in the interpretation put forth and comparisons drawn by the Applicant.

[136] The Applicant contends that decision of the Full Bench in *Svitzer* highlights that the Act gives primacy to concerns of public welfare and safety.[23] And, such concerns must be appropriately weighed against the industrial interests of the party engaging in the action.

[137] Further, the Applicant submits that, in accordance with its interpretation of *Svitzer*, the Commission did not concern itself with the *likelihood* of the emergency situation arising.[24] Rather, the Applicant submits, the Commission focused on the fact that, if a situation were to arise, the *capabilities of responding* to such an emergency would be diminished:

> "The Applicant submits that the test adopted by the Full Bench in *Re Svitzer* therefore did not involve a quantitative analysis on the probability of an emergency situation actually happening, but whether it was probably that in the event of an emergency situation, there would be a threat to endanger the welfare of the population (or a part of it). This, the Applicant submits, is the appropriate test in the present matter."[25]

[138] The Unions submit that applications currently before the Commission differ greatly factually from the circumstances pondered by the Full Bench in *Svitzer*.[26] Noting that the PIA in *Svitzer* concerned a complete stoppage of tugboat operations,[27] not a temporary stoppage of maintenance work completion.

[139] In regards to *Svitzer*, I accept the Applicant's submissions that the decision of the Full Bench, clearly, contains useful guidance which should be heeded in the current matter.

[140] I do not, however, accept the conclusion that the Commission should direct its *primary focus* to the possible effect of the PIA on a response *if* an emergency situation arises, and not consider the probability of an emergency situation arising.

[141] Whether orders are to be issued under the Act requires consideration of all relevant circumstances and inspection of the evidence and submissions put forth.[28]

[142] The previous decisions of the Commission, including that in *Svitzer*,[29] make clear that the Commission's consideration under section 424(1)(c) of the Act is whether the PIA, on the basis of probabilities, threatens to endanger.[30]

[143] I must focus on whether the *action of the PIA* would *threaten to endanger* the part of the population in the ways described in the Act, not strictly, *if* an emergency situation were to arise, the potential practical effect the PIA could have on a *response* to such situation.

[144] I do not accept the Applicant's submission that the Full Bench's conclusion regarding the impact on emergency response, or any absence of discussion specifically in regard to probability, endorses the Applicant's interpretation of *Svitzer*.

[145] *Svitzer* indeed serves as an example that a negative impact on emergency response services can lead to a conclusion that PIA would threaten to endanger.[31]

[146] Further, as highlighted by the Unions, the Full Bench noted that Svitzer Australia Pty Ltd was the main provider for emergency towage services in 8 of 11 regions around Australia.[32]

[147] The PIA in *Svitzer* concerned a lockout of all towage employees and therefore obstructed any towage services. Such circumstances are not analogous with the nature of the Applicant's operations and any of the proposed forms of PIA in the present matter.

[148] The Full Bench made clear that the threat to endanger arose, in part,[33] from circumstances where a large majority of Australian regions could be left with diminished or no emergency response services,[34] not merely because of a *possible* negative impact on the *efficiency* of emergency response services such as in the present matters.

[149] To summarise, the Applicant's characterisation of the test to be applied is inaccurate.

[150] The test is neither a "*quantitative analysis on the probability of an emergency*" arising nor is it "*whether it was probabl[e] that in the event of an emergency situation*", there would be a threat to endanger.[35]

[151] The test, as prescribed by the Act, is whether the Commission is satisfied that the PIA has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. And, in coming to a decision on whether the PIA would threaten to endanger, it must be done on the basis of probability of the PIA doing so and not some possibility of it doing so.

[152] I draw reference again to the Unions' assertion that the comparison to matter in *Svitzer* is incompatible. I accept this submission and note the following:

- The action proposed in *Svitzer*, being a lockout of all harbour towing employees, is far more extreme than the PIA proposed in the current matters.

- The action proposed in *Svitzer* was for an indefinite period of time, unlike the shorter and defined period of time in the current matters.

- The nature of the roles performed by the employees, and of the businesses in question, and the degree to which their roles contribute to emergency services in both matters is vastly different.

[153] Any factual comparisons to *Svitzer*, are overly ambitious and I am not persuaded that a similar finding should be reached on that basis.

[154] The Applicant submits that, in the event the Commission does not accept the test put forth, then it must find the emergency situation occurring is indeed probable. As explained above, a finding that it is probable an emergency situation will occur is not the only consideration to be factored into the Commission's conclusion and would not amount to a consideration of all relevant circumstances.

Final consideration – No threat to endanger - Matters dismissed

[155] As I do not accept the Applicant's submissions regarding the test to be applied, I have come to my conclusion in accordance with the principles explored at [121]-[134].

[156] On assessment of all relevant circumstances and materials before me, and in consideration of the relevant principles, I am not satisfied that any orders may be issued in accordance with the Act. There is insufficient evidence to conclude that, in the circumstances of these applications, on the balance of probabilities, the PIA would threaten to endanger in the ways described in the Act.

[157] This is not a matter in which the PIA would threaten to endanger. Rather, in the event of an emergency request, alternative options are available and viable, if those alternatives are even required in the circumstances.

[158] The PIA, as proposed, could *possibly* impose an *inconvenience* to the Applicant in responding to client requests for services.

[159] Further, requests could be made to another provider, and, due to the nature of the notice, there are preparations that could be made to reduce any possible inconvenience caused by the PIA.

[160] Additionally, I accept the proposition by the Unions that requests will be reduced as there will be no passenger transport to the client facility during the period of the PIA.

[161] The threat to endanger that the PIA poses, as alleged by the Applicant, can only be identified through speculation of a myriad of possibilities; if accepting that an emergency situation may arise, and then accepting the emergency response may be negatively impacted, and ignoring the option of alternative providers, it merely results in the possibility that there may be a delayed response – I conclude this is insufficient for a finding that the PIA threatens to endanger.

[162] The evidence central to my conclusion above is as follows:

- The employees who are to engage in the PIA are LAME's, whose duties ensure the Applicant's helicopters are ready for use on short notice. The PIA, that the LAME's are engaging in, will decrease the Applicant's ability to have helicopters available on short notice, however, the undertaking provided by the Unions means the LAME's would recommence their duties and make a helicopter serviceable as a matter of urgency to ensure that any emergency operations which may occur can be actioned as soon as practicable.

- There are employees of the Applicant who will not be engaging in PIA, I note the evidence regarding the delay and qualifications of those employees, however, the PIA will not result on a complete absence of the Applicant's maintenance workforce.

- There are alternative providers for emergency response services that may be contacted to provide service.

- The primary safety concerns are obviated by the undertaking of the Unions.

- The PIA stoppage of work being engaged in by the employees of the Applicant is not for a prolonged or an indefinite period of time. Had this been this case, the Applicant's argument would have stronger consideration, however the relatively short duration of the stoppage and the undertaking provided in relation to emergency situations weighs against a finding that the Commission must issue orders.

- The Applicant is able to, but on the evidence has not, make preparations that would mitigate the possible impact on efficiency and further alleviate possible safety concerns.[36]

[163] I also note the argument of the Unions in relation to the impact the orders sought by the Applicant would have on the employees. Such submission would be central to consideration of whether the PIA should be terminated or suspended. [37]

[164] The orders sought by the Applicant request termination of the PIA. There is no doubt that if this order had been made it would have significantly impacted the employees leverage in the bargaining process.

[165] As the notices of PIA were the first significant PIA the employees were engaging in and in the case of the stoppage of work are not for a prolonged period, such an order in my determination would not appropriate in this instance.

[166] As I have concluded above, there is no threat to endanger, however, if I have erred in that conclusion, the likely outcome would have been an order temporarily suspending the action.

Conclusion

[167] I have previously determined,[38] on the basis of the evidence before the Commission, that I am not satisfied the protected industrial action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of the population. This decision has provided the Commission's detailed reasons for such conclusion.

[168] Accordingly, the Commission did not issue orders terminating or suspending the protected industrial action. The applications are dismissed.[39]

COMMISSIONER

Appearances:

S Bakewell of EMA Consulting for the Applicant.
L Saunders of Counsel for the Unions.

Hearing details:

2023.
Perth (by video):
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<PR760594>

[1] [PR760302] - [[2023] FWC 620].

[2] [PR760302] - [[2023] FWC 620].

[3] The only industrial action that may be terminated by such an application is protected industrial action that has the essential characteristics as described in section 424(1) of the Act. Industrial action that is not having the effect as described in section 424(1)(c) and (d) of the Act cannot be subject to an order that it be suspended or terminated.

[4] Section 266 of the Act.

[5] [AE510756] - [PR727794].

[6] Statement of M Coutinho, paragraph 10.

[7] Outline of Submissions (Applicant), paragraph 32.

[8] [2014] FWC 6839.

[9] Outline of Submissions (Applicant), paragraph 38.

[10] (2000) (203) CLR 194, 208.

[11] Statement of D Heath, Annexure DH10.

[12] [2009] FWA 44, [28].

[13] *Ibid*, [29].

[14] [2011] FWA 5902.

[15] [2011] FWA 5902, [17]-[19].

[16] [2011] FWAFB 8165 at [51]; see also [2009] FWA 44 at [32]

[17] [2014] FWC 6839.

[18] [2014] FWC 6839, [18]–[23].

[19] [2022] FWC 1746, 108.

[20] [2022] FWCFB 213, [28].

[21] *Coal and Allied v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194, [20].

[22] [2022] FWCFB 213.

[23] Outline of Submissions (Applicant), paragraph 35-36.

[24] *Ibid*, paragraph 35.

[25] *Ibid*, paragraph 38.

[26] Outline of Submissions (Unions), paragraph 28.

[27] [2022] FWCFB 213, [2].

[28] [2014] FWC 6839, [20].

[29] [2022] FWCFB 213, [29].

[30] [2009] FWA 44, [28]; [2011] FWA 5902, [17]-[19]; [2014] FWC 6839, [23].

[31] [2022] FWCFB 213, [30].

[32] *Ibid*.

[33] Noting that the Full Bench found the action threatened to endanger in three ways; *Ibid*, [30]-[34].

[34] *Ibid*, [30].

[35] I note that both of "tests" referenced by the Applicant in their submissions, although not tests, clearly detail considerations and factual matters that would often be relevant to the Commission's determination. If an emergency event was certain or impossible that would be a key consideration for the Commission alongside whether, in an emergency, the PIA would have an extremely detrimental, or extremely modest, impact on an emergency response and the potential outcomes of that impact. Dependant on the factual circumstances, either or both could very well result in the PIA threatening to endanger.

[36] Counsel for the Unions noted that notices can serve as warning to prepare for the impact of industrial action. A submission with which I agree and note that risks can and should be mitigated by the party who is on notice.

[37] [2022] FWCFB 213, [42].

[38] [PR760302] - [[2023] FWC 620].

[39] [PR760600].