



REASONS FOR DECISION

Fair Work Act 2009

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

Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy

v

**Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Services Union of Australia**

(B2024/1007)

Electrical Power Industry

DEPUTY PRESIDENT SLEVIN

SYDNEY, 26 AUGUST 2024

*Application by Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy for
an order to terminate protected industrial action*

[1] On 12 August 2024 I issued my decision dismissing an application by Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy (Endeavour) for an order pursuant to s. 424 of the *Fair Work Act 2009* (Cth) to terminate protected industrial action. The application was made on 7 August 2024. The Commission is required to determine s. 424 applications, if practicable, within 5 days. I was able to hear and determine the matter in that time, but it was not practicable to provide written reasons. These are my reasons.

[2] Endeavour asked for orders that protected industrial action that is being engaged in, and is threatened, impending or probable be terminated. The application was made on the ground that industrial action had threatened and is threatening to endanger the life, the personal safety and health, and welfare of the population or of part of it. The employees who have engaged in the industrial action are members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The CEPU opposed the application.

[3] At the hearing Endeavour relied upon witness statements of Emma Murison, Head of People and Culture, Edmund Li, Head of System Operations, Danielle Manley Head of Customer Experience, and Benjamin Barker Network Control Manager. Mr Barker was cross examined. The CEPU relied upon statements of Tara Koot, Industrial Organiser, Tony McCarthy, Emergency Services Officer and Senior Lead Delegate, Jareth Woolsey, Leading Hand Electrical Fitter Mechanic and Lead Delegate, and Peter Johnson, Live Line Worker, and Delegate. Ms Koot and Mr McCarthy were cross examined.

Background

[4] The background to the application is largely uncontested.

[5] Endeavour describes itself as a “poles and wires” electricity distribution business. It is the sole supplier of electricity to 1.1 million commercial and residential customers in Greater Western Sydney, the Blue Mountains, mid-Western NSW, Southern Highlands, Illawarra, and the South Coast. It estimates the residential population of these areas at approximately 2.5 million people. Endeavour described its infrastructure and assets as comprising approximately:

- a) 202 major substations
- b) 32,600 distribution substations
- c) 430,000 power poles and streetlight columns, and
- d) 60,600 km of overhead and underground cables.

[6] Endeavour’s electricity network supplies electricity to approximately:

- a) 80 major hospitals
- b) 40,000 life support customers
- c) 8,700 telecommunications hubs
- d) 96 police stations
- e) 28 state emergency service depots
- f) 82 fire stations
- g) 87 rural fire stations
- h) 1,500 utility stations/plants for water and/or sewerage
- i) 223 aged care homes
- j) 880 schools
- k) 1,400 traffic lights
- l) 227,849 streetlights, and
- m) 337,000 hot water systems.

[7] Endeavour has around 1,580 employees. The majority of those work in field operations, system operations, customer liaison, engineering, and administrative roles. An important part of the work performed by these employees involves the maintenance of Endeavour’s infrastructure and assets to ensure the supply of electricity over the network.

[8] That work is done on both a planned and unplanned basis. Planned work includes construction, inspection, maintenance, augmentation, and defect rectification of one or more of its assets including poles, wires, feeders, and transformers. It also includes any follow up work subsequent to initial emergency responses and reactive work in response to unplanned work. Planned work may result in an interruption in supply of electricity or outage. Endeavour is required under the National Energy Customer Framework to provide customers with four business days’ notice of any outage due to planned work.

[9] Unplanned work occurs in response to unexpected or abnormal events on the network. Examples include the breakdown of a network part, or an incident like a vehicle colliding with a pole or excavation machinery disrupting underground cables. These incidents often require immediate attention as they can cause an unexpected power cut which may pose a danger to public safety. Endeavour employs Emergency Services Officers and Rapid Response teams

who respond to unplanned work. They make the area safe and conduct minor repairs. If additional work is required from a safety or network perspective, employees from Field Operations are called out to do that work. Where incidents occur that threaten the safety of the general public, employees and/or the network are fixed as soon as possible. These are known as fault and emergency incidents. They include wires becoming unsafe or cables being exposed creating an electrocution risk, vehicle or other objects running into poles or substations, where live electricity is being fed back into premises, for example through taps, creating an electrocution risk, and poles falling onto footpaths and/or roads. There are on average 8,300 fault and emergency incidents per year. At any one time Endeavour has around thirteen employees working on or managing unplanned defects on a weekday as part of their rostered work and around 7 employees working on weekends on standby or overtime arrangements.

[10] Bargaining has been occurring for an enterprise agreement to replace the *Endeavour Energy Enterprise Agreement 2021* since September 2023. The agreement covers approximately 1,400 of Endeavours employees. Since September 2023, the bargaining has involved over 60 bargaining meetings, 30 meetings to deal with issues common to all parts of the business and 30 sub-committee meetings to deal with matter relating to discrete areas of the business. The assistance of the Commission has also been sought. Endeavour has notified a dispute over bargaining under s. 240 of the Act and the CEPU has sought good faith bargaining orders and s. 229 of the Act. Compulsory conferences have also occurred pursuant to s448A of the Act. The parties are still apart on a number of issues.

[11] In December 2023, the CEPU sought and was granted protected action ballot order pursuant s.347 of the Act. A ballot was conducted. The ballot was of CEPU members only. 809 employees were eligible to vote. The employees authorised the industrial action described in the ballot. In May 2024, a further protected action ballot order was made permitting a ballot in relation to additional forms of industrial action. The employees approved the additional forms of industrial action.

[12] The industrial action authorised by the protected action ballot included a safety commitment. The consequence of the commitment is that any industrial action authorised by the employees in the ballot was limited by the safety commitment. The safety commitment was subsequently included in notices of industrial action. It was in the following terms:

Safety Commitment

A. An employee will temporarily suspend industrial action to perform Emergency Work where:

- (i) suspending the action is necessary to perform Emergency Work; and
- (ii) the employee is directed in writing to perform Emergency Work.

B. “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.

C. An employee will temporarily suspend industrial action to perform work where suspending the action is necessary to perform work affected by and during a “Declared Incident”.

D. A “Declared Incident” is referred to in the Endeavour Energy Enterprise Agreement 2021 and may be declared by the Chief Executive Officer of the Respondent. It will generally cover major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.

E. 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.

F. At all times, the following number of Senior System Operators and System Operators (Operators) who are ordinarily rostered to work will attend the Control Room and monitor their systems for the purpose of identifying and responding to Emergency Work:

- a. Day shift – 4 Operators in total
- b. Afternoon shift – 4 Operators in total
- c. Night shift - 2 Operators in total.

[13] Endeavour explained that it has received notices of protected industrial action on an almost daily basis since 24 January 2024. I was provided with a bundle of documents comprising the notices. Typically, each notice refers to a suite of industrial action, ranging from speaking to a member of the public during work related calls about industrial action and the CEPU campaign for a new enterprise agreement to rolling 1-hour stoppages of work. An example of the notices is attached to these reasons and marked Annexure A. It is the notice provided to Endeavour on 5 August 2024.

[14] Once a notification of the intention to take industrial action is provided to Endeavour it is up to each employee to determine what, if any, of the notified industrial action she or he takes. Counsel for Endeavour put to the CEPU witnesses in cross examination the circumstances of a hypothetical employee, Tom Jones, who was said to be typical, who may attend work but choose to take only some of the of the action notified. The witnesses confirmed that for someone like Mr Jones, it was not unusual that only some industrial action would be taken. This leaves Endeavour in a state of uncertainty as to what action would be taken until the time it is actually taken.

[15] Endeavour complains that the industrial action since February 2024 has had an impact on both planned and unplanned work. It has had the cumulative effect of eroding the protections that are built into the network. Some maintenance, system repairs and upgrades, and lower risk category works have not been actioned for around six months. Endeavour has not completed approximately 1276 planned works and outages since the industrial action commenced. It says that if the industrial action were to cease now, it will take at least 12 months to catch up on this work. The extent of the impact was described by reference to the previous year. During 2023 Endeavour executed 8,225 planned works and had 2,648 cancelled planned works. In 2024, to date, to date it has executed 2,640 planned works and had a total of 3,239 cancelled planned works, 1,276 of the cancellations were because of industrial action.

[16] When planned work is to result in an interruption of electricity supply Endeavour gives customers at least 4 days' written notice of the work. Additionally, any life support customer within a 250m proximity of the outage area is also notified, as a precautionary measure, to ensure all customers who may be impacted by the outage are notified. The notification sent to life support customers advises to make alternative arrangements for the period of the planned outage, which may require relocation or arrangements for alternative supply. Endeavour also advises these customers of steps to take to prepare for the outage. Those steps include ensuring reserve oxygen cylinders are filled and working, medical supplies are fully stocked in case of an emergency, a back-up is built into the life support equipment and that they have supply power back-up generators for their life support equipment if the power is out, or that they consider making alternate arrangements at another location, including a medical centre or other health facility, where it is not possible for them to remain at the usual place of residence.

[17] When a planned outage does not occur, Endeavour notifies customers. Endeavour led evidence of a survey of customers who had been notified of an outage but later told the outage would not occur. The survey covered the financial year 2024. Survey forms were sent to 31,568 customers. There were 1,589 returns. Endeavour provided the survey results and Ms Manley gave an account of her assessment of those results. Based on Ms Manley's assessment it appears that the majority of customers who complained did so because they were inconvenienced. They told that there would be an outage, they made alternative arrangements, and, when they were told there would not be an outage, they had made those arrangements for no reason. Examples were given of customers arranging alternate accommodation for the time of the notified outage, postponing medical treatment, hiring a generator for the day, cancelling housework and leaving the house for the day, cancelling clients in a home business, and buying ice to keep frozen goods frozen. Other complaints were about late notice of the cancellation, and the cost associated with arrangements for extra childcare or alternative accommodation. Ms Manley expressed concern the impact of cancelling of planned work on customers level of trust in Endeavour's notifications to customers.

[18] Examples were also concerning the need to install and maintain generators as a source of power while planned work is performed on the network and the planned work was cancelled, sometimes a number of times, due to industrial action. This has led to longer periods where generators are used as the primary power source. Residents in one of these areas have complained that the generators, which are diesel fuelled, smell. Residents in one street complained that the smell prevents them from opening doors and windows. Others found the noise from the generator disruptive at night and others could not hang out washing. The repair work has been carried out in this area and a generator is no longer being used. Similar circumstances arose in a second example where it was said that delays in planned work arose due to the industrial action, led to a prolonged use of a generator and residents had complained. The work there has also been completed and the generator is no longer in use. The time that it took to carry out the repairs had similarly led to frustration and complaints from customers. A third example involved a wholesale food business. The business was informed of a scheduled outage for 2 days in April 2024. A generator was obtained to cover the outage. The outage was postponed resulting in unnecessary costs to the business. A further outage was scheduled for 2 days in June 2024. To reduce costs the generator remained on site at cost to the business so it could be used to cover that outage. That outage was also postponed. The outage is rescheduled for 31 August 2024. The business continues to incur the costs of keeping the generator on site

in preparation for the outage. It has expressed concern about the costs incurred and the uncertainty that the next scheduled outage will also be cancelled.

[19] Mr Barker described the current vulnerabilities in Endeavour's network. His evidence identified an increasing risk and severity of unplanned power outages. I understand Mr Barker's evidence to be that Endeavour operates its network to include additional or duplicate components, systems, or pathways to ensure that the network remains operational if there is a failure in one of these components, systems, or pathways. These duplicates are known as redundancies. This is said to be a critical aspect of ensuring a continuous supply of electricity over the network. Endeavour has 209 major zone transmission substation or sub-transmission switching stations from which it distributes electricity to customers. These assets are operated on the basis that each substation has adequate redundancies in place. This means that if there is a failure in an asset the duplicate asset becomes operational so that there is no outage in the system.

[20] Mr Barker describes 4 of the 209 zones as not currently having network redundancy. This is because back up feeder cables are not available should the primary feeder cable fail. Feeder cables transport electrical energy from substations to various distribution points. The reason that the feeder cables are not available is said to be the protected industrial action that has been organised by the CEPU. According to Mr Barker's evidence when Endeavour has attempted to repair the faulty feeder cables the work is not carried out due to the industrial action. The faulty feeder cables give rise to a risk that if the operating feeder cables were to fault then the entire area for which the substation provides power will experience an unplanned outage. He estimates that it would take between 5 hours to 2-3 days to restore power in those circumstances. Mr Barker provided the number of customers, including the number of customers on critical life support in each of the areas affected. The areas, cable references for the feeders, date the one cable was damaged, its status at the time the application was made, and the number of customers are as follows:

Substations	Feeder cable references	Date of any fault	Status	Customers Total (Vulnerable)
Huntingwood	23J	February 2024	out	1,174 (50)
	23G	-	operating	
North Leppington	9L4	6/4/24	repaired 25/7/24	3,607 (67)
	93X	25/7/24	out	

[21] Mr Barker states that if the remaining feeder cable in each area faulted then the work to repair it would be regarded as Emergency work as it would give rise to an imminent threat to the health and safety of the population in the area.

[22] Mr Barker provided an assessment of the fault rates for the feeders as follows:

Feeder Cable	Fault rate per year
23G	0.07
23J	0.13
9L4	2 per year
93X	1 per year

[23] There is also concern about the substations at Chipping Norton and Anzac Village. They supply 5,183 customers and 6,635 customers, respectively. At Chipping Norton 203 are described as critical life support customers. At Anzac Village there are 300 customers so described. The concern at these substations is that feeder breakers have low points of failure. The feeder breakers are on feeders 501 and 528. This issue is usually managed through maintenance and ongoing inspections. Attempts to perform work on the feeder breakers on feeder 501 have been thwarted by industrial action on 6 occasions and on 3 occasions on feeder 528. I was not provided with evidence of the fault rates for these feeders.

[24] I understand the current situation to be that as planned work has not occurred on the assets referred to by Mr Barker there is no redundancy in place in the four areas covered by the substations referred to and an incident involving the operating feeders would result in an unplanned outage necessitating urgent unplanned work.

[25] There was some contest about the feeders. Mr McCarthy's evidence was that there is a switching plan in place for feeder 23G which would address the redundancy for the Huntingwood substation area. The switching plan would allow electricity in the affected area to be supplied from adjacent substations. Mr Barker in his oral evidence said that no switching plan existed. Although he agreed with Mr McCarthy's assessment that Endeavour could use a switching plan to get electricity diverted from nearby substations should feeder 23G fault in the Huntingwood area. This would restore power to the majority of customers as Mr McCarthy described. Mr McCarthy was cross examined on whether the switching plan existed. He confirmed he believed it did. The issue was clarified late in the proceedings by counsel for Endeavour whose instructions were that the switching plan had been developed in February 2024 but not finally approved. It exists but is regarded as a draft plan. Mr McCarthy's evidence also went to the other areas and it was to the effect that switching power from adjacent substations would also address any damage to the remaining feeder cables and deal with any outage that arose.

[26] Mr Barker confirmed in cross examination that at no stage had Endeavour relied upon the safety commitment which was recorded in the notifications of industrial action to require work be done to repair the four faulty feeder cables. He explained that he was concerned about the response he would get from the CEPU if he did so. He stated that there had been requests that the work be done but they were not requests that made it clear that the work was emergency work caught by the Safety Commitment.

[27] The concern expressed by Endeavour about the feeder cables amounts to a concern that redundancy measures that provide an immediate back up should a fault occur are compromised by the industrial action. Where there is no immediate solution to an unplanned fault then unplanned or emergency work is required. Mr Li gave evidence for Endeavour of the impact of

the industrial action on unplanned work to the effect that labour for the purpose of resolving unplanned outages was available. Although he said it was more challenging. His evidence was:

Since the commencement of industrial action, response to fault and emergency has been more challenging with increasing difficulty to call in standby staff, time spent on issue directions for work to be done and dealing with objections raised by employees taking industrial action and the ETU, relating to the performance of work under the Safety Commitment. This has been reflected in an increase in the average time to respond and resolve a fault and emergency by around 50 minutes.

[28] After receiving the statements filed by Endeavour in the proceedings the CEPU wrote to company on 12 August 2024 and informed it that the CEPU would ensure that its members would be available to restore feeders 93X, 23J and 501 and noted that feeder 528 had already been restored. That work would remove any risk of outages in the North Leppington, Huntingwood and Chipping Norton substation areas. Endeavour responded to the letter stating that it would now schedule work to ensure that the work on the feeders was done as quickly as possible. It also confirmed that feeder 528 had been restored thereby addressing any risk to the community.

[29] Mr Barker also gave evidence about diesel generators. He describes them as last minute short term solutions to supply electricity in small areas. He also describes them as noisy, environmentally damaging, and more prone to unexpected breakdowns. He stated that prior to the current industrial action generators were rarely used for more than 48 hours and never more than a week. The industrial action has resulted in some generators being used for longer periods. Three examples of recent use of generators were referred to by Mr Barker. The first, a generator in Baulkham Hills was installed in the grounds of a primary school in June 2024. There have been complaints about the ongoing use of the generator from the public, the school, the local council, and the Environmental Protection Agency. The second, a generator in Ingleburn that was in place from February 2024 to July 2024. It tripped in July leaving customers without power for 12 hours. The repair work was declared Emergency work. The work was not carried out as directed and Endeavour maintains that the failure to do so amounted to unprotected industrial action. The third is the generator on the M7 Motorway. It has been in place since February 2024. Endeavour has sought to connect the customer to the network, but the protected industrial action has prevented it from doing so.

[30] Mr Woolsey gave evidence that generators are regularly used for longer than 48 hours and gave the example of the need to use generators when switch gears fail. Whilst it was once the case that switch gears were regularly maintained, that is no longer the case resulting in the need for replacement switch gears. He said switch gear failures now occur once a week. Mr Woolsey said installing replacement switch gears takes 4 days and that generators are used while this work is done.

[31] The CEPU letter of 12 August 2024 also referred to the generator at Baulkham Hills and stated that the CEPU would ensure that its members were available to fix the underlying fault requiring the use of the generator at Baulkham Hills.

[32] Mr Barker also explained the impact of two of the bans that form part of the protected industrial action; bans on switching and bans on the removal of earths and short-circuiting

equipment. Switching refers to the task of connecting and disconnecting various parts of the network. The process starts with system operators in the control room and requires physical work in the field which is done by qualified operators who open and close switches and place earths and other safeguards on the system. The bans are on doing the physical work in the field. Switching is a critical part of the work done by Endeavour and the ban on switching slows the way work is carried out. The bans on the removal of earths and short-circuiting equipment, if carried out, will have an impact on the safety of employees working on the network. The work the subject of the bans is carried out at the end of planned and unplanned work as a step in getting that part of the network the subject of the work up and running. Mr Barker's evidence is that while the CEPU has notified bans of this type, they have not been implemented by employees. Mr Barker expressed concern about the safety implications of the bans being implemented particularly in relation to unplanned work.

[33] Mr Woolsey disagreed with Mr Barker about the impact of bans on switching. Mr Wolseley has worked with Endeavour for over 22 years. He is an authorised switcher at all levels. He referred to declared events and emergencies and said that the employees could be directed to cease protected industrial action and perform that work if safety was critical and that they would do so. I understand this to be a reference to the Safety Commitment. He also explained that the ban on switching does not extend to circumstances where a switch needed to be fixed in critical situations or where a potential safety issue arises. He gave the example of the work currently being done to schedule work to address pre-summer bushfire defects. These will be completed by 31 October 2024. His evidence was that industrial action is not being taken in relation to this work. He also addressed the other concerns raised by Mr Barker about the potential impact of the switching ban on safety.

Section 424

[34] Section 424(1) provides:

424 FWC must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

(1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

- (a) is being engaged in; or
- (b) is threatened, impending or probable;

if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
- (d) to cause significant damage to the Australian economy or an important part of it.

[35] Section 424(1) requires the Commission to consider two things. First, whether protected industrial action is being engaged in or is threatened, impending or probable. Second, if it is,

whether it is satisfied that the industrial action had threatened, is threatening or would threaten to have the effects set out in s 424(1)(c) or (d).

[36] A recent Full Bench of the Commission in *CEPU v Transgrid* [2024] FWCFB 333 (*Transgrid*) described s. 424(1) as calling for an exercise of discretion in the broad sense in that the threat as to which the Commission must be satisfied for the purposes of s 424(1)(c) involves a degree of subjectivity or value judgment¹. The Full Bench went on to observe that s. 424(1) requires the Commission to initially identify whether particular protected industrial action is being engaged in or is threatened, impending or probable. If so, the Commission must then determine if it is satisfied that the particular protected industrial action has threatened, is threatening or would threaten to have consequences of the type set out in s 424(1)(c) or (d)².

[37] Subsection 424(1) requires that the Commission must make an order suspending or terminating the protected industrial action that is being engaged in, or is threatened, impending or probable if satisfied that it has threatened, is threatening or would threaten to endanger the personal safety or health, or the welfare, of part of the population. As the Full Bench in *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 (*ANF*) said:

[49] It is clear that there must be an appropriate evidential basis to found such a satisfaction. As the High Court said in *Coal and Allied Operations Pty Ltd v AIRC* in considering somewhat similar provisions in the *Workplace Relations Act 1996*:

“... the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment... [A] decision under s 170MW(3)(b) that industrial action is ‘threatening... to cause significant damage to the Australian economy or an important part of it’... is not simply a matter of impression or value judgment... the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question”.

[38] As to endangerment, the Full Bench in *ANF* said:

[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.

¹ At [20]

² At [25]

[39] In *Re Svitzer Australia Pty Limited* [2022] FWCFB 213 the Full Bench said:

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

[40] I was referred by counsel for Endeavour to three decisions where single members of the Commission found the requirements in s. 424(1) were met and was encouraged to take the same approach in the interests of comity in Commission decisions. I have considered those cases and do not believe that the facts considered in each of them were equivalent to the facts in this case. In the case that might be said to have some resonance with this matter, *Essential Energy v CEPU* [2016] FWC 3338, it was not contested that the protected action in question threatened to endanger the life, the personal safety, the health and the welfare of a part of the population of NSW. The industrial action here differs from that case and there was a contest as to whether it has threatened, is threatening, or would threaten to endanger the life, the personal safety, the health and the welfare of the population or part of it. A significant difference between this case and that is the Safety Commitment that imposes a significant constraint on industrial action when it comes to work necessary to address risks to human life or personal illness or injury.

Consideration

[41] For the purpose of satisfying the first step under s. 424(1) the industrial action that Endeavour relies upon is the industrial action notified in the CEPU’s notices of protected industrial action. I was provided with a bundle of 137 notices and directed to the following species of action:

- A) A 24 hour ban on managers and supervisors covered by the proposed enterprise agreement reporting planned protected industrial action to the company. The ban on managers and supervisors reporting planned protected industrial action the company
- B) A 24 hour ban on field staff switching for workgroups, contractors, ASPs, supply authorities or Ausconnex jobs, except to make safe in a fault.
- C) A 24 hour ban 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, airbrakes switches, circuit breakers, switching stations and sub stations.
- D) A 24 hour ban on writing or approving switching plans for planned switching at short notice (72 hours or less).
- E) A 24 hour ban on answering work calls and emails out of hours.
- F) A 24 hour ban on the use of electronic devices.
- G) A 24 hour ban on placing a Switching Plan in Progress.
- H) A 24 hour ban on executing steps for Planned Switching, except where the failure to remotely execute the switching steps would result in uncertainty as to the true status of the network.
- I) A 24 hour ban on issuing steps on multiple Switching Plans (ie issuing steps on one switching plan at a time).
- J) A 24 hour ban on amending an Approved Switching Plan.
- K) A 24 hour ban on starting and/or finishing on-site.

l) A 24 hour ban on the removal of operational earths, working earths, operational protective bonds, working protective bonds and CT shorts applied to protection relays, except in the case where refusal to remove these devices results in the inability to restore supply to life support customers.

M) The following stoppages of work:

- (a) A 1 hour stoppage commencing at 12am;
- (b) A 1 hour stoppage commencing at 1am;
- (c) A 1 hour stoppage commencing at 2am;
- (d) A 1 hour stoppage commencing at 3am;
- (e) A 1 hour stoppage commencing at 4am;
- (f) A 1 hour stoppage commencing at 5am;
- (g) A 1 hour stoppage commencing at 6am;
- (h) A 1 hour stoppage commencing at 7am;
- (i) A 1 hour stoppage commencing at 8am;
- (j) A 1 hour stoppage commencing at 9am;
- (k) A 1 hour stoppage commencing at 10am;
- (l) A 1 hour stoppage commencing at 11am;
- (m) A 1 hour stoppage commencing at 12pm;
- (n) A 1 hour stoppage commencing at 1pm;
- (o) A 1 hour stoppage commencing at 2pm;
- (p) A 1 hour stoppage commencing at 3pm;
- (q) A 1 hour stoppage commencing at 4pm;
- (r) A 1 hour stoppage commencing at 5pm;
- (s) A 1 hour stoppage commencing at 6pm;
- (t) A 1 hour stoppage commencing at 7pm;
- (u) A 1 hour stoppage commencing at 8pm;
- (v) A 1 hour stoppage commencing at 9pm;
- (w) A 1 hour stoppage commencing at 10pm;
- (x) A 1 hour stoppage commencing at 11pm.

[42] In its written submissions it pointed to four circumstances in which that industrial action has threatened and is threatening to endanger the life, the personal safety or health, or the welfare of a part of the population. The four circumstances in which this is said to have happened are:

- a) First, the industrial action preventing repairs to electricity feeder cables in multiple areas of the network, creating an imminent risk to thousands of customers, including hundreds who are reliant on a continuous supply of power for life support equipment.
- b) Second, the industrial action, due to electricity outages and/or system failures, resulting in customers relying on diesel generators for power for many months.
- c) Third, the industrial action causing planned outages to be cancelled at short notice, significantly impacting customers.
- d) Fourth, ongoing industrial action causing significant delays in planned maintenance activities resulting in an increase in the backlog of maintenance work.

[43] Following the CEPU's 12 August 2024 undertaking to ensure that labour was available to fix the faulty feeder cables Endeavour changed tack somewhat by emphasising that its case could proceed on the basis that the industrial action had threatened to endanger the life, the personal safety or health, or the welfare of a part of the population and so the requirement in s.424(1)(c) was met.

[44] In relation to the first circumstance, I am not satisfied that there was or is the requisite threat to endanger the life, the personal safety or health, or the welfare of a part of the population arising from protected action preventing repairs to the electricity feeder cables.

[45] The threat is said to have arisen due to the failure to repair cables. The threat is said to have been that the backup feeder cables used whilst the repair of the primary cables was being delayed may have or may fail resulting in an outage, and an outage results in the requisite endangerment. As the backup cables have not failed, this involves some speculation.

[46] There was evidence that when backup cables fail there are alternative measures in place that can deal with any resulting outage. Mr McCarthy's evidence addresses those measures. They include using switching plans to divert power from nearby substations which would restore power to the majority of customers affected by any outage. The evidence suggests that some customers may not be accommodated by the switch to another substation, but those customers are customers who require higher voltages than the switching plans could provide, and those customers have backup generators.

[47] Endeavour's evidence touched upon vulnerable customers, such as customers on life support, who could be endangered in the event of an outage. But there was also evidence all vulnerable customers have contingency plans such as small generators to deal with outages. Endeavour made general submissions as well about hospitals, emergency services providers and the like. I was not provided with evidence of any particular customer who had been endangered or under the threat of endangerment in the period that the primary feeder cables were faulty. Having not been provided with specific examples of customers threatened by the situation nor taken to the reasons those customers could not deal with an outage, if it did occur, I do not have evidence that there was the requisite threat of endangerment. The evidence falls short of allowing me to reach the required satisfaction. I consider the evidence here to fall into the category of generalised predictions as to the likely consequences of the industrial action which was described as inadequate by the High Court in *Coal and Allied Operations Pty Ltd v AIRC* and referred to by the Full Bench in *ANF*. Consequently, I am not satisfied that there was a danger to the life, the personal safety or health, or the welfare, of the population or of part of it.

[48] Another reason I am not satisfied that there was a risk arising from the faults in the feeder cables is the evidence of Mr Barker as to the frequency that those cables do fault. Mr Barker's evidence was that the faults occur on an infrequent basis. Consequently, while it was possible that an outage may have occurred due to a fault in the backup feeder cables, I do not consider it was probable that a fault would occur. As it turned out, for the periods that the four nominated areas were down to one feeder cable, there was no fault and so the threat did not eventuate. That is there was no outage. In those circumstances I am not satisfied that there was the requisite threat to endangerment for the purpose of s, 424(1).

[49] I am not satisfied in any event that if a threat did exist it arose due to protected industrial action. Section 424(1) is directed to protected industrial action. However, the Safety Commitment operates to require that work be performed to address emergency situations. The refusal to do such work is not, and would not be, protected action. Emergency work is defined in the Safety Commitment as 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. If work on repairing feeder cables was required to avoid a serious and imminent risk of personal injury and there was a refusal to do that work, then the failure to perform the work was not protected action because the Safety Commitment applied such that the failure to do the work was excluded from protected action. Endeavour submitted that the Safety Commitment only applied where the risk was imminent and so set a higher bar than s.424(1) of the Act. I do not accept the submission. If the threat of an outage existed, then it was an imminent one as it could occur at any moment. I was told a feeder may fault at any moment by a vehicle running into a power pole carrying the backup cable, or an excavator may accidentally dig up a feeder cable buried underground. This made the threat imminent.

[50] Further, the Safety Commitment excluded work in relation to a declared incident. Under the commitment protected industrial action is suspended to allow employees to perform work affected by, and during, a declared incident. A declared incident is defined as an incident that is declared by the Endeavour's Chief Executive Officer and includes major emergency situations such as major equipment failures. If the fault in the feeder cables was a major equipment failure, as Endeavour submitted it was, then Endeavour could have declared it as an incident that required the suspension of industrial action. It did not do so. This suggests that Endeavour did not at the time the feeder cables were out regard the faults as major equipment failures posing such a threat to justify it being a declared incident. This fortifies me in the view I take that the threat was not such as to satisfy the test in s.424(1)(c). In failing to declare the work in accordance with the Safety Commitment Endeavour may well have had in mind the type of contingencies referred to above that I found and were available to address any outage that may eventuate and consequently it did not regard the fault a major emergency situation.

[51] I was also not taken to specific examples of employees refusing to do repair work. The evidence was general in nature. I do not see how any refusal to perform work that gave rise to a threat to human life, or a serious risk of personal illness or injury would be protected action given the existence of the Safety Commitment. That being the case, I am not satisfied that protected industrial action has led or will lead to any threat to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[52] The focus of Endeavour's case was on the first circumstance, the potential failure of the backup feeder cables. I am also not satisfied that the issues associated with the other three circumstances, the use of generators, the cancellations of planned outages, and the delay in planned maintenance resulting in a backlog of maintenance work, give rise to a threat to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[53] The evidence concerning the use of generators did not on my view rise above inconvenience to those who had been exposed to diesel generators. Three examples were given. The generator in Baulkham Hills was the subject of complaints from the public, the local school, the local council, and the Environmental Protection Agency. Endeavour submitted that

the emphasis in this part of its case was on the welfare of those who were exposed to the fumes and noise of the generators. I do not accept that the welfare of those identified in the evidence was threatened by that exposure. As the Full Bench in *ANF* said the impact of the industrial action must be more than merely to cause inconvenience, it must be to expose the relevant group to danger. I do accept that there was inconvenience to those groups and individuals. The test however is more than inconvenience. I note that the CEPU's letter of 12 August 2024 indicated that the fault necessitating the generator at Baulkham Hills would be repaired. As I consider the complaints made as amounting to no more than inconvenience, I am not satisfied that the requirement in s. 424(1)(c) is met.

[54] The second generator, in Ingleburn, tripped in July leaving customers without power for 12 hours. Repairing it was considered Emergency work. The work was not carried out as directed and Endeavour maintains that the failure to do so amounted to unprotected industrial action. Consequently, the example does not meet the requirement in s. 424(1) that any order be directed to protected industrial action.

[55] The evidence concerning the impact of cancelling planned outages was also couched in terms of endangering the welfare of customers. Again, I do not accept that the evidence rose above that the customers affected by the cancellations were inconvenienced by the circumstances. Inconvenience however does not meet the test in s. 424(1)(c).

[56] The last circumstance, going to the the ongoing industrial action causing significant delays in planned maintenance activities which has resulted in an increase in the backlog of maintenance work, leading to the network becoming more vulnerable which may increase the safety and power outage risks also falls short of giving rise to a threat to endanger the life, the personal safety or health, or the welfare, of the population or of part of it. The complaint was put in a generalised way. Some degradation of the network arising from industrial action will be inevitable. The backlogs in maintenance work will also inevitably follow as part and parcel of ongoing industrial disputation where the statutory right to take protected industrial action is exercised. Generalised predictions as to the likely consequences of industrial action however fall short of providing an evidentiary basis for a finding that there is a threat to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[57] On 12 August 2024 the application for an order terminating the industrial action was dismissed because I was not satisfied for the reasons now provided that the requirements under s424(1) for the making of an order were met.



DEPUTY PRESIDENT

Appearances:

V. Bulut of counsel for the Applicant

J. Agius SC and L. Doust of counsel for the Respondent

Hearing details:

12 August 2024

In person

The Fair Work Commission

Sydney

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Annexure A

Notice by Bargaining Representative of Intention to take Protected Action in the form of Employee Claim Action (under s.414 of the Fair Work Act 2009)

TO: Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy
The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) gives notice that employees of Endeavour Energy Network Management Pty Ltd T/A Endeavour Energy for whom the CEPU is the bargaining representative and who will be covered by a proposed enterprise agreement to replace the Endeavour Energy Enterprise Agreement 2021 intend to take protected industrial action as follows.

Friday 9 August, Saturday 10 August, Sunday 11 August, and Monday 12 August 2024.

On each of Friday 9 August, Saturday 10 August, Sunday 11 August, and Monday 12 August 2024, subject to the "Safety Commitment" described below, the following industrial action:

1. For 24 hours, speaking to members of the public during work related telephone calls about the industrial action and ETU/CEPU campaign for a new enterprise agreement.
2. A 24 hour ban of the use of Teams.
3. A 24 hour ban on managers and supervisors covered by the proposed enterprise agreement reporting planned protected industrial action to the company.
4. A 24 hour ban on reversing a company vehicle without a spotter.
5. A 24 hour ban on changing of branding on vehicles or plant from Endeavour Energy to Ausconnex or other branding/company name or vice versa.
6. For 24 hours, distributing or displaying CEPU enterprise agreement campaign related material whilst performing work, including but not limited to t-shirts, written communications, car signage, flags and stickers (subject to employees not wearing or carrying personal metal effects such as keys, metal banded watches, bracelets, metal belts, clothing with metal thread woven into it, metal zips, cigarette cases, ear rings, body piercings, necklaces, rings, mobile phones, etc, when working on or near live electrical apparatus and wearing any required personal protective clothing)

Tuesday 13 August and Wednesday 14 August 2024

On Tuesday 13 August 2024 and Wednesday 14 August 2024 subject to the "Safety Commitment" described below, the following industrial action:

1. A 24 hour ban on field staff switching for workgroups, contractors, ASPs, supply authorities or Ausconnex jobs, except to make safe in a fault.
2. A 24 hour ban on using physical or digital locking systems, including (but not limited to) locking or unlocking of phones, iPads, tablets, computers, switchboard, switchrooms, electrical cabinets, access gates, airbrakes switches, circuit breakers, switching stations and sub stations.
3. A 24 hour ban on writing or approving switching plans for planned switching at short notice (72 hours or less).
4. A 24 hour ban on answering work calls and emails out of hours.
5. A 24 hour ban on the use of electronic devices.
6. A 24 hour ban on placing a Switching Plan In Progress.

7. A 24 hour ban on executing steps for Planned Switching, except where the failure to remotely execute the switching steps would result in uncertainty as to the true status of the network.
8. A 24 hour ban on issuing steps on multiple Switching Plans (ie issuing steps on one switching plan at a time).
9. A 24 hour ban on amending an Approved Switching Plan.
10. A 24 hour ban on starting and/or finishing on-site.
11. A 24 hour ban on the removal of operational earths, working earths, operational protective bonds, working protective bonds and CT shorts applied to protection relays, except in the case where refusal to remove these devices results in the inability to restore supply to life support customers.
12. The following stoppages of work:
 - (a) A 1 hour stoppage commencing at 12am;
 - (b) A 1 hour stoppage commencing at 1am;
 - (c) A 1 hour stoppage commencing at 2am;
 - (d) A 1 hour stoppage commencing at 3am;
 - (e) A 1 hour stoppage commencing at 4am;
 - (f) A 1 hour stoppage commencing at 5am;
 - (g) A 1 hour stoppage commencing at 6am;
 - (h) A 1 hour stoppage commencing at 7am;
 - (i) A 1 hour stoppage commencing at 8am;
 - (j) A 1 hour stoppage commencing at 9am;
 - (k) A 1 hour stoppage commencing at 10am;
 - (l) A 1 hour stoppage commencing at 11am;
 - (m) A 1 hour stoppage commencing at 12pm;
 - (n) A 1 hour stoppage commencing at 1pm;
 - (o) A 1 hour stoppage commencing at 2pm;
 - (p) A 1 hour stoppage commencing at 3pm;
 - (q) A 1 hour stoppage commencing at 4pm;
 - (r) A 1 hour stoppage commencing at 5pm;
 - (s) A 1 hour stoppage commencing at 6pm;
 - (t) A 1 hour stoppage commencing at 7pm;
 - (u) A 1 hour stoppage commencing at 8pm;
 - (v) A 1 hour stoppage commencing at 9pm;
 - (w) A 1 hour stoppage commencing at 10pm;
 - (x) A 1 hour stoppage commencing at 11pm.

Safety Commitment

The above intended action is subject to the Safety Commitment recorded in the Order of Deputy President Roberts of the Fair Work Commission made on 22 December 2023 in PR 769697 which is as follows:

A. An employee will temporarily suspend industrial action to perform Emergency Work where:

- (i) suspending the action is necessary to perform Emergency Work; and
- (ii) the employee is directed in writing to perform Emergency Work.

B. “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.

C. An employee will temporarily suspend industrial action to perform work where suspending the action is necessary to perform work affected by and during a “Declared Incident”.

D. A “Declared Incident” is referred to in the Endeavour Energy Enterprise Agreement 2021 and may be declared by the Chief Executive Officer of the Respondent by the Chief Executive Officer. It will generally cover major emergency situations such as storms, bushfires, IT breakdown and major equipment failures.

E. 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.

F. At all times, the following number of Senior System Operators and System Operators (Operators) who are ordinarily rostered to work will attend the Control Room and monitor their systems for the purpose of identifying and responding to Emergency Work:

- (i) Day shift – 4 Operators in total
- (ii) Afternoon shift – 4 Operators in total
- (iii) Night shift - 2 Operators in total.

If Endeavour Energy has any questions or requires further clarification concerning any of the above, please contact me as soon as practicable on the details below.