

"Bar table assertions" not enough to refute strike challenge

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The FWC has for the second time this month stressed that unions cannot leave any room for ambiguity when notifying employers of protected industrial action, pulling the pin on a strike by helicopter maintenance engineers working in the north-west.

Having at the start of the month shut down planned protected industrial action at a smelter after noting its "organic" nature gave the business little chance of safely preparing for its impact (see [Related Article](#)), the tribunal last week determined that AWU and ALAEA members servicing [PHI International's](#) Broome-based chopper fleet had similarly failed to meet the bar set by s414(6) of the Fair Work Act.

The provision requires that a strike notice must specify the "nature" of the action and the day on which it will start.

Thirty engineers pursuing a new deal had planned to begin a three-week campaign of work stoppages and overtime bans on Wednesday that would have affected transport and, potentially, search and rescue and emergency services to clients including offshore gas platforms.

While the FWC had originally granted the unions a PABO on the basis that any industrial action needed to make exceptions for search and rescue and emergency responses, PHI told Deputy President Melanie Binet that the notices failed to adequately detail when and in what circumstances engineers would respond to such incidents.

Observing in reasons published on Friday that a notice must not be drafted "so as to conceal more than it reveals", the deputy president said the full court in *Esso Australia Pty Ltd v Australian Workers Union* 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" (see [Related Article](#)).

"More specifically what a reasonable person in the position of the employer would understand the industrial action to involve as well as not involve," said Deputy President Binet.

"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."

The company, the deputy president said, wanted to know "reasonable to whom?", and what qualified as "directly related"?

"PHI argue that the exceptions provided to the stoppages that have been notified in the notices each involve numerous, intersecting and overlapping ambiguities."

"PHI says these ambiguities 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."

Not clear to "reasonable person"

On the basis of evidence from both PHI and [INPEX](#) managers drafted in to offer a client's perspective, Deputy President Binet said she was provided with an interpretation and explanation of the alleged ambiguities from more than one employer.

By contrast, the AWU and ALAEA "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 [the managers'] confusion in relation to the application of the exceptions was unreasonable."

"Critically they chose not to cross examine [the managers] 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 [the managers] was not reasonable and should be ignored."

Accordingly, the deputy president said she accepted 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".

"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."

"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.

"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."

[PHI International Australia Pty Ltd v Australian Workers' Union, The, Australian Licenced Aircraft Engineers Association, The \[2022\] FWC 579 \(18 March 2022\)](#)

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