REASONS FOR DECISION

Fair Work Act 2009
s.424—Industrial action

Re Svitzer Australia Pty Limited
(B2022/1726)

ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT EASTON

SYDNEY, 22 NOVEMBER 2022

Suspension or termination of protected industrial action – endangering life etc – acting on Commission's own initiative.

Introduction

[1] For more than three years, Svitzer Australia Pty Limited (Svitzer) has been bargaining for a new enterprise agreement with three unions acting as bargaining representatives: the Australian Maritime Officers' Union (AMOU), the Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union (MUA) and the Australian Institute of Marine and Power Engineers (AIMPE). The proposed new agreement is to replace the *Svitzer Australia Pty Limited National Towage Enterprise Agreement 2016*[1] (2016 Agreement). The 2016 Agreement applies to Svitzer and its employees and trainees in relation to work performed by them on tug boats in or about 17 identified ports in Australia.[2] The AMOU, the MUA and the AIMPE are covered by the 2016 Agreement. Its nominal expiry date was 31 December 2019.

[2] On 14 November 2022, Svitzer gave notice to the bargaining representatives pursuant to s 414(5) of the *Fair Work Act 2009* (Cth) (FW Act) of employer response action in the form of an indefinite lockout of all harbour towage employees covered by the 2016 Agreement commencing at midday on 18 November 2022. A media release issued by Switzer on the same day[3] relevantly stated:

> "…
> This step is being taken in response to industrial action which has made it difficult for Svitzer to run its operations.

[1] AE417722

[2] Adelaide, Albany, Bowen, Brisbane, Cairns, Eden, Fremantle, Geelong, Geraldton, Kwinana, Melbourne, Mourilyan, Newcastle, Port Kembla, Spencer Gulf (Port Pirie and Whyalla), Sydney (Port Jackson and Port Botany) and Westernport. Towage work at Whyalla, Bowen and Geelong is no longer performed under the Agreement, but it is agreed that the Agreement applies to an additional port at Lucinda.

[3] Svitzer Australia Advises of Lockout for Harbour Towage Crews, 14 November 2022

> This is harming Svitzer's ability to reliably, safely and efficiently serve our shipping customers and port operations around the country and is causing serious disruption to the national supply chain which is reliant on shipping.
>
> **Protected industrial action**
>
> There have been more than 1100 instances of industrial action notified by the maritime unions since October 2020. Since 20 October 2022, there have been more than 250 instances of protected industrial action alone, amounting to nearly 2000 hours of work stoppages. There is new protected action being notified by the unions on an almost daily basis.
>
> With each instance of industrial action valuable imports and exports are delayed, disrupted, or goods and produce lost.
>
> Svitzer has had to respond to the protected industrial action as a matter of necessity with one of the few avenues available to employers faced with such action.
>
> When the lockout becomes effective, no shipping vessels will be towed in or out of 17 Australian ports otherwise serviced by Svitzer.
>
> This will impact shipping operations at major metropolitan and regional Australian ports nationwide in Queensland, New South Wales, South Australia and Western Australia.
>
> **Extensive bargaining**
>
> Svitzer has been bargaining with the maritime unions for over three years, since the agreement expired in 2019. Despite Svitzer's best efforts to reach a reasonable agreement, the parties remain apart on key threshold issues. There has been exhaustive bargaining in 75 meetings, including 2 conciliation sessions with the Fair Work Commission and one independent mediation process with a former Deputy President of the FWC recommended by the unions. Svitzer is seeking to remove restrictive work practices from its enterprise agreement which are critical to the future sustainability and competitiveness of its Australian business.
> …"
>
> (emphasis added)

[3] Following the above notification and press release, on 15 November 2022 a member of the Commission (Riordan C) engaged in a conciliation process with Switzer and the three unions in an endeavour to avoid the lockout proceeding. This was unsuccessful. Following the completion of this conciliation process, the Commission issued a Statement on 15 November 2022[4] which referred to Svitzer's press release and relevantly stated:

[4] [2022] FWC 3038

> "[3] Svitzer's announcement has caused the Commission to consider making an order under s.424 of the Fair Work Act 2009 (FW Act) on its own initiative to suspend or terminate protected industrial action by Svitzer.
>
> . . .
>
> [9] On 14 February 2022, Svitzer applied to the Commission for orders to stop protected industrial action under s.424 of the FW Act, in response to notices issued by the AMOU advising that protected industrial action would take place at a number of ports from 17 February 2022 onwards. The protected industrial action comprised 48-hour stoppages at various port locations between 17 February 2022 and 4 March 2022.
>
> [10] On 18 February 2022, the Commission made orders under s.424 of the FW Act suspending protected industrial action over the period during which the 48-hour stoppages were scheduled because it was satisfied that the action threatened to cause significant damage to an important part of the Australian economy. Reasons for this decision were issued on 4 March 2022. The Commission's reasons included findings as to the actual damage caused or potential damage to be caused by this industrial action. These findings give rise to a concern that the protected industrial action recently announced by Svitzer may similarly threaten to cause significant damage to the Australian economy or an important part of it."
>
> (footnotes omitted)

[4] The Statement notified the parties that the matter would be listed for mention at 12:00 pm on 16 November 2022. This mention was attended by Svitzer, the MUA, the AMOU, the AIMPE and representatives of the following parties:

- Commonwealth Minister for Employment and Workplace Relations (Minister);
- Patrick Stevedores Holdings Pty Ltd (Patrick);
- Various DP World entities (DP World);
- Qube Ports Pty Ltd (Qube Ports);
- Port Botany Operations Pty Ltd and Port Kembla Operations Pty Limited (NSW Ports);
- Port of Melbourne Operations Pty Ltd (Port of Melbourne).

[5] At the mention the parties were invited to indicate their positions as to the issues in the matter arising under s 424(1) of the FW Act. The Commission also explored whether further conciliation prior to the hearing of the matter should be undertaken, or alternatively whether some other interim arrangement could be reached on the basis that the Svitzer's lockout would not proceed at the date and time notified. This proved to be fruitless because Svitzer declined to participate in further conciliation or to defer the commencement of the lockout. Immediately following the mention, the matter was listed for hearing at 1:00 pm AEDT the following day, 17 November 2022, and directions were made for the filing of evidence and submissions by 11:00 am AEDT prior to the hearing.

[6] The hearing commenced and concluded on 17 November 2022. In the morning of 18 November 2022, before Svitzer's lockout was due to commence, we issued a decision[5] in which we made the following findings:

---

[5] [2022] FWCFB 209

(1) The lockout of its employees which Svitzer proposes to commence later today constitutes protected industrial action that is threatened, impending or probable. Section 424(1)(b) is therefore engaged.

(2) We are satisfied that Svitzer's intended lockout threatens to endanger the welfare of the Australian population or part of it. This finding engages s 424(1)(c).

(3) We are satisfied that Svitzer's intended lockout threatens to cause significant damage to the Australian economy. This finding engages s 424(1)(d).

[7] We then said:

"[3] As a consequence of the above findings, we are required under s 424(1) to make an order suspending or terminating Svitzer's protected industrial action. We consider that the appropriate course is to make an order suspending Svitzer's protected industrial action for a period of six months. The effect of this order under the FW Act will be that no party will be able to take protected industrial action for the period of the suspension: s 413(7)(a)."

[8] An order[6] was issued in conjunction with the decision to give effect to it. We indicated in the decision that we would issue our reasons in due course.

[9] We set out below our reasons for our decision and order.

Statutory framework

[10] Section 408(c) of the FW Act provides that "*employer response action*" for an enterprise agreement is "*protected industrial action*".

[11] Section 411 of the FW Act defines "*employer response action*" as:

411 Employer response action

Employer response action for a proposed enterprise agreement means industrial action that:

(a) is organised or engaged in as a response to industrial action by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who will be covered by the agreement; and

(b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and

[6] PR748042

(c) meets the common requirements set out in Subdivision B.

[12] A lockout of employees from their employment by their employer is included in the definition of "*industrial action*" in s 19(1) of the FW Act.

[13] Division 6 of Part 3-3 of the FW Act sets out when the Commission may or must make orders to terminate or suspend protected industrial action. Relevantly, s 424 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:
>
> (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.

Evidence and submissions

Svitzer

[14] Svitzer submitted that the effect of its proposed lockout would be that over 90% of vessel movements at the 14 ports at which it is the monopoly operator would cease and that a substantial proportion of movements at the two Sydney ports would also cease, leading to disruption of containerised trade and coal exports. This would have a dramatic impact on the Australian economy and the economies of the States of New South Wales, Victoria, Queensland, Western Australia and South Australia. It submitted that we should make an order terminating rather than suspending its protected industrial action because:

(a) The threat to the economy caused by the indefinite lockout was ongoing rather than temporary.

(b) A suspension of protected action under s 424 has already been attempted. However, it failed since, 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 former Deputy President Bull, 11 meetings with retired former Senior Deputy President Lacy AO and 9 conciliation conferences with Commissioner Riordan. The differences between Svitzer and the unions remain irreconcilable. 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, as in fact happened after the previous suspension.

[15] Svitzer tendered a witness statement made by Deniz Kirdar True, its General Manager - Harbour Towage East. She gave evidence about the protracted bargaining process, the previous protected industrial action that had taken place, and the effects of the lockout should it proceed. Ms Kirdar True was cross-examined by the three unions. In response to the directions made 16 November 2022, Svitzer also filed an expert report made by Greg Houston of Houston Kemp Economics concerning the economic impact the proposed lockout of Svitzer employees would have on the Australian economy or important parts of it. However, Svitzer did not tender this report at the hearing.

MUA

[16] The MUA submitted that we should make an interim order under s 589 of the FW Act suspending industrial action until it could properly prepare its case against termination of protected industrial action, because it had not had sufficient time to review the other parties' material in the matter. It submitted in the alternative that we should suspend the protected industrial action until 1 January 2023 rather than terminate it, taking into account the following matters:

- that employees' ability to take protected industrial action is a valuable workplace right;
- that the proposed lockout is "*manifestly disproportionate*" to the employee claim action that precipitated it;
- that the MUA wishes to continue bargaining and does not believe the process is at an impasse, but rather has been productive with the Commission's assistance;
- that Svitzer could withdraw its proposal to lock out employees and thus remove the threat of harm to the Australian economy, but has chosen not to, and should not be allowed to "*hold a gun to everyone's heads*" in that manner and be rewarded for it;
- that Svitzer has "*effectively withdrawn from bargaining*" since 20 October 2022 and changed its position after that date to undermine ongoing negotiations;
- the MUA has undertaken not to notify any further protected industrial action for the balance of 2022 and remains willing to participate in conciliation before the Commission to attempt to resolve the outstanding issues; and
- there is a potential for further industrial action that would endanger the welfare of the population.

[17] The MUA tendered a witness statement made by Paul Garrett, Deputy Secretary of its Sydney Divisional Branch. In his statement, Mr Garrett set out the history of bargaining for a

new enterprise agreement to replace the 2016 Agreement, expressed the view that the parties could still reach an agreement, and said that he thought termination of the protected industrial action would negatively impact MUA members' bargaining power and ability to influence Svitzer's position. Mr Garrett was not required for cross-examination.

AMOU

[18] The AMOU submitted, like the MUA, that we should issue an interim order suspending the protected industrial action until this matter can be heard to completion, rather than acting with "*undue haste*", which would prejudice its ability to properly put its case. It further submitted that if we were not minded to issue such an interim order, we should suspend the protected industrial action until 1 January 2023, and terminating it should be "*a step of last resort*". In support of its position, the AMOU set out the following factors:

- that Svitzer's characterisation of the bargaining period as spanning "*three years and 70 meetings*" was misleading, because of the impact the COVID-19 pandemic had on the process, among other reasons;

- bargaining with the assistance of a Commission member was "*in its relative infancy*" and agreement could have been reached if Svitzer had not withdrawn from the process;

- the parties have progressed substantially in the bargaining process, to the extent that it believed the parties had reached an in-principle agreement in May 2022 and again in October 2022;

- it has engaged in limited protected industrial action since first notifying Svitzer of its intention to do so in February 2022;

- all the union parties agree that protected industrial action should be suspended rather than terminated; and

- while it is possible that Svitzer may threaten another lockout if the protected industrial action is suspended rather than terminated, that is not a sufficient basis to terminate it, there is no basis on which the Commission might find that that is likely and, even if it occurs, s 424 of the FW Act remains in place to suspend that action.

[19] The AMOU tendered a witness statement made by Jarrod Moran, its Senior Industrial Officer, concerning the bargaining process to date. Mr Moran said that he did not believe the bargaining for a new enterprise agreement to replace the 2016 Agreement is "*doomed to fail*", but rather that an agreement may well be reached if the parties were permitted to continue to negotiate in good faith. He said the parties were quite close to reaching agreement before Svitzer "*[went] backwards in relation to significant parts… that had previously been agreed*". He also undertook that the AMOU would not organise any protected industrial action for the balance of 2022. Mr Moran was not required for cross-examination.

AIMPE

[20] The AIMPE's primary position was that we should issue an interim order suspending the protected industrial action for four weeks, and then convene a hearing regarding whether to issue a final order suspending or terminating that action in two weeks' time. It said this course would balance the need to prevent the "*potentially catastrophic implications*" of the proposed lockout while affording it and the other union parties procedural fairness by giving them time to properly prepare their cases. However, it submitted in the alternative that we could make a final order suspending the action for three months. The AIMPE echoed the MUA's submission that Svitzer ought not to be rewarded for its behaviour, and also submitted that the progress that the parties have made in negotiations, the limited prior industrial action by the union parties and the fact that the unions have offered not to notify any further industrial action for a period all weighed in favour of suspending rather than terminating the protected industrial action.

[21] The AIMPE tendered a witness statement made by Gregory Yates, its Senior National Organiser. Mr Yates' evidence in his statement was that the protected industrial action AIMPE members have taken to date in the course of bargaining for an enterprise agreement to replace the 2016 Agreement has been limited, that negotiations have been productive despite the challenges which Svitzer's "*shifting agenda*" and changes to its lead negotiators had thrown up and that he believed the outstanding matters in dispute could be resolved if parties could focus on further negotiations rather than industrial action. Mr Yates was not required for cross-examination.

The Minister

[22] The Minister submitted that the proposed lockout would have critical implications for the Australian economy and would also endanger the safety and welfare of the population or a part of it. On that basis, the Minister's primary submission was that we should terminate the proposed lockout. The Minister submitted that because of Svitzer's indication that the proposed lockout will not be deferred, that it will continue indefinitely, the lengthy duration of bargaining between the parties and the history of other protected action having previously been suspended (and the parties not having reached agreement since) it was open to us to be satisfied that terminating, rather than suspending, the protected industrial action would be more likely to permanently address the threat of damage to the economy, or the safety and welfare of the population. In the alternative, the Minister submitted that it might be open to the Commission to decide that suspension of the action is the more appropriate course, having regard to the objects of the FW Act including achieving fairness through enterprise-level collective bargaining underpinned by good faith bargaining obligations (per s 3(f) of the FW Act), and all the circumstances of the bargaining and Svitzer's response action, but that the period of any suspension should be a minimum of six months.[7]

[23] The Minister tendered two witness statements. The first was made by Mark Cully, the Acting Deputy Secretary of the Macroeconomic Group of the Department of the Treasury. Mr Cully gave evidence concerning the damage to the Australian economy which would occur if the lockout proceeded. The other was made by Mark Morrow, the Executive Director of the Response Division, Australian Maritime Safety Authority (AMSA). Mr Morrow gave evidence

[7] Transcript, 17 November 2022, PN924

concerning the role of Svitzer as the main provider of emergency towage capability in the majority of regions around Australia, and the safety and environmental risks which would arise if this capability was not available because of the lockout. Neither Mr Cully nor Mr Morrow was required for cross-examination.

Other parties

[24] NSW Ports, Qube Ports, Patrick and DP World all made submissions contending that the lockout would cause significant damage to the Australian economy or part(s) of it and that the protected industrial action should be terminated rather than suspended. The following witness statements were tendered:

- NSW Ports: Julian Sefton, General Counsel and General Manager Property.
- Qube Ports: Michael Sousa, Director.

[25] The statements described the impact the lockout would have on NSW Ports and Qube Ports' operations respectively.

[26] The Port of Melbourne submitted that the appropriate course was for the Commission to terminate the protected industrial action because bargaining had been protracted and parties should be afforded certainty via termination. The NSW Minerals Council also filed a submission as to the effect of the lockout on coal and mineral exports from the ports of Newcastle and Port Kembla, but made no submissions on the question of whether we should suspend or terminate the proposed lockout.

Consideration

Threatened, impending or probable industrial action?

[27] It is not in dispute, and we find, that the Svitzer's indefinite lockout of employees to commence at midday on 18 November 2022 is protected industrial action, in the form of employer response action for a proposed enterprise agreement, that is threatened, impending or probable. This engages the prerequisite in s 424(1)(b).

[28] It is therefore necessary to consider whether we are satisfied as to one or both of the matters specified in paragraphs (c) or (d) of s 424(1). This requires us to undertake an evaluative assessment of a discretionary nature.[8]

Endangerment of the life, the personal safety or health, or the welfare, of the population or of part of it?

[29] The terms "*endanger*" and "*welfare*" used in s 424(1)(c) are not defined in the FW Act, however they bear their ordinary meaning, and it is a matter for the Commission, in each case

[8] *Coal and Allied v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 at [20]

before it, to determine whether or not it is satisfied that industrial action is threatening to endanger the welfare of the population, or a part of it.[9]

[30] We are satisfied, on the basis of the evidence of Mr Morrow, Mr Cully and Mr Yates, that Svitzer's intended lockout threatens to endanger the welfare of the population or part of it. This would arise in three ways. *First*, the lockout will have a significant detrimental impact on Australia's emergency towage response capacity. Svitzer has contracted with AMSA to provide emergency towage services in response to vessels in distress, which may include vessels that have lost power, suffered equipment breakdown or malfunction, caught fire or lost their anchorage or mooring capability. If such vessels run aground there may be a risk of a significant oil or other noxious substance spill, leading to serious environmental and ecological outcomes. Svitzer is the main provider of emergency towage capability in 8 of 11 regions around Australia, 6 of which would be impacted by Svitzer's lockout. The lockout may mean that there is a diminished, or no, emergency response capability in those areas for an indefinite period, which would put at risk the safety of affected vessels and those onboard and give rise to a risk of serious environmental incidents such as oil spills.

[31] Under cross-examination, Ms Kirdar True made it clear that Svitzer has taken no steps to exclude emergency response operations from its lockout or to put in place any alternative arrangements:

> "And the evidence, as we understand it, unchallenged put forward by the Minister, on behalf of the Minister, was that if the lockout went into effect it would affect the capacity to implement measures to address shipping — ships in distress or in emergency situations or potentially environmental oil spills and the like. Did you see that evidence?---I have not.
>
> Are you aware that that would be the consequence of Svitzer locking out its employees, including those engaged in the emergency response work that Svitzer is contracted to perform?---I'm aware.
>
> You are aware. Right. What contingencies did Svitzer put in place to ensure that there wasn't danger to shipping or to the environment as a consequence of its decision to lockout employees, to your knowledge?---There were no contingencies.
> . . .
> Were any employees exempted from the lockout notice on the basis that they were engaged in emergency operations?---There were no employees exempt because there are no employees specifically dedicated to this operation.
>
> That is, all employees were locked out, including those who would be necessary to engage in the emergency operations. Correct?---Correct.
> . . .
> Okay. If I frame it by reference to your answer, Svitzer was willing to respond to the protected industrial action to take action which had the potential to endanger shipping

[9] *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44, 187 IR 119 at [32]-[33].

> and to endanger the environment by locking out employees engaging in emergency operations. Correct?---Yes."[10]

[32] *Second*, Svitzer's lockout will indefinitely disrupt the import of pharmaceutical goods, particularly through the Sydney ports. Again, the evidence of Ms Kirdar True makes it apparent that Svitzer has given no consideration to the effect that its lockout will have on the availability of imported essential medical supplies:

> "… What steps, if any, to your knowledge has Svitzer taken to ascertain whether there were medical supplies due to be unloaded at any of the ports it services necessary for hospital or other operations that might be interrupted by its decision to give notice of a lockout from 12 pm tomorrow?---We haven't done any.
> . . .
> Are we correct in understanding that to your knowledge Svitzer has taken no step to ascertain whether the action it notified of locking out its employees from 12 midday tomorrow would have an impact in interrupting essential medical supplies being delivered around the country?---We have not taken any steps."[11]

[33] *Third*, if tug boats are not available to escort cruise ships into ports, passengers may be stranded for an indefinite period offshore.

[34] No party (including Svitzer) opposed the making of a finding of endangerment to welfare under s 424(1)(c).

Significant damage to the Australian economy or an important part of it?

[35] It is accepted by all parties, and we are satisfied on the basis of the unchallenged evidence of Mr Cully, Mr Sefton and Mr Sousa, that Svitzer's proposed lockout is threatening to cause significant damage to the Australian economy or a significant part of it.

[36] As earlier stated, Svitzer operates in 17 ports across Australia and has 100% market share in 14 of these ports. Of the 3 ports at which Svitzer is not the monopoly operator, Svitzer's competitor is unlikely to have the capacity to substitute for the majority of Svitzer's towage jobs in Port Jackson and Port Botany, and Eden is only a small port. Over 90% of the vessels that call at these ports require assistance from one or more tug boats, and these vessel movements will cease at the 14 monopoly ports and will substantially cease at Port Jackson and Port Botany.

[37] Approximately $1.1 billion's worth of goods pass through these 17 ports each day. Australia's ports are critical economic infrastructure, facilitating exports to global markets and imports that are key components of production processes and bringing goods to our shores that will be on-sold through retail stores. Given the limited availability of alternative freight options, the cessation of towage operations would cause significant economic harm to many sectors of the Australian economy. The threatened lockout would have implications for other parts of the supply chain. An ongoing lockout by Svitzer is likely to cause significant harm to many sectors

---

[10] Transcript, 17 November 2022, PNs 387-389, 391-392, 401

[11] Ibid, PNs 408, 410

of the Australian economy, especially those that are reliant on imports as business inputs, are likely to exacerbate supply chain pressures that are already significant, and are likely to put considerable upward pressure on business costs. Export sectors affected include coal and grain, and all containerised trade will be disrupted. An economic impact assessment conducted in February 2022 commissioned by NSW Ports estimates that disruptions to port operations at Port Botany and Port Kembla in NSW alone could cost the economy $14 million for a 24-hour stoppage and $193 million for a two-week temporary closure of the two ports. There are also more specific effects: for example, the only source of liquid fuels (petrol, diesel and jet fuels) in Western Australia is via the Kwinana port and refinery, and this will cease as a result of the lockout. At the time of the hearing, vessels were already being turned away from or leaving Australian ports in anticipation of the lockout.

Suspension or termination?

[38] Having made the above findings, we are required by s 424(1) to make an order suspending or terminating Svitzer's protected industrial action. As to the selection of the alternatives of a suspension order or a termination order and, in the case of the former, as to the period of the suspension, the discretion conferred by s 424(1) is unfettered save by the subject matter and objects of the FW Act.[12] Considerations which have been taken into account in previous decisions made under s 424(1) include the following:

- that the system of bargaining under the FW Act encourages enterprise bargaining and permits protected industrial action;[13]
- the length of time negotiations have been going on;[14]
- the progress that has been made in negotiations;[15]
- whether there has been prior industrial action; [16]
- the views of the parties (especially where both parties agree on the appropriate course of action);[17] and

---

[12] Cf s 425(1)

[13] *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [14]; see also *Svitzer Australia Pty Ltd v AMOU* [2022] FWC 493 at [103].

[14] *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 at [60]; *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; 187 IR 119 at [27]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [19] - [22]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [61]; *Qenos Pty Ltd* [2022] FWC 2727 at [63]-[66], [72]; *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930 at [112]-[113]

[15] *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [19]-[22]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [60]-[62]; *Qenos Pty Ltd* [2022] FWC 2727 at [57], [73] and [76]; *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930 at [114]-[115]

[16] *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44; 187 IR 119 at [27]; *Ausgrid; Endeavour Energy; Minister for Industrial Relations (New South Wales) v CEPU, ASU and AMWU* [2015] FWC 1600 at [59]

[17] *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *Monash v National Tertiary Education Industry Union* [2013] FWCFB 5982 at [55]; *Ausgrid; Endeavour Energy; Minister for Industrial Relations (New South Wales) v CEPU, ASU and AMWU* [2015] FWC 1600 at [59]; *Minister for IR (Vic) v Esso Australia Pty Ltd & Ors* [2016] FWC 8826 at [21]; *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [12]

- the potential for further industrial action that would enliven s 424(1) and the need to make further orders.[18]

[39] It is important to bear in mind, however, that the purpose of s 424(1) is the protection of the population and the economy from the specified types of endangerment and significant damage, not to bring to an end enterprise bargaining which is perceived to be "intractable". The state of progress, or otherwise, in bargaining is a consideration which may be taken into account in the exercise of the discretion under s 424(1) as to the type of order to be made, but the FW Act does not disclose any object or purpose to terminate "intractable" enterprise bargaining as such.

[40] In this case, it is clear that bargaining has been going on for a very long time, even taking into account the fact that bargaining was paused because of the COVID-19 pandemic and then effectively started again because Svitzer "reset" its position in September 2020 by issuing a new log of claims in response to what it perceived were deteriorating commercial circumstances. Protected industrial action has been taken by the unions' members on various occasions since October 2020 and industrial action notified by the AMOU on 11 and 14 February 2022 caused the Commission to issue a suspension order under s 424(1) on 18 February 2022 which operated until 6 March 2022.[19] Svitzer has applied to terminate the 2016 Agreement, and this has been listed for a 20-day hearing commencing next month. Industrial action on the part of the unions and their members has intensified since late October 2022, when there appears to have been a rupture in relations after a period during which bargaining appears to have made some incremental progress. In the hearing before us, each side blamed the other for this rupture, but we are not in a position on the limited evidence before us to assign blame for this. This intensified industrial action seems to have been a major motivator in Svitzer's decision to lock out its workforce.

[41] Svitzer relies upon these matters as demonstrating that the preferable course is a termination order, since the unlikelihood of the parties reaching an agreement through bargaining renders a suspension order inutile. However, we consider that there are some countervailing factors which need to be taken into account:

(1) The three unions oppose termination, and their officials who gave evidence via their witness statements expressed a degree of optimism that an agreement could be reached if negotiations resumed in good faith and without the distraction of industrial action.

(2) Each side has contended that, at various stages of the bargaining process, they have either reached agreement in-principle or have been close to reaching an agreement, but alleges that this did not come to fruition because the other side changed its position or "walked away". Again, we are not in a position to assign blame for this, but it does indicate that agreement is not impossible.

---

[18] *Essential Energy v CEPU* [2016] FWC 3338 at [37]; *BP Refinery (Kwinana) Pty Ltd* [2019] FWC 68 at [61]; *Qenos Pty Ltd* [2022] FWC 2727 at [57] and [70]; *Minister For Tertiary Education, Skills, Jobs and Workplace Relations re Qantas* [2011] FWAFB 7444 at [15]

[19] PR738544; [2022] FWC 493

(3) The parties have also had serious discussions about having some or all of the disputed issues arbitrated by consent pursuant to s 240 of the FW Act. The obstacles to reaching agreement about this as a last resort to finalise the bargaining, to the extent they were disclosed at the hearing, do not appear to be insuperable.

[42] An important consideration must necessarily be that a termination order would deprive the parties of their rights to collectively bargain under the FW Act whereas a suspension order would not. The significance of this consideration arises from that part of the object of the FW Act in s 3(f), which refers to "*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*". In this case, the evidence gives rise to the inference that Svitzer's threatened indefinite lockout of all harbour towage employees was primarily for the purpose of engineering a situation whereby s 424(1) would apply with the objective of bringing collective bargaining, and the associated used of protected industrial action, to an end. Svitzer's Managing Director, Mr Nicolaj Noes, apparently made the decision to lock out Svitzer's workforce. Mr Noes did not give evidence in the proceedings and there was no suggestion that he was not available to give evidence. It is sufficient for present purposes to identify three matters which support this inference:

(1) In proceeding to take employer response action for the first time, Svitzer determined to take the most extreme action available to it — that is, a lockout of all harbour towage employees in all ports commencing at the same time for an indefinite period. While there is no requirement for employer response action to be a "reasonable, proportionate or rational" response to employee claim action,[20] this escalation in response to employee claim action, which Ms Kirdar True conceded[21] did not meet the s 424(1) threshold, can only rationally be understood as having s 424(1) in contemplation.

(2) On 11 November 2022, three days before it gave notice of the lockout and four days before the Commission initiated s 424(1) proceedings on its own initiative, Svitzer made initial contact with its expert, Mr Houston, concerning the preparation of a report as to the economic effects of an indefinite lockout. A formal letter of instructions was sent by Svitzer's lawyers to Mr Houston on 14 November 2022, the day the notice of the lockout was issued. This letter made explicit reference to an "*Anticipated Hearing*" under s 424 of the FW Act in the Commission arising from the notice.

(3) Under cross-examination, Ms Kirdar True eventually conceded that, in Svitzer's internal considerations concerning the taking of lockout action, the scenario was discussed whereby this might lead to other parties intervening in the matter and a s 424 application being made.[22]

---

[20] *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65, 202 FCR 200 at [155] per Perram J

[21] Transcript, 17 November 2022, PNs 418, 421

[22] Ibid, PNs 442-459

[43] We also note the submission advanced on behalf of Svitzer (without any admission) that it is entitled "*just as Qantas did*" to "*bring bargaining to an end using the legal tools available to it to facilitate the end of the bargaining*".[23] While it has been recognised that employer response action may be used in an opportunistic way to attract the operation of s 424(1) and thereby to bring industrial action to an end,[24] we do not accept the proposition that s 424(1) is to be construed and applied on the basis that it constitutes a legitimate avenue for an employer, or any bargaining representative, to bring about the end of a bargaining process. As earlier stated, s 424(1) is to be approached on the basis that its purpose is to protect the population from endangerment and the economy from significant damage that is threatened to be caused by protected industrial action. That Svitzer, as we infer, has threatened an indefinite lockout of its employees, with full knowledge of the damaging consequences for the community which would ensue, in the expectation that this might bring about an end to bargaining via s 424(1) is a matter which, we consider, weighs against making a termination order that negates the bargaining rights of other parties under the FW Act.

[44] We reject the position advanced by the unions that we should make a suspension order that endures only until the New Year — that is, a period of only about six weeks. That period is not sufficient to engender certainty and confidence as to the orderly functioning of Australia's ports, which must necessarily be a fundamental consideration in the exercise of our discretion having regard to the protective purpose of s 424(1). On a fine balance, we consider that a termination order is also not appropriate since, for the reasons earlier stated, we do not consider the parties should be deprived of their collective bargaining rights in circumstances where there is still some basis to think that the parties can either reach an agreement or engage in consent arbitration of outstanding matters pursuant to s 240.

[45] The appropriate course in all the circumstances is to suspend Svitzer's protected industrial action for a period of six months. This will, in our view, provide sufficient certainty as to the operation of Australian ports and will also allow the parties sufficient time to attempt to reach an agreement or engage in consent arbitration without the distraction of industrial action. In the event that no outcome is achieved by the end of the six-month period, the Commission will again be vigilant to ensure that any repetition of Svitzer's regrettable threat of economy-damaging protected industrial action is not permitted to come to fruition.

[46] For completeness, we reject the unions' application for an interim order to be made. Even assuming there is a proper jurisdictional basis to make such an order, we do not consider that the necessary haste in conducting these proceedings has led to any party being denied procedural fairness nor that we would be in any better position to determine this matter in a week or two's time than we are now.

---

[23] Ibid, PN 890

[24] *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65, 202 FCR 200 at [157], [166] per Perram J

ACTING PRESIDENT

Appearances:

S Wood KC with *D Ternovski*, counsel, for Svitzer Australia Pty Limited.

M Gibian SC with *P Boncardo*, counsel, for The Maritime Union of Australia.

E White, counsel, with *A White*, counsel, for The Australian Maritime Officers' Union.

O Fagir, counsel for The Australian Institute of Marine and Power Engineers.

Y Shariff SC with *T Sebbens*, solicitor, for the Hon Tony Burke MP, Minister for Employment and Workplace Relations.

J Sefton for Port Botany Operations Pty Limited and Port Kembla Operations Pty Limited.

K Winter for DP World Melbourne Limited, DP World Sydney Limited, DP World Fremantle Limited, DP World Brisbane Pty Limited, DP World Logistics Australia Limited and DP World Australia Logistics Limited.

J de Flamingh, solicitor, for Qube Ports Pty Ltd.

D Perry, solicitor, for Patrick Stevedores Holdings Pty Limited.

D Pearson, solicitor, for Port of Melbourne Operations Pty Ltd.

Hearing details:

2022.

Sydney with video links to Melbourne and Brisbane using Microsoft Teams:
17 November.

Printed by authority of the Commonwealth Government Printer

<PR748161>