

[2024] FWC 1914 [Note: An appeal pursuant to s.604 (C2024/5297) was lodged against this decision - refer to Full Bench decision dated 9 August 2024 [[\[2024\] FWCFB 333](#)] for result of appeal.]



DECISION

Fair Work Act 2009

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

NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid

v

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (B2024/925)

DEPUTY PRESIDENT CROSS

SYDNEY, 2 AUGUST 2024

Application to suspend or terminate protected industrial action (endangering life etc) - s.424 threatened, impending or probable – endanger the life, the personal safety, or the welfare, of the population or of part of it - application granted

[1] On 19 July 2024, NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid (the Applicant/Transgrid) applied to the Fair Work Commission (the Commission) requesting orders be made pursuant to section 424 of the *Fair Work Act 2009* (Cth) (the Act) to terminate protected industrial action. The Applicant has been notified that protected industrial action is planned to be taken by members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) (the Respondent/CEPU) employed within the Applicant's operations.

[2] A Hearing was conducted on 24 July 2024. At the conclusion of the Hearing, I issued a brief oral decision on transcript and indicated that a more detailed decision would follow. Subsequently an Order was issued in the following terms:

[1] Pursuant to section 424(1)(c) of the *Fair Work Act 2009* (the Act) the Fair Work Commission orders that protected industrial action in relation to the work defined in the Revised Safety Commitment as a declared incident or emergency work, and declared as such by the CEO of Transgrid, be suspended for a period of three (3) weeks effective from the date of this Order.

[2] This Order is binding on:

- (a) NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid;

- (b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; (**CEPU**)
- (c) all employees who will be covered by the classifications covering CEPU members in the proposed agreement to replace the *Transgrid Enterprise Agreement 2020*.

[3] The CEPU is ordered to distribute a copy of this Order to their respective members who will be covered by the Order, and advise members of the effect of this Order, by using the most expeditious mean(s) possible, including by electronic means.

[4] NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid is ordered to distribute a copy of this Order to all employees who will be covered by the Order and advise the employees of the effect of this Order, by using the most expeditious mean(s) possible, including electronic means.

[5] This Order comes into operation at 11:59PM on 24 July 2024.

[6] Reasons for my Decision will follow in due course.

[3] In a brief decision on transcript, I determined, on the basis of the evidence before the Commission, I was satisfied that protected industrial action is threatened, impending or probable. I further determined, on the basis of the evidence before the Commission, that I was satisfied that the action had, is or would threaten to endanger the life, the personal safety, or the welfare, of the population or of part of it .

[4] I indicated that the Order, giving effect to the oral Decision, would issue in conjunction with that decision, and that full reasons for my decision would be issued in due course. These are those reasons.

Background

[5] Transgrid employees in classifications of administrative officers, engineering officers, professional officers, operators, power workers, trades persons and apprentices are covered by the *Transgrid Employees Agreement 2020* (the 2020 Agreement). The 2020 Agreement passed its normal expiry date on 1 December 2023. Transgrid has been renegotiating a new enterprise agreement to replace the 2020 Agreement (the Proposed Agreement) since July 2023. There have been approximately 30 bargaining meetings in relation to the Proposed Agreement since the negotiations commenced. The parties are currently far apart with respect to the wages claim for the Proposed Agreement.

[6] Transgrid is responsible for the High Voltage Transmission Network in NSW and the ACT (the HVTN). The HVTN transmits electricity from generators of electrical power to distributors (who in turn distribute to consumers), other states and some major end users.

[7] Transgrid's biggest direct connect customer is the Tomago Aluminium Smelter. The Tomago Aluminium Smelter is located just outside Newcastle. It is the largest consumer of

electricity in New South Wales (using at least 10% of NSW's total electricity supply) and has over 1,000 employees.

[8] Within NSW and the ACT, there are approximately:

- (a) 219 public hospitals (not including private hospitals);
- (b) 713 waste water pumping stations;
- (c) 862 residential care facilities;
- (d) a number of essential telecommunications hubs; and
- (e) thousands of life support customers. Life support customers are individuals who use life support equipment at home, whose details are included on a special register. Life support equipment includes dialysis machines, oxygen concentrators and ventilators. During an unplanned blackout, life support customers may have back-up batteries or generators, however these may not be sustainable for long periods or may not always be available.

[9] The National Electricity Market (NEM) operates in NSW, the ACT, Queensland, South Australia, Victoria and Tasmania. Transgrid's HVTN forms part of the NEM.

[10] The NEM is a wholesale electricity market and the physical power system.

[11] The NEM is regulated by three bodies:

- (a) the Australian Energy Market Commission (AEMC);
- (b) the Australian Energy Regulator (AER); and
- (c) the Australian Energy Market Operator (AEMO).

[12] The AEMC makes the rules which regulate the operation of the NEM. Those rules include the National Electricity Rules (NER). Amongst others, these rules are binding on Transgrid.

[13] The AER monitors performance and compliance with the NER and other rules.

[14] AEMO manages the NEM and oversees its operations and security. As part of its role, AEMO monitors system performance and security via 24/7 control rooms to ensure the network's capacity to produce and transport energy can meet demand. This involves forecasting demand and supply of electricity, forecasting any risks to supply, as well as assessing and planning for the impact that operational changes will have on the system (such as planned outages and the connection of new generators).

[15] If an emergency occurs, AEMO is also responsible for ensuring systems are restored to a secure operating state as soon and as safely as possible.

[16] As part of this, AEMO provides advice and direction to Transgrid, and Transgrid provides information to AEMO, including information on Transgrid assets which are critical for the operation of the HVTN. These assets include transmission lines and substations.

[17] Transgrid's HVTN forms part of the NEM and is directly connected to the transmission networks in Queensland and Victoria. This allows energy trading between NSW, Queensland and Victoria, supporting the competitive wholesale electricity market.

[18] On 27 December 2023 the CPU served a notice of protected industrial action pursuant to s.414 of the Act. Amongst other things, that protected industrial action imposed a series of bans on the operation of the control room. That notice contained a safety commitment in the following terms (the Safety Commitment):

Safety Commitment

The above intended action is subject to the Safety Commitment recorded in the Order of Deputy President Hampton of the Fair Work Commission made on 11 December 2023 in [PR769005](#) as follows:

An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work.

“Emergency Work” is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

[19] On 28 December 2023, Transgrid made an application for orders under section 424 of the Act to suspend or terminate industrial action, having particular regard to the impact of the protected action on Transgrids control room. At the commencement of that hearing, Transgrid and the CEPU agreed Transgrid would withdraw its application at that time on the basis of the CEPU agreeing to an extended safety commitment (the Extended Safety Commitment) to be incorporated into any future notices of protected industrial action. The Extended Safety Commitment provides as follows:

Safety Commitment

1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work or where suspending the action is necessary to perform work affected by and during a “Declared Incident”.

2. A “Declared Incident” will be declared by the Chief Executive Officer of Transgrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.

3. “Emergency Work” is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

4. An Employee who is ordinarily rostered to perform work will keep the mobile device they ordinarily use for communicating with the Employer on their person for the purpose of being notified of Emergency Work and/or a Declared Incident and will answer their phone if contacted by the employer.

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

[20] Throughout 2024, the CEPU has notified and taken protected industrial action. There are several forms of protected industrial action notified by the CEPU that prevent field maintenance work. There is a “Locking Ban” (effectively a ban on locking or unlocking anything, be it a mobile phone, a laptop, a gate lock) which precludes the performance of any switching tasks necessary to safely isolate or de-isolate apparatus. There are other bans on issuing certificates required for safe work and bans on issuing changes or commissioning new apparatus, being “Switching Bans”. If an employee applies any of these bans, it means that the maintenance and/or emergency work to which they and other employees have been assigned cannot be undertaken.

[21] On 12 July 2024, Transgrid received correspondence from AEMO in the following terms:

Dear Mr Redman

Confidential – TNSP Obligations under the NER

AEMO has been advised that Transgrid may experience issues when returning transmission equipment back into service, either after planned works or unplanned outages, due to the ongoing industrial dispute.

AEMO is concerned that continued industrial action will impact Transgrid’s and AEMO’s ability to effectively manage system security and public safety in line with our respective obligations under the National Electricity Rules (NER).

In particular, AEMO is concerned that the inability to promptly return transmission equipment to service may be or may result in associated breaches of the following NER obligations:

- 4.2.6 – The ability to operate the power system to remain in a secure state and, following a contingency event, return the power system to a secure state, within 30 minutes.
- 4.8.1 – Transgrid must promptly advise AEMO of any circumstance which could be expected to adversely affect the secure operation of the power system.

- 4.8.9 – Transgrid must comply with directions and instructions in the timeframe specified by AEMO.
- 4.8.10 – Transgrid must be available to disconnect generation, if requested by AEMO.
- 4.8.14 – Transgrid must comply with any applicable requirements of the local black system procedures as quickly as is practicable.
- 4.9.2A - Transgrid must comply with dispatch instructions given by AEMO.
- 4.10.2 – Transgrid must ensure that transmission network operations performed on their behalf are undertaken by authorised persons advised in writing to AEMO.

In addition to the above NER clauses, Transgrid also have obligations under functions delegated to Transgrid as set out in the Schedule 1 of the Transgrid Instrument of Delegation. In particular, AEMO notes that the function of maintaining power system security within the Transgrid Operational Zone is delegated to Transgrid.

AEMO believes that if Transgrid cannot meet these NER and delegated obligations:

- Transgrid would be unable to effectively respond to power system faults meaning these would be unmanaged. This would increase the likelihood of damaged equipment, cascading failures, blackouts and risk the public.
- Transgrid would be unable to identify fault causes and rectify issues to ensure serviceability of transmission equipment, which would subsequently hinder AEMO's ability to maintain power system security.
- AEMO would not be able to re-secure the power system following an outage of transmission equipment in the NSW network.
- AEMO may have to take the action of instructing load shedding in NSW to re-secure the power system when the return of affected transmission equipment would have avoided this action.
- The NSW system would be more susceptible to cascading failures and potential regional black events after non-credible contingencies due to a reduction of available in-service transmission equipment.
- Transgrid would be unable to identify and switch faulty transmission equipment or unstable generators out of service, reducing overall power system security.
- Transgrid would be unable to enact local black start procedures leading to prolonged region or system black events.

Given the above, AEMO is becoming increasingly concerned about the impact ongoing industrial action might have on Transgrid's ability to promptly restore transmission equipment to service, as well as respond to unplanned events and emergencies. AEMO's

highest priority is ensuring that it can continue to rely on Transgrid to fulfil its complementary obligations in relation to power system security. I would appreciate your assurance that adequate steps have been taken by Transgrid to ensure its continued compliance with its obligations and prompt response when required.

[22] Transgrid responded to the above correspondence on 16 July 2024, advising that it had written to the relevant unions seeking commitment to ceasing forms protected industrial action that impact upon system security. Transgrid noted it was preparing to make an application under section 424 of the Act to terminate the protected industrial action.

[23] Also on 16 July 2024, Transgrid wrote to relevant unions (the 16 July Letter) including the CEPU as follows:

Dear all

Transgrid ongoing industrial dispute

We act for Transgrid. On Friday 12 July 2024 Transgrid received a letter from AEMO in which AEMO raises concerns that continued industrial action is impacting and will continue to impact Transgrid's and AEMO's ability to effectively manage system security and public safety, including Transgrid's ability to promptly restore transmission equipment to service, as well as respond to unplanned events and emergencies. A copy of the letter is enclosed.

The concerns AEMO has raised are consistent with the concerns Transgrid has repeatedly raised with the CEPU over several months, including in our letters of 24 May 2024, 14 June 2024 and 29 June 2024, about the very serious and imminent risks to the electricity grid and to the public arising from the continued industrial action.

Having regard to the article published by the ABC on 9 July 2024, the CEPU has acknowledged these concern by the comments of Matt Murphy, National Industry Coordinator for the CEPU, who is reported to have said, among other things, that the NSW transmission network was being degraded the longer the stand-off lasted. The CEPU also acknowledged that the protected industrial action was causing the degradation, stating that '... a lot of the stuff we do is we will agree to do some work, take some equipment out of service, we'll then do all the work that's required to maintain it, then refuse to put it back in'.

This has now reached the point where, in Transgrid's view, the protected industrial action is threatening the life, personal safety, health or welfare of the NSW population, and threatens to cause significant damage to the Australian economy or part of it. By its letter, AEMO seems to share these views.

It is apparent from AEMO's letter, the CEPU's public comments and Transgrid's own concerns about the impact of the industrial action and the degradation of the network, that the situation has reached a critical point. Further, it is also clear that negotiations have reached a stalemate.

Transgrid respects the right of its employees to take industrial action. However, in light of the current circumstances, Transgrid calls for the CEPU and Professionals Australia (unions) and your members to immediately suspend all protected industrial action impacting system security on an indefinite basis. Specifically, Transgrid requires that:

- the unions agree that the 'Extended Safety Commitment' be amended as follows:
 - that the unions ensure its members comply immediately with any direction made by Transgrid in relation to work which Transgrid considers is 'emergency work' or where Transgrid has declared a Declared Incident. If a union considers that a direction does not relate to emergency work or to a declared incident, they should notify the Fair Work Commission of a dispute;
 - that the definition of emergency work be extended to include circumstances where there is a risk of a system outage;
 - that the unions' members will return to service immediately any assets which are currently switched out; and
 - to the extent assets are switched out during the operation of this amended Extended Safety Commitment, they will be returned to service immediately, including but not limited to bushfire preparatory work, (together, the **Revised Safety Commitment**);
- the unions agree that the Revised Safety Commitment will apply to all forms of protected industrial action taken from the date of this letter;
- your members will suspend protected industrial action to facilitate the connection of any transmission, generation (including new generators) and storage facilities (including BESS projects) to the network to ensure system security.

Transgrid considers that this is the only responsible course of action in the present circumstances. If the unions do not agree to all of the measures set out immediately above, Transgrid intends to make an application under section 424 of the Fair Work Act 2009 (Cth) to terminate the protected industrial action. Transgrid is currently in the process of preparing that application.

Transgrid seeks a response to these matters as a matter of urgency and, in any event, **by no later than 5pm on Thursday 18 July 2024.**

Transgrid reserves all of its rights.

[24] There have occurred six incidents where protected industrial action has threatened blackout and/or load shedding (reduction in electricity to selected areas as a last resort). Two

particular examples of such incidents, which are generally reflective of all six incidents, involved:

- (a) The Bega Area on 4 May 2024; and
- (b) A First Forecast Lack of Reserve Level 2 Condition on 18 May 2024.

(a) The Bega Area on 4 May 2024

[25] The Bega area is connected to the national power grid by two 132 kV feeders, being Feeder 974 and Feeder 97R. These are owned by Essential Energy.

[26] Among other things, the Bega area includes:

- (a) approximately 24,286 customers;
- (b) 882 life support customers;
- (c) hospitals; and
- (d) nursing homes.

[27] On or around 2 May 2024, Feeder 974, which runs from Bega to Cooma, was de-energised to enable operational work to be performed. This meant 24,286 customers, 882 of which are life support customers, multiple hospitals and nursing homes were left on radial (meaning only one feeder supplied the area), such that the network was not secure.

[28] On or around 2 May 2024, the work was completed, and Feeder 974 was ready to be returned to service, which needed to occur imminently to resecure the network, and at 3.57pm on 3 May 2024, Transgrid received a request from Essential Energy that Transgrid return Feeder 974 to service.

[29] At 5.36pm on 3 May 2024, an employee was directed by Transgrid to perform the return switching. This required a Substation Technician to attend to Feeder 974 at Cooma and perform the tasks that would return it to service, including switching. That communication included the following:

you are aware, members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU / ETU) are currently engaged in protected industrial action.

This protected industrial action is subject to a Safety Commitment. Amongst other things, that Safety Commitment provides:

1. An employee will temporarily suspend industrial action to perform Emergency Work, where such an employee is directed in writing to perform Emergency Work”

2. "Emergency Work" is work that if not performed imminently, would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

You are directed to perform the following "Emergency Work".

Return switching of 974 Cooma 132 to Bega 132. The current situation leaves 24,286 customers, 882 of which are life support customers, multiple hospitals and nursing homes on radial. This is an unacceptable state in which to leave Essential Energy's network for an extended period particularly while facing uncertain weather conditions.

If this work is not performed imminently, in Transgrid's view, this would create a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury as informed by Essential Energy.

If you do not do so then

1. In Transgrid's view, you will be engaging in unprotected industrial action. Amongst other things, this means that Transgrid must not pay you while you are engaging in the unprotected industrial action with a minimum deduction of 4 hours;
2. You may be subject to disciplinary action.

[30] At 6.30pm on 3 May 2024, Allen Hicks (Secretary of the CEPU) replied, questioning whether the work needed to be performed as directed. The CEPU challenged Transgrid's call on whether the 'Safety Commitment' exception applied to the locking ban. Mr Hicks wrote:

I am in receipt of an email you have sent to Transgrid employees directing them to perform emergency work.

Your email does not clarify what the emergency is.

On the information you have provided it is not clear how you purport this to be an emergency.

To give proper consideration to your request please advise of the following:

Do the 24,286 customers currently have power?

What serious and imminent threat to human life currently exists?

What serious and imminent risk of personal illness or injury currently exists?

Upon receipt of the requested information we will give further consideration to your request.

Absent any further information, We strongly refute any suggestion that employees are undertaking unprotected industrial action by refusing to perform the requested work and reserve all rights with respect to the threats you have made to their employment.

I await your response.

[31] At 10.37am on 4 May 2024, Ian Davidson (General Manager of Maintenance) replied to the CEPU, as follows:

I note Transgrid has requested under the safety commitment a response to return a feeder to service to alleviate the risk to ~24,000 people on the South Coast. This was in response to a request by Essential Energy who requested “that TransGrid invoke whatever emergency provisions are available to have this line returned to service. In consultation with Les Parker (Head of System Control Essential Energy) on behalf of Essential Energy I am advising that the current situation which leaves tens of thousands of regional customers radial is an unacceptable state in which to leave our network”

Transgrid has directed in writing by Darren and requested standby response to both perform the restoration under the safety commitment and/or as a mitigation step to relocate the switching personnel from Yass to Cooma to reduce any further risk to customers in the event the loss of load occurs. Presently the CEPU has advised Transgrid personnel to not respond.

I was advised by Keiren Tolley that she received a call from Matt Murphy last night at 9:23pm and told me that no one would be responding to 974 line switching and the employee directed by CEPU to be called back off the job.

Due to fatigue risks to Transgrid personnel the matter was left overnight as Transgrid was unable to change the current status given the return home of Transgrid’s personnel.

This morning Transgrid has again requested standby personnel to attend to this matter as a means to mitigating any further risk.

As discussed last night, these customers are currently being supplied by a radial feed and hence are at risk in the event of any disruption to this single feeder. In the event of loss of supply the risk of a lack of redundancy is immediate and no longer imminent.

The loss of supply is an immediate threat to the radial feeder with 24,286 customers of which 882 are life support customers. A delayed response would have a significant impact on these customers including the life support customers and creates a serious and imminent threat to human life or a serious and imminent risk of personal illness or injury.

Transgrid believes the failure to respond both last night and currently, is in breach of the safety commitment.

We again request this response be undertaken.

[32] At 10.10am on 4 May 2024, Alana Heffernan, Head of Legal and Operations of the CEPU, wrote to Mr Tattersall, raising (amongst other things) the following issues:

Alleged Emergency Work

I refer to the above matter and to your recent communications with employees about works to be performed on the 974 Cooma-Bega line. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the ETU) represents the industrial interests of members you have contacted.

The ETU understands you have directed employees to perform work in a period of protected industrial action on the basis that such work is “Emergency Work” for the purpose of the Safety Commitment. The ETU has the following concerns.

Communication on 3 and 4 May 2024

1. On 3 May 2024, you advised employees that the “current situation leaves 24,286 customers [without power], 882 of which are life support customers, multiple hospitals and nursing homes on radial”. The ETU had received instructions that, at that time, there was no power outage.

2. Accordingly, the ETU immediately wrote to you seeking clarification of:

- a. Whether the 24,296 customers currently had power;*
- b. What serious and imminent threat to life existed at the time;*
- c. What serious and imminent risk of personal injury existed at the time.*

3. The ETU required the above information to be able to properly advise its members as to whether there was Emergency Work to be undertaken.

4. You failed to respond, in any way, to the ETU’s correspondence. Instead, Transgrid continued to communicate directly with ETU members. Keiren Tolley, Manager of Execution, has refused to engage with ETU organiser, Matt Murphy. Instead, they have continued to communicate directly with ETU members. This conduct is obviously concerning and undermines freedom of association.

5. The ETU has since been advised that Keiren Tolley has directed Mr Paul Goulding, ETU member, to relocate to Cooma for the duration of the purported incident. This direction is neither lawful nor reasonable, for the following reasons (without limitation):

- a. relocations are intended to be by mutual consent. Transgrid has not sought our member’s voluntary consent;*
- b. the direction has had no regard to our member’s personal or family circumstances;*
- c. the direction purports to rely on the ETU’s Safety Commitment. It extends far beyond that Safety Commitment and appears to require our member to perform duties that extend beyond simply performing “Emergency Work”.*

[33] After further correspondence, and at 5.50pm on 4 May 2024, Ms Heffernan wrote to Mr Davidson stating:

Alleged Emergency Work

I refer to the above matter and to recent correspondence between the parties. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and

Allied Services Union of Australia (the ETU) responds to your most recent email as follows:

1. The ETU denies that the current situation can properly be characterised as an “Emergency” for the purpose of the Safety Commitment. There has been no disruption to power supply and the community has full power.

2. As a gesture of good faith, the ETU has arranged for the Yass standby employee to travel to Cooma to be locally available to switch if the radial Bateman’s Bat-Bega 132kV line is affected and/or there is a disruption to power. In either of these events, the employee will immediately restore power. The employee will be in a position to do so, as there is an ability to immediately bring the 974 132kV Cooma-Beha line into service.

[34] On 9 May 2024, Feeder 974 was returned to service. If there had been a disruption to Feeder 97R before Feeder 974 had been restored to service, there would have been an immediate threat of loss of supply to the 24,286 customers of which 882 were life support customers, and that delay in restoring power to these customers created an imminent threat to human life or a serious and imminent risk of personal illness or injury.

(b) A First Forecast Lack of Reserve Level 2 Condition on 18 May 2024.

[35] In May 2024, there were three particular 330kV transmission lines out of service in NSW, being:

(a) Yass 3L 330 kV line (3L Line);

(b) Dapto Marulan 8 330 kV line (8 Line); and

(c) Tamworth – Armidale 86 330 kV line (86 Line).

(the Relevant 3 Lines)

[36] Those lines collectively supply power to a broad geographical area in NSW, including the South Eastern Highlands, the Sydney Basin and Nandewar and New England Tableland regions. The 3L line is connected through Yass to the Collector wind farm.

[37] 8 Line was out of service from 27 April 2024 for repair of a failed voltage transformer and was ready for restoration on 3 May 2024. 3L Line and 86 Line were isolated to enable project work to be undertaken by Transgrid. Putting these lines back into service requires relevant Transgrid employees to undertake restoration switching, which takes between 30 minutes and two hours not including travel to site.

[38] At 11.23am on 17 May 2024, AEMO notified Transgrid of a forecast LOR 2 condition (Lack of Reserve) in the NSW Region to occur on 20 May 2024. AEMO requested Transgrid return the Relevant 3 Lines to service. The reasons for the LOR 2 forecast included:

(a) planned and unplanned generator outages;

(b) forecast elevated demand for electricity due to cold weather conditions; and

(c) constraints associated with the Relevant 3 Lines being out of service.

[39] With effect from 8pm, on 17 May 2024, the Chief Executive Officer of Transgrid declared a “*Declared incident*”.

[40] At around 10.26am on 18 May 2024, Ms Heffernan wrote to Transgrid as follows:

Alleged Declared Incident

I refer to recent communications from you to TransGrid employees, including members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the ETU). The ETU has the following concerns:

Your correspondence

1. At about 7:45am this morning, a Notice declaring a declared Incident, signed by you, was circulated to employees (the Notice).

2. The Notice refers to a forecast LOR on Monday, 20 May 2024.

3. The Notice fails to identify how circumstances, which are forecast to occur in two days, meets the following definition of “Declared Incident” as prescribed by the Safety Commitment:

“A “Declared Incident” will be declared by the Chief Executive Officer of TransGrid and covers major emergency situations such as storms, bushfires, IT breakdown and major equipment failures”.

4. It is the ETU’s view that, based on the limited information you have provided, the circumstances cannot properly be regarded as a “Declared Incident” at this stage. On that basis, this provision of the Safety Commitment has not been triggered.

Next steps

5. In the future, all such correspondence ought to be directed to the ETU, in addition to employees. This will assist the parties to communicate effectively and ensure ETU members are able to respond appropriately to bona fide Declared Incidents.

6. In respect of this Notice, the ETU requests you either withdraw it or provide a proper basis to justify the characterisation of the circumstances as a Declared Incident.

[41] Employees did not return the Relevant 3 Lines to service, and further correspondence was exchanged between Solicitors for Transgrid and the CEPU.

[42] On the evening of 18 May 2024, 8 Line was returned to service, and on the afternoon of 19 May 2024, 86 Line was returned to service. The 3L Line was not returned to service until 18 June 2024.

Maintenance Delays

[43] Transgrid structures its field work into two categories or programs:

(a) Capital Program: work performed under the capital program involves the building and installation of new assets, or the replacement of existing assets; and

(b) Maintenance Program: the maintenance program consists of work to ensure the smooth operation of existing HVTN assets. This includes routine work such as inspections and preventative maintenance tasks, as well as emergency or incident response work such as:

(i) responding to incidents where the supply of electricity is interrupted or cut off (known as 'loss of supply events');

(ii) dealing with asset condition issues like oil leaks; or

(iii) dealing with asset failures like transmission towers falling over.

[44] The protected industrial action taking place has had an effect on the amount of Maintenance performed. I accept that Transgrid is approximately 25% behind on spend in relation to the program of works for the first year of the regulatory period and is continuing to fall further behind, primarily as a result of the protected industrial action, and that Transgrid is similarly behind on its scheduled progress in relation to the program of works.

Submissions of Transgrid

[45] Transgrid sought termination of the protected action. Transgrid submitted that the trigger points for such termination as outlined in the Act were clearly met and referred to the six incidents where protected industrial action have threatened blackout /load shedding, as well as delays in the maintenance programs within Transgrid that it was submitted were also threatening or would threaten safety.

[46] Transgrid submitted that it and the CEPU were “*coming at this from different universes*” because the CEPU thinks that because risk is objectively unlikely, that is the chance of actually happening is unlikely, that they should not have to suspend the protected industrial action pursuant to the Extended Safety Commitment.

[47] Transgrid submitted that the Commission only need find one form protected industrial action that is having the effect outlined in s.424(1)(c) or (d) in order to have jurisdiction to order the termination of all protected industrial action taking place.

[48] Transgrid conceded that, having found protected industrial action that is having the effect outlined in s.424(1)(c) or (d), the Commission could order suspension of such action,

however, their submission was that the appropriate order is termination in the circumstances given how long the parties have been negotiating and the apparent impasse reached.

Submissions and Undertakings of the CEPU

[49] At the commencement of its submissions, the CEPU proffered the following undertakings¹, which would apply whether accepted as part of a resolution by Transgrid or not:²

The ETU undertakes until 30 September 2024 not to engage or organise to engage in the following actions authorised by the protection action ballot order of 11 December 2023 being an unlimited number of indefinite and/or periodic gains on the completion of field staff and control room staff writing and carrying out field staff switching for work groups, client, contractors, accredited (indistinct) risks.

An unlimited number of indefinite and/or periodic bans on using physical or digital locking systems including but not limited to locking or unlocking of phones, iPads, tablets, computers, switchboard, switch rooms, electrical cabinets, access gates, air brake switches, circuit breakers, switching stations and substations (being the switching or locking bans).

[50] The CEPU submitted that Transgrid could engage with the union in a far more productive way, which would mean that genuine safety issues were resolved on a much quicker basis rather than simply threatening employees with disciplinary action and allegations that they're taking unprotected industrial action.

[51] The CEPU submitted the most important point is that the Commission has to take into account the undertaking put forward by the CEPU and if the Commission does so, the Commission would not make an order under section 424.

Reply of Transgrid

[52] Transgrid submitted that if there was to be acceptance of an undertaking from the CEPU, it would need to effectively provide the safety commitment outlined in the 16 July Letter.³

[53] Transgrid submitted that the Commission could exercise its power to suspend action power, decide at this stage to make an interim order suspending for a period of a few weeks, and, give the parties the opportunity to see if they can reach an agreement in relation to what undertakings the CEPU might give.⁴

Decision on Transcript

[54] At the conclusion of the Hearing, I outlined the following basis for my decision:⁵

...Well, noting the undertakings provided by the respondent union, I nonetheless find that pursuant to section 424(1)(c) that the requisite jurisdictional hurdle has been met in relation to the threat to persons and the public and the like. I intend to order that protected action in relation to the work defined in the required safety commitment declared as - as a declared incident or emergency work and declared as such by the

CEO of Transgrid be suspended for a period of three weeks effective from the date of this order.

That will be the terms - the first terms - or the first term of the order. Effectively, what that puts in place is the breathing space within which the parties can, what seems to be, resolve issues of undertakings between themselves. Let me be abundantly clear, as I think I was with my questioning of the applicant, and not so much with the respondent, but I thought I'd said enough. I consider the Extended Safety Commitment urged at page 325 of the digital court book to be something that would be productive in the further conduct between the parties.

An order will issue with the associated notations as to notification to the parties and it will be - commence operation at 11.59 pm tonight. A decision will be published as soon as possible thereafter giving reasons.

Reasons for Decision

[55] The evidence regarding the six incidents that have occurred where protected industrial action has threatened blackout and/or load shedding was compelling, and clearly established that protected industrial action engaged in has threatened to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. The most severe example would involve persons on life support equipment but would also involve multiple hospitals and nursing homes left with an electricity network that was not secure.

[56] The actions of the CEPU in the two particular examples of such incidents, and the balance of the six incidents, disclosed impermissible attempts to block and/or delay Declared Incidents and Emergency Work sought to be dealt with by Transgrid pursuant to the Extended Safety Commitment.

[57] The protected industrial action insofar as it affected maintenance within Transgrid did not on the evidence before the Commission, however, threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. That it has resulted in mounting delays in maintenance is undoubted, but such an effect is not proscribed, and is in reality a usual consequence of protracted industrial action.

[58] Upon my conclusion that the s.424(1)(c) criterion has been satisfied in some, but not all, respects, I was required by the Act to make an order suspending or terminating protected industrial action. The only protected industrial action to which the required order could apply was that which I found satisfied the s.424(1)(c) criterion relating to Declared Incidents and Emergency Work, and the operation of the Extended Safety Commitment.⁶

[59] As to the discretion as to whether to make a suspension or termination order, I determined to make a suspension order as, notwithstanding submissions by Transgrid that bargaining was at an impasse, I considered that, particularly where the parties would not be able to access the intractable bargaining provisions of the Act until September 2024, termination would be premature.

[60] Regarding the issue of the duration of the order that I was required by s.427 to specify, I considered, as is apparent from the decision on transcript, that a three-week suspension would allow the parties to resolve issues surrounding the application of the Extended Safety Commitment and the CEPU's undertakings. That was particularly so where once such an order was made, any other industrial action notified ceased to be protected by reason of s.413(7) whilst such order is in operation.



DEPUTY PRESIDENT

Appearances:

Mr R Dalton of Counsel (KC) on behalf of the Applicant.

Mr A Crocker of Counsel on behalf of the Applicant.

Mr I Latham of Counsel on behalf of the Respondent.

Ms A Heffernan on behalf of the Respondent.

Hearing details:

24 July 2024.

In-person.

Sydney.

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¹ Transcript PN 1064 to 1069.

² Transcript PN1069 and 1101.

³ Transcript PN 1108.

⁴ Transcript PN 1115 and 1116.

⁵ Transcript PN 1131 to 1133.

⁶ *Monash University v NTEIU* [2013] FWCFCB 5982 at [54]; *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200 at [128]-[130] per Buchanan J, [179]-[180], [182] per Perram J.