



DECISION

Fair Work Act 2009

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

The Hobart Clinic Association Limited T/A The Hobart Clinic

v

Health Services Union

(B2024/6)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 17 JANUARY 2024

Suspension or termination of protected industrial action – endangering life etc

Introduction and Outcome

[1] On 5 January 2024 I issued an Order suspending industrial action until 11:59pm on Monday 22 January 2024. I now publish my Decision in relation to the Order.

[2] This is an application made by the Hobart Clinic Association Limited (the **Hobart Clinic**) pursuant to section 424(1) of the *Fair Work Act 2009* (FW Act) in relation to industrial action by members of the Health Services Union (**HSU**) which is threatened, impending or probable.

[3] The Hobart Clinic, amongst other things, operates a mental health inpatient facility located in Rokeby, Tasmania. The clinic has 27 inpatient beds and offers a range of mental health and wellbeing services to support and treat patients with a range of mental health illnesses and symptoms, including acute anxiety, depression, self-harm and suicidal ideation.

[4] The HSU and the Hobart Clinic are currently bargaining for an enterprise agreement which will apply to nurses employed by the Hobart Clinic

[5] By letter dated 3 January 2024 (the notice), the HSU notified the Hobart Clinic of its intention to take the following industrial action commencing at 9:00am on 8 January 2024:

1. Indefinite bans on performing work unless wearing union clothing, badges and other union campaign items.
2. An indefinite ban on reading and responding to work emails outside of work hours.
3. Indefinite action in the form of a ban on performing any duties not stated in the employee's relevant position description.

4. An alteration to how members would ordinarily perform work by speaking with patients, the public, and the media about industrial action, including giving them union materials.

[6] The action is authorised by the ballot declared on 22 December 2023, pursuant to the Protected Action Ballot Order B2023/1347 issued by Deputy President Hampton on 12 December 2023.

[7] On 8 December 2023, the Hobart Clinic sent an email to the Commission which it copied to the HSU. In the email, the Hobart Clinic advised that it did not object to the HSU's Application for a Protected Action Ballot Order, however it noted concerns about the following type of industrial action:

An alteration to how you ordinarily perform work by speaking with patients, the public, and the media about industrial action, including giving them Union promotional materials.

[8] The email relevantly stated:

The Hobart Clinic considers this type of action has the potential to present a risk to the health and safety of third parties (particularly the patients at the Hobart Clinic) such that it is likely that any notice of intention to take this action in the future is likely to be objected to on that basis, subject to an assessment of what is proposed at the time.

[9] On 4 January 2024, the Hobart Clinic lodged an application to the Fair Work Commission for an order for suspension or termination of protected industrial action pursuant to s. 424 of the FW Act.

[10] The Hobart Clinic considers that the action proposed in the notice is conduct which threatens to put the physical and mental state of patients at risk of material detriment and/or would hinder or prevent improvement in patients' mental state such that it endangers the personal health or safety of patients at the Hobart Clinic.

The Hearing

[11] I listed the matter for an urgent hearing via video conference at 12:00pm on 5 January 2024.

[12] I granted Ms Samantha Masters, solicitor, permission to appear at the hearing for the Respondent pursuant to s. 596 of the FW Act on the grounds that it would enable the matter to be dealt with more efficiently, having regard to the complexity of the matter. Mr James Eddington, Legal Officer, represented the HSU.

[13] The Hobart Clinic called evidence from:

- a. Ms Kath Skinner, CEO, Hobart Clinic.
- b. Dr Kipling Walker, Forensic Psychiatrist, Hobart Clinic.

[14] The HSU called evidence from Mr Desmond Marcenko, Industrial Organiser, HSU.

[15] At the commencement of the hearing, Mr Eddington advised me that he had just returned from leave, that he had only about 10 minutes notice of the hearing and that he would prefer to have the matter stood down for two hours to allow him to prepare for the hearing.

[16] I advised Mr Eddington that there was no intention to put him at any disadvantage and that one of the reasons that the matter was listed at 12:00pm rather than earlier was so both parties had two hours to prepare. I explained that due to the timing of the industrial action, which had been determined by the HSU, the Commission was required to hear and determine this matter before the industrial action commenced at 9:00am on 8 January 2024

[17] I indicated that an option available to the parties was to have discussions about whether the matter could be resolved. I said that the HSU may be able to provide some commitments to the Hobart Clinic in light of the issues raised that provides some level of reassurance to the Hobart Clinic to the extent that the matter is able to be resolved and the application withdrawn. I explained that it was also open to the HSU to withdraw its notice of industrial action and have some discussions with the Hobart Clinic with the view to reissuing the notice in an amended form, or accompanied by undertakings.

[18] I noted that the Hobart Clinic indicated that it had some concerns with at least one of the ballot questions in not opposing the application for a protected action ballot, so the HSU was on notice of the Hobart Clinic's concerns. I decided to stand down the matter for 20 minutes so the HSU could consider their position and, if it was inclined to have some discussions with the Hobart Clinic, to allow those discussions to commence with a view to advising the Commission at the conclusion of the period whether the HSU thought that the matter could be resolved on some basis or not.

[19] When the matter resumed, Mr Eddington requested that the matter adjourn into conference so that the HSU could better understand the Hobart Clinic's concerns. As it was clear on the face of the application what the Hobart Clinic's concerns were, I invited Ms Masters to provide an opening so that the HSU understood the nature of the case that the Hobart Clinic was proposing to present. I then advised Mr Eddington that if there were any particular proposals that the HSU wished to make, having heard the opening, I would adjourn the matter into private conference subject to the views of the Hobart Clinic.

[20] Mr Eddington then declined my offer to adjourn into private conference, so the hearing proceeded. At the conclusion of the hearing, I advised the parties that my decision would be handed down after one hour and encouraged the parties to have further discussions with the view to exploring whether the matter could be resolved during that time. When the matter resumed, the parties informed me that the matter was not resolved, so I issued the Order.

Factual Background

Ms Kath Skinner, CEO Hobart Clinic

[21] Ms Skinner is the Chief Executive Officer of the Hobart Clinic and has ultimate responsibility for clinical governance of the Hobart Clinic.¹ She has Masters of Health Science, Masters of Clinical Nursing and Bachelor of Nursing degrees, a Diploma of Applied Science Nursing, and a Certificate in Executive Management and Development. She is a registered nurse with the Australian Health Practitioner Regulation Agency (AHPRA) and a graduate of the Australian Institute of Company Directors.²

[22] Ms Skinner explained that the Hobart Clinic is a designated psychiatric hospital and has patients with a range of mental health conditions including acute anxiety and depression. Many of the patients exhibit self-harm behaviours and are in the Hobart Clinic because of suicidal ideation. They are undergoing treatment to address their diagnoses and symptoms. They are acutely unwell patients and if their condition deteriorates, they are sometimes transferred to the Royal Hobart Hospital as involuntary patients if the Hobart Clinic is not able to keep them safe.³

[23] The Hobart Clinic has approximately one hundred employees, including about fifty nurses. The Hobart Clinic also has consultant psychiatrists who are either employees or visiting medical officers.⁴

[24] The Hobart Clinic provides a range of services including clinical psychiatry services and nursing care. It also provides a range of mental health wellbeing programs and group therapies provided by a range of therapeutic allied health professionals including clinical psychologists, music therapists and art therapists. Patients sometimes have electroconvulsive therapy (ECT) at Hobart Private Hospital which is paid for as part of their admission to the Hobart Clinic.⁵

[25] Psychiatrists come to see patients a number of days a week and see patients for an hour or so at a time, whereas nurses are onsite 24/7 caring for patients 24/7 during their entire stay. Nurses develop a therapeutic relationship with patients. The Hobart Clinic has a long-documented history of inpatient notes showing that admission to the Hobart Clinic is a protective factor for patients not taking their own lives.⁶

[26] Ms Skinner is concerned about the wellbeing of patients because they become very anxious even when there are people in the building who they don't know, and so everyone wears name badges in the building. If patients think their carers who provide the safe environment for them may not be here for them or may only provide a limited part of the nursing care for them, then that impacts how safe they feel being in the facility.⁷

[27] If nurse takes industrial action that involves withdrawing some part of the care they deliver to patients, the Hobart Clinic's ability to continue to provide care to patients in a way that patients feel safe can escalate a patient's condition, how they're feeling, whether they feel safe and whether they continue to engage in treatment. If a patient leaves the facility before they have finished a course of treatment, that can have very severe consequences. If patients feel like they are not getting what they need at the Hobart Clinic, their condition worsens.⁸

[28] In a mental health context, feeling safe in the place where a person is receiving care is of the utmost importance. The HSU's submissions that the industrial action is merely an inconvenience shows little insight into patients and what they go through when they're acutely unwell.⁹

[29] In relation to the proposed industrial action that members would alter how they ordinarily perform work by speaking with patients, the public and the media about industrial action, including giving them union materials, Ms Skinner said that this would have very real potential for patients to have heightened anxiety and stress and potentially disengage in the therapy that they are at the Hobart Clinic to receive. Patients may be worried about their safety at the Hobart Clinic, whether there will be sufficient staff to care for them, whether their nurses will be available when they need them and whether they will be discharged prematurely.¹⁰

[30] If there was a skeleton staff, for example, patients would be worried about how long they would be waiting until they see someone when they are distressed, whether their medications will be given on time and whether there will be disruption to their TMS or ECT therapy.¹¹

[31] So, there are many practical operational issues that will lead to patients being concerned about whether they will get the care that they need. There is also the whole therapeutic relationship that mental health nurses have with their patients about keeping their patients feeling safe and de-escalating situations.¹²

[32] In cross-examination, Mr Eddington put to Ms Skinner that many of her concerns were not the subject matter of the application, or the particular forms of industrial action notified, and that the Hobart Clinic had not yet received notice in relation to stoppages of work. Ms Skinner advised that the Hobart Clinic had requested information from the HSU to understand better what the indefinite bans on performing work are referred to in paragraph 1 of the notice but had not been provided with those details. In relation to paragraph 4 of the notice, Ms Skinner said it's very clear that there is an interruption to the ordinary performance of work. Ms Skinner said that patients don't need to know how industrial action will impact them. It will raise for them the concern that they may not get things that they need. In the case of an acutely unwell mental health patient if they have any concern that they're not going to get the care they need, it doesn't matter if the concern is well founded or not. It's about that patient's perception of feeling safe while they're admitted in the facility.¹³

[33] Mr Eddington put to Ms Skinner that none of the proposed bans impact upon staffing levels at all and that a nurse wearing a badge would not impact upon staffing levels. Ms Skinner said that the Hobart Clinic did not have that level of detail from the HSU and would like to know this. The Hobart Clinic did not know if the proposed action means that there will be staff on site who won't deliver medication because there is not enough union badges that day. She stated that there is a lot of ambiguity in these actions and how they will impact service delivery. Ms Skinner also said that the HSU had not provided the Hobart Clinic detail of what will be on the badges. The Hobart Clinic cannot form an opinion about whether it is safe for staff to wear these badges or not without knowing what it's going to say.¹⁴

[34] Mr Eddington put to Ms Skinner that patients would be concerned that the staff that are charged with caring for them are adequately remunerated. Ms Skinner said that patients would

care about the conditions of being in the Hobart Clinic and they would want the place to be a place where employees felt good about being there, because it would come out in the culture of the Hobart Clinic. However, many of patients who are acutely unwell have got no head space for thinking about the pay rates of nurses.¹⁵

[35] Mr Eddington put to Ms Skinner that if patients are acutely unwell, they are not going to be concerned as to whether a nurse is wearing a badge. Ms Skinner disagreed and said that there had been an incident where a patient said to the Director of Nursing, 'Why is that staff member wearing that cap with that logo on it? What's that logo on that cap about? That shouldn't be in here'. Patients notice every little detail about things that may make them feel unsafe. This is why the Hobart Clinic escorts visitors like tradespeople through the building. This is part of how a safe environment is provided for patients who may be easily triggered.¹⁶

[36] Mr Eddington put to Ms Skinner that a nurse speaking to the media is not directly imminent or proximate to impinging upon the health and safety of a patient. Ms Skinner said she was concerned about this as patients have access to a television and newspaper and she would be concerned if patients are reading about things that would trigger them or watching something on the news at night such as nurses going on strike.¹⁷

Dr Kipling Walker, Forensic Psychiatrist, Hobart Clinic

[37] Dr Walker is a Forensic Psychiatrist who gained fellowship with the Royal Australian and New Zealand College of Psychiatrists in 2000. He has a Masters in Criminology degree and is a member of the Faculty of Forensic Psychiatry. He performs a range of roles as a psychiatrist and on the day of the hearing, due to a shortfall in psychiatrists working at the Hobart Clinic, was working as a locum at the Hobart Clinic. In this role, he treats, admits and discharges inpatients.¹⁸

[38] Dr Walker explained that at the Hobart Clinic there are patients with a range of diagnoses including anxiety, depression, schizophrenia, bipolar disorder and personality disorders. There are also people detoxing or in rehabilitation from substance abuse, particularly alcohol or cannabis. Dr Walker explained that it is known from research that people who have one condition tend to have more than one and all of his patients at the Hobart Clinic have at least two or three different conditions, which may be a mood condition, drug and alcohol condition, personality condition or pain condition. Patients are at the Hobart Clinic because their symptoms have become untenable, and this is the most efficient way for them to get the treatment they need.¹⁹

[39] Patients are on a range of medications and may be treated for low mood, elevated mood or psychotic symptoms, such as hearing voices. Pain is a common occurrence amongst patients. There are a number of patients at the Hobart Clinic who go into Hobart for ECT. The Hobart Clinic runs a transcranial magnetic stimulation machine program unit (TMS) and a lot of the inpatients are undergoing courses of TMS, typically for treatment of depression.²⁰

[40] Most patients see a psychiatrist no more than twice a week, but they would see nurses every day. Nurses play an essential role in administering medications but more significantly in allaying patients' anxieties. Nurses try to help patients do more, as when patients are depressed, generally they want to stay in bed. Nurses get patients out of bed, into the shower, into groups

and guide them through attending programs. This is called behavioural activation. Nurses deal with patients' families as they come in to take patients out and also visitors. The nurse/patient relationship in the treatment of mental health patients at the clinic is critical to patients being safe and getting better.²¹

[41] In response to a question from Ms Masters, Dr Walker said that a nurse talking to a patient about taking strike action is likely to lead to deterioration in the health of the patient, particularly in the context of there being a change in psychiatrists working at the Hobart Clinic and patients being anxious about who their doctor is going to be. Dr Walker said that he would expect such a discussion to aggravate and prolong patients' anxieties, because there is already significant anxiety among patients at the Hobart Clinic, mainly around who is going to treat them both in hospital and when they are discharged. Further anxiety at the severe end leads to errors in thinking. A reference to strike action by a nurse is therefore likely to be heard or misperceived or perceived by a patient as abandonment which also will aggravate and prolong anxiety.²²

[42] In relation to patients with depression, Dr Walker explained that depression can erase a sense of time and cause a sense of hopelessness. Dr Walker said discussing industrial action with patients is likely to feed their sense of hopelessness in the context of there being a change in psychiatrists staffing. At the 'pointy end', this could lead to self-harm or suicide attempts for some patients. Dr Walker said that even if there was no uncertainty about psychiatrists staffing at the Clinic, he would still have concerns about nurses talking to patients about industrial action. He clarified that he would not have these concerns in relation to patients on a general surgical ward but has these concerns in relation to a psychiatric ward, as potentially these conversations are likely to worsen depression, worsen anxiety and require close monitoring of patients with longstanding thoughts about dying and suicide.²³

[43] In cross-examination, Mr Eddington put to Dr Walker that merely talking to patients about industrial action, provided this is done ethically, responsibly and with appropriate clinical judgement, in and of itself does not cause a significant risk to health and safety. In response, Dr Walker said:

I'm not sure I'd agree with you on that, for reasons as I've said. Logically, it makes sense what you've just said that it shouldn't pose a risk, but we are not dealing with a logical population. We are dealing with people who are not at their best, who their sense of their world and their time has shrunk...who tend to mislead, misconstrue and misinterpret information. So I think that risk persists...even assuming that...these are discussions are handled extremely sensitively and, of course, ethically. I think the skill doesn't mitigate the risk that people when they are mentally unwell...tend to misread and misinterpret information that's coming in to them. And their relationship with the nurse is close and it's one of trust. I think it potentially also complicates the role and there are ethical issues around that. You know, we're meant to lobby for patients. I'm not sure patients are meant to lobby for us. But I heard what you said before [that] no one is asking patients to lobby, but I think that would be a natural conclusion or an assumption that, well, if the nurse is saying this to a patient, the patient is likely...to turn around and say, 'What can I do? How can I help?' And for reasons I've said, I think that does pose a risk to the patient's health.²⁴

[44] Dr Walker said that the risk to a patient's health was a risk that their symptoms would be prolonged and become worse and in some situations precipitate a suicide attempt or a self-harm episode.²⁵ Mr Eddington also put to Dr Walker that any risk to a patient occasioned by a nurse talking to a member of the public is a very remote risk. Dr Walker responded that that nurses talking to their partners or the public does not pose anywhere near the risk that a nurse talking while at work in a psychiatric hospital would pose to the wellbeing of the patients.²⁶ Dr Walker agreed with Mr Eddington that the wearing of a badge which says something like 'Nurses want a pay rise' is not likely to cause a significant risk to patients.²⁷

Mr Desmond Marcenko, Industrial Organiser, HSU

[45] Mr Marcenko is the HSU private health organiser for Southern Tasmania. As part of that role, he is involved in bargaining for enterprise agreements and is currently active in bargaining with the Hobart Clinic.²⁸ Mr Marcenko gave evidence in relation to the proposed action of indefinite bans on performing work, unless wearing union clothing and badges and other union campaign items. Mr Marcenko explained that HSU members are proposing to wear a badge saying, 'Extraordinary care, ordinary pay', or 'Your health is Hobart Clinic's wealth.' Mr Marcenko said that in the discussions that he has had with members their priority is to maintain the health and wellbeing of the patients that they look after. This is why they do the job that that they do and this is why they are fighting so hard in this campaign so that the safety and wellbeing of patients can be continued.²⁹

[46] In cross examination, Ms Masters put to Mr Marcenko that he received correspondence from the Hobart Clinic asking that he provide clarification with respect to the proposed indefinite ban on performing work unless wearing union clothing, badges and other union campaign items. Mr Marcenko said that there has been some correspondence that has gone back and forth between the parties but that he could not remember seeing that particular email.³⁰

[47] Ms Masters put to Mr Marcenko that there was there is no limitation on what could be put on the campaign items in paragraph 1 of the notice. Mr Marcenko agreed but said that it is the intention of HSU members to ensure the health and safety of patients and that they would not put anything inflammatory on the badges that would directly negatively affect any patient's mental health.³¹

[48] Ms Masters put to Mr Marcenko that it is not within a nurse's expertise to make decisions about whether or not discussing particular matters would impact or detriment an inpatient's health at the Hobart Clinic. Mr Marcenko said that the nurses are frontline workers, that they potentially see patients more than anyone else and would have the most acute understanding of what might negatively affect a patient's mental health because they have spent hours each day with patients. To suggest that nurses would not have an indication of what is going to negatively affect a patient's mental health is incorrect.³²

[49] During cross-examination Mr Marcenko said that the proposed action would be limited to the wearing of badges³³ and that that HSU members reserve the right to speak to patients but that they are not currently proposing to do this.³⁴

Submissions

The Hobart Clinic

[50] The Hobart Clinic clarified during the hearing that they were specifically concerned about the actions specified in paragraphs 1 and 4 of the notice namely:

- (a) Indefinite bans on performing work unless wearing union clothing, badges and other union campaign items.
- (b) An alteration to how members would ordinarily perform work by speaking with patients, the public, and the media about industrial action, including giving them union materials.

[51] The Hobart Clinic submitted that the concerns of both Dr Walker and Ms Skinner relate to the impact that the proposed action could have on patients if they felt that there was some uncertainty around their ongoing care at the Hobart Clinic and the detrimental impact that this could have on patients' health and safety.

[52] The protected industrial action commits nursing staff to speak with patients about industrial action. 'Industrial Action' has a particular meaning under the FW Act. Based on the ballot it is likely that nursing staff would discuss at least the types of action that they have voted in favour of engaging in. That sense of uncertainty presents a danger, a real risk that patients of the Hobart Clinic would suffer a detrimental effect to particularly their mental health, and also would prolong their recovery from their mental health conditions.

[53] With respect to indefinite bans on performing work unless wearing union clothing, badges and other union campaign items, there are no limitations on what that campaign material could reflect or what message it could communicate. Mr Marcenko gave evidence that there has been an agreement from members to wear badges that communicate a particular message.

[54] There is nothing preventing the union or its members from wearing a badge or handing out union campaign material which refers to things like, 'Hobart Clinic Nurses Strike Action' and 'We won't work until we get better pay'. That kind of messaging would contribute to those feelings of uncertainty that Dr Walker and Ms Skinner gave evidence as being a real concern to the health and safety of the patients at the Hobart Clinic.

[55] There is sufficient evidence and material before the Commission for it to be satisfied that the protected action notified on 3 January 2024 threatens to endanger potentially the life, and certainly the personal health and safety of the population or part of it, being patients at the Hobart Clinic.

[56] While Mr Marcenko has given evidence about what action will occur, there are no guarantees and no limitations on what action may be taken, provided it is within the ambit of the notice that has been given. Regardless of Mr Marcenko's evidence, HSU members can engage in any of the action that falls within the ambit of the notice.

[57] If the Commission is minded to suspend the industrial action rather than terminate it, this should be for an extended period of time as the risk to patient health and safety of this proposed type of action does not go away because of some change in circumstances.

HSU

[58] The HSU submitted that within the scheme of the FW 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.

[59] The threat to individuals' health and safety has to be direct and imminent. It cannot be merely speculative, which at this stage before the action has even commenced it clearly is.

[60] These mechanisms should only be triggered where the industrial action is causing harm of some significance, or potentially causing harm of some significance, not merely causing an inconvenience. These actions are relatively benign, particularly the action in relation to wearing union clothing, badges or union campaign items.

[61] The intent is not for this ban to authorise a non-performance of the duties that are prescribed for nurses. The intent is simply for members to wear a simple, reasonably benign badge.

[62] The application remains highly speculative because it is discounting or ignoring those matters that it touches on in its own application. And that is that HSU members who are nurses operate all the time by exercising a high degree of clinical judgment. The AHPRA code of conduct is mentioned in the application, so at all times HSU members are going to be constrained by their professional obligations.

[63] The application does not give the nurses enough credit about the clinical judgement that they may exercise in terms of speaking with patients responsibly and ethically regarding these matters.

[64] In relation to part of the population, it is the HSU's view that this speaks more broadly to a broader range of the population rather than simply to very confined set of patients at the Hobart Clinic. It deals with the population as a whole or a significant part of the population.

[65] The HSU submitted that if the Commission was minded to suspend the protected industrial action, the length of the suspension should be very short because the difficulties that are proposed or the concerns that the Hobart Clinic has may well be simply addressed by providing a more expansive and detailed notice.

Consideration

[66] Section 424(1) of the FW Act provides:

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.

[67] Section 424(2)(b)(i) provides that the Commission may make the order on application by a bargaining representative for the agreement. The application before me has been made by the Hobart Clinic, a bargaining representative for the proposed enterprise agreement. I am therefore satisfied that the application has been validly made.

[68] The Hobart Clinic relies upon ss.424(1)(b) and (c). Based on these provisions, I am required to make an order suspending or terminating protected industrial action for a proposed enterprise agreement if I am satisfied that the action is threatened, impending or probable and that it would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[69] I am satisfied that the requirements of 424(1)(b) are met on the basis of the notice provided by the HSU on 3 January 2024 which is Attachment B to the application and the evidence of Mr Marcenko. The notice indicated that action was to commence at 9:00am on 8 January 2024. Although Mr Marcenko gave evidence that only action in paragraph 1 was intended to commence on 8 January 2024, he did not rule out the possibility of other actions specified in the notice being commenced after that time. I have therefore considered the matter on the basis that any of the four actions specified in the notice may be taken by HSU members at any time from 9:00am on 8 January 2024.

[70] The main area of contention between the parties is whether the action would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[71] The Hobart Clinic relied upon the decision of the Full Bench in *Victorian Hospitals' Industrial Association v Australian Nursing Federation*³⁵ which relevantly provided:

[51] We were taken in the proceedings to previous decisions of FWA and its predecessors regarding the meaning of the terms in s.424(1), including the references to

“welfare” of the population and the concept of endangerment. These are commonly used words and expressions which are widely understood in the community and which should be given their ordinary meaning. Conduct that puts a person’s physical or mental state at risk of material detriment - or that materially hinders or prevents improvement in a person’s poor physical or mental state - may qualify as conduct that endangers personal health or safety. Although the conduct might not be of such a serious nature as to amount to an endangerment to “life”, it might nevertheless be such as to constitute a significant risk to “personal safety or health”. Conduct that delays or puts off the efficient supply of public health services has the capacity to impact adversely upon the welfare of at least some of the persons who require those services. The impact of the conduct must, however, be more than merely to cause inconvenience to the persons concerned - it must be such as to expose them to danger. (reference omitted)³⁶

[72] In relation to the submissions of the HSU that 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, I note the following comments of the Full Bench in *National Tertiary Education Industry Union v Monash University*³⁷:

[20] In *NTEU v University of South Australia* we do not consider that the Full Bench, by its use of the expressions “exceptional circumstances” and “significant harm” in the passages quoted in the Decision, was intending to establish criteria or tests in substitution for or in addition to those found in the language of s.424(1) itself. Rather the Full Bench used those expressions only to characterise the legislative intention that could be gleaned from the Explanatory Memorandum to the *Fair Work Bill 2008*. It is no doubt the case that the circumstances which would satisfy the criterion in s.424(1)(c) are likely to be exceptional in the sense of being atypical and out of the ordinary, and that a threatened endangerment to life, personal safety, health or welfare under the subsection may well involve the affliction of significant harm. However, that does not mean that in determining any particular case, expressions of that nature not to be found in the actual language of the statute should be determinative of the outcome, and we do not understand the *NTEU v University of South Australia* to stand for any contrary proposition.

[73] On the basis of these decisions, if I find that the proposed actions amount to 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, this may constitute conduct that endangers personal health or safety within the meaning of s.424(1)(c). I am not required to find that exceptional circumstances exist or that significant harm is being caused by the action. However, I note that a finding that detriment to a person’s physical or mental state may occur is likely to also amount to a finding of significant harm being caused to the person.

An alteration to how members would ordinarily perform work by speaking with patients, the public, and the media about industrial action, including giving them union materials.

[74] In support of its application, the Hobart Clinic called evidence from Ms Kath Skinner, CEO of the Hobart Clinic and Dr Kipling Walker, Forensic Psychiatrist. Dr Walker’s evidence was that HSU members speaking to the patients at the Hobart Clinic was likely to worsen

depression and anxiety and require close monitoring of patients with longstanding thoughts about dying and suicide. Similarly, Ms Skinner's evidence was that this proposed action would have very real potential for patients to have heightened anxiety and stress and potentially disengage in the therapy that they are receiving at the Hobart Clinic. In my view the exacerbation of serious medical conditions experienced by patients who are already in hospital amounts to endangering the health, or the welfare of those patients. It does not amount to a mere inconvenience as submitted by the HSU.

[75] Further, I do not accept the HSU's submissions that 'part of' the population refers more broadly to a broader range of the population rather than simply to a very confined set of patients at the Hobart Clinic. Although Dr Walker provided deidentified examples about specific patients in his evidence, it was clear that his concerns were in relation to all inpatients at the Hobart Clinic as all of these patients are experiencing mental illness which is serious enough to require hospitalisation. I therefore find that 'the population' or 'part of it' for the purpose of s.424(1)(c) are the inpatients at the Hobart Clinic.

[76] The evidence from both Ms Skinner and Dr Walker was credible and compelling. I do not accept the HSU's submissions that the application was speculative. The evidence from both Ms Skinner and Dr Walker was based on genuine concerns about the probable impact of the proposed action on the well-being of current patients of the Hobart Clinic.

[77] The HSU did not call any evidence in response to the evidence of Ms Skinner and Dr Walker but instead submitted that HSU members who are nurses constantly exercise a high degree of clinical judgment and that the application does not give the nurses enough credit about the clinical judgement that they may exercise in speaking with patients responsibly and ethically regarding industrial action. This may well be the case, however it is difficult for me to reconcile the professional opinion of Dr Walker that such conversations would not be appropriate in any circumstances with the submissions of the HSU, given that the HSU did not call any evidence from health professionals which contradicted Dr Walker's evidence. This was despite the fact that the HSU was on notice from 8 December 2023 that the Hobart Clinic considered that HSU members speaking to the patients at the Hobart Clinic had the potential to present a risk to their health and safety.

[78] In the circumstances I accept the evidence of Ms Skinner and Dr Walker and, on the basis of that evidence, I find that that HSU members speaking with patients about industrial action, without limitation, would put patients' physical or mental state at risk of material detriment and therefore threaten to endanger the personal safety or health, or the welfare, of part of the population being patients at the Hobart Clinic within the meaning of s.424(1)(c) of the FW Act.

[79] In relation to the proposed action of an alteration as to how work is ordinarily performed by speaking the public and the media about industrial action, including giving them union promotional materials, Ms Skinner had concerns about this action, whereas Dr Walker was less concerned. Ms Skinner said that patients have access to television and newspapers and that she would be concerned if patients became aware of media coverage of matters that trigger them such as nurses going on strike. Dr Walker said in cross-examination that that nurses talking to their partners or the public does not pose anywhere near the risk that a nurse talking while at work in a psychiatric hospital poses to the wellbeing of the patients.

[80] There are a range of potentially distressing matters which are reported in the media, however there is no evidence which establishes that patients' access to newspapers or television is restricted to protect them from such matters. I therefore have difficulty accepting that there is a direct causal link between nurses talking to the media and a detrimental impact on patients. Further, given that Dr Walker is less concerned about nurses speaking to the public, there is insufficient evidence to establish that an alteration as to how work is ordinarily performed work by speaking the public and the media about industrial action would threaten to endanger the personal safety, health, or the welfare, of patients at the Hobart Clinic.

Indefinite bans on performing work unless wearing union clothing, badges and other union campaign items.

[81] In relation to the proposed action of indefinite bans on performing work unless wearing union clothing, badges and other union campaign items, I note that Ms Skinner's concerns were that the HSU had not provided the Hobart Clinic information about what will be on the badges. As such, the Hobart Clinic cannot form an opinion on whether it is safe for staff to wear these badges or not. Ms Skinner was also concerned that the Hobart Clinic did not know if the proposed action means that there will be staff on site who will not deliver medication because there is not enough union badges that day. Dr Walker did not give any evidence in chief about whether he had concerns about this action but agreed in cross-examination that that the wearing of a badge which says something like 'Nurses want a pay rise' is not likely to cause a significant risk to patients.

[82] The Hobart Clinic did not call any specific evidence which established the circumstances in which messages on union clothing, badges and other union campaign items could cause harm to patients of the Hobart Clinic. This is in contrast to the detailed evidence which the Hobart Clinic called in relation to nurses talking to patients about industrial action. Talking about industrial action and wearing a badge or clothing with a slogan are two different communication methods. Talking about industrial action could involve communicating a level of detail which is simply not possible to convey in a slogan on a badge or clothing. In addition, Dr Walker's particular concerns about nurses talking to patients about industrial action included the potential complication of the relationship of trust between patient and nurse and the ethical issues that arise from this. Such concerns do not necessarily arise from a nurse simply wearing a badge or clothing with a slogan.

[83] In relation to Ms Skinner's concerns about the 'indefinite bans on performing work' aspect of this proposed industrial action, I note that Mr Marcenko's evidence was that the action was limited to HSU members proposing to wear a badge saying, 'Extraordinary care, ordinary pay', or 'Your health is Hobart Clinic's wealth'. It appears from Mr Marcenko's evidence that there is no intention to apply any bans. Regardless of this, paragraph 1 of the notice is expressed in a way that conveys the potential for bans to be applied which, given the nature of the work performed by HSU members, could give rise to a finding that such bans would threaten to endanger the life, the personal safety or health, or the welfare, of the patients in the Hobart Clinic. However, given that the Hobart Clinic did not make any submissions about this issue, it appears that the Hobart Clinic accepts that the HSU does not intend to apply any bans associated with this action.

[84] In the circumstances I find there is insufficient evidence to establish that the proposed action of indefinite bans on performing work unless wearing union clothing, badges and other union campaign items would threaten to endanger the personal safety, health, or the welfare, of patients at the Hobart Clinic.

[85] The Hobart Clinic did not make any submissions in relation to the proposed actions specified in paragraphs 2 and 3 of the notice, so I make no finding in relation to these proposed actions with respect to s.424 of the FW Act.

Should the action be suspended or terminated?

[86] Having been satisfied that the requirements of ss.424(1)(b) and (c) are met with respect to HSU members speaking with patients about industrial action, without limitation, I am required to make an order suspending or termination the industrial action. I have a discretion as to whether to make a suspension or termination order.

[87] The primary submission by the Hobart Clinic is that the industrial action should be terminated or in the alternative, suspended for an extended period of time as the risk to patient health and safety of the proposed type of action does not go away because of some change in circumstances.

[88] It is clear from the submissions by the HSU that there is no intention by HSU members for the industrial action to harm or cause any detriment to patients of the Hobart Clinic. However, the protected action notice is drafted in a way which does not capture these intentions and has given rise to the concerns which have led to the making of this application. It is a common practice for notifications of industrial action to be accompanied by undertakings in relation to the safety of affected parties where such concerns are raised by the employer. As I noted to the parties at the commencement of the hearing, it is open for them to have discussions and with a view to resolving the Hobart Clinic's concerns by for example the HSU redrafting the notice or providing undertakings.

[89] During the hearing I put to Ms Masters that if the Commission suspended the proposed industrial action there would be potential for HSU to take on board the concerns of the Hobart Clinic and to give notice of other types of industrial action that may not cause the Hobart Clinic the same concerns. In response Ms Masters said that the Hobart Clinic had made it very clear its concern is the impact of the proposed action on patients. If the Commission's decision was to suspend the industrial action and the HSU reconsidered its position in regard to taking this action with respect to patients, and heard the concerns from the Hobart Clinic about the potential impact on patients, then that would likely have the effect of reducing the Hobart Clinic's concerns.

[90] Mr Eddington submitted that if the Commission was inclined to suspend the action, the length of the suspension should be very short because the difficulties that are proposed or the concerns that the Hobart Clinic has may be simply addressed by providing a more expansive and detailed notice. For example, the HSU could indicate that indefinite bans on performing work unless wearing union clothing, badges or other union campaign items, simply describes wearing a badge and that the performance of work will be conducted in exactly the same way in accordance with the duties and requirements that all employees have.

[91] Having regard to the parties' submissions, I believe that the matters raised by the Hobart Clinic can be addressed by the HSU contemplating industrial action which does not involve speaking with patients about industrial action and which addresses other issues raised in the application. I have therefore decided to suspend rather than terminate the action. If the HSU persists with the action which I have found to meet the requirements of ss.424(1)(b) and (c) of the FW Act following a period of suspension, it is likely that the Hobart Clinic will make a fresh application to terminate such action.

[92] I am required by s.427 of the FW Act to specify the duration of the suspension. I accept the submissions of the HSU that the length of the suspension should be short because the issues raised by the Hobart Clinic can be addressed by the HSU relatively quickly. I have therefore determined to suspend the industrial action until 11:59pm on Monday 22 January 2024 as this will provide sufficient time for the parties to meet to discuss the proposed industrial action with the view to reaching agreement. It may also provide an opportunity for negotiations for a new enterprise agreement to continue. The parties may request the assistance of the Commission in relation to those negotiations.

Conclusion

[93] The Order that I issued on 5 January 2024 suspended the industrial action notified by the HSU on 3 January 2024 until 11:59pm on 22 January 2024.

[94] The Order may only apply to protected industrial action which satisfies the s.424(1)(c) criterion which in this case is HSU members speaking to patients about industrial action.³⁸ I have therefore issued an amended Order which clarifies the scope of the Order. However, once such an order is made, any other industrial action notified by the HSU ceases to be protected because of s.413(7).³⁹ The consequence of the Order that I issued on 5 January 2024 and the Amended Order I have issued with this Decision is the same in that the totality of the industrial action notified by the HSU on 3 January 2024 is not protected during the period that concludes at 11:59pm on 22 January 2024.



DEPUTY PRESIDENT

Appearances:

S Masters of Edge Legal on behalf of the Applicant.

J Eddington on behalf of the Respondent.

Hearing details:

2024

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By Video using Microsoft Teams.

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¹ Transcript, PN 63

² PN108-PN109.

³ PN65-PN66.

⁴ PN67.

⁵ PN68.

⁶ PN69-PN70.

⁷ PN73.

⁸ PN75.

⁹ PN76.

¹⁰ PN77.

¹¹ PN78.

¹² PN79.

¹³ PN84-PN86.

¹⁴ PN87-PN91.

¹⁵ PN93-PN95.

¹⁶ PN98.

¹⁷ PN99-PN100.

¹⁸ PN125-PN126.

¹⁹ PN127, PN133.

²⁰ PN131.

²¹ PN135.

²² PN136, PN140.

²³ PN137-PN138, PN141-PN143.

²⁴ PN152.

²⁵ PN153.

²⁶ PN156.

²⁷ PN157.

²⁸ PN181.

²⁹ PN182-PN187.

³⁰ PN191.

³¹ PN194.

³² PN198.

³³ PN207.

³⁴ PN210.

³⁵ [\[2011\] FWAFB 8165](#)

³⁶ Ibid, [51]

³⁷ [\[2013\] FWCFB 5982](#), 20.

³⁸ *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200 at [69]-[72] per Lander J, [128]-[130] per Buchanan J, [179]-[180], [182] per Perram J cited in *National Tertiary Education Industry Union v Monash University* [\[2013\] FWCFB 5982](#), [54].

³⁹ Ibid.