

IN THE FAIR WORK COMMISSION

Matter No: B2022/1726

Re Svitzer Australia Pty Ltd

STATEMENT OF GREGORY JAMES YATES

I, Gregory James Yates, union organiser, of 40 Brookes Street Bowen Hills say:

Background

1. I am the Senior National Organiser for the Australian Institute of Marine and Power Engineers (AIMPE). My duties include consulting with and representing members' views in negotiations for marine towage sector Agreements, including the enterprise agreement that governs the terms and conditions of marine engineers employed by Svitzer Australia Pty Limited (**Svitzer**). I have had approximately 22 years' experience with AIMPE over an approximate 29 year period.
2. I have graduate and post graduate qualifications in Industrial Relations, Human Resource management and Commercial Arbitration. I also successfully completed the requisite modules for eligibility for a Marine Engine Driver Grade 2 license, however, have not obtained a certificate of competency due to lack of sea time. I also completed training in the Elements of Shipboard Safety.
3. Since approximately 2009, I have progressively become more involved in the towage sector, taking over as portfolio holder in around 2010. As portfolio holder I would either directly be involved in negotiations for enterprise agreements in the sector or oversee coordination. This is always under the direction of the AIMPE Federal Executive and relevant membership.
4. The employers that I deal with on behalf of AIMPE members have been Svitzer, Smit Lamnalco (previously Smit Marine), Westug (AKA Engage Marine), Port Lincoln Tugs (jointly owned between Svitzer and Stannards), Daltug, Teekay Shipping, and Pacific Tug.
5. I participate in negotiations not only for the settlement of enterprise agreements, but also when required advice and advocacy in relation to port practices and individual member issues.

Industrial action

6. It is my understanding, based on things that Svitzer has said publicly together with my own experience in the industry, that the lockout will stop shipping in ports where there is no alternative towage operator. That would mean that no containers, fuel, minerals, primary produce and commodities, passenger ships (that require tugs), defence vessels or other large vessels would be permitted to arrive or depart. The effect would be to stop imports and exports

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in and out of those ports. This is because ships entering and leaving harbours require tug escorts (whether 1 or 4, depending on the vessel size, nature of the cargo and sea state).

7. Svitzer is the only towage operator in Cairns, Brisbane, Newcastle, Sydney, Port Kembla, Westernport, Melbourne, Adelaide, Port Pirie, Albany, Kwinana, Fremantle and Geraldton. Ships movements in and out of these ports would cease should Svitzer lock out crews and not have available replacement tugs.
8. I do not know the actual extent to which the economic harm the lockout would cause, but it would be very extensive if for an indefinite period.
9. The protected industrial action engaged in by AIMPE members on the other hand has been relatively limited. The vast majority of stoppages have been for four hours, with one 24 hour stoppage in two small ports (Cairns and Mourilyan) and a handful of 7–10 hour stoppages. The stoppages have with two exceptions not been coordinated across ports. Only 2 “all port” stoppages have been occurred, with both being 4 hours used for the purpose of a joint department “virtual yard meeting’ to report to all port crews.
10. In addition, AIMPE members’ industrial action exempts all of the following:
 - (a) an emergency circumstance advised by a Harbour Master or representative of a Port Authority or another circumstance where the safety of the port, vessel, crew or marine environment may be in jeopardy;
 - (b) any services potentially impacting the movement of a Defence Force vessel;
 - (c) for a stoppage or stoppages longer than 4 hours—any services impacting or potentially impacting the movement of a vessel loaded with livestock; and
 - (d) the movement of cruise and passenger ships.
11. These exemptions are in place to ensure that passengers, livestock and Defence vessels are not unduly impacted by the action, and that there is emergency response for any situation where safety of the port, vessel, crew or marine environment may be at risk.
12. I have summarised the industrial action by AIMPE members in a table at **Annexure GJY-01**.

Risks caused by the lockout

13. As I have explained, the entry of most large vessels to ports requires tug escorts. This includes cruise ships and other passenger ships.
14. If tugs are not available to escort passenger ships into port, passengers may be stranded offshore. I expect that this will, if continued for any significant period, cause risks to the health safety and welfare of those passengers.

15. Svitzer tugs also perform emergency towage work. A recent example of emergency work is the salvage of the stricken Portland Bay cargo ship off the coast of Sydney. Another example of emergency work is when a ship is blown off a wharf. When this occurs, a ship can careen around a port uncontrollably and crash into other ships or port infrastructure. This creates a risk not only to the port infrastructure but to the safety of persons on the ship and those on other ships and port workers.
16. I do not know what arrangements if any Svitzer has in place to cover its emergency response requirements. If there is no cover in place, the lockout will in my opinion create a threat to the safety and welfare of various persons, including passengers on ships and seafarers and port workers.

Bargaining

17. Bargaining in this round of negotiations with Svitzer has been in three distinct “stanzas”.
18. The first stanza of bargaining commenced for the replacement enterprise agreement in September 2019. Negotiations up until March 2020 were unremarkable in that it was the usual exchange of claims and issues for resolution and drafting sessions that culminated in a near complete final draft. This draft was dated 28 February 2020. During this period Elizabeth Ferrier lead negotiations for Svitzer.
19. The second stage involved bargaining being put on hold due to the pandemic from March 2020. We proposed a 12–18 month rollover of the agreement during this period but Svitzer did not agree. During the period March–September 2020 there was very limited negotiation. During this period Katie Davis and James Mather lead negotiations for Svitzer.
20. The third stage began with a letter from Svitzer’s managing director, Nicolaj Noes, identifying his prior for negotiations when they recommenced. In this letter Nicolaj proposed a series of dramatic changes to terms and conditions. The proposals involved a complete departure from Svitzer’s February 2020 proposal. AIMPE for its part has maintained in its original log of claims.
21. This stage involved a mix of lead negotiators involving Vivian Faraj, Madeline Tiedeman, Fabiana James and Deniz Kidar True.
22. Given the scale of the changes Nicolaj was pursuing from September 2020 onward, negotiations were always going to be long and difficult.
23. In January 2022 Svitzer filed an application to terminate the current agreement. This has significantly slowed down negotiations. The conduct of that case has involved the preparation of a huge amount of material and has distracted all the parties from the bargaining for months on end.

24. Despite these challenges, there has been real progress in negotiations.
25. For example there was a particularly productive period of negotiations from 27–29 September 2022. I say bargaining on these dates was productive because AIMPE delegates and Svitzer representatives discussed and resolved particularly contentious issues related to engineer responsibilities/duties and maintenance time. During the 28 September 2022 meeting Svitzer and AIMPE reached agreement on the language of maintenance and engineer duties clauses which resolved two major issues. This involved a major concession by our members.
26. A draft enterprise agreement containing those agreed clauses was circulated by Svitzer to the union bargaining representatives on 29 September 2022.
27. On 12 October 2022, and without prior notice or discussion, Svitzer circulated a revised draft agreement. The draft agreement resiles from the agreed position. The parties discussed the clause on 20 October 2022. During that meeting Nicolaj Noes stated that Svitzer wants to direct crew to perform maintenance at any time of the day without payment.
28. This issue was discussed extensively from September 2020, however, it was during an “Engineers issues only” meeting on 27 September 2022 I felt that resolution of Svitzer’s issues were fully discussed, considered and resolved.
29. AIMPE has filed an application for bargaining order in relation to Svitzer’s conduct in renegeing on agreed items.
30. In short, bargaining has been extensive but progress has been made.
31. The reasons for the length of bargaining in my view include:
 - (a) COVID interrupting negotiations in around March 2020;
 - (b) Svitzer then abandoning the largely agreed position and effectively restarting bargaining in September 2020;
 - (c) the scale and impact of the changes Svitzer is seeking to make;
 - (d) the effect of the termination application; and
 - (e) Svitzer’s resiling from agreed items and making new and expanded claims.

The current position

32. As things stand, the main items in dispute between AIMPE and Svitzer are:
 - (a) maintenance;
 - (b) Port Operating Procedures (POPs);
 - (c) order of pick;

- (d) permanent part-time employees; and
 - (e) the management of and entitlement for leave accrual for recall on duty free days
33. Briefly in relation to those items:
- (a) As I have explained, the maintenance clause was agreed in September before Svitzer changed its mind. I am currently unsure whether there is in fact a dispute of substance or there is simply a misunderstanding between the parties.
 - (b) In relation to POPs, the dispute is that Svitzer wants the agreement to state that they are not incorporated whereas the existing agreement says they are incorporated. I am not sure what practical effect this will have or what Svitzer is trying to achieve by the change, bearing in mind that the same requirements for changing POPs appear similar in their latest draft agreement.
 - (c) The process for alterations to POPs was also discussed. Currently both Svitzer or a union can propose changes within a time frame that allows for determination by the Fair Work Commission. Svitzer want to have unilateral rights to change POPs in an expedited process which will give Svitzer the right to change hours of work and availability of crews with the only recourse for crews to dispute the process not the content.
 - (d) How permanent part time employees (PPT) are utilised and what obligations under their employment contract PPTs have to be available, but unpaid.
 - (e) In relation to leave accrual, AIMPE has agreed to a significant change where employees cease to accrue leave and then are “cashed out” after working a certain number of recall days (days worked when rostered off duty). The remaining dispute is whether leave should cease to accrue after 7 days or 14 days. The change AIMPE has agreed to would reduce the compounding effect of leave accrual and result in savings for the company in reduced requirement of relief engagement and casual usage.
34. I also note that there have been some media statements about engineer representative participation in recruitment and selection exercises. I do not understand this to be a matter in dispute. In relation to recruitment, AIMPE understands that the involvement of an Engineer representative nominated by engineers has been agreed. The Engineer’s role in the shortlisting and interview process is not to dictate who gets employed but, as a subject matter expert, test candidates “bone fides” and qualifications in claiming to be able to manage a complex vessel like a tug. The agreement has always stated that the final decision is the company’s decision as the Engineers actually don’t want make the selection decision. The change that has been agreed recently that an Engineer’s Representatives on the recruitment panels perform that task in their

own time if not on roster. Engineer bargaining representatives have expressed to both the AIMPE and the company, that getting the right person on tugs is essential so as to minimise poor or insufficient engineering practices and outcomes. I believe that this has been agreed and confirmed by Svitzer during both the September and October 2022 bargaining sessions. In short it is agreed that Engineers will assist, including in their own time if on their days off, for the company to make the best recruitment decision possible.

35. In my opinion the matters in dispute can be agreed with further negotiations. This is particularly likely if both sides suspend their industrial action for the rest of the year and instead focus on getting an agreement done. This will not only free up more time but will take some of the heat out of the negotiation and, from AIMPE's side at least, increase the chances that our members will be willing to make (further) reasonable concessions to meet Svitzer's concerns.
36. For AIMPE's part, we have suspended all industrial action on the basis continuity of towage services and safety of ports and marine environment are not placed in jeopardy, so that facilitates the opportunity that Svitzer and the other unions engage in intensive genuine and valuable bargaining between now and Christmas.

Signed

Dated 17 November 2022

Schedule A—AIMPE industrial action

Date	Cairns	Mourilyan	Brisbane	N'castle	Sydney	Port Kembla	Eden	W'port	M'bourne	Adelaide	Port Pirie	Albany	Kwinana	Fremantle	Geraldton
25/09/2021			4						4						
27/09/2021				4	1								2	2	1
24/10/2021			8	4									4	4	
28/10/2021			4						4						
5/08/2022	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
26/10/2022	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
1/11/2022	24	24													
4/11/2022													10	10	
5/11/2022													2		
9/11/2022															4
10/11/2022												8	4	8	
11/11/2022												7	8	7	
14/11/2022									8						
15/11/2022					4										
16/11/2022					4	4									