DECISION

Fair Work Act 2009
s.418 - Application for an order that industrial action by employees or employers stop etc.

PHI International Australia Pty Ltd
v
Australian Workers' Union, The, Australian Licenced Aircraft Engineers Association, The
(C2022/1713)

DEPUTY PRESIDENT BINET PERTH, 18 MARCH 2022

Application for an order that industrial action by employees or employers stop. Application granted.

[1] On 14 March 2022, PHI International Australia Pty Ltd (**PHI**) filed an application (**s.418 Application**) pursuant to section 418(2)(b) of *Fair Work Act 2009* (Cth) (**FW Act**) seeking that the Fair Work Commission (**FWC**) issue an order to stop threatened industrial action related to the negotiation of a new enterprise agreement for its Broome base (**Proposed Agreement**).

[2] The threatened industrial action involved the stoppage of the performance of work and a ban on the performance of overtime between 16 March 2022 and 5 April 2022 at PHI's Broome base.

[3] On 14 March 2022, PHI also filed an application pursuant to section 424 of the FW Act seeking that the FWC issue an order to terminate protected industrial action (**s.424 Application**).[1]

[4] The s.418 Application and the s.424 Application sought orders against the following:

a. the Australian Workers Union (**AWU**);
b. the Australian Licenced Aircraft Engineers Association (**ALAEA**);
c. employees of PHI who are employed by PHI as licenced aircraft maintenance engineers (**LAMEs**) or aircraft maintenance engineers (**AMEs**) and who have the AWU or ALAEA as their bargaining representative for the negotiation of the Proposed Agreement (**Employees**); and
d. officers and employees of the AWU and ALAEA who have responsibility for the industrial interests of one or more Employees (**Union Representatives**).

[1] Digital Court Book ('***DCB***') 245-254.

[5] The s.418 Application and the s.424 Application were jointly listed for a conciliation conference and subsequently a hearing on 15 March 2022. Directions for the filing of materials in advance of the Hearings were issued to the parties (**Directions**).

[6] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. Permission was sought by, and granted to, PHI to be represented at the Hearing on the grounds that it would enable the matters to be dealt with more efficiently, taking into account the complexity of the matters.

[7] At the Hearing PHI was represented by Mr Stuart Wood QC.

[8] In accordance with the Directions written submissions were filed by PHI, the AWU and the ALAEA.

[9] PHI filed witness statements from the following witnesses in support of the granting of the s.418 Application:

a. Mr Simon Edwards – Aviation Manager for INPEX (**Mr Edwards**).

   Mr Edwards is responsible for the safe management of aviation operations for INPEX. He was previously the Flight Operations Manager for a helicopter company providing similar services to PHI. Mr Edwards gave evidence with respect to the nature and importance of the services provided by PHI to INPEX. He also gave evidence with respect to the nature and importance of the servicing requirements of the helicopters provided by PHI to INPEX.[2]

b. Mr Timothy David Hartley – Director of Commercial and Business Development for PHI (**Mr Hartley**).

   Until recently Mr Hartley was General Manager PHI. He was Commercial Manager from 2018 until 2021. Prior to being employed by PHI he was employed as a helicopter pilot. He gave evidence with the respect to the services provided by PHI to its clients and the potential impact of the Notified Action.[3]

c. Mr Alan Bradshaw – HR Manager PHI (**Mr Bradshaw**).

   Mr Bradshaw has carriage of the negotiations for the Proposed Agreement on behalf of PHI. He gave evidence with respect to the progress of the negotiations for the Proposed Agreement.[4]

d. Mr Ross Paton – Offshore Installation Manager/Field Manager for INPEX (**Mr Paton**)

   Mr Paton is responsible for the safe and efficient operation of INPEX's activities in the Ichthys oil and gas field. In particular he is responsible for co-ordinating the responses

---

[2] Ibid 569-604.

[3] Ibid 606-661.

[4] Ibid 466-511.

to emergency situations. He gave evidence with respect to the nature and importance of the services provided by PHI to INPEX[5]

[10] Mr Bradshaw and Mr Paton were not cross examined and their evidence was admitted unopposed. Mr Edwards and Mr Hartley were cross examined by the AWU and the ALAEA.

[11] The AWU and the ALAEA filed witness statements from the following witnesses in response to the Application:

a. Mr Douglas Heath– Offshore Alliance Organiser (**Mr Heath**)

   Mr Heath is employed by the AWU and the Maritime Union of Australia (**MUA**) to represent the industrial interests of workers who will be covered by the Proposed Agreement. He gave evidence with respect to his knowledge of the services provided by PHI and the alternative suppliers of those services.

b. Mr Paul Carroll– Licenced Aircraft Maintenance Engineer at PHI (**Mr Carroll**)

   Mr Carroll is a bargaining representative for the Proposed Agreement. He gave evidence with respect to the potential impact of the industrial action on the services provided by PHI.

[12] In reaching my decision, I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

[13] The s.418 Application was heard and determined on 15 March 2022, following a conciliation conference attended by PHI, the AWU and the ALAEA earlier the same day. I informed the parties of my decision on transcript at the conclusion of the hearing on 15 March 2022. In light of my decision PHI orally discontinued the s.424 Application before it was heard.

[14] An order terminating the industrial action was published on 16 March 2022, in Print PR739358 (**Order**). Below are the reasons for my decision.

Background

[15] PHI is an American headquartered aviation company that provides a range of helicopter services to its customers. In Australia this includes providing search and rescue (**SAR**) and Medevac services to its oil and gas clients, such as INPEX and Shell. It also provides those services to the:[6]

a. Australian Maritime Safety Authority (**AMSA**);
b. Western Australian Police Force (**WAPOL**);
c. Government of Western Australia, WA Country Health Service (**WACHS**); and
d. Government of Western Australia, Department of Health (**WA Health**).

[5] Ibid 513-537.

[6] Ibid 627-631.

[16] PHI is the only qualified provider of 'FullSAR' in the Pilbara. FullSAR are SAR services provided from PHI's fully equipped Sikorsky S92A helicopter. PHI provides these services not just to its customers, but also to its competitors.

[17] SAR services are not only essential, but mandatory, to safe operations on offshore facilities. For example, as a condition of its operations, INPEX is required by a safety case administered by the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) to have 24/7 SAR coverage of their offshore facilities.

[18] During periods when PHI has helicopters in the air, which is usually between 6am and 6pm, it is required as part of its contract with INPEX to be able to deploy a SAR within 15 minutes. At all other times, such as overnight, it is required to be able deploy SAR within 60 minutes.[7]

[19] Medevac is effectively a flying ambulance service, most commonly utilised to respond to non-work-related illnesses and injuries on board an offshore facility. PHI is required to deploy Medevac within 60 minutes of being notified of a medical emergency of this kind. PHI works in conjunction with the Royal Flying Doctor Service (**RFDS**) in providing those services.[8]

[20] Over the past four years, PHI Australia has performed 114 offshore SAR and Medevac operations from its Broome Base. Recent examples include:[9]

a. on 25 January 2022, an aerial search for an Emergency Locator Transmitter personnel distress beacon (ELT) activated overland to the east of Broome;
b. on 1 January 2022, a medical evacuation from the INPEX Corporation (INPEX) 'Ichthys Explorer' facility;
c. on 15 December 2021, an aerial search and rescue overwater which resulted in the winch recovery of two personnel from a sunken vessel following the activation of an ELT;
d. on 4 December 2021, a medical evacuation from the 'Ichthys Explorer' facility;
e. on 4 December 2021, the emergency evacuation of 150 workers from the Shell's Prelude floating LNG facility in response to a fire that had started in an electrical utility;
f. on 14 November 2021, a medical evacuation from the 'Ichthys Venturer' facility;
g. on 8 November 2021, a medical evacuation from the INPEX DLV2000 pipe laying vessel;
h. on 7 November 2021, an aerial search and rescue overwater which resulted in the winch recovery of passengers from a flipped over vessel near Derby;
i. on 6 November 2021, an aerial rescue overwater which resulted in the winch recovery of an injured sailor from a tug boat;
j. on 29 October 2021, a medical evacuation from the Shell Australia Prelude facility; and
k. on 26 October 2021, an aerial rescue overwater which resulted in the winch recovery of an injured passenger from the Tourism vessel "True North".

---

[7] Ibid 544-545.

[8] Ibid 545.

[9] Ibid 631-632.

[21] Over the past two years, PHI has also been involved in Medevac operations in respect of COVID-19 and suspected COVID-19 cases among seafarers on bulk carriers and cruise ships.[10]

[22] In addition to medivac and SARs PHI also provides transport services to INPEX's offshore facilities located approximately 250 nautical miles from the Broome Base. The transport services provided include the transport of personnel and goods (which are varied and may range from mechanical components to medical supplies).[11]

[23] The transport services include urgent transportation of crew onshore in the event a full "de-manning" is required, due to an event such as a cyclone or a shutdown of electricity.[12]

[24] The transport services are provided to INPEX workers, but also to third party contractors who provide services to INPEX on the Explorer and the Venturer. [13]

[25] PHI has operational bases in Broome, Karratha and Port Hedland.[14]

[26] PHI employs approximately 200 employees, made up of pilots, LAMEs, AMEs, ramp workers, SAR/medevac staff and management staff to deliver its services.[15]

[27] Each of PHIs helicopters including those utilised for SAR and Medevac require an ongoing process of inspection, servicing and certification in order to be ready to fly. This work is performed by the LAMEs and AMEs.[16]

[28] Each helicopter is inspected and certified at least once, and usually twice, a day. If a helicopter has not been certified on a given day, it will not be ready to fly until that process has been performed. Because of the schedule of those servicing requirements, the non-certification of one helicopter will disrupt the schedule and have a knock-on effect for the readiness of the remaining resources. [17]

[29] The unavailability of helicopters also poses an issue for the ongoing SAR training requirement for PHI Australia's pilots, who are required to perform 40 to 50 hours of SAR training per month in order to maintain currency.20 If the helicopter needed to perform that training is not properly certified and ready to fly for the purposes of training, it may lead to a situation where, in the event of an SAR incident, certain pilots and rescue crew may not be properly qualified to carry out the operation. [18]

---

[10] Ibid 632.

[11] Ibid 633-634.

[12] Ibid 545-546.

[13] Ibid 633-634.

[14] Ibid 626-629.

[15] Ibid 628.

[16] Ibid 541-544

[17] Ibid 541-544

[18] Ibid 541-544

[30] Therefore, it is not just the work that the employees perform at the time that a helicopter needs to take off that is important — all of their core duties of inspecting, maintaining and certifying the helicopter are important to the timely deployment of the helicopters when they are required.

[31] The parties to both the s.418 Application and the s.424 Application are currently bargaining for the Proposed Agreement which would cover the 30 LAMEs and AMEs employed by PHI.[19]

[32] On 7 February 2022, the AWU and ALAEA applied for a Protected Action Ballot Order (**PABO**) pursuant to section 437 of the FW Act. On 15 February 2022, Vice President Catanzariti issued in Prints PR738374 and PR738384 Protected Action Ballot Orders (**PABOs**) pursuant to section 443 of the FW Act allowing the AWU and the ALAEA respectively to hold protected action ballots of the Employees.

[33] The PABOs were relevantly identical. They each contained one question asking eligible members of each of the AWU and the ALAEA whether they endorsed "taking separately, concurrently and/or consecutively" unlimited stoppages of work for periods ranging from 30 minutes to six hours, and unlimited bans for an indefinite period on the performance of overtime.

[34] In making the PABO, the FWC relied upon the following exclusion from the scope of the industrial action mentioned in the questions:

> *"Search and Rescue Operations*
> *An employee taking the protected action listed above will, during the duration of the notified industrial action, comply with a reasonable direction from PHI International Australia Pty Ltd to perform any work directly related to search and rescue operations work.*
>
> *Emergency Events*
> *An employee taking the protected action listed above will, during the duration of the notified industrial action, comply with a reasonable direction from PHI International Australia Pty Ltd to perform work in response to an unexpected event that creates a serious and imminent threat to safety if the following conditions are met:*
>
> *(i) the work cannot be reasonably performed by anyone else on site; and*
> *(ii) the work must be immediately performed in response to an emergency event; and (iii)the company provides written notice to the employee that identifies the emergency event, provides a brief explanation regarding why the work cannot be performed after the period of industrial action and why the work cannot be performed by anyone else on site; and*
> *(iii) during the duration of the notified industrial action, an employee will only resume work to the extent necessary to avert the serious or imminent threat to safety."*

[19] Ibid 637.

[35] A ballot was subsequently conducted by the authorised Ballot Agent CiVS. On 27 March 2022, CiVS declared that each PABO had been endorsed by a majority of the Employees.[20]

[36] On 4 March 2022, both the AWU and the ALAEA gave PHI notice that the Employees would take industrial action (**Notices**).[21] The Notices are relevantly identical.

[37] The Notices describe the industrial action in the following forms (**Notified Action**):[22]

a. A ban on the performance of overtime, which will commence at 12:30am on 16 March 2022 and remain in place until further notice; and
b. A series of consecutive stoppages of work for periods of 30 minutes, one hour, and two hours, which will commence at midnight on 16 March 2022 and continue without ceasing for each 24-hour period until 5 April 2022.

[38] The Notices contain the following exception (**SAR Exception**):[23]

> *"Search and Rescue Operations*
> *An employee taking the protected action listed above will, during the duration of the notified industrial action, comply with a reasonable direction from PHI International Australia Pty Ltd to perform any work directly related to search and rescue operations work."*

[39] The Notices also contained the following exception (**Emergency Exception**):[24]

> *"Emergency Events*
>
> *An employee taking the protected action listed above will, during the duration of the notified industrial action, comply with a reasonable direction from PHI International Australia Pty Ltd to perform work in response to an unexpected event that creates a serious and imminent threat to safety if the following conditions are met:*
>
> *(i) the work cannot be reasonably performed by anyone else on site; and*
> *(ii) the work must be immediately performed in response to an emergency event; and*
> *(iii) the company provides written notice to the employee that identifies the emergency event, provides a brief explanation regarding why the work cannot be performed after the period of industrial action and why the work cannot be performed by anyone else on site; and*
> *(iv) during the duration of the notified industrial action, an employee will only resume work to the extent necessary to avert the serious or imminent threat to safety."*

---

[20] Ibid 44.

[21] Ibid 1306-1341.

[22] Ibid 1306-1341.

[23] Ibid 1306-1341.

[24] Ibid 1306-1341.

Consideration

[40] Section 418 of the FW Act provides that:

> *"**418 FWC must order that industrial action by employees or employers stop etc**.*
>
> *(1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:*
>
> *(a) is happening; or*
> *(b) is threatened, impending or probable; or*
> *(c) is being organised;*
>
> *the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.*
>
> *Note: For interim orders, see section 420.*
>
> *(2) The FWC may make the order:*
>
> *(a) on its own initiative; or*
> *(b) on application by either of the following:*
>
> *(i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;*
> *(ii) an organisation of which a person referred to in subparagraph (i) is a member.*
>
> *(3) In making the order, the FWC does not have to specify the particular industrial action.*
>
> *(4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:*
>
> *(a) some or all of which has not been taken before the beginning of the stop period specified in the order; or*
> *(b) which has not ended before the beginning of that stop period; or*
> *(c) beyond that stop period;*
>
> *the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot."*

[41] PHI is a 'national system employer', within the meaning of the FW Act and the Employees are national system employees within the meaning of the FW Act.

[42] The s.418 Application was made by PHI in its capacity as a person likely to be affected directly by the industrial action. I am satisfied that PHI has standing to make the Application.

[43] In order to grant the Application and make the order sought by PHI, I must be satisfied that:

a. industrial action;
b. is happening, is threatened, is impending, is probable or is being organised;
c. which is not or would not be protected industrial action.

First Element - Industrial Action

[44] The term 'industrial action' is defined in section 19 of the FW Act as follows:

> ***"s.19 Meaning of industrial action***
>
> *(1) Industrial action means action of any of the following kinds:*
>
> *(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;*
> *(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;*
> *(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;*
> *(d) the lockout of employees from their employment by the employer of the employees.*
>
> *Note: In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited , PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.*
>
> *(2) However, industrial action does not include the following:*
>
> *a) action by employees that is authorised or agreed to by the employer of the employees;*
> *b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;*
> *c) action by an employee if:*
>
> *(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and*
> *(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or*

another workplace, that was safe and appropriate for the employee to perform.

(3) An employer locks out employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

Note: In this section, employee and employer have their ordinary meanings (see section 11).”

[45] The Notified Action proposes the imposition of bans, limitations and restrictions on the performance of work by Employees.

[46] The Notified Action is not authorised by, or agreed to, by PHI.

[47] There is no assertion that the Notified Action falls within the exceptions set out in sub section 19(2) of the FW Act.

[48] I am therefore satisfied that the Notified Action is “industrial action” as defined by section 19 of the FW Act.

Second Element - is happening, is threatened, is impending, is probable or is being organised

[49] It is not in dispute, and given the issuing of the Notices, I am satisfied that, the Notified Action is being organised by the AWU and by ALAEA and that the Notified Action is threatened, impending and probable.[25]

Third Element - is not or would not be protected industrial action

[50] Industrial action is protected industrial action for a proposed enterprise agreement if it is employee claim action for the purposes of section 409 of the FW Act.

[51] Employee claim action is defined in section 409 as follows:

*“**s.409 Employee claim action***

(1) Employee claim action for a proposed enterprise agreement is industrial action that:
(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and
(b) is organised or engaged in, against an employer that will be covered by the agreement, by:
(i) a bargaining representative of an employee who will be covered by the agreement; or

[25] Ibid 23.

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part) .

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation."

[52] The Notified Action is organised by the AWU and the ALAEA against PHI for the purpose of advancing the claims of the Employees in relation to the Proposed Agreement.

[53] The Notified Action is authorised by the Ballots conducted in accordance with the PABO issued on 15 February 2022 in Prints PR738374 and PR738384.

[54] There is no assertion that:

a. the Notified Action involves claims for matters which are not permitted matters;

b. the Notified Action is in support of claims to include unlawful terms in the Proposed Agreement;
c. the Notified Action involves pattern bargaining;
d. the Notified Action relates to a demarcation dispute; or
e. Section 429 of the FW Act applies in relation to the Notified Action.

[55] The common requirements for industrial action to be protected industrial action are set out in section 413 of the FW Act as follows:

> *"s.413 Common requirements*
>
> *(1) This section sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement.*
>
> *Type of proposed enterprise agreement*
>
> *(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.*
>
> *Genuinely trying to reach an agreement*
>
> *(3) The following persons must be genuinely trying to reach an agreement:*
>
> *(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;*
> *(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the bargaining representative of the employee.*
>
> *Notice requirements*
>
> *(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.*
>
> *Compliance with orders*
>
> *(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:*
>
> *(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;*
> *(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the employee and the bargaining representative of the employee.*
>
> *No industrial action before an enterprise agreement etc. passes its nominal expiry date*

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;
(b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;
(c) a serious breach declaration in relation to the agreement."

[56] The Notified Action is organised by the AWU and the ALAEA for the purpose of advancing the claims of the Employees in relation to a proposed enterprise agreement.

[57] There is no assertion that:[26]

a. the Proposed Agreement is a greenfields or multi enterprise agreement;
b. the AWU or the ALAEA are not genuinely trying to reach an agreement;
c. the AWU or the ALAEA has contravened any industrial orders; or
d. a suspension or termination order is in operation.

[58] The Agreement has passed its nominal expiry date.

[59] PHI assert that Notified Action is not protected industrial action because the common requirement that the notice requirements set out in section 414 of the FW Act be met has not been met in relation to the Notified Action.

[60] Section 414 of the FW Act provides that:

"s.414 Notice requirements for industrial action

Notice requirements--employee claim action

(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) The period of notice must be at least:

(a) 3 working days; or
(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph--that period of notice.

---

[26] 853-854

Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements--employee response action

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements--employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and
(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements--content

(6) A notice given under this section must specify the nature of the action and the day on which it will start."

[61] The AWU and ALAEA in their capacity as bargaining representatives of the Employees who will be covered by the Proposed Agreement have given written notice of the Notified Action to PHI prior to engaging in the Notified Action.

[62] Consistent with section 414(3) of the FW Act the Notices were issued on 4 March 2022 after the results of the PABO were declared on 27 February 2022.

[63] Initially PHI submitted that the Notified Action was not 'protected industrial action' because the Notices evidenced an intention to commence the Notified Action within the notice period specified in the PABOs contrary to section 414(2) of the FW Act. The AWU and ALAEA conceded this to be the case at the Conference and revoked in writing the Notified Action scheduled to occur within the notice period.[27]

[64] PHI submit that the remaining Notified Action is unprotected because the Notices do not satisfy the content requirement demanded by section 414(6) of the FW Act.

[65] Section 414(6) of the FW Act requires that such a notice "must specify the nature of the action and the day on which it will start".

[27] Ibid 852.

[66] PHI asserts that the Notices fail to specify the nature of the action that the employees intend to take because the Exceptions contained in the Notices fail to adequately notify PHI when, and in what circumstances, the employees will return to work from a stoppage to perform work in respect of SAR and emergency events.

[67] The issuing of a notice pursuant to section 414 of the FW Act is not a mere formality.[28] The notice must satisfy the requirements set out in section 414.

[68] In considering whether the notice meets the requirement to specify the industrial action proposed to be taken, it is necessary to have regard to the purpose of the notice requirement and the relevant circumstances. The purpose of the notice requirement is to give the employer the opportunity to respond to the action by making relevant preparations. Whether the notice is adequate may depend on the nature of the employer's operations including their size, the number of employees, the number of locations, the time at which the action is to occur and the employees potentially taking the industrial action.[29]

[69] A notice must not be drafted so as to conceal more than it reveals.[30]

[70] In *Esso Australia Pty Ltd v Australian Workers Union*[31] at [104] the Full Court explained that the construction which should be given to notices of this type is that which a reasonable person in the position of the employer would understand the notice to mean. More specifically what a reasonable person in the position of the employer would understand the industrial action to involve as well as not involve.[32]

[71] In the same judgement the Full Court referred with approval to the following comments of the primary judge:[33]

> *"86 The task for the court is not the conventional one of the construction of a document, with a view to understanding what the author intended. The document with which we are concerned here was a notice: its purpose was to convey information. Thus the question is not what the author intended, but what the addressee would reasonably have understood from the terms used in the notice. Two things follow from this. First, if the notice might reasonably carry more than one denotation, I see no reason to err on the side of the giver of the notice, thereby permitting him or her to take advantage of his or her own ambiguity. The FW Act leaves it entirely to the giver of the notice to identify the "nature" of the action intended to be taken, and it should not be open to him or her to complain if the terms chosen leave scope for the addressee to see things differently from what the giver, subjectively, might have had in mind. Secondly, it would not be sufficient for the respondent to establish what its own members understood by the presently contentious expression. Even if they knew what they meant by "de-isolation*

---

[28] *Telstra Corporation Ltd v Communications, Electrical, Electronic, Services Union* (2009) 190 IR 342, 346.

[29] *Telstra Corporation Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWAFB 1698 at [12].

[30] *Telstra Corporation Ltd v Communications, Electrical, Electronic, Services Union* (2009) 190 IR 342, 346.

[31] *Esso Australia Pty Ltd v Australian Workers Union* (2016) 39 FCR [120].

[32] Ibid [104].

[33] Ibid [102].

> *of equipment", the question is what the applicant's management would reasonably have understood by that expression.*
>
> *87 Although I have noted above that the judgment of Wilcox and Cooper JJ in Davids Distribution does not directly provide the answer to the present question, one aspect of that judgment which is here valuable is the identification of the purpose of a notice of industrial action given under the predecessor to s 414 of the FW Act. Their Honours saw the purpose as enabling the party who would be adversely affected by the intended action to take appropriate defensive action. Their Honours recognised the importance of a defending employer, for example, having the opportunity to protect sophisticated equipment from damage. In my view, it is no less important for the affected party to know what functions, operations, etc will not be touched by the intended action. To take an example far from the facts of the present case, an employer handling perishable foodstuffs should be entitled to assume, with confidence, that its operations will not be affected beyond those notified to it under s 414 of the FW Act. Understood in this sense, the notification of industrial action has a negative, as well as a positive, dimension, each of which may be perceived as within the broad purpose of the statute."*

[72] PHI conducts time and safety critical operations vital to the perseveration of lives and high value assets. It provides specialised equipment and services which are not commonly available or easily replaced. The Employees perform duties which are integral part of PHI providing its equipment and services to its customers and the community more broadly. These factors demand a higher degree of specificity and clarity in notices than might be required in other workplaces.

[73] PHI submit that the notification of a continuous three-week stoppage of work by employees, with an exception for situations in which they are given a "reasonable direction" to "perform work that is directly related to search and rescue operations work", contains several ambiguous qualifications such that a reasonable person in the position of PHI could not understand what the threatened industrial action would involve and not involve.

[74] PHI describes those ambiguities as follows:[34]

> *"First, the requirement that a direction from PHI Australia to perform SAR work be "reasonable" before employees will return from their stoppage raises the question: reasonable to whom? Given the operational and safety demands of PHI and its customers, PHI should not be expected to rely upon consensus with the Respondents or employees in the middle of an industrial dispute as to whether a direction to perform SAR work is reasonable or not.*
>
> *Second, the requirement that the direction be in respect of work which is "directly related" to SAR work imports another broad judgment. Whether some work is directly related to SAR work, as opposed to merely related to it, or relevant to it, or incidental to it, or necessary for it, is a matter about which minds might, and in the circumstances very likely would, differ. It does not make clear whether "directly related" includes routine inspection, servicing, certification or training, of SAR or medevac.*

[34] DCB 24.

Third, the reference to "search and rescue operations work" is ambiguous in a similar way. It is not clear whether the reference to "operations" in this phrase is intended to be descriptive of SAR work generally, or intended to limit the scope of the work that will be performed during a stoppage to that which is directly related to an SAR operation. As has been described, an SAR operation itself is the proverbial tip of the iceberg — the bulk of the work which is essential to the safe and effective provision of SAR services occurs by way of routine inspection, servicing, certification and training carried out on a day-to-day basis."

[75] PHI also submit that the notification of a continuous three-week stoppage of work by the Employees, with an exception for situations in which the Employees are given a "*reasonable direction*" to perform work that is "…*work which cannot be reasonably be performed by anyone else on site*" and is "…*in response to an unexpected event*", contains several ambiguous qualifications such that a reasonable person in the position of PHI could not understand what the threatened industrial action would involve and not involve.

[76] PHI describes those ambiguities as follows:[35]

"*On a first reading, the exception appears to mean that the direction can only be given in response to an event creating a serious and imminent threat to safety itself. For example, it is currently cyclone season. If PHI Australia was to be notified of a weather system in the Timor Sea that had the potential to develop into a cyclone, it would need to be on high alert, with all aircraft primed and ready to fly for a full de-manning of the Ichthys facilities at any time. Though the "event" of the cyclone, that which creates the serious and imminent threat to safety, may not yet have crystallised, and may ultimately not eventuate, it is nonetheless necessary for PHI Australia to perform preparatory work to ensure that the necessary complement of helicopters is ready to fly in short compass if and when the event occurs. Given the severity of the safety risks involved in a delay to that work, the lack of certainty as to the circumstances in which it will be performed is unsatisfactory.*

As to the specific requirement that the event be "unexpected", that term is difficult to understand in the context of PHI Australia's business. Because of the inherently risky nature of the work performed by PHI, it is natural and in fact essential to plan for contingencies and to anticipate emergencies so as to more effectively respond to them. In that sense, an emergency situation may not necessarily be unexpected. To go back to the previous example: a cyclone may not be "unexpected" in cyclone season, but poses no less serious a risk to safety because of that.

Finally, the phrases "immediately required" and "serious or imminent threat to safety" are elastic, and minds might differ as to their meaning in a given situation. The phrases compound the uncertainty of the wording of this exception as a whole, and are not appropriate in the context of PHI Australia's business and the risks at play in the event of emergencies.'

[35] Ibid 24.

[77] PHI argue that the exceptions provided to the stoppages that have been notified in the Notices each involve numerous, intersecting and overlapping ambiguities.

[78] PHI says these ambiguities are go directly to the availability of the most critical safety-related services provided by PHI affecting the Notices in their entirety by concealing from PHI Australia more than they reveal about the circumstances in which these core services will be performed.

[79] For these reasons, PHI submit that the Notices fail to adequately specify the nature of the action that the employees intend to take, in particular the functions and operations of PHI which will not be affected by the action. PHI submit that as a consequence it is wrongly denied the opportunity to take necessary action to reduce the risk or prevent loss of life or harm to property or people as a consequence of the Notified Action.

[80] In this matter the only evidence before me with respect what a reasonable person in the position of the employer would understand the notice to mean is that given by Mr Paton, Mr Edwards and Mr Hartley.

[81] Mr Paton who is employed by INPEX says that it is unclear what 'directly' related to SAR work means. He says that for example it is unclear whether SAR training is covered.[36]

[82] Mr Edwards who is employed by INPEX says that it is unclear what the phrases 'reasonable direction', 'directly related', 'in response' and 'unexpected' are intended to mean in the context of PHI's operations. For example, he says it is unclear whether a low pressure system which may develop quickly into a cyclone is unexpected. He is also explained that the preparation and response to a SAR event requires the performance of ongoing work not merely in response to an incident of a crew member falling overboard.[37]

[83] Mr Hartley says that he has difficulty in interpreting the SAR Exemption particularly in the light of the use of the words "reasonable direction", "directly related" and "operations work". He says that even without taking into account the separate purported carveout in relation to medevac, the SAR Exemption to have at least the following four possible meanings:[38]

a. that the stoppages would not affect work on the FullSAR helicopter at all, and it would be maintained and certified in the same way it is now;
b. that the engineers would maintain the FullSAR helicopter in accordance with usual practice, but only provide certification and handover to the pilots when the helicopter is required for a search and rescue operation or search and rescue training; or
c. that the engineers would maintain the FullSAR helicopter in accordance with usual practice, but only provide certification and handover to the pilots when the helicopter is actually required for a search and rescue operation; or
d. that the engineers would not work on the FullSAR helicopter during the period of the bans, unless a callout for a search and rescue operation came, in which case they would comply with a "reasonable direction" to commence work.

---

[36] Ibid 521-522.

[37] Ibid 577-578.

[38] Ibid 610.

[84] Mr Hartley also says that he does not understand how the SAR Exemption will work in relation to Employees who are not at the workplace at the time that a direction to perform work "directly related to" SAR operations work, as any delay while Employees travel to base will jeopardise SAR response times.[39]

[85] Mr Hartley says further confusion arises from the use of the term 'reasonable' in both exemptions because it is unclear whether the business or employees will determine what is reasonable.[40]

[86] He also says that it is not clear to him that the Exemption will cover all evacuation circumstances, as they may not meet the requirement of being "immediately required", "unexpected" or involving a "serious or imminent threat to safety".[41]

[87] No doubt for sound business reasons PHI and its client INPEX would prefer the Employees did not to exercise their right to take protected action.

[88] The Exceptions are not long or unduly complex. The Exceptions use terms which are commonly used in industrial instruments and which have been the subject of detailed consideration by courts and tribunals. I have some concern that Mr Hartley, Mr Paton and Mr Edwards views about the alleged ambiguity of the Exceptions were motived by a desire to prevent the Notified Action occurring at all rather than a genuine inability to understand how the Exceptions were intended to apply in practise.

[89] For example, in the correspondence exchanged in relation to the PABO applications and during these proceedings both Unions expressed a willingness to engage with PHI to provide further clarity as to the operational effect of the Exceptions. PHI displayed an unwillingness to engage in this exercise.[42]

[90] In terms of credit I note that Mr Hartley contradicted his own written evidence and Mr Edwards written and oral evidence in relation to the provision of SAR and Medivac services by PHI's competitors.

[91] The AWU and the ALAEA made much of the fact that Mr Hartley is now removed from immediate responsibility for the day to day operation of the Broome base or the interpretation of notices of proposed industrial action.

[92] A PHI witness currently charged with responding to such notices such as Mr Bradshaw would appear to be a far more appropriate witness.

[93] However, Mr Hartley has had significant experience at the Broome base as an employer in various levels of management and has had decades of experience as a commercial helicopter pilot.

---

[39] Ibid 611.

[40] Ibid 612.

[41] Ibid 612.

[42] Ibid 828-847, 850, 871.

[94] Notwithstanding my concerns about Mr Hartley's evidence his evidence and the limited evidence of Mr Paton and Mr Edwards is all the evidence I have before me with respect to what a reasonable person in the position of the employer would understand the industrial action to involve as well as not involve. The evidence of these witnesses provides an explanation of the ambiguities they say exist. I note that Mr Paton and Mr Edwards are employed by INPEX and therefore I have before me evidence of more than one employer's interpretation of the Exceptions.

[95] The AWU and the ALAERA did not call any witness to give evidence as to what a reasonable person in the position of PHI would understand the notice to mean. Nor did they call any witness or tender any documentary evidence to demonstrate that Mr Hartley, Mr Paton or Mr Edwards confusion in relation to the application of the Exceptions was unreasonable.

[96] Critically they chose not to cross examine Mr Hartley, Mr Edwards or Mr Paton about the reasonableness of their assertions that the Exceptions were ambiguous. It is not simply enough to stand at the bar table not under oath and assert that the evidence of Mrss Hartley, Edwards and Paton was not reasonable and should be ignored.

[97] In these circumstances I accept that a reasonable person in the position of PHI would not clearly understand the Exceptions and thereby know what the industrial action would involve as well as not involve.[43]

[98] I am therefore not satisfied that the Notices specify the nature of the industrial action to be taken as required by section 414(6) of the FW Act.

[99] Consequently, I am not satisfied that the notice requirements set out in section 414 have been met in relation to the industrial action. Therefore, the common requirements for industrial action to be protected industrial action set out in section 413 of the FW Act have not been met.

[100] As the common requirements set out in section 413 of the FW Act have not been met I am not satisfied that the Notified Action is "protected industrial action" as defined by section 409 of the FW Act.

[101] Having found that industrial action is being threatened, impending and probable which would not be protected industrial action I granted the order sought by PHI.

[102] An Order to this effect was issued on 16 March 2022 in Print PR739358.

---

[43] *Esso Australia Pty Ltd v Australian Workers Union* (n 26) [104].

DEPUTY PRESIDENT

Appearances:
Mr Wood QC, for the Applicant.
Mr Duncalfe, for the First Respondent.
Mr Sowter, for the Second Respondent.

Hearing details:
2022
Perth
15 March

Printed by authority of the Commonwealth Government Printer

<PR739344>