IN THE FAIR WORK COMMISSION

Matter No: B2022/1726

Matter: Re Svitzer Australia Pty Ltd

SUBMISSIONS OF PATRICK STEVEDORES HOLDINGS PTY LTD

1. On the Commission's own motion, proceedings have been commenced under s 424 of the *Fair Work Act 2009* (Cth) (**FW Act**), concerning a lockout of employees notified by **Svitzer** Australia Pty Ltd.

2. **Patrick** Stevedores Holdings Pty Ltd is an interested party in the proceedings, for the reasons set out below. Pursuant to the Commission's directions of 16 November 2022, it makes the following brief submissions.

3. Patrick submits that the three questions raised in the issues document circulated by the Commission on 16 November 2022 ought be answered as follows:

   (a) Is it agreed that the indefinite lockout of employees commencing Friday 18 November 2022 notified by [Svitzer] on 14 November 2022 [(**Lockout**)] is protected industrial action for a proposed enterprise agreement that is threatened, impending or probable?

   Answer: Yes.

   (b) If the answer to [(a)] is "yes", is it agreed that the protected industrial action is threatening or would threaten to cause significant damage to the Australian economy or an important part of it?

   Answer: Yes.

   (c) If the answer to [(b)] is "yes", should the Commission suspend or terminate the protected industrial action?

   Answer: The Commission should terminate the protected industrial action.

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Background and Patrick's interest

4. Patrick is part of the corporate group which operates the Patrick Terminals container stevedoring business. Patrick terminals are located at Port Botany (Sydney) and the Ports of Melbourne, Brisbane and Fremantle.

5. Container stevedoring in Australia is critical to the import/export supply chain, as maritime freight is the only realistic way to move large quantities of cargo in and out of the country. Most such cargo is now containerised. Container operations are also highly concentrated. Australia has only five container ports, being those in which Patrick operates plus Adelaide. There are three container terminals in each of Sydney, Melbourne and Brisbane, two terminals in Fremantle, and only one (Flinders Adelaide Container Terminal) in South Australia.

6. At container terminals such as those operated by Patrick, very large container ships berth and are loaded/discharged by ship-to-shore cranes. These ocean-going vessels are powerful but unwieldy, and cannot navigate safely in harbour, let alone berth precisely. Tug boats provide this service. Without them, container terminals cannot operate and would be idle. Patrick and its related companies would be unable to operate their business.

7. There are relatively few towage operators in Australia. So far as Patrick is aware, Svitzer performs all such operations in Melbourne, Brisbane and Fremantle, and there are few other tugs in Port Botany.

Protected industrial action that is threatened, impending or probable?

8. On the basis of publicly available material, Patrick understands that:

   (a) Svitzer and its employees, represented by three unions, have been bargaining for a substantial period.

   (b) Employees have engaged in a range of protected industrial action pursuant to the results of various protected action ballots - most recently, see PR746066 (AMOU), PR743511 (CFMMEU), PR736881 (AIMPE).

   (c) Svitzer has given its employees notice of the Lockout under section 414 of the FW Act.

9. The Lockout is "*industrial action*" as defined in s 19 of the FW Act.[1] Patrick has seen nothing to suggest it does not meet the "*common requirements*" in s 413 or the notice requirements in s 414. Thus, as long as the Lockout meets the additional requirements of protected "*employer response action*" in s 411, it is protected industrial action.

[1] Specifically, s 19(1)(d).

10. There seems little reason to doubt that Svitzer's industrial action is responsive to past employee claim action. Once it is established that the Lockout is responsive in this way, arguments about its proportionality, speculation about other purposes or other judgments about it are irrelevant: *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; 202 FCR 200 (***Qantas Judicial Review***) at [157] and [166]-[167] per Perram J, see also [126] per Buchanan J.

11. Having been notified to employees, there is no doubt that the Lockout is threatened and impending. A case where industrial action has been notified to occur in the future is an obvious case of this kind: see e.g. *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26; 166 FCR 108 at [20] per Gray and North JJ.

12. The Commission's first question should therefore be answered "yes".

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

13. Having satisfied itself that protected industrial action is threatened, impending and/or probable, the Commission must then determine whether it has threatened, is threatening, or would threaten to cause significant damage to the Australian economy or an important part of it. Even if conceived as three separate lockouts against different groups and considered on that basis (as explained in *Qantas Judicial Review*, though there were three separate agreements under negotiation), this is of no moment, because a tug cannot operate without a master, engineer and ratings - that is, the lockout of any of these groups means Svitzer cannot operate tugs: *Svitzer Australia Pty Ltd v Australian Maritime Officers' Union* [2022] FWC 493 (***First Svitzer Case***) at [20].

14. As the High Court has said of predecessor legislation in similar terms,[2] a determination of whether industrial action threatens "*significant damage to an important part of the Australian economy*" involves "*a measure of subjectivity or value judgment*": *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 447; 203 CLR 194 at [28] per Gleeson CJ, Gaudron and Hayne JJ.

15. The task of the Commission is to assess what "*damage*" given industrial action has threatened, is threatening or would threaten to the Australian economy or an important part of it, and whether that damage would be "*significant*". No additional test or gloss ought be superimposed on the words of the section: *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982 at [20]-[21].

16. In any event, the circumstances at issue here are exceptional by any measure. Svitzer is the sole supplier of essential towage services to most of Australia's major ports. If Svitzer does

[2] The pre-WorkChoices *Workplace Relations Act 1996* (Cth) s 170MW(3)(b).

not operate, the maritime supply chain grinds to a halt, and with it virtually the entirety of Australia's import/export commerce.

17. In Patrick's submission the Commission would readily find that the indefinite Lockout of Svitzer employees threaten to cause significant harm to:

    (a) the Australian economy; and/or

    (b) every State and Territory economy,[3] which are all important parts of the Australian economy: see *Minister for Industrial Relations for the State of Victoria v AGL Loy Yang Pty Ltd* [2017] FWC 2533; *BP Refinery (Kwinana) Pty Ltd v Australian Workers' Union* [2019] FWC 68 at [58]; and/or

    (c) every industry which is reliant on the import or export of goods into or from Australia, many of which are important in their own right and which, cumulatively, will be far larger than the aviation/tourism and sugar industries found to justify orders under s 424 in, respectively, *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444; 214 IR 367 (***Qantas Lockout Case***) and *Sucrogen Australia Pty Ltd v Australian Workers' Union* [2010] FWA 6192.

18. On any view the inability to move ships in and out of Australia will cause enormous economic loss. Even a short disruption would be damaging; an indefinite Lockout would be much more so. The reasons this is so was canvassed in more detail in the *First Svitzer Case*.

19. The Commission's second question ought therefore be answered "yes".

Suspension or termination

20. Should the Commission be satisfied of the relevant matters in s 424(1), it must make an order suspending Svitzer's Lockout. Whether to order suspension or termination is a discretionary matter for the Commission: *Qantas Judicial Review* at [92] per Lander J. Factors relevant to that discretion may include the length of bargaining and progress made to date, whether there has been previous industrial action, the views of the parties, and the potential for further action which would attract an order under s 424: *Essential Energy v Communications, Electrical Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWC 3338.

21. Significant industrial action has been taken by employees against Svitzer, leading to a prior order under s 424 (in the *First Svitzer Case*) which nonetheless has not prevented a recurrence and escalation of damaging industrial action. Bargaining has been ongoing since

[3] While the Australian Capital Territory has no cargo ports, it is nonetheless dependent on imports entering through NSW and/or Victorian ports.

September 2019, with approximately 50 meetings just between then and March 2022: *First Svitzer Case* at [10]-[12].

22. On no view is this a case where the parties are plainly close to agreement and the appropriate order ought be approached on the basis that they might sort out their differences. That alone would pull in favour of termination rather than suspension. The primary consideration, however, must be the effect of the action on important parts of the Australian economy, and the Commission must consider the risk that the same situation will recur: *Qantas Lockout Case* at [15]. The Commission would infer that if action is only suspended, it is unlikely that this will enable the parties to conclude an enterprise agreement given the posture of the parties and the extent to which industrial action has escalated. The likeliest outcome of a suspension order is a period of inactivity followed by further damaging action, and the need for further proceedings of this kind before the Commission.

23. For the above reasons, the appropriate order in this case is one terminating Svitzer's Lockout. This is the only step which can definitely protect the economy from any future lockout, or indeed other damaging industrial action by the parties due to the "common requirement" in s 413(7) of the FW Act (as explained in *Qantas Judicial Review* at [72] per Lander, [130] per Buchanan J, [182] per Perram J.

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17 November 2022