REASONS FOR DECISION

Fair Work Act 2009
s.437 - Application for a protected action ballot order

The Maritime Union of Australia Division, Construction, Forestry, Maritime, Mining and Energy Union

v

Sydney International Container Terminals Pty Ltd T/A Hutchison Ports Australia Pty Limited; Brisbane Container Terminals Pty Ltd T/A Hutchison Ports Australia Pty Limited
(B2020/355)

DEPUTY PRESIDENT ASBURY BRISBANE, 10 JULY 2020

Proposed protected action ballot of employees of Hutchison Ports Australia Pty Limited and others – Section 443(5) - Whether exceptional circumstances justify extended notice period for employee claim action – Exceptional circumstances found – Period extended to 5 days.

BACKGROUND

[1] On 3 July 2020, the Construction, Forestry, Maritime, Mining and Energy Union, Maritime Union of Australia Division (CFMMEU) applied under s.437 of the *Fair Work Act 2009* (the Act) for a protected action ballot order in relation to employees of Sydney International Container Terminals Pty Ltd (SICTL) and Brisbane Container Terminals Pty Ltd (BCTL) t/a Hutchison Ports Australia Pty Limited (collectively HPA). The application and the draft order appended to it seeks that various questions relating to proposed industrial action be asked of the CFMMEU's members at each port.

[2] On 6 July 2020, HPA filed an application pursuant s.443(5) of the Act seeking an extension to the notice period required under s.414(2), for the taking of industrial action, from 3 working days to 5 working days. The applications were allocated to me on 7 July 2020, for hearing.

[3] In its application, HPA contends that there are exceptional circumstances justifying the extension. In summary those exceptional circumstances are said to be:

- the effect of protected industrial action on third parties including customers, suppliers and end users;
- matters associated with the structure of the stevedoring industry and the current status of enterprise bargaining generally;
- the fundamentally different nature of the forms of industrial action proposed by the CFMMEU in the ballot order application from forms of industrial action previously approved by employees, and the impact that such action will have on HPA,

particularly in relation to its ability to outsource or sub-contract work that cannot be undertaken because of the protected industrial action; and
- the impact of the current COVID-19 pandemic.

[4] HPA does not otherwise object to the making of the protected action ballot order. The CFMMEU objects to the extension of the notice period sought by HPA and contends that there are no exceptional circumstances justifying such an extension.

[5] The matter was listed for hearing at 5.00 pm on 7 July 2020 to ensure, if the order was issued, that the protected action ballot would be conducted expeditiously, as required by s.443(c) of the Act. At the hearing, the CFMMEU was represented by its National Legal Director, Ms Wendy Carr. Permission was granted pursuant to s.596 of the Act for the Respondent to be represented by Mr Paul Brown of Baker & McKenzie Lawyers, on the basis that I was satisfied that this would allow the matter to be dealt with more efficiently, taking into account its complexity. The following persons gave evidence on behalf of HPA and were cross-examined:

- Mr Jarrod Graham, Senior Manager for Terminal Operations, SITCL;[1] and
- Mr Rajan Samidurai, Manager Terminal Operations, BCTL.[2]

[6] Evidence for the CFMMEU was given by its Divisional Assistant National Secretary of the Maritime Division, Mr Warren Smith.[3]

[7] On 9 July 2020 I issued a Decision and order granting the protected action ballot application. I also decided to extend the period of written notice of employee claim action from 3 working days to 5 working days pursuant to s.443(5) of the Act. I indicated that I would give reasons for my decision as soon as possible. These are my reasons.

THE MATTERS FOR DETERMINATION

[8] The employees to be balloted are employees of HPA, who are members of the CFMMEU and are currently covered by the *Sydney International Container Terminals Enterprise Agreement 2015* (the 2015 Agreement). The nominal expiry date of the 2015 Agreement was 25 November 2018. The minimum notice period in s.438(1) of the Act for the application to be made has been met, on the basis that the application was made on 2 July 2020, a date that is not earlier than 30 days before the nominal expiry date of the Agreement.

[9] Attached to the protected action ballot order application is a statutory declaration made by Mr Warren Smith, the Divisional Assistant National Secretary of the CFMMEU's Maritime Union of Australia Division, in support of the application. Mr Smith outlined the history of enterprise agreement negotiations between the parties which commenced in September 2018. According to Mr Smith's statutory declaration, some 26 meetings have been held in Brisbane and Sydney and in more recent times, by video.

[10] Mr Smith outlined the claims advanced by the parties in the negotiations. Mr Smith states that CFMMEU had been, and is, genuinely trying to reach an agreement with HPA and has expended significant time, effort and resources in this regard. As previously noted, HPA does not oppose the making of a protected action ballot order but seeks that such order stipulates a period of written notice of 5 working days (pursuant to s. 414(2)(b) and s. 443(5) of the Act) instead of the 3 day period of written notice specified in s. 414(2)(a).

[11] For the purposes of s.443(1)(b) of the Act, and having regard to the statutory declaration of Mr Smith, I am satisfied, on the basis of the unchallenged position of the CFMMEU that it has been, and is, genuinely trying to reach an agreement with HPA. The matters for determination are whether, pursuant to s. 443(5) of the Act, the protected action ballot order in these proceedings should specify an extended period of written notice of employee claim action.

[12] Relevantly, s.414 of the Act provides:

> "**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."

[13] Section 443(5) of the Act provides:

> **443 When the FWC must make a protected action ballot order**
> …
> (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

PRINCIPLES TO BE APPLIED IN EXTENSION OF NOTICE PERIOD

[14] In *Construction, Forestry, Maritime, Mining and Energy Union v DP World Brisbane Pty Ltd and Others* (*DP World*),[4] a Full Bench of the Commission endorsed the principles to be applied in relation to considering whether an extension of the notice period for engagement in employee claim action should be granted, that were stated in the Full Bench decision in *National Tertiary Education Industry Union v Charles Darwin University* (*NTEU*).[5] In relation to s 443(5) generally, the Full Bench in *NTEU* observed:

> "[20] The exercise of a discretion under s.443(5) results in an interference with the right of a bargaining representative to otherwise give three working days' written notice of industrial action that is to be organised and engaged in by employees in support of a proposed agreement. That this right should not lightly be curtailed by the imposition of a longer period of notice is evident in the grant of power itself. There must be "exceptional circumstances" in relation to the proposed industrial action the subject of the order justifying a longer period."

[15] In relation to the meaning of the expression "*exceptional circumstances*", the Full Bench in *NTEU* quoted and applied a decision of the Australian Industrial Relations Commission[6] relating to the equivalent provision in the *Workplace Relations Act 1996* as follows:

> "[10] … In summary, the expression "exceptional circumstances" requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon."

[16] The Full Bench in *NTEU* then set out a three-step decision-making process required in order to determine whether there should be an extension to the notice period pursuant to s.443(5) of the Act:

> "[23] The determination of whether the circumstances in a particular case are 'exceptional' involves an evaluative judgement. A proper approach to the exercise of the Commission's discretion under s.443(5) requires first that a member identify or make findings about the particular facts or circumstances in relation to the proposed industrial action which are said inform the evaluative judgement that such factors or circumstances are exceptional circumstances. The phrase "exceptional circumstances" carries its ordinary meaning.
>
> [24] Secondly, there must be a consideration whether the identified exceptional circumstances are circumstances "justifying" a longer notice period. This also involves an evaluative judgement made on the basis of probative material. The use of the verb "justifying" in s.443(5) signifies that the identified exceptional circumstances must show or prove that it is reasonable or necessary or the circumstances warrant or provide good reason to require a longer period of written notice.
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> [25] Thirdly, if the member is satisfied there are exceptional circumstances justifying a longer period of notice, there must be a consideration of whether to exercise the discretion and, if so, the additional period of notice that should be given in the circumstances (noting the maximum period)."

[17] The Full Bench in *DP World* also considered the extent to which the adverse consequences of employee claim action on third parties, can constitute exceptional circumstances for the purposes of the Commission deciding whether to exercise the discretion in s.443(5) to require the provision of a further period of written notice of such action. In relation to this matter, the Full Bench in *DP World* said:

> "[17] If the Decision [under appeal] was to be read as finding exceptional circumstances on that basis alone, we would accept that it would be in error. In our view, it is difficult to contemplate a situation where the taking of industrial action by employees in the form of a stoppage of work would not involve some impact, with cost implications, on third parties. Detrimental effects on suppliers, customers or subcontractors of the employer are an ordinary incident of the legitimate 'duress' or 'coercive influence' of protected industrial action. It has long been recognised that part of the purpose of the standard notice requirement for protected industrial action is to allow the employer to attempt to ameliorate the consequences for such third parties." (citations omitted)

[18] To illustrate this point, the Full Bench in *DP World* gave as an example, a decision in relation to equivalent provisions in the former *Workplace Relations Act 1996*, where the Federal Court Full Court majority (Wilcox and Cooper JJ) in *Davids Distribution Pty Ltd v National Union of Workers*[7] said (emphasis added):

> "[87] We think s170MO(5) was designed to ensure that industrial disputants who are to become affected by protected action, in relation to which their usual legal rights are significantly diminished, are at least able to take appropriate defensive action. For example, an employer may operate a sophisticated

> item of equipment that will be damaged if precipitately shut down. If warned in advance of a ban that might affect the continued operation of that plant, the employer might choose a controlled shut down during the period of the notice. *More commonly, perhaps, an employer might use the notice time to communicate with suppliers and customers, and thereby reduce the consequences for them of the notified industrial action.* Very often, the recipient of the notice will respond in a way that has a legal dimension. For example, a union might react to a notice by an employer of intent to lockout some employees by giving notice that all employees will strike indefinitely as from the commencement of the lockout. Similarly, an employer might respond to an employees' notice of bans by giving notice of a lockout of some or all employees."

[19] The Full Bench in *DP World* went on to state that:

> "[18] Consequently on no basis could it be said that the simple fact that protected industrial action has effects upon third parties requiring ameliorative steps to be taken is "out of the ordinary course", "special", "rare" or "uncommon" such as to constitute the requisite exceptional circumstances. Were it otherwise, extensions to the standard notice period under s 443(5) would be granted as a matter of course."

[20] However the Full Bench in *DP World* also emphasised that the requirement for exceptional circumstances calls for particular facts and circumstances of a case to be considered, and an evaluative judgment to be made. Those facts and circumstances include the impact of industrial action on third parties. In this regard, the Full Bench said (at [20]):

> "…There can be no doubt that one of the factors to be weighed by the Commission in determining whether exceptional circumstances justify an extension of the written notice period is the impact of the industrial action proposed to be put to a ballot upon the interests of third parties. Plainly, the magnitude of the impact and its ramifications will be a matter of degree in each case, depending on a range of factors, *inter alia*, the nature, extent of, and duration of the proposed industrial action. This is a matter which may be taken into account together with a range of other relevant factors including but not limited to the direct effect upon the employer, the effect of an extension upon the bargaining power of employees, the range of mitigative strategies which an employer may adopt within the standard notice period, and the capacity of the employer to take protected response action." (citations omitted).

[21] The nature of the task the Commission undertakes in determining whether to exercise the discretion to grant a longer period of notice was explained by the Full Court of the Federal Court in a judgement dismissing an application by the CFMMEU to quash the orders extending the notification period, which were the subject of the Full Bench Decision in *DP World.* The Full Court of the Federal Court said:

> "As a general matter it is apparent that the formation of the discretionary judgment called for by s. 445(3) is conditioned on the FWC forming a discretionary evaluative judgement about whether, having regard to all of the circumstances, there exists some characteristic of the foreshadowed proposed industrial action, in the whole of the context in which it is to occur, that justifies allowing a longer period of written notice."[7]

[22] I turn now to consider the evidence and submissions in the present matter.

EVIDENCE

[23] The evidence of Mr Smith and the submissions of the parties indicate that there is some history to the matter. An earlier application for a protected action ballot order with respect to the employees of SICTL and BCTL who are members of the CFMMEU, was granted by Deputy President Sams on 30 November 2018,[8] and the time for the completion of the ballot subject of that order, was varied by Commissioner Cambridge on 12 December 2018.[9] The results of the earlier protected action ballot were announced by the Australian

Electoral Commission on 10 January 2019. I assume that the majority of employees balloted, approved the taking of industrial action in the manner set out in the ballot questions.

[24] On 8 January 2019, HPA made an application pursuant to s.443(5) of the Act, to vary the Order made by Deputy President Sams, by extending the notice period for the taking of protected industrial action from 3 days to 5 days. In a decision issued on 16 January 2019, Commissioner Cambridge refused that application on the basis that he was not satisfied that there were exceptional circumstances justifying an extension.[10] Industrial action as authorised by the November 2018 protected action ballot order has been taken by members of the CFMMEU since that time. The present application seeks a further protected action ballot order in relation to a group of employees described in the same terms as the November 2018 protected action ballot order.

[25] The evidence and submissions on behalf of HPA can be summarised as follows. HPA tendered a document comparing the forms of industrial action set out in the November 2018 protected action ballot order application and those set out in the present application.[11] Particular reference was made in the evidence of HPA's witnesses, to two forms of industrial action which were said to be significantly different to the forms of industrial action authorised on 10 January 2019 as follows:

- An unlimited number of bans on the performance of work on vessels that have been sub-contracted to or outsourced to Hutchison by another stevedoring company for an indefinite period (the subcontracting/outsourcing ban).
- An unlimited number of bans on the performance of work on any nominated vessel/s or shipping lines for an unlimited period (the nominated vessels/shipping lines ban).

[26] The ballot questions also propose forms of industrial action which can colloquially be described as "go slow" including bans on the speed of cranes, twin lifting operations and the performance of discharge and backloading movements. There is also a ban (in the form of a limitation) for an indefinite period, whereby maintenance employees will use their non-dominant hand while using tools, when it is safe to do so.

[27] In their witness statements, Mr Graham and Mr Samidurai gave evidence in similar terms, about the nature of HPA's operations in Sydney and Brisbane and the work performed at the terminals. That evidence can be summarised as follows. HPA provides stevedoring services at both Terminals. On a day-to-day basis, this involves vessels berthing at the Terminals to have containers loaded and unloaded, for transportation to other locations by sea, road, and in Sydney by rail also. As part of this process, the Terminals receive deliveries of containers to be loaded onto vessels. These containers are stored in a yard at each Terminal until they are loaded. HPA's stevedoring employees (those covered by the 2015 Agreement) perform duties including loading and unloading vessels berthed at the terminal, receiving containers to be loaded, delivering containers to importers by road or rail and preparing containers for road transport or rail transport in Sydney. Both Terminals are operated according to various ship, yard and rail schedules including berthing forecasts, which set out information regarding the vessels to be berthed, such as scheduled arrival and departure dates.

[28] To provide stevedoring services, HPA requires the services of linesmen (who are employed by a contractor of the shipping agent in Sydney), tugboats and/or pilots and shipping agents shipping agents, responsible for the planning associated with the handling of containers at the ports, the berthing schedule and arrangements for a vessel's departure

including tug services, as well as managing communications with vessel crews. These services are booked in advance to ensure that vessels remain on schedule and to avoid additional costs associated with missing arrivals or departures at subsequent scheduled stops. The relevant port authorities in Sydney and Brisbane oversee the movement of vessels into and out of the ports at both Terminals. The shipping agents for the vessels are required to book pilot timeslots with the relevant authority in advance for vessels to berth and unmoor, and if these timeslots are missed, the shipping agents incur charges from the relevant port authority.

[29] Containers to be loaded on vessels are typically delivered to the Terminals approximately five days prior to the expected berthing of a vessel. If the containers are delivered late, this can prevent them being loaded on to the vessel in time for the vessel's scheduled departure date, and can impact the shipping line at subsequent ports, including the opportunity for import or export (where relevant) being lost. As a result, the shipping lines can incur charges for cancelled slots and late receival fees from terminals at subsequent ports and/or additional transport costs.

[30] There are generally five types of containers loaded and unloaded from vessels berthed at the Sydney and Brisbane Terminals:

(a) empty containers;

(b) containers containing general non-hazardous materials, which may include materials with prescribed "Use By" or "Best Before" dates such as pharmaceutical products or medical devices;

(c) containers referred to as "out of gauge", which generally means oversized cargo, the dimensions of which exceed a standard container;

(d) containers containing dangerous or hazardous materials; and

(e) containers referred to as "Reefers", which contain temperature-controlled and perishable material such as chilled meats, fruit, vegetables, seafood, ice-cream and other materials with prescribed "Use By" or "Best Before" dates.

[31] Mr Graham said that approximately 4,500 containers (on average) transfer through the Sydney Terminal over the course of a five-day-a-week operation. Of these 4,500 containers, 3,700 containers usually arrive (in the case of exports) or depart (in the case of imports) via road transport. The remaining 800 containers (approximately) usually arrive (in the case of exports) or depart (in the case of imports) via rail. On any given week-day in a five-day-a-week operation, up to 1000 containers transit through the Sydney Terminal via road, and up to 200 containers transit through the Sydney Terminal via rail. The number of individual containers travelling via each train, varies from season to season, and could be anywhere between 20 to 50 individual containers on the one train trip.

[32] The containers which travel via rail to SICTL usually contain large quantities of bulk agriculture products including grains, ethanol, timbers, cotton, aluminium and flour. These containers usually travel long distances to arrive at the Sydney Terminal, including from far North West New South Wales and destinations like Dubbo, Bathurst, Narrabri, Wee-Waa and Narromine.

[33] Mr Graham said that the direct result of employee industrial action at the Sydney Terminal is that SICTL will be unable to service its rail and road customers over the period of the industrial action. To minimise disruption to operation schedules and rail, road and ship customers, SICTL will be required to subcontract the work (being required movement of the containers) to a fellow stevedoring company, for example, DP World Sydney Limited (DP World) or Patrick Stevedores (Patrick). DP World and Patrick provide container services at Port Botany, Sydney and Port of Brisbane, and are HPA's competitors.

[34] In relation to the sub-contracting process, for containers already on site at the Sydney Terminal, SICTL would be required to contact either DP World or Patrick to see whether either stevedoring company has the capacity to accept the containers into their facility. Assuming that the relevant facility is able to accept the containers already on site at SICTL, SICTL would then need to facilitate the transfer of data regarding the containers and the vessel they are proposed to travel on, to the end facility. Mr Graham's estimate is that this process of data migration and validation from SITCL's operating systems to the operating systems of the receiving facility, could take up to two days.

[35] Once the data migration process has completed, SICTL would then need to arrange for the containers to be delivered to the relevant facility by arranging an available transport operator, to collect the containers from the Sydney Terminal and transport them to the relevant facility. Depending on the size and weight of the commodities in the containers, the containers may need to be transported via road individually. Transport via road would be most efficient in this instance. Depending on availability to accept the containers having regard to their own existing operation schedules and customer requirements, physical transport of the relevant containers from SICTL to the relevant facility could take anywhere between 3 to 5 days.

[36] Mr Graham said that under normal circumstances, it would be incredibly difficult for this to be achieved within a 3-day window. According to Mr Graham, this is further exacerbated by the current environment of COVID-19 whereby transport companies are experiencing increased difficulties meeting customer requirements with reduced staffing.

[37] In relation to containers on-route to the Sydney Terminal by rail, Mr Graham said that travel time for such containers is usually at least 24 hours and that a significant amount of pre-planning is required. This includes SICTL contacting the relevant rail operator regarding available trains, train times and crew to collect the containers from their starting point and transport them to the Sydney Terminal and the rail operator having regard to access and available pathways across multiple NSW rail networks and restrictions on imposed by Sydney Trains during peak commute hours.

[38] In Mr Graham's experience, for containers travelling by rail from far distances to the Sydney Terminal, (for example, from Dubbo or Narrabri), the process of booking to receiving containers via rail, would usually take at least 3 days. Mr Graham also said that for containers scheduled to arrive at the Sydney Terminal via train which have not yet arrived, during a period of employee industrial action, SICTL will not be able to accept those containers. This is because there are unlikely to be sufficient stevedoring employees available to receive the containers, including to assist in the unloading process.

[39] In this instance, SICTL would be required to contact the relevant rail operator which would then make alternative arrangements for the customer's containers to be delivered to an alternative stevedoring company. In Mr Graham's experience, rail travel is far less flexible than road travel when it comes to containers being delivered to the Sydney Terminal. The entire process could take 3 (or more) days, especially from far away destinations. Similarly, the relevant rail operator would likely need 3 (or more) days to facilitate alternative arrangements for the customer where SICTL cannot accept any containers via rail due to employee industrial action.

[40] Mr Graham said that 3 working days' written notice of employee claim action is an insufficient period in which to enable HPA to make appropriate alternative arrangements for impacted containers, being containers already on site at the Sydney Terminal or containers due to arrive on site at the Sydney Terminal, particularly via rail travel. Appropriate alternative arrangements would usually include:

(a) diverting vessels carrying containers to other ports;

(b) subcontracting with DP World or Patrick to collect containers which have already arrived to the Sydney Terminal to facilitate delivery to their end destination;

(c) subcontracting with DP World or Patrick to receive containers due to arrive at the Sydney Terminal to facilitate delivery to their end destination.

[41] Mr Graham said that in the event HPA is not provided with 5 working days' notice of proposed industrial action and is therefore unable to make alternative arrangements with other container services operators, containers which would otherwise be received from, or loaded onto vessels could be trapped inside the Sydney Terminal for an indefinite period with no certainty as to they could be attended to and/or loaded onto, or discharged from a vessel. Although Mr Graham understands that the Act allows for a longer notice period of up to 7 days for written notice of employee claim action to be provided, it is his view that 5 working days would be sufficient time for HPA to make appropriate subcontracting arrangements.

[42] Mr Graham also said that notwithstanding the commercial costs that will be incurred by HPA in subcontracting the work related to the containers to other container services operators, the ability to make these alternative arrangements would ensure there is no significant commercial or other harm to end customers – importers, exporters and end consumers of the goods.

[43] Under cross-examination Mr Graham agreed that protected industrial action had been taken at Port Botany with 3 days' notice and that HPA has responded to that industrial action by subcontracting out on the basis of either discharge (import only) or full exchange (import and export). Mr Graham was not aware of the time frame for putting the subcontracting arrangements into place on these occasions. Mr Graham is aware that the MUA has provided exemptions for Reefer Containers when taking protected industrial action but said that notwithstanding this the containers are not shipped out during industrial action. Mr Graham did not know if this had caused the contents of those containers to perish.

[44] In re-examination, Mr Graham said that the present application provides for forms of industrial action that are materially different than those authorised by the 2018 ballot protected action ballot. In this regard, Mr Graham said that bans on nominated vessels or

customers could knock out a particular customer for a lengthy period and this would require time for that customer to change its business model. Mr Graham also said that another material difference is that the Union will be able to black-list vessels that are being subcontracted to HPA from other Operators and vessels coming to HPA. As a result, HPA will not be able to undertake a discharge only contract because the Company won't be able to accept the vessel back. HPA would also not have sufficient time to deliver the cargo to other stevedores, if only 3 days' notice was given.

[45] Under further cross-examination, Mr Graham maintained that if vessels were black-listed more than 3 days' notice would be required. In response to the proposition that the ban on a particular vessel would be no different than a consecutive series of 24 hour stoppages, Mr Graham said that it would still take longer than three days to arrange a subcontractor to deal with the cargo, as HPA would not be able to get the containers out in that scenario. Containers would be stuck on the wharf and exports would not make the vessel. Mr Graham also said that once a 24 hour stoppage has been notified there is a start and finish point, with a requirement that further stoppages of 24 hours be notified. In contrast, once a ban is placed on a particular vessel for an indefinite period, it cannot return to the terminal until the ban is withdrawn. Further, Mr Graham said that a vessel subject to such a ban would go for a full exchange to another stevedore and containers could not be removed within a three day period.

[46] Mr Samidurai said that the General Containers (to the extent they may contain cargo with prescribed Use By dates, such as pharmaceutical products or medical devices) and Reefer Containers, are relevant to the requirement for HPA to have 5 days written notice of employee claim action. According to Mr Samidurai, Reefer Containers generally contain:

(a) temperature-controlled and perishable cargo including chilled meats, ice-cream, fruit (commonly grapes, oranges and kiwi fruit amongst other types of fruit), vegetables, seafood and other food products, such as chocolate; and

(b) other cargo with prescribed "Used By" or "Best Before" dates including pharmaceutical products and medication (which is varied and can include anything from blood pressure tablets to tablets aimed at treating heart conditions and various cancers).

[47] General Containers may also contain pharmaceutical products or medical devices, being cargo of significant importance to the end customer and which, in the case of pharmaceutical products and medication, has an express "Use By" or "Best Before" date. Mr Samidurai said that in the present uncertain COVID-19 environment, it is particularly important that the contents of the General Containers (which could include hand sanitisers, face masks and medication or medical devices such as defibrillators) reach the end customer in a timely manner.

[48] Mr Samidurai also said that due to the perishable nature of the cargo contained in Reefer Containers, their temperature must be strictly controlled at the Terminals to ensure those contents remain preserved until the Reefer Containers reach the end customer. The end customer for Reefer Containers is also varied and can include grocers, supermarkets, produce and/or seafood markets, pharmacies, hospitals, nursing homes and medical clinics or in the case of Reefer Containers to be exported to an overseas end customer, Customs Clearance Agents. The end customer for General Containers, where the cargo is of a pharmaceutical,

medical or medicinal nature, may also include pharmacies, hospitals, nursing homes and medical clinics.

[49] Further, Mr Samidurai said that the contents of the Reefer Containers and General Containers are classified, which means that HPA does not have visibility over, and is not in a position to, identify the contents, (or combination of the contents), in each Reefer Container or General Container. Staff at the Terminals cannot open the Reefer Containers or General Containers or segregate contents which are perishable or have a prescribed "Use By" or "Best Before" date, from those contents which are non-perishable or do not have a prescribed "Use By" or "Best Before" date. Due to the classified nature of the contents in the Reefer Containers and General Containers, staff at HPA do not always know who the end customer is for each Reefer Container or General Container.

[50] In the case of export containers received at the Brisbane Terminal, Reefer Containers and General Containers to be loaded on vessels are typically delivered to the Brisbane Terminal approximately five days prior to the expected berthing of a vessel. Similarly, in the case of import containers, any Refer Containers and General Containers to be unloaded from vessels are collected in the first five days after the expected berthing of a vessel. The effect of this is that there is generally a five day window in which HPA is required to handle Reefer Containers and General Containers (whether Export Containers or Import Containers) to ensure they arrive at their final destination in both a timely manner and in a satisfactory condition, in line with the requirements of the end customer.

[51] Mr Samidurai said that in light of the five day window in which HPA operates, 3 working days' written notice of employee claim action is an insufficient period in which to enable HPA to make the necessary alternative arrangements for the Reefer Containers, General Containers and all other containers. In relation to the Brisbane Terminal, those alternative arrangements involve HPA subcontracting out the work associated with containers scheduled to arrive, to other container services providers, such as DP World or Patrick. DP World and Patrick are the only available container service providers in the Port of Brisbane who deal in the same shipping quantities as HPA. In relation to the number of containers involved, Mr Samidurai said that in the week prior to the hearing of this matter, approximately 2,500 containers transited through the Brisbane terminal. As at 7am on 6 July 2020, there were 1,000 containers on site at the Brisbane Terminal.

[52] It is Mr Samidurai's view, for the same reasons as those advanced by Mr Graham, that HPA would require at least 5 days' written notice of the proposed employee industrial action to enable the Brisbane Terminal sufficient time to sub-contract out the necessary work to other providers, (such as DP World or Patrick), so that the incoming containers do not arrive at the Brisbane Terminal. If the relevant containers have already been delivered to the Brisbane Terminal, HPA may also be required to facilitate the transport of the relevant containers from the Brisbane Terminal to the relevant container services provider (either DP World or Patrick). Under normal circumstances, it would be incredibly difficult for this to be achieved in a 3-day window.

[53] Mr Samidurai said that this difficulty is further exacerbated in the current COVID-19 environment. In this regard, Mr Samidurai is aware that transport companies are already experiencing difficulties managing current customer workloads where staff numbers have been reduced as a direct result of COVID-19 and financial difficulties.

[54] Under cross-examination, Mr Samidurai agreed that there is currently protected industrial action taking place at the Brisbane Terminal. In response to a question about the similarity in his evidence in these proceedings with evidence he gave in earlier proceedings where HPA sought a 5 day notice period, Mr Samidurai said that some evidence is similar but there are differences. In this regard, Mr Samidurai said that he has provided more detailed evidence in his statement in the current proceedings, to explain more clearly, the subcontracting process and why it may take longer.

[55] In response to a question about why a 5 day notice period would make a difference in the subcontracting process, Mr Samidurai said that containers that have arrived at HPA's Brisbane Terminal when industrial action is taking place, have to be transferred to another terminal. Given the receival time for cargo is five days, this process uses time that the stevedoring company requires and compresses the time available for that company.

[56] Mr Samidurai also gave evidence about the significant changes brought about by the COVID-19 pandemic. As a result of the pandemic, trucking companies have removed drivers. This makes transporting cargo between terminals even more difficult, as there are less wheels on the road. Mr Samidurai said that as a result, it is practically impossible to move cargo on 3 days' notice, and that this means some cargo will get detained at HPA. According to Mr Samidurai, Brisbane is different because there is a higher amount of refrigerated cargo. The market value of this cargo drops if it deteriorates, causing substantial loss to third parties. In this regard, Mr Samidurai said that the issue is not only the control of the temperature in the containers, but also the time it takes to transport them. Typically, fresh produce is packed into refrigerated containers the day before they are sent to the terminal in order to keep the value of the contents. If there is a delay in delivering the containers the value of their contents is reduced.

[57] Mr Samidurai said that the need to transport containers from one terminal to another as a result of industrial action, also creates issues, because some trucks do not have temperature control. Trucks are required to stop and when they have no temperature control the contents of containers can be affected. If HPA has five days' notice of protected industrial action, and is going to subcontract to another stevedore, it will have sufficient time to send containers directly to the other stevedore rather than having them arrive at the Brisbane Terminal and then be transported to the other terminal. While the distances to the other terminals are short, containers will be required to move on the road more frequently, and still have to wait at the gate of a terminal to be received. This will be avoided if 5 working days notice of industrial action is given.

[58] Mr Samidurai agreed that since January 2019 the Union has taken industrial action at the Brisbane and Sydney Terminals. Mr Samidurai agreed that in Brisbane, the Company had been able to subcontract with three days' notice of industrial action, but maintained that this had occurred with difficulty. Mr Samidurai also agreed that various forms of industrial action will impact the process of subcontracting. In relation to the differences between the forms of industrial action currently approved, and those proposed in the ballot subject of these proceedings, Mr Samidurai said that these are significant and will affect HPA's operation differently.

[59] In response to a question in re-examination as to which of the different forms of industrial action would impact the ability of HPA to mitigate by outsourcing, Mr Samidurai pointed to "go slow" bans such as the speed at which cranes are driven. Mr Samidurai also

pointed to bans on subcontract work and on particular vessels and shipping lines. The effect of a ban on a particular shipping line is that if its containers are received by HPA, they cannot be removed. This will apply to both imports and exports. Because the ban in this regard is indefinite, there may be no remedy. An increase in the notification time will mean that arrangements can be made so that containers are not received.

[60] Mr Samidurai said in relation to the COVID-19 situation, that it is causing increasing difficulty in moving containers and that when industrial action happens, hundreds of containers will have to be marshalled and moved to another stevedore. The capacity to do this is significantly reduced by the lack of trucks and drivers and the need to move hundreds of containers with short notice.

[61] In submissions HPA denied that it is simply re-running its unsuccessful argument in relation to the earlier application heard and determined by Commissioner Cambridge. It was submitted that the present application is a different kettle of fish on the basis that:

- The proposed industrial action has a very different focus than the current forms of industrial action being taken;
- Because of the significant differences in the industrial action proposed in the ballot it will have different impacts; and
- The different forms of industrial action and impacts need to be considered in the current environment created by the COVID-19 pandemic.

[62] It was also submitted that end users will be impacted by industrial action and the ability of HPA to outsource the movement of containers is compromised, which in turn requires more time in which to make such arrangements. Other than asserting that 3 days' notice of industrial action is sufficient, the Union has not put a counter-factual case relevant to the balancing exercise required and has provided no evidence as to the impact on bargaining if the extended notice period was granted. When the present situation is considered, there are exceptional circumstances and 5 days' notice should be applied across the board.

[63] HPA also submitted that the context in which it operates is relevant to whether there are exceptional circumstances. That context is that there are only three players in the stevedoring industry who can load and unload containers. It was contended that the Union intends to establish a position whereby industrial action at DP World would result in the loading and unloading of ships being outsourced to HPA. Members of the Union at HPA could then place a ban on a particular vessel or shipping line, resulting in HPA being unable to undertake the work.

[64] In this scenario, the only other option to undertake the work, would be Patrick. This was described by Mr Brown on behalf of HPA as a "drag net across the industry with a potential for no boxes to be moved". It was submitted that where there is only one other potential provider, more than 3 days' notice is required for negotiations with that provider to be conducted. It was also submitted that the evidence of witnesses for HPA establishes that containers cannot be moved at a whim. They need to be marshalled, data must be transferred to the receiver and containers must be moved within a compressed period. Monitoring of Reefer Containers does not assist as items in those containers cannot sit *ad infinitum*. This set of facts is sufficient to establish exceptional circumstances in the current environment.

[65] In response to a question as to how a ban on a vessel outsourced or sub-contracted to HPA by DP World hurts HPA, other than by removing its income from undertaking the work associated with the vessel, it was submitted that as a ship sails, HPA expects its employees to work and service vessel. When a ban is placed on the ship, HPA has the option to accept part-performance of work by its employees or to stand them down. If it stands employees down, then no work will be done at DP World or HPA and in these circumstances, 3 days' notice is an insufficient time frame to divert the vessel and arrange for work to be undertaken by the third provider, Patrick.

[66] HPA submitted that on the one hand the Commission needs to consider leverage and proper opportunity for HPA and third parties to take defensive action. On the other hand, is diminution in the effectiveness of bargaining power of the Union and its members. The present scenario is completely different than it was 12 months ago, and no effective diminution of bargaining power will flow from the extension of the 3 days' notice period to 5 days.

[67] Mr Smith provided a statement to the Commission in the present proceedings which appended a statement he made in the 2019 proceedings where HPA's earlier application for an extension to the notice period for employee claim action was considered and refused. In that statement Mr Smith outlined his extensive experience in negotiations in the stevedoring industry and said that for each of the enterprise agreement negotiations in which he has been involved, the notice period for employee claim action has been 3 working days.

[68] In his statement for these proceedings, Mr Smith said, in relation to the evidence of Mr Graham and Mr Samidurai, that there is no evidence that any medical equipment will be impacted on. In Mr Smith's experience, containers shipped by sea can spend months at sea and sea voyages are well known as being imprecise in terms of actual times. Mr Smith said that nothing urgently required for saving lives is packed in a container that goes on a potential three month sea voyage. Mr Smith also said that there is no evidence that delays on Pharmaceuticals will be impacted upon. In Mr Smith's experience, medicines that are urgent or which could in any way be impacted through expiry of their shelf life, are not shipped via container. Tablets on average have a life of approximately 6.7 years.

[69] Mr Smith said that MUA members at both the Sydney and Brisbane terminals have taken protected action pursuant to the order made in B2018/1115 on a number of occasions since January 2019. The Union has provided the requisite 3 days' notice on all those occasions. Mr Smith also said that BCTL and SICTL have been able to make the alternative arrangements referred to in their statements to sub-contract out the work to other stevedoring companies within the 3-day period provided for in the current order.

[70] In relation to Reefer Containers, Mr Smith said that to his knowledge, there has never been an incident in waterfront history where the contents of a reefer container have been negatively affected through industrial action. Consistently the Union has given exemptions around perishable cargoes. The Union would continue to exempt Cargo Care Workers and Reefer Monitors from industrial action. In relation to receival timeframes for cargo, it is Mr Smith's understanding that general receival timeframes are three days.

[71] In cross-examination, Mr Smith accepted that the comparison table tendered by HPA, setting out current and proposed forms of industrial action, is accurate. Mr Smith agreed that the present application proposes new forms of protected industrial action and that his evidence

about three days' notice being given for industrial action to date, relates to current forms of industrial action and not those proposed in the present application. Mr Smith also agreed that there are two other stevedoring operators in Sydney and Brisbane – DP World and Patrick – and that the Union is presently negotiating enterprise agreements with both of these operators. In response to the proposition that protected industrial action is taking place at the operations of DP World and Patrick, Mr Smith said that it is only taking place in the operations of DP World.

[72] Mr Smith was also cross-examined about a hypothetical situation in which DP World was subjected to protected industrial action and requested HPA to service a vessel under a subcontract arrangement. In response to the proposition that the subcontracting/outsourcing ban would be imposed by the Union in these circumstances, Mr Smith said that the ban was not about industrial action but rather about stopping HPA from accessing a source of income from providing the outsourcing services. Mr Smith also maintained that there are many circumstances in which HPA can get outsourced vessels, which do not involve industrial action impacting the company which outsources the vessel.

[73] In response to the proposition that the Union was not prepared to provide comfort to HPA, that in event of DP World being subjected to bans and outsourcing to HPA, Mr Smith said that the Union would not include a form of industrial action in a protected action ballot and then undertake not to engage in that form of industrial action. Mr Smith also maintained that it is the right of the Union to take protected industrial action in a way that would remove a source of income from HPA.

[74] In response to the proposition that the nominated vessels/shipping line ban would apply to circumstances where vessel was caught by protected industrial action at DP World, and HPA agreed to service that vessel, Mr Smith said that the MUA members would be taking industrial action to prosecute an enterprise agreement for members at HPA. If the members of the Union nominated a client of HPA or a shipping line on which to place a ban, then it is their right to do so, and is a legitimate form of leverage in order to reach an agreement with HPA.

[75] Mr Smith also said that the Union is not prepared to provide an undertaking that where a vessel or shipping line is subject to industrial action, then members at HPA would not take the action encompassed in the subcontracting/outsourcing ban or the nominated vessel/shipping line ban. Mr Smith maintained that stevedores move customers between themselves voluntarily, as a usual means of operating their businesses, in circumstances where they are not subject to industrial action. Mr Smith maintained that this creates an income stream with which the CFMMEU has a right to interfere, by taking protected industrial action.

[76] In response to the proposition that the subcontracting/outsourcing ban and the nominated vessel/shipping line ban have different potential consequences, Mr Smith maintained that those consequences were no different to those attaching to a 24 hour stoppage. Mr Smith also maintained that HPA's application for an extended notice period in the present case is simply based on the fact that DP World succeeded in an application for an extended notice period when HPA did not, and HPA was now "having another crack" and that there is no logical reason for a 5 day period instead of a 3 day period. Mr Smith maintained that HPA simply wants to mitigate its losses as a result of protected industrial action by minimising the right of members to take such action.

[77] In response to the evidence of HPA's witnesses in relation to the contents of the Reefer and General Containers, Mr Smith said that there was nothing new about HPA asserting that the contents of the containers established exceptional circumstances. In this regard, Mr Smith gave a number of examples of the contents of containers "morphing" including that during the bushfires it was asserted that containers held bushfire fighting equipment and that similar assertions about the contents of containers were also made at Christmas and Easter. Mr Smith questioned whether medications which would be impacted by a 2 day extension would be shipped on a vessel which could be at sea for an extended period.

[78] In response to the proposition that a ban on a vessel would not cost members anything, Mr Smith said that HPA has "a quick trigger finger" in standing people down. Mr Smith later agreed that there is a difference between the subcontracting/outsourcing ban and the nominated vessel/shipping line ban on the one hand, and 24 hour stoppages on the other. Mr Smith maintained that the newer forms of bans are bans on income streams and have nothing to do with industrial action.

[79] The CFMMEU submitted that there is no material difference in the circumstances presently before the Commission and the circumstances in existence when the 2019 application to extend the notice period was considered in the proceedings before Commissioner Cambridge. While the questions for ballot are different, other than COVID-19, there is no material difference in the circumstances. It was contended that there is no difference for HPA if it has 3, or 5 days' notice. The issue is whether the extension is justified. Regardless of whether the notice period is 3 or 5 days, there may be some delay in the ability of HPA to respond to industrial action. That delay, on its face, does not bring about exceptional circumstances, particularly where nothing has changed.

[80] The CFMMEU also submitted that the impact on the Company of the subcontracting/outsourcing ban and the nominated vessel/shipping line ban, will be the same as the impact of the forms of industrial action already being taken, in particular, 24 hour stoppages. In this regard, the Company had not shown a difference in impacts. It was further submitted that the Company has the option to subcontract or not to accept subcontract work. The purpose of the proposed ban is to impose a cost on HPA and the Company cannot expect industrial action with no cost.

[81] In relation to the Full Bench decision in *DP World* it was submitted that this is not a precedent for the rest of the industry. DP World has a very large share of the market and the circumstances in that case were very different to those in the present case. While the parties are in a world of COVID-19, the CFMMEU has indicated in relation to perishables, that Reefer Containers would be exempt from industrial action in accordance with longstanding arrangements. The Union is also prepared to provide the same undertaking with respect to COVID-19 related materials. These could be identified by HPA and the containers would be moved.

[82] In response to a proposition that the entire environment is different because of the impact of COVID-19, and that it is arguable that because of this impact, third parties are more susceptible to damage than they would otherwise be, the CFMMEU submitted that:

- The effect of industrial disputation on third parties has always been there; and

- There is no material difference to third parties whether the notice period is 3 days or 5 days.

CONSIDERATION

[83] The facts or circumstances in relation to the proposed industrial action, which in my view are relevant to the question of whether there are exceptional circumstances, are firstly, that the proposed industrial action will adversely impact third parties, including customers, suppliers and end users of freight handled by HPA. I accept that this is the case. Delays caused by industrial action at HPA's terminals will cause additional costs to shipping lines and shipping agents at the Port where the delays occur and at subsequent ports because of the knock-on effects of delay on schedules. The fact that shipping transport is subject other vagaries such as weather, does not reduce the impact of losses caused by delays due to industrial action.

[84] Delay caused by industrial action also adversely affects end exporters, importers and end users. Delay can cause deterioration of the contents of refrigerated containers notwithstanding that these are exempted from industrial action. While the exemption ensures that the temperature of Reefer Containers can be maintained, it does not assist with the movement of those containers and I accept that some of their contents deteriorates over time, regardless of the maintenance of temperature. There are also adverse effects on end users waiting for delivery of non-perishables.

[85] Regardless of these adverse effects, I do not accept that the impact on third parties, of delay caused by industrial action, is of itself, an exceptional circumstance. The impact of delay on third parties is an ordinary feature of doing business in the stevedoring industry and is a factor that pertains to the operations of all participants.

[86] I accept that there are only three major stevedoring companies and that options for any of them to subcontract work to mitigate the effects of industrial action, are limited. It is also the case that the impact of protected industrial action will make subcontracting more difficult, particularly in circumstances where one of the proposed forms of industrial action to be taken by members of the CFMMEU employed by HPA, is a ban on subcontracting or outsourcing.

[87] Notwithstanding these difficulties, the structure of the stevedoring industry has not changed and has been one where there are only a few major players, for some time. Mr Smith's uncontested evidence was that the three major stevedoring companies are adept at subcontracting between themselves and engage in this process in the normal course of doing business, even when there is no industrial action being taken. There is nothing out of the ordinary course, special or uncommon, about an oligarchy and this factor, of itself, does not constitute exceptional circumstances.

[88] Neither does the fact that the CFMMEU proposes a ban on subcontracting or outsourcing by HPA, constitute exceptional circumstances. The terms of the relevant form of industrial action is that CFMMEU members will not undertake work on vessels that have been subcontracted or outsourced to HPA. The effect of the ban is that it may be imposed on subcontract or outsourcing work that HPA has agreed to carry out for other stevedoring operators. The ban may be notified either before or after such arrangements have been entered into by HPA provided the requisite notice is given. There is no evidence to suggest

that the ban is intended to operate other than to place pressure on HPA for the purpose of reaching an agreement with the CFMMEU and its members employed by HPA.

[89] The scenario advanced by Mr Brown in relation to an intention on the part of the CFMMEU to place a "drag net" across the industry is hypothetical and somewhat hyperbolic. That the ban may have an impact on other industry players is not an exceptional circumstance, but rather, is to be expected in the context of protected industrial action of this kind taken against an employer in an industry with the characteristics of the stevedoring industry. Provided that the ban is employee claim action as defined in s. 409 of the Act, and that other requirements for it to be protected are met, it is legitimate for the CFMMEU and its members to implement such a ban. For the same reasons, and subject to the same caveats, the nominated vessels/shipping lines ban is also a legitimate means for the CFMMEU and its members to advance bargaining claims and to seek agreement from HPA to those claims. The novelty of these forms of industrial action to HPA does not, of itself, provide a basis for a finding of exceptional circumstances. I am also of the view that the hypothetical possibility that an otherwise legitimate form of protected industrial action may be used in a manner that is illegitimate, does not of establish exceptional circumstances. There are other remedies in the Act for dealing with such matters.

[90] There is also nothing out of the ordinary course, special or uncommon about bans colloquially described as "go slow". While one may have legitimate cause for concern about how maintenance employees can work safely in any circumstances, using only their non-dominant hand, "go slow" bans have been long been available to Unions and their members and there is nothing out of the ordinary course, special or uncommon about such bans being deployed as a form of protected industrial action. Neither is the effect of such bans out of the ordinary course, special or uncommon. HPA's response to such bans is also not relevant to whether there are exceptional circumstances.

[91] Whether HPA chooses to accept part-performance of work by its employees or to engage in employer response action is entirely a matter for HPA. In this respect, HPA can opt to have some work performed and some containers moved, or engage in employer response action, with a result that no containers are moved. Absent exceptional circumstances, the scheme of the legislation is to provide an employer subject to such action, a notice period of three working days to ameliorate the impact of, or defend itself against, industrial action of this kind.

[92] I am also of the view that the nature of the actions that HPA is required to take to respond to industrial action, does not of itself, constitute exceptional circumstances. Mr Smith's evidence is that the industry has been operating during periods of protected industrial action, on the basis of 3 days' notice. Mr Samidurai conceded that industrial action has been taken with 3 days' notice, and that arrangements to move containers have been made, albeit with difficulty.

[93] With respect to HPA's submissions about the difficulty it will encounter, that is ordinarily to be expected in circumstances where employees are exercising a legitimate right to take protected industrial action. It is not the purpose of the notice period in s. 414(2)(a) of the Act to completely ameliorate the effect of employee claim action and absent exceptional circumstances, the three day notice period prescribed in that section is the default position, to give employers an opportunity to take defensive steps. The difficulty of the steps that must be

taken in the present case, is not of itself, a sufficient basis for a finding that there are exceptional circumstances.

[94] However, there is an additional matter that, in combination with the other facts and circumstances identified above, does tip the balance of the assessment in favour of a finding that there are exceptional circumstances. That factor is the COVID-19 pandemic and its impact, in combination with the other factors. I accept the evidence of HPA's witnesses, particularly that of Mr Samidurai, that the COVID-19 environment is making an already difficult task of moving containers, almost impossible. Mr Samidurai's uncontested evidence is that there are less wheels on the road in terms of transportation and that this exacerbates the delay that would ordinarily be occasioned by industrial action, necessitating the additional transportation of containers to the terminals of other companies, so that those containers can be dealt with. Mr Graham's evidence also emphasised the impact of reduced transport services on an already difficult process of responding to delays caused by protected industrial action.

[95] While reduced transportation may be able to be dealt with (albeit with difficulty) in the face of a 24 hour stoppage or a series of such stoppages, I accept that this is not the case in circumstances where a stoppage is indefinite, in the sense that the forms of industrial action encompassed in the proposed subcontracting/outsourcing ban and the nominated vessels/shipping lines ban, do not require an end date or time to be provided when notice of the ban is given. This is exacerbated by the COVID-19 related transport issues so that in combination with other factors, it is an exceptional circumstance.

[96] I am also of the view that a feature of the COVID-19 environment is that the majority of companies operating in it have reduced capacity to withstand loss or damage as a result of protected industrial action being taken in the operations of one of three main providers of stevedoring services. Those services are important to end users who may be awaiting the contents of delayed containers. This is particularly of concern in circumstances where such contents may include supplies of goods and materials to assist in stopping the spread of the COVID-19 virus or supplies destined for hospitals, aged care facilities, schools and providers or other front-line services.

[97] In relation to this matter I accept Mr Samidurai's evidence that HPA does not have visibility over the contents of Reefer and General Containers to separate contents which may be vital in the current pandemic environment. Mr Smith gave evidence that he has been informed that such goods can be easily identified and I do not doubt the veracity of that evidence. However, Mr Samidurai's evidence is direct, and given in his capacity as the Manager of Terminal Operations for BCTL, and I prefer that evidence.

[98] There is force in Mr Smith's assertion that vital supplies would not usually be sent by sea and that the contents of containers "morphs" depending on arguments sought to be advanced by stevedoring employers. However, this does not necessarily apply in present circumstances, where other forms of transport are also impacted. While there was no direct evidence called by HPA on this point, it is a matter of common knowledge that the impacts of COVID-19 have affected all forms of transport by which goods and services arrive and depart Australia.

[99] I have considered the undertaking offered by the CFMMEU to exclude COVID-19 materials from protected industrial action. While the CFMMEU is to be commended for

offering this undertaking, for reasons associated with the difficulty of ascertaining the contents of containers, and the time it would take to identify and marshal them, this does not mitigate the impacts of the industrial action so that on balance, the circumstances cease to be exceptional.

[100] I am satisfied that the exceptional circumstances in the present case justify a longer notice period. HPA does not seek the maximum period allowed under s. 443(5) of the Act. The extension of two working days equals the five day period for handling containers and given the additional difficulty in transporting them to another location or diverting them, including all of the related processes which must be undertaken, and the fact that this compresses the required time at the receiving terminal, two additional days is not excessive and will still create some degree of difficulty for HPA in responding to employee claim action.

[101] I do not consider that the additional 2 days of notice diminishes the ability of the CFMMEU and its members to take employee claim action to an extent where that diminution outweighs the other factors I have considered. Accordingly, I consider that it is reasonable to extend the period by two days as sought by HPA.

[102] I am satisfied that there are exceptional circumstances in the present case, on the basis of all of the circumstances including the proposed industrial action and the entire context in which it is to occur. I am also of the view that the discretion to grant the additional period of notice should be exercised in favour of HPA. Further, I am of the view that the circumstances in the present case are materially different than those considered by Commissioner Cambridge in 2019.

CONCLUSION

[103] For these reasons, I decided to issue the protected action ballot order in terms of the CFMMEU application and to extend the notice requirements for employee claim action by 2 working days, to a total of 5 working days, and an order to that effect was issued on 9 July 2020.

DEPUTY PRESIDENT

Appearances:

W Carr for the Maritime Union of Australia Division, Construction, Forestry, Maritime, Mining and Energy Union

P Brown and *B Dearing*, from Baker and McKenzie (with permission), with *H Mihalopoulos* for Hutchinson Port Australia Pty Limited.

Hearing details:

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[1] Statement of Jarrod Graham – HPA1.

[2] Statement of Rajan Samidurai – HPA2.

[3] Statement of Warren Smith – MUA1.

[4] [2019] FWCFB 1150

[5] [2018] FWCFB 4011.

[6] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Services Corporation* [2017] AIRC 848.

[7] *Construction, Forestry, Maritime, Mining and Energy Union v DP World Sydney Ltd* [2019] FCAFC 99.

[8] PR702786

[9] PR703051; *Construction, Forestry, Maritime, Mining and Energy Union – The Maritime Union of Australia Division v Sydney International Container Terminals Pty Limited T/A Hutchison Ports Australia Pty Ltd and Brisbane Container Terminals Pty Limited T/A Hutchison Ports Australia Pty Ltd* [2018] FWC 7521.

[10] *Sydney International Container Terminals Pty Limited T/A Hutchison Ports Australia Pty Ltd and Brisbane Container Terminals Pty Limited T/A Hutchison Ports Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union – The Maritime Union of Australia Division* [2018] FWC 7521.

[11] Exhibit HPA3.