Industrial Court
of New South Wales

Case Title:	Director-General of the NSW Department of Education and Communities and Managing Director of TAFE NSW v New South Wales Teachers Federation
Medium Neutral Citation:	[2012] NSWIRComm 58
Hearing Date(s):	13 February 2012; 25 June 2012
Decision Date:	28 June 2012
Jurisdiction:	Industrial Court of New South Wales
Before:	Haylen J
Decision:	(i) the New South Wales Teachers Federation is found guilty of contravening the dispute orders issued by Backman J on 7 September 2011; (ii) the New South Wales Teachers Federation is to pay the following penalties: (a) in relation to the contravention of the dispute orders on 7 September 2011, the sum of $4000; (b) in relation to the contravention of the dispute orders on 8 September 2011, the sum of $2000. (iii) the penalties imposed in (ii) above shall be payable within 28 days of the date of this judgment.
Catchwords:	INDUSTRIAL RELATIONS ACT 1996 - Dispute orders - s 137 - contravention by industrial union - relevant principles - consideration of surrounding circumstances

	- steps taken by union to give advance notice of industrial action - steps taken by applicants to notify students and parents of effect of strike action - industrial action taken by public sector unions under auspices of Unions NSW - strike action taken in relation to Government policy and legislation - no jurisdiction in Commission to make award or arbitrate underlying cause of strike - contravention admitted - penalties imposed
Legislation Cited:	Industrial Relations Act 1996
Cases Cited:	Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd (2006) 151 IR 153 BHP Steel Ltd v AWU, New South Wales [2003] NSWIRComm 151 Bluescope Steel (AIS) Ltd v AWU and anor (No 2) [2005] NSWIRComm 210 Bluescope Stree Ltd (formerly BHP Steel Ltd) v Australian Workers Union, NSW (No 2) (2005) 141 IR 329 Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd (No 2) (1999) 94 IR 231 Crown Employees (Teacher in TAFE and Related Employees, Bradfield College and Teachers in TAFE Children's Centres) Salaries and Conditions Award, 2009 [2009] NSWIRComm 169 Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award and others [2009] NSWIRComm 2 Director-General, NSW Department of Education and Training and the Managing Director of TAFE v NSW Teachers Federation [2010] NSWIRComm 77 Director-General, NSW Department of Education and Training v NSW Teachers Federation [2010] NSWIRComm 44
Texts Cited:	
Category:	Principal judgment

Parties:	Director-General of the NSW Department of Education and Communities and Managing Director of TAFE NSW (Applicant) New South Wales Teachers Federation (Respondent)
Representation	
- Counsel:	Mr P Kite, SC with Mr Easton of counsel (Applicant) Mr N Dawson, Solicitor (Respondent**)**
- Solicitors:	Crown Solicitor for New South Wales (Applicant) Federation Law, Lawyers (Respondent**)**
File number(s):	IRC 1525 of 2011
Publication Restriction:	

JUDGMENT

BACKGROUND

1 The Director-General of the NSW Department of Education and Communities and Managing Director of TAFE NSW ("The Director-General") has moved the Court by way of a summons to show cause calling upon the New South Wales Teachers Federation ("the Federation") to show why action should not be taken against it arising from an alleged contravention of dispute orders made by Backman J on 7 September 2011.

2 The relevant background to this Application is as follows. In mid-June 2011 the Government amended the *Industrial Relations Act* 1996 ("the Act") primarily to require the Commission to give effect to certain aspects of Government policy relating to public sector employment. The amendments, placing certain restrictions on the hitherto wide discretion exercised by the Commission in arbitral proceedings, were opposed by

public sector unions and Unions NSW. Pursuant to the provisions of s 215 of the Act, Unions NSW is a State peak council for employees. In July 2011 Unions NSW, together with various public sector unions, organised a public protest rally of employees against the changes made to the Act. That protest rally took place on 15 July 2011 when approximately 12,000 employees gathered outside Parliament House.

3 Following that event, Unions NSW organised a further "day of protest" to be held on 8 September 2011 as part of the union movements ongoing opposition to the Government's amendments to the Act. On or about 31 August 2011 the Federation directed its members to take industrial action in the form of a 24-hour stop work meeting on 8 September 2011. During this stop work action all members of the Federation, within reasonable travelling distance of Sydney, were urged by the Federation to attend the public sector rally to be held in the Sydney Domain with other members urged to attend protest activities organised in their local area. In terms of a time frame, 31 August 2011 was a Wednesday and 8 September 2011 was a Thursday.

4 On Friday 2 September 2011 the Director-General notified a dispute to the Commission in relation to the Federation's directive to stop work for 24 hours on 8 September 2011. On Monday 5 and Tuesday 6 September 2011 Marks J convened conferences of the parties. Marks J was asked by the notifier to make a Recommendation or Direction that the Federation not proceed with strike action. His Honour declined to make any Direction or Recommendation because the issue was political rather than industrial and was not otherwise within the jurisdiction of the Commission to resolve. At the request of the notifier, his Honour issued a certificate of failed conciliation.

5 Marks J issued a Statement on 6 September 2011 in which he expressed his lack of optimism concerning the extent to which the Commission could further assist the parties in the context of a political protest, stating that he did not propose to list the matter for any further directions or report back. If

the parties required assistance within the jurisdiction and power of the Commission, application could be made for the proceedings to be relisted or a fresh notice of dispute could be lodged with the Registry.

6 After those proceedings concluded before Marks J but also on 6 September 2011, the Director-General applied to the Commission for dispute orders. That Application was heard by Backman J on 7 September 2011 and at approximately 2.50 pm on that day, her Honour issued dispute orders against the Federation. In short, those orders directed the Federation to refrain from taking industrial action on 8 September 2011 and ordered the Federation to cease and refrain from authorising, organising, supporting, encouraging or inciting industrial action, including 24-hour strike action, for a period of 48 hours. The Federation was directed to take all reasonable steps to ensure that employees and members of the Federation complied with those orders. The orders were to take effect immediately and were to remain in force for 48 hours.

7 The Federation did not take any steps to comply with those orders and encouraged its members to participate in strike action in support of the rally on 8 September 2011. On 21 September 2011 the Director-General applied to the Court to issue a summons to show cause directed to the Federation for breaching the dispute orders made on 7 September 2011. In late September 2011 a summons to show cause was issued but in view of possible deficiencies in the first summons to show cause, with the consent of the parties, a second summons to show cause was issued.

EVENTS IN THE COMMISSION

8 Having briefly set out the background, it is appropriate that the course of events before the Commission should be dealt with in more detail. When the dispute notification was listed on 6 September 2011, for the second occasion, Marks J had taken steps to have Unions NSW attend so as to inform the Commission in greater detail of the nature of the protest rally that was to take place on 8 September 2011. The Assistant Secretary of

Unions NSW, Mr Christodoulou, appeared in those dispute proceedings and informed his Honour that Unions NSW had organised the protest on 8 September 2011 as part of its ongoing opposition to the State Government's industrial relations laws. An earlier rally had taken place outside Parliament House on 15 July 2011 involving some 12,000 workers but on that occasion the Federation had only a small contingent as it took the view that it wished to consult its members and gauge their reaction to the new laws before participating in any further protest action or rallies. It was anticipated that the rally to take place on 8 September 2011 would be much larger than the rally held on 15 July 2011. Significantly, Mr Christodoulou stated:

> Every public sector union will be participating and many thousands of workers from many unions will be taking industrial action to attend. Many unions have now asked their members to consider taking industrial action or strike action to attend, particularly given that the Government has put out circulars which clearly state that departments are to refuse any applications for any type of leave on that day for people to be able to attend the rally.

9 Mr Christodoulou referred to circulars issued by individual departments indicating that employees would be refused authorised leave to attend the rallies and if they did attend any rally or take time off, it would be construed as industrial action and they would not be paid for their absence. Mr Christodoulou submitted that, if authorised leave was not able to be taken, employees were required to take industrial action in order to attend the protest rally. He predicted that, of those attending the rally on 8 September 2011, 95 per cent would be taking industrial action in order to attend. In answer to a query from his Honour, Mr Christodoulou said he was aware that different unions were, sometimes, taking a different approach to the rally but he was aware of one public sector union as large as the Federation that, as a result of the circulars prohibiting the taking of leave, had told their members they should take industrial action to attend the rally. There had been ballots in approximately 25 hospitals and in 23 hospitals, nurses would be striking to attend the rally. Sydney Harbour bridge workers would be striking to attend the rally and within most public

departments, be it Public Works and Services, Trade and Investment, the Art Gallery or the State Library, "workers will be striking to attend the rally."

10 Buses were being organised from as far away as Nowra, Wollongong, Lithgow and Dubbo so that workers could attend the rally and inevitably they would be taking the whole day off as strike action because they could not take leave. Mr Christodoulou described the action as "a political protest against these draconian laws" with many workers feeling that they had no other option than to take industrial action to attend the rally. He pointed out that the Federation had not taken the approach of other unions by simply allowing individuals to make a decision: that may have been more detrimental to parents and students if followed by the Federation because there would be some uncertainty about whether a school would be open or closed. Students would be turning up only to find that at 9.30 am some teachers would leave the school to attend the rally and possibly returning or not returning until the school had closed. He submitted that, by advising people well in advance of their intentions to participate in the rally with other public sector workers, the Federation had taken a "responsible" position. He later submitted that the Federation should not be singled out from other unions in relation to attending the rally.

11 Mr Dawson, appearing for the Federation before Marks J, informed his Honour that the Federation had not adopted the approach of simply walking out of schools and that to do so would be "irresponsible." In accordance with departmental instructions, schools had notified parents the day before whether the school would be sufficiently staffed to provide minimal supervision or whether the whole school, including the principal, would be on strike. Parents had therefore been informed of the situation in relation to their school.

12 Having received those responses from Unions NSW and the Federation, his Honour addressed counsel for the notifier and expressed his concern about the futility of issuing a direction which he knew was not going to be obeyed. Counsel for the notifiers pointed out that taking industrial action

was in breach of contracts of employment and that the industrial action would be taken to the detriment of 750,000 school students and 500,000 TAFE students with a resultant concern of parents and that situation should not be "let stand." For that reason a Recommendation was sought that the Federation refrain from taking industrial action in the form of a 24 hour strike on the following day.

13 His Honour responded by recognising and understanding the concerns expressed by the notifiers but then stated:

> In the normal conventional type of industrial dispute I am the first to come forward and say thou shalt not strike. Hopefully, that is my track record over 18 years. But in the normal situation where I do that, this Commission has some power and some authority to do something about the underlying cause of the dispute. But the underlying cause of this dispute is legislation introduced by the New South Wales Government. ... So it is a political battlefield that ought to be fought out in Parliament. It has been fought out in Parliament and lost. And on one view people can say, well, that's the law and you must abide by it. But as I said yesterday, in a democracy people have the right to demonstrate peacefully and lawfully. I understand that this is not lawful. It is in breach of contracts of employment and arguably in breach of industrial awards of this Commission. But it is an industrial and political fact of life here and if this Commission had some authority or some power to in some way deal with the underlying matter then I would be much more willing to issue a direction, not just a recommendation, without you even asking for it because that is the basis upon which the Commission operates. There is never any need for a strike or any industrial action because we have the ability to deal with the underlying problem. We do not have that ability here. It is a political issue and I am reluctant to issue a direction when I know that it is going to be broken. There is just no point. ... and after the strike action on 8 September the Government will have the full force of the law available to it, to enforce individual contracts of employment, to take action for breach of industrial awards and whatever else, sue for damages, seek injunctions restraining that type of conduct in the future. That is a matter for Government.

Although his Honour accepted that he had not conducted conciliation, at least in the usual sense because of the nature of the dispute he, nevertheless, issued a certificate of failed conciliation on the application of the notifiers.

DISPUTE ORDERS SOUGHT

14 The application for dispute orders came before Backman J after objections were raised by the Director-General that Marks J had exercised conciliation powers in the dispute proceedings. The matter therefore came before her Honour as a matter of urgency as the proposed strike action was to take place the next day.

15 In the proceedings before Backman J her Honour was informed of the nature of the dispute proceedings before Marks J and the applicants also relied upon an affidavit sworn by Mr Mark Philip, Director of Industrial Relations, New South Wales Department of Education and Communities. In answer to some queries raised by her Honour counsel for the Director-General indicated that a different approach had been taken to the Federation's participation in the protest rally because they had directed their members to take 24-hour strike action and others had encouraged participation by way of industrial action but possibly for a much more limited period considering the rally was to take place between 11.30 am and 2.00 pm. It was conceded that the Public Service Association ("PSA") had given a directive to members to take industrial action but not for a 24-hour period.

16 In relation to this matter the Federation informed her Honour that, because of the Federation's widespread membership, it had given notice since 31 August 2011 that the stoppage would occur so that arrangements could be made at each individual school and that parents would be aware of the circumstances at their school. To do otherwise, it was suggested, would be chaotic and irresponsible. There was evidence that, in the previous few days, contact had been made with schools to establish what staffing would be available and whether the schools would be open or not. Her Honour was also informed that, during the morning of 7 September 2011, Marks J had heard a dispute in relation to Corrective Services and had given a direction not to conduct a 24-hour stoppage. Overall, the scale of

disruption would be much larger arising from the 24-hour strike directed by the Federation.

17 Her Honour was concerned about the utility of the orders given the lateness of the time and the limited ability to inform teachers that they were not to take industrial action. The Federation informed her Honour that, at the time of hearing, teachers and students were engaged in sporting activities and there would be practical difficulties in contacting the Federation's members and reversing the directive given a week before. It was also argued that the arrangements for the operation of schools on 8 September 2011 had already been established and arrangements made by parents in relation to the state of their school and whether or not there was a level of supervision available and that to make the orders now would only add to the confusion rather than bringing about any degree of certainty. Her Honour, nevertheless, expressed concern at the disruption that would take place in State schools.

18 Mr Philip was cross-examined in relation to his affidavit. Mr Philip conceded that it was known for some months that teachers and other public servants would participate in another protest rally organised by Unions NSW. More recently, Mr Philip had become aware that the PSA had directed its members to attend the rally but stated that it was the duration of the Federation's industrial action that was of most concern. No dispute had been notified regarding the industrial actions taken by the PSA in the teaching areas of the public sector. Mr Philip accepted that he had issued a direction that applications for recreational leave or extended leave, flexible time or adjusted core times to coincide with the 8 September 2011 rally should not be approved except in exceptional circumstances.

19 Mr Philip agreed that, on 1 September 2011, he had written to regional directors, school education directors and principals about the supervision of students and staff for 8 September 2011 and had asked principals to ascertain by 5 September 2011 what level of supervision would be available at their school and whether their school could operate safely.

They were to provide written directions to parents, caregivers and students of the supervision arrangements that would be in place at their school on 8 September 2011. Mr Philip presumed that all schools had made those arrangements. While Mr Philip did not think it was responsible for teachers to go on strike, he agreed that it would be irresponsible for teachers to simply walk-off the job without notice as other public sector employees proposed to do on 8 September 2011.

20 At approximately 2.50 pm on 7 September 2011, Backman J issued a statement and granted a modified form of orders sought by the Director-General. In the course of that statement, her Honour said:

> In making the orders, I am aware that disruptions are still likely to occur across all schools within New South Wales, given the lateness of the application for those orders. It seems equally likely however that if the orders are made the inevitable disruption will be reduced, perhaps substantially reduced.
>
> This outcome in my view seems to best serve the public interest. My conclusion in this regard is based partly on the evidence given by Mr Philip, the Director of Industrial Relations at the New South Wales Department of Education and Community with regard to the avenues of communication available including the media which I understand to be utilised in order to inform persons involved of the content of the orders. I should add that given the urgency of this matter and the obvious time constraints I have not had the opportunity to express my reasons more fully at this stage than making the orders as amended.

21 The orders made by Her Honour were as follows:

> A. Pursuant to s 137 (1) of the *Industrial Relations Act* 1996:
>
> 1. The New South Wales Teachers Federation by its officers, employees and members employed by the Director-General of Education and Community and the managing director of TAFE are hereby ordered to refrain from taking industrial action on 8 September 2011.
>
> 2. The New South Wales Teachers Federation, its officers, employees and members employed by the Director-General of Education and Community and the managing director of TAFE are hereby ordered to cease and refrain from authorising, organising, supporting, encouraging or inciting industrial action

including a 24-hour strike proposed to take place, commencing on 7 September 2011, for a period of 48 hours.

B. Pursuant to s 136 (1)(a) of the *Industrial Relations Act* the Commission makes the following directions:

1. The New South Wales Teachers Federation and its officers are hereby directed to take all reasonable steps to ensure that the employees and members of the New South Wales Teachers Federation comply with orders A1 and A2, including informing its members of the said orders by posting the orders provided by the notifier in a prominent position on its website no later than 6 pm on 7 September 2011.

2. Service of orders A1 and A2 and direction B1 may be effected by sending a facsimile copy to the New South Wales Teachers Federation or by handing a copy of the orders to an officer or employee of the New South Wales Teachers Federation by 6 pm on 7 September 2011.

C. Pursuant to s 136 (1) of the *Industrial Relations Act* the Commission makes the following directions.

1. These orders and directions shall take effect as of now, on 7 September 2011 and shall remain in force for 48 hours unless, on formal application, they are varied or rescinded in the meantime.

22 The orders made by her Honour reflected the orders sought: the major difference was that her Honour was unwilling to make orders that ran for three months and instead confined the orders to an operative period of 48 hours. In the course of proceedings counsel for the Director-General described the operation of the orders in the following way: under Pt A, order 1 was a direction to the Federation itself, its employees and members to refrain from taking industrial action and order 2 was a supplementary order that the Federation cease and refrain from authorising, organising, supporting, encouraging or inciting industrial action, including the 24-hour strike proposed for the 8 September 2011. The Pt B orders were described as being "essentially" facilitative and directed the Federation and its officers to take all reasonable steps to ensure that employees and members of the Federation comply with order

A1 and A2. Order B2 was also facilitative in terms of how the service of the order was to be effected.

BREACH OF DISPUTE ORDERS

23 The summons to show course arising from the alleged breach of the orders made by Backman J was again supported by an affidavit of Mr Philip. That affidavit, in terms, provided the evidentiary basis for various allegations contained within the grounds and reasons supporting the issuing of a summons to show cause. Those grounds and reasons were stated to be as follows:

> 1. At approximately 2.50 pm on Wednesday, 7 September 2011 in proceedings IRC 1462 of 2011 Her Honour Justice Backman made dispute orders against the Respondent ("**The Dispute Orders").**
>
> 2. On 7 September 2011 the Respondent contravened the Dispute Orders.
>
> 3. On 8 September 2011 the contravention continued.
>
> 4. The Applicant was the person who applied for the Dispute Orders.
>
> 5. A penalty has previously been imposed on the Respondent for a contravention of an earlier dispute order.
>
> **E.** Particulars:
>
> 1. The Respondent is an industrial organisation.
>
> 2. On or about 31 August 2011 the Respondent issued a publication on its website entitled "Teachers to Stop Work on 8 September" **("the First Directive").** The First Directive included the following words:
>
> > ... the Teachers Federation directs all members to stop work for 24 hours on Thursday, 8 September.

3. The First Directive, by its terms, authorised, organised, supported, encouraged and incited the taking of industrial action on 8 September 2011.

4. On or about 30 August 2011 the Respondent issued a circular entitled "24 Stop Work - Day of Action on 8 September 2011" **(the second Directive').** The Second Directive included the words:

> It is essential that you and all your colleagues Stop Work for 24 hours on that day to attend to these activities.

5. The Second Directive, by its terms, authorised, organised, supported, encouraged and incited the taking of industrial action on 8 September 2011.

6. At approximately 2.50 pm on Wednesday 7 September 2011, in proceedings IRC 1462 of 2011, Her Honour Justice Backman made dispute orders against the Respondent **("The Dispute Orders").**

7. The Applicant was the person who applied for the Dispute Orders**.**

8. Between 2.50 pm and midnight on 7 September 2011 the Respondent took no steps to revoke, alter or otherwise withdraw the First Directive.

9. The Respondent's failure to do so on 7 September 2011 was in contravention of the Dispute Orders in that the Respondent failed to cease authorising, organising, supporting, encouraging or inciting the taking of industrial action on 8 September 2011.

10. Between 2.50 pm and midnight on 7 September 2011 the Respondent took no steps to revoke, alter or otherwise withdraw the Second Directive.

11. The Respondent's failure to do so on 7 September 2011 was in contravention of the Dispute Orders in that the Respondent failed to cease authorising, organising, supporting, encouraging or inciting the taking of industrial action on 8 September 2011.

12. After the making of the Dispute Orders on 7 September 2011 the Respondent took positive steps to authorise, organise, support, encourage or incite the taking of

industrial action on 8 September 2011, including but not limited to:

i. between 3 pm and 4 pm on 7 September 2011 the Respondent posted advice on its website titled "Teachers' strike to proceed." (**the NSWTF Posting")**;

The NSWTF Posting included the words:

> NSW Teachers Federation members will proceed on strike tomorrow and join with nurses, firefighters, police and other public sector workers in rallies against the unjust O'Farrell government industrial legislation.

ii. The Respondent caused an SMS message to be sent to some or all members advising them to "*disregard any reports to the contrary and proceed on 24 hour strike 8th Sept. More info go to www.nswtf.org.au.".*

iii. The Respondent, by its officer or employee Ms Nicole Calnan, made public statements in support of the industrial action. Ms Calnan's statements were subsequently reported, on the day, on the Illawarra Mercury website.

iv. The Respondent by its officer or employee Ms Nicole Calnan (Country Organiser), made public statements on Twitter in support of the industrial action.

v. The Respondent, by its officer or employee Mr John Dixon (Membership Manager), made public statements on Twitter in support of the industrial action.

vi. The Respondent, by its officer or employee, Mr Jason Gerke (City Organiser), made public statements in support of the industrial action. Mr Gerge's statement were subsequently reported, on the day, on the Blacktown Advocate website.

vi. The Respondent, by its President Mr Bob Lipscombe, made public statements in support of the industrial action. Mr Lipscombe's statements were subsequently reported, on the day, on the Manly Daily website.

vii. The Respondent, by its President, made public statements in support of the industrial action. Mr Lipscombe's statements were subsequently reported, the next day, on the Daily Telegraph website.

13. The above conduct was, collectively and separately, conduct by the Respondent in contravention of the Dispute Orders.

14. On 8 September 2011, members of the Respondent took industrial action by way of a 24-hour stoppage. This industrial action was in contravention of the Dispute Orders.

15. On 8 September 2011 the Respondent took no steps to revoke, alter or otherwise withdraw the First Directive.

16. The Respondent's failure to do so on 8 September 2011 was in contravention of the Dispute Orders in that the Respondent failed to cease authorising, organising, supporting, encouraging or inciting the taking of industrial action on 8 September 2011.

17. On 8 September 2011 the Respondent took no steps to revoke, alter or otherwise withdraw the Second Directive.

18. The Respondent's failure to do so on 8 September 2011 was in contravention of the Dispute Orders in that the Respondent failed to cease authorising, organising, supporting, encouraging or inciting the taking of industrial action on 8 September 2011.

19. On 8 September 2011 the Respondent took positive steps to authorise, organise, support encourage or incite the taking of industrial action on 8 September 2011, including but not limited to:

i. The Respondent, by its President, Mr Bob Lipscombe, made public statements in support of the industrial action. Mr Lipscombe's statements were subsequently reported, on 8 September, on the ABC News website.

ii. The Respondent, by its President, Mr Bob Lipscombe, made public statements in support of the industrial action. Mr Lipscombe's statements were subsequently reported, on 8 September, on the Eden Magnet website.

iii. The Respondent, by its President Mr Bob Lipscombe, made public statements in support of the industrial action. Mr Lipscombe's statements were subsequently reported, on 8 September, on the Northern Star website.

iv. The Respondent, by its officer or employee, Ms Nicole Calan (Country Organiser), made public statements on Twitter in support of the Industrial action.

v. The Respondent, by its officer or employee, Mr John Dixon (Membership Manager), made public statements on Twitter in support of the industrial action.

20. The above conduct was, collectively and separately, conduct by the Respondent in contravention of the Dispute Orders.

21. The Respondent also contravened the Directions given by Her Honour Justice Backman. So far as the Applicant is aware the Respondent did not take any of the steps it was directed by Her Honour to take.

22. A penalty has previously been imposed on the Respondent for a contravention of an earlier dispute order.

23. The Applicant relies upon the matters referred to in the affidavit of Mark Andrew Phillip sworn 21 September 2011

24 Mr Philip's affidavit also contained copies of various press reports and other communications whereby officers and employees of the Federation indicated, after her Honour granted the dispute orders, that the orders would not be complied with and encouraging the members of the Federation to attend the rally on 8 September 2011 as part of the 24-hour strike. Mr Philip also gave evidence that officers of the Industrial Relations Directorate of the Department took a number of telephone calls from school principals and school education directors indicating that a large percentage of teachers went on strike and of those, a substantial number attended the rally. The Department had estimated that, as a result of the 24-hour strike, there was very significant disruption to the educational delivery of lessons of up to 750,000 students across New South Wales. The strike action affected the educational delivery of classes of up to

500,000 students at TAFE colleges and campus locations that were severely disrupted.

25 In a later affidavit Mr Philip also gave evidence that, from documents collected by the Department, on 8 September 2011, 1,586 schools were non-operational and while 714 schools were operational, almost 90 per cent of students across the State were absent. It was further noted that approximately 75 per cent of school teachers, being approximately 41,000 employees, were absent on the day. The reporting was different in relation to TAFE but from documents available to him, Mr Philip estimated that approximately 38 per cent of TAFE teachers participated in the industrial action on 8 September 2011.

26 On the hearing of the summons to show cause, both parties helpfully provided substantial written outlines. For the Federation, those submissions admitted contravention of the dispute orders in that:

(a) on 8 September 2011, in contravention of her Honour's orders, the Federation took industrial action;

(b) on 7 September 2011, in contravention of the orders made by her Honour, the Federation did not cease or refrain from authorising or organising industrial action; and

(c) on 8 September 2011, in contravention of the orders made by her Honour, the Federation did not cease or refrain from authorising and organising industrial action.

27 The written submissions revealed that there was no disagreement between the parties as to the appropriate principles to apply. Both parties referred to the judgment of Boland J in *Bluescope Steel (AIS) Ltd v AWU and anor (No 2)* [2005] NSWIRComm 210 and the fact that his Honour's approach and reasons had been approved by the Full Bench in *Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd* (2006) 151 IR 153

at [72]. The judgment of Boland J listed a series of matters considered to be relevant arising from the consideration of relevant issues by Branson J in *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231. Those matters so identified were as follows:

> The list of relevant matters identified by her Honour is helpful in compiling a similar list that may be relevant in respect of contraventions of dispute orders under s 139 of the *Industrial Relations Act* where the conduct constituting a contravention calls for the imposition of a penalty under s 139(3)(e). In my opinion, the matters that may be considered to be relevant and appropriate are:
>
> (a) the circumstances in which the relevant contravention took place (including whether the contravention was undertaken in deliberate defiance or disregard of the dispute order);
> (b) whether the person found to have been in contravention of a dispute order has previously been found to have engaged in conduct in contravention of an earlier dispute order (in this respect see s 139(4)(b), which provides for higher maximum penalties where there has been an earlier contravention);
> (c) the consequences of the conduct found to be in contravention of the dispute order;
> (d) the need, in the circumstances, for deterrence;
> (e) any relevant subjective factors including undertakings regarding future conduct.

28 Although the issue was not addressed by the parties, the Court will proceed on the basis that the penalties to be imposed are civil penalties (see *BHP Steel Ltd v AWU, New South Wales* [2003] NSWIRComm 151).

DELIBERATION

The Director-General, in submissions, emphasised that the Federation had been found in contravention of earlier dispute orders. Reference was made to the decision in *Director General, NSW Department of Education and Training v New South Wales Teachers' Federation* [2010] NSWIRComm 44. The dispute orders had been made by Boland J, President. In this case, Staff J imposed a penalty of $4000 for a breach that occurred on one day. The industrial action in that case was part of a campaign by the

Federation said to be directed to, firstly, protesting against a decision of the Full Bench of the Commission given in October 2009 in respect of variations made to *the Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award and others* [2009] NSWIRComm 2; *Crown Employees (Teacher in TAFE and Related Employees, Bradfield College and Teachers in TAFE Children's Centres) Salaries and Conditions Award, 2009* [2009] NSWIRComm 169; secondly, to pressure the New South Wales Government not to implement the decision of the Full Bench and to garner support of school teachers for the stance taken by the Federation and its TAFE members as part of the general campaign.

29 His Honour, Staff J, in fixing a penalty in that case was bound to fix a penalty not exceeding $10,000 for the first day with an additional $5,000 for each subsequent day in which the contravention continued. In finding that the Federation's actions was "plainly a serious offence" Staff J noted that: the contravention was undertaken in blatant and deliberate defiance of the dispute order made by Boland J, that Boland J had observed that the industrial action planned by the Federation was entirely without justification and there had been a failure of the Federation to apologise to the Court for the breach and for failing to make a public declaration of belief in and willingness to uphold the integrity of the Commission.

30 In *Director General, NSW Department of Education and Training and the Managing Director of TAFE v NSW Teachers Federation* [2010] NSWIRComm 77 the Federation was found to have contravened dispute orders made by a Full Bench of the Commission. The short background to this matter involved an increase of 12 per cent to employees over three years as a result of an agreement, assisted in negotiations by the Commission. An unresolved issue was whether there should be some adjustment to direct teaching hours of work of TAFE teachers and time credit hours to fund the salary increase beyond 2.5 per cent each year. The Federation had campaigned against that approach but it was always

known by the parties that the teaching hours issue would be the subject of arbitration if there was no agreement in relation to it.

31 Approximately one month before the arbitration was to be heard, the Federation convened a stop work meeting of TAFE teachers contrary to prior directions given by the Commission that no industrial action should take place. Three weeks later the Federation indicated that there would be industrial action taken in the form of a 24-hour strike by TAFE teachers as part of a rally. In those circumstances, a Full Bench of the Commission made dispute orders. In granting orders the Full Bench recited the relevant history and the fact that it was understood by all parties that the teaching hours issue would be arbitrated and further observed that, by its conduct in organising and encouraging industrial action by its members at TAFE, the Federation was undoubtedly attempting to pressure the Department to either forego its right to have the hours issue arbitrated or to have the Department alter its position to the advantage of the Federation. The attitude of the Federation in pursuing a course of industrial action was described as "indefensible". Ultimately, the stop-work meeting lasted approximately three hours.

32 In dealing with the Federation's breach of the dispute orders, Marks J noted that the Federation had undertaken a deliberate and planned course of conduct in arranging and holding the stop-work meeting and that the stop-work meeting was undertaken in "calculated disregard" of the dispute orders issued by the Full Bench. The circumstances in which those stop work meetings were conducted were indicative of an act of defiance in reaction to a Full Bench decision and was representative of a disregard for and dismissal of the authority of the Commission. His Honour stated that the contravention was a most serious matter and that the industrial action was organised in a flagrant breach of the dispute orders. His Honour noted that the Court could not have confidence that the respondent would not breach any further dispute order and noted that, at no time during the proceedings had the Federation apologised for its conduct nor did it give

any indication of remorse or contrition for the conduct. The maximum penalty available was $10,000: his Honour imposed a penalty of $7000.

33 In the present case the Federation is exposed to a maximum penalty of $20,000 for the first day of the contravention and $10,000 for each day thereafter. The setting of an appropriate penalty may proceed on the basis of the need for deterrence and in recognition of the fact that the industrial action resulted in the substantial closure of schools and had a significance impact upon TAFE operations.

34 The Director-General, in submissions, sought the imposition of penalties in the higher range. In considering the seriousness of this breach, the following matters appear to be relevant. Firstly, this breach does not seem to be at the same level of seriousness as the two earlier breaches committed by the Federation. In those cases the Commission, exercising its industrial arbitral powers after due consideration, had made awards that were simply rejected by the Federation. The industrial action and the breach of dispute orders were actions taken directly in challenge to the authority of the Commission both as to its arbitral powers and its powers to make dispute orders. The penalties imposed in those two cases represent a considered assessment of the seriousness of each case.

35 The present case is distinctly different. As indicated by Marks J in the compulsory conferences held on 5 and 6 September 2011, the underlying issue was not an industrial matter which the Commission had jurisdiction to entertain or in relation to which it could make an order or award. His Honour pointed out that, in the normal case, he would not hesitate to give a direction or a Recommendation that no industrial action take place and would then attempt to conciliate the matter and if conciliation was unsuccessful, the matter would be open to arbitration. This was not such a case and there was nothing that Marks J could do to influence the Federation from taking industrial action by joining Unions NSW and other public sector unions in their protest rally against Government industrial policy and amendments made to the *Industrial Relations Act*. Because the

Commission lacked jurisdiction, there could be no serious challenge to its authority by the Federation rejecting any recommendation or direction regarding this industrial action: indeed, Marks J made neither a recommendation nor gave a directions regarding the strike. Although his Honour issued a certificate of failed conciliation at the request of the Director-General, he accepted that he had not undertaken conciliation in the usual manner when dealing with an industrial matter otherwise within jurisdiction. He concluded the dispute proceedings by indicating that he would not relist the matter again unless the parties required assistance with a matter within the jurisdiction and power of the Commission and that might be made by way of a fresh notice of dispute.

36 When the matter was heard urgently before Backman J, no attention was paid to the jurisdiction of the Commission to make dispute orders pursuant to the provisions of s 137 of the Act. Section 137(1) provides:

> The Commission may make the following kinds of dispute orders when dealing with an industrial dispute in arbitration proceedings...

Apart from a reference to the industrial disruption that would be caused by strike action intended to be taken the following day, in terms, the Director-General did not draw this provision to the attention of her Honour nor was it spelt out with any precision what was the industrial dispute and what were the arbitration proceedings. There was some muted reference made by the Director-General to salary claims being pursued by the Federation but clearly, there was no evidence either before Marks J or before her Honour of any such industrial campaign - the whole issue was about a directive given by the Federation to its members to participate in the protest rally about Government legislation and was not about any current wage claim or proposed wage claim. Further, it is to be noted that s 137(1) provided the Commission with a discretion as to whether or not to make dispute orders but that point was not spelt out for the benefit of her Honour.

37 The Court readily accepts that, if there are any flaws in the dispute orders made by her Honour whether jurisdictional or discretionary, those orders, nevertheless, remained binding on the Federation until they were set aside. Having regard to the fact that the orders were made shortly before 3.00 pm on the day before the industrial action was to take place, it may well have been the Federation's view that an appeal was not practical. Whether or not the Federation even considered taking such action, the point is it did not do so and remained bound by the orders made.

38 The Federation relied upon what it described as a "responsible" approach having regard to the fact that the protest rally organised by Unions NSW had been foreshadowed for a number of months and that approximately one week before the rally was to take place, the Federation had given a direction to its members and had thus provided sufficient time for the Director-General to take whatever actions deemed appropriate to either keep schools and TAFE colleges open or to close them because of the lack of supervision available and to inform students and parents of those actions. Indeed, the evidence of Mr Philip was precisely that action was taken and by 5 September 2011 schools and TAFE colleges had notified the students and parents whether or not they would be open and the nature of their capacity to supervise students who attended. There is some force in the Federation's submission that, had it adopted the attitude of other public sector unions and had merely left it to individuals on the day to decide whether or not to take strike action to join the rally, there would have been chaos in public schools and TAFE colleges with no ability to advise parents and students of the facilities available or whether there would be closures.

39 The early notification of the Federation directing its members to take industrial action and to attend the rally gave the Director-General sufficient time to make an early application for dispute orders. The evidence clearly demonstrates that attention was being paid to advising staff as to restrictions on leave that might be taken in order to attend the rally and even though other public sector unions had advised that strike action might

be taken by their members, there was no public sector-wide application made for dispute orders. Instead, dispute proceedings were commenced and continued over two days before Marks J and when they proved to be unfruitful for the Director-General, there was a very late application made and an urgent hearing convened to deal with the dispute order applications. Her Honour was clearly concerned by the lateness of the application and information provided by the Federation that, because the hearing was taking place on a school sports day and in the mid-afternoon, it would be highly unlikely that its members would return to school and the efficacy of any notification of the orders to its members would be highly questionable. Ultimately, her Honour formed the view that the public interest required efforts to be made to secure the opening of the schools and colleges to the greatest extent possible.

40 Having regard to the circumstances surrounding the lateness of the application and the period of notice given by the Federation, the Court is unable to conclude that these breaches are of the same order of seriousness as the previous two breaches by the Federation. This industrial action involved protest rallies against Government policy, not open to arbitration: the rally itself was supported by all public sector unions under the auspices of Unions NSW, the State peak council for employees under s 215 of the Act. Further, it is appropriate that the penalty for each day encompass the entirely of the actions taken by the Federation in breach of the dispute order - this approach appears to reflect the structure of s 139.

41 In assessing the appropriate penalty in this case the Court is mindful of the wide discretion available to it having regard to all the circumstances of the case.

In this respect mention is made of the decision of the Full Bench in *Bluescope Stree Ltd (formerly BHP Steel Ltd) v Australian Workers Union, NSW (No 2)* (2005) 141 IR 329. In that case there had been two earlier strikes restricting the despatch of coils, regarded as "urgent product." The

Australian Workers Union was party to an enterprise agreement where it had agreed to adopt certain processes during periods of industrial disputation so that there would be no interruption to the supply of urgent product. The Full Bench noted that the terms of this agreement had been breached as well as the terms of dispute orders. This was regarded as a serious offence, nevertheless, the industrial context led the Full Bench to reject the company submissions to impose a penalty "at the top of the range" and instead to defer fixing a penalty for two years to allow the union to demonstrate its commitment to ensure compliance with the urgent dispatch provisions of the enterprise agreement.

42 Having regard to the general considerations referred to by Boland J in *Bluescope Steel* and the particular matters discussed above, the appropriate penalty in this case should be $4000 for the first day and $2000 for the second day. It might be noted that the first day of the contravention commenced from approximately 3.00 pm but the importance of that day was that it was the time that the Federation needed to advise its members of the orders made and to encourage its members not to take strike action on the following day. That is an important matter and is reflected in the quantum of penalty imposed for the first day. The second day is significant because it was the day on which the industrial action took place.

ORDERS

43 (i) the New South Wales Teachers Federation is found guilty of contravening the dispute orders issued by Backman J on 7 September 2011;

(ii) the New South Wales Teachers Federation is to pay the following penalties:

(a) in relation to the contravention of the dispute orders on 7 September 2011, the sum of $4000;

(b) in relation to the contravention of the dispute orders on 8 September 2011, the sum of $2000.

(iii) the penalties imposed in (ii) above shall be payable within 28 days of the date of this judgment.