

In the matter of a proceeding under s 424 of the *Fair Work Act 2009*

Svitzer's submission

A Introduction

1. The employer, **Svitzer**, operates tugboats and provides towage services in ports throughout Australia. Svitzer's tugboats are crewed with a master, an engineer and a rating.¹
2. For over three years, Svitzer has been bargaining for a new enterprise agreement (**Proposed Agreement**) with three unions who are the bargaining representatives for the approximately 580 employees who will be covered by the agreement:²
 - a. Australian Maritime Officers Union (**AMOU**), which represents the masters covered by the Proposed Agreement;
 - b. Australian Institute of Marine and Power Engineers, which represents the engineers covered by the Proposed Agreement; and
 - c. Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union, which represents the ratings covered by the Proposed Agreement.
3. Since October 2020, these unions have organised extensive protected industrial action by employees in support of their claims.
4. On 18 February 2022, on Svitzer's application, Easton DP made an order under s

¹ Witness Statement of Deniz Kirdar True dated 17 November 2022 (**True Statement**) at [9], [13].

² True Statement at [16]–[34], [50].

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424 of the *Fair Work Act 2009 (FW Act)* suspending stoppages of work organised and notified by the AMOU until 6 March 2022.³

5. However, after this suspension expired, the unions' industrial action continued and escalated. Just in the period from 20 October 2022 to 13 November 2022 alone, the unions have issued some 52 notices notifying over 300 instances of industrial action. Between 26 October 2022 and 14 November 2022, Svitzer has been the subject of industrial action almost every day, including stoppages of up to 24-hours. These stoppages have occurred at each of the 17 ports covered by the Proposed Agreement where Svitzer currently operates (**Relevant Ports**) and involved most of the employees covered by the Proposed Agreement.⁴
6. On 14 November 2022, Svitzer gave notice that, in response to the employee industrial action, from 12pm AEDT on Friday 18 November 2022, Svitzer will indefinitely lockout all of its employees covered by the Proposed Agreement (**Lockout**).⁵
7. On 15 November 2022, on its own initiative, the Commission commenced this proceeding to determine whether the Lockout should be suspended or terminated under s 424 of the FW Act. Svitzer submits that, for the reasons set out below, the Commission should make an order terminating the Lockout.

B Impact of the Lockout

8. Svitzer is the largest Australian employer of seafarers, employing approximately 580 masters, engineers and ratings to operate 52 tugboats at the Relevant Ports.⁶
9. Svitzer's tugboats require all three crew members — a master, an engineer and a rating — in order to operate. As a result of the Lockout, none of these crew members will continue working once the Lockout commences. Svitzer cannot replace its employee crew with contractor labour. Hence, the effect of the

³ *Svitzer Australia Pty Ltd v AMOU* [2022] FWC 493 (**First 424 Decision**).

⁴ True Statement at [37]–[45].

⁵ True Statement at [46]–[49].

⁶ True Statement at [50].

Lockout is that all of Svitzer's towing services at the Relevant Ports will cease.⁷

10. The 17 Relevant Ports are Adelaide, Albany, Brisbane, Cairns, Eden, Fremantle, Geraldton, Kwinana, Lucinda, Melbourne, Mourilyan, Newcastle, Port Kembla, Spencer Gulf (Port Pirie), Sydney (Port Jackson), Sydney (Port Botany) and Westernport.⁸
11. Five of the Relevant Ports — Adelaide, Brisbane, Fremantle, Melbourne and Sydney (Port Botany) — have container terminals. These are the only Australian ports that have container terminals. With the exception of Sydney (Port Botany), all of the Relevant Ports have dry bulk terminals. These dry bulk terminals export dry commodities, including coal, grain, timber and sugar. They include the world's busiest coal terminal in Newcastle. Most of the Relevant Ports also have liquid bulk terminals where tankers dock. These tankers mostly transport refined fuels and crude oil for import into Australia. Several of the Relevant Ports contain roll on/roll off terminals, cruise ship terminals and naval bases.⁹
12. Over 90% of the vessels that call at the Relevant Ports require one or more tugboats to get in and out of the port.¹⁰
13. Svitzer has a 100% market share in all of the Relevant Ports except for Port Botany and Port Jackson in Sydney (where Svitzer has a 69% and a 59% market share respectively) and the very small port of Eden (where Svitzer has a 67% market share). No alternative towage provider is available for the 14 Relevant Ports where Svitzer has a 100% market share. In the two Sydney ports, Svitzer's competitor Engage could replace Svitzer on *some* of Svitzer's towage jobs, but is unlikely to have capacity to substitute for a majority of these jobs.¹¹
14. Hence, the effect of the Lockout is that over 90% of vessel movements at all

⁷ True Statement at [12]–[15].

⁸ True Statement at [3]. See also [51]–[52].

⁹ True Statement at [9], [51].

¹⁰ True Statement at [11].

¹¹ True Statement at [52]–[57].

Relevant Ports other than the two Sydney ports and Eden will cease. In the two Sydney ports, a substantial proportion of the vessel movements will also cease.¹²

15. The expert report of Greg Houston dated 17 November 2022 partially quantifies the impact that this stoppage will have on the Australian economy by disrupting containerised trade and the export of coal from Newcastle. However, no expert evidence is really necessary here. Given that Australia is an island nation, it is self-evident that an indefinite stoppage of most vessel movements at 16 of the 17 Relevant Ports — including at all Australian container terminals and at the world’s largest coal terminal in Newcastle — will have a dramatic impact on the Australian economy and the economies of the States of NSW, Victoria, Queensland, Western Australia and South Australia.

C The Commission should terminate the Lockout

16. Section 424 of the FW Act provides:

424 FWC must suspend or terminate protected industrial action— endangering life etc.

Suspension or termination of protected industrial action

(1) *The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:*

- (a) *is being engaged in; or*
- (b) *is threatened, impending or probable;*

if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- (c) *to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or*
- (d) *to cause significant damage to the Australian economy or an important part of it.*

(2) *The FWC may make the order:*

- (a) *on its own initiative; or*
- (b) *on application by any of the following:*

¹² True Statement at [58].

- (i) *a bargaining representative for the agreement;*
 - (ii) *the Minister;*
 - (iia) *if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;*
 - (iib) *if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;*
 - (iii) *a person prescribed by the regulations. Application must be determined within 5 days*
- (3) *If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.*

Interim orders

- (4) *If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.*
- (5) *An interim order continues in operation until the application is determined.*

17. Here, the requirements of s 424(1) are satisfied.
18. First, the Lockout is a type of industrial action.¹³ Further, it is an employer response action,¹⁴ and therefore protected action.¹⁵
19. Secondly, the Lockout is threatened, impending or probable.
20. Thirdly, for the reasons set out above, the Lockout is threatening “to cause significant damage to the Australian economy or an important part of it”. In the previous s 424 proceeding, Easton DP found that stoppages of up to 48 hours at 5 ports were likely to cause significant damage to the economies of the relevant States.¹⁶ Here, the damage from the Lockout will vastly exceed the damage from the stoppages considered by Easton DP.

¹³ FW Act s 19(1)(d).

¹⁴ FW Act s 411; True Statement at [37]–[48].

¹⁵ FW Act s 408(c).

¹⁶ First 424 Decision at [86]–[92].

21. The requirements of s 424(1) being satisfied, the Commission *must* make an order suspending or terminating the Lockout.¹⁷ The Commission retains a discretion whether to order termination or suspension.¹⁸
22. Here, termination rather than suspension is appropriate:
- a. The threat to the economy caused by the indefinite Lockout is ongoing rather than temporary.¹⁹
 - b. A suspension of protected action under s 424 has already been attempted. It failed — after this suspension expired, the unions continued to organise employee industrial action, leading Svitzer to eventually give notice of the Lockout.
 - c. The extensive bargaining for the Proposed Agreement has been continuing for over 3 years. It included 75 bargaining and drafting meetings, one failed vote, an application to terminate the current enterprise agreement, two s 424 applications, 4 sessions with Bull DP (as he then was), 11 meetings with former SDP Lacy AO and 9 conciliation conferences with Riordan C. The differences between Svitzer and the unions remain irreconcilable.²⁰ If the Commission merely suspends industrial action for some weeks or months, there is little reason to expect that Svitzer and the unions will be able to reach agreement during the period of suspension.
 - d. Hence, a suspension would be of little assistance to anyone because hostilities are likely to resume after the suspension ends,²¹ as in fact

¹⁷ *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; (2009) 187 IR 119 at [26]; *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA 7444; (2011) 214 IR 367 at [11].

¹⁸ *Australian and International Pilots Association v FWA* [2012] FCAFC 65; (2012) 202 FCR 200 at [92] (Lander J), [181] (Perram J).

¹⁹ *Cf Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA 7444; (2011) 214 IR 367 at [15].

²⁰ True Statement at [23]–[34].

²¹ *Cf Victoria v Community and Public Sector Union* [2011] FWA 9245 at [22]; *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; (2009) 187 IR 119 at [27].

happened after the previous suspension.

D Conclusion

23. For these reasons, the Commission should make an order terminating the Lockout under s 424(1) of the FW Act.

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