IN THE FAIR WORK COMMISSION

Matter No: B2022/1726

Re: Application on Commission's own initiative re Svitzer Australia Pty Limited [2022] FWC 3038

Interested parties: Port Botany Operations Pty Limited and

Port Kembla Operations Pty Limited

(collectively "NSW Ports")

NSW PORTS OUTLINE OF SUBMISSIONS

1. NSW Ports limits its submissions to issues 2 and 3, as set out in the *Issues for Determination under section 424(1) of the Fair Work Act 2009*, circulated by the Commission on 16 November 2022 and replicated in the (amended) *Directions* issued on 16 November 2022 at [3(b)] and [3(c)].

2. In summary, section 424 of the *Fair Work Act* 2009, states that the Commission must suspend or terminate protected industrial action that is being engaged in or is threatened, impending or probable, if satisfied that the protected industrial action has threatened, is threatening or would threaten:

    - to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
    - to cause significant damage to the Australian economy or an important part of it.

Issue 2 – is the protected industrial action threatening or would threaten to cause significant damage to the Australian economy or an important part of it?

3. Svitzer Australia Pty Limited (**Svitzer**) by its public announcement on 14 November 2022, stated that it had given notice to all harbour towage employees covered under its 2016 National Towage Enterprise Agreement and to the AMOU, MUA and AIMPE of a threatened lockout that will take place from 12:00 pm AEDT, Friday 18 November 2022, and will continue indefinitely (**Protected Action**).

4. Importantly, the public announcement went on to state that the Protected Action will result in no shipping vessels being towed in or out of 17 Australian ports otherwise serviced by Svitzer. Port Botany and Port Kembla are included in those 17 ports.

5. This, it is said, will only impact 'shipping operations' at major metropolitan and regional Australian ports nationwide in Queensland, New South Wales, South Australia and Western Australia.

6. Insofar as the impact on shipping operations at ports in New South Wales is concerned, NSW Ports relies on the witness statement signed by Julian Peter Sefton on 17 November 2022 (**JPS Statement**).

7. However, it is important to recognise that the impact of the Protected Action is not confined to shipping operations per se as suggested by Svitzer.

8. Notably, the impacts extend beyond the ports, as ports are a node in an interconnected supply chain. Disruptions in one part of the supply chain have implications for other parts of the supply chain – as was observed during the COVID-19 global shipping supply chain disruption.

9. As set out in the JPS Statement, the consequences of the Protected Action will materially impact participants in the national ports sector which encompasses end consumers; exporters; importers and operators in the transport and logistics supply chain and markets for shipping services, container port services, stevedoring services, bulk port services, towage services, pilotage services and transport services (road and rail).

10. It is evident that the consequences of the Protected Action will be experienced on fuel supply and storage, mining, farming, supermarkets, retail, construction, steel making and more. These in turn will impact employment, customer confidence and puts at risk, export markets. Disruption contributes to increased costs, as seen during the COVID-19 pandemic and previous congestion related shipping line surcharges at ports experiencing disruptions.

11. The economic impact of port disruption is significant – as shown by the extract of the economic impact assessment conducted by *Prominence Consulting* (see JPS Statement at [34] and figure 4, p6 cf).

12. The longer the disruption at a port the greater the economic impact. Even shorter periods of regular disruption have significant economic impact. For example, a two week temporary closure of Port Botany and Port Kembla could cost $193 million to NSW Gross State Product (see JPS Statement, Figure 4, p6).

13. Given the short time in which NSW Ports had to prepare the JPS Statement, NSW Ports only looked at a selection of impacts on port operations and port users at both port locations over the next week.

14. Longer term impacts will need to be assessed on an ongoing basis and are likely to compound the longer the Protected Action continues.

15. The examples set out in the JPS Statement (at [42], [43], [45], [51] to [55] and [57]), are a small subset of the potential impacted port users / operators. Even from these limited examples the Commission can appreciate the economic impact that will arise from the Protected Action will be significant. Expanded across all affected parties and for longer periods of time, across 17 ports located in Queensland, New South Wales, South Australia and Western Australia, the impact will be even more significant.

16. The Protected Action will create significant supply chain disruption leading to unreliable shipping services; additional costs (due to congestion and delays); challenges for exporters to meet contractual obligations for delivery of goods; reputational risk of doing business with Australia and maintaining/securing export customers; and delays to product deliveries to businesses, shops and supermarkets as stock is unable to be replenished.

17. Across the port sector supply chain associated with Port Botany and Port Kembla, the Protected Action will impact on labour servicing ports and supply chains and have 'knock-on' effects to fuel supply, manufacturing, mining and farming where their inputs are unable to be supplied or their products are unable to be transported from site / storage impacting on their ability to continue their operations until the backlog is cleared.

18. Therefore, the Commission must look to the wider implications of the Protected Action and not only the effect on shipping operations, which is just one aspect.

19. An assessment of the impacts of the Protected Action at 17 ports covering port sector supply chains in Queensland, New South Wales, South Australia and Western Australia and the consequences of those impacts on <u>all participants</u> is therefore relevantly required.

20. Viewed in this way, we submit that if such an assessment is undertaken, the Commission would be satisfied that the national ports sector supply chain meets the threshold as *an important part of the Australian economy*.

21. Furthermore, the material impact of the Protected Action correctly viewed, *threatens to cause significant damage* to the national ports sector supply chain and hence *an important part of the Australian economy*.

22. Alternatively, and in addition, we submit that the impact on the national ports sector should be viewed as *significant* in the same way as the threaten action proposed by Qantas to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air

passenger and cargo services as held in *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (Giudice J, Watson SDP, Roe C, 31 October 2011).

23. Accordingly, NSW Ports respectfully submits that the answer to the question posed by Issue 2, is in the affirmative.

Issue 3 – should the Commission suspend or terminate the Protected Action?

24. We submit that the Commission should, in all the circumstances, terminate the Protected Action based on the principles set out below.

25. In determining whether to suspend or terminate the protected industrial action, the Commission should be satisfied that suspension would not provide sufficient protection against the uncertainty to the national ports sector by reason of the Protected Action (see *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (Giudice J, Watson SDP, Roe C, 31 October 2011).

26. We submit, that an order for termination is more likely in circumstances where there is little chance of reaching agreement and bargaining is at a standstill. The Commission should be satisfied, having regard to the history of protected industrial action involving more than 1100 instances of industrial action notified by the maritime unions since October 2020 and, since 20 October 2022, more than 250 instances of protected industrial action alone, amounting to nearly 2000 hours of work stoppages coupled with the fact that there is new protected action being notified by the unions on an almost daily basis. Furthermore, with each instance of industrial action it is reasonable to conclude (as alleged by Svitzer's public announcement) that valuable imports and exports are delayed, disrupted, or goods and produce lost (see *Application by State of Victoria, Department of Sustainability and Environment & Australian Workers' Union, The* (002N) - [2016] FWC 203, at [40]):

> *"In this case the Department argues that there is little chance of reaching agreement and bargaining is at a standstill... The AWU put little to me to counter the submissions of the Department... for these reasons I decided to terminate the protected industrial action."*

27. We submit, as is the case here, that an order for termination is more likely in circumstances where negotiations have been going on for so long and various forms of protected industrial action have already been taken (see *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 at [27]):

> *"Ambulance Victoria sought an order that I terminate the action. The LHMU opposed the order but did not submit, in the alternative, that I should suspend rather than terminate the proposed protected action. In the circumstances I only considered whether to terminate the action. Aside from the parties' tacit agreement that that was the question I needed to decide, it seemed to me, in circumstances where negotiations have been*

going on for so long and various forms of protected industrial action have already been taken, that termination rather than suspension was the appropriate course should I be satisfied as to the relevant endangerment."

28. Further to paragraph 25 above, an order for termination is more likely where a particular industry is vulnerable to 'uncertainty' as is the case here where the threatened Protected Action creates uncertainty across a wide variety of participants in the national port sector including end consumers, port operators, stevedores, shipping lines, exporters, importers and the like (see *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 at [13] and [15]):

"On the evidence there is significant uncertainty arising from the protected action initially of the unions but in particular arising from the lockout and the grounding of the airline. We should do what we can to avoid significant damage to the tourism industry."

...

"In this case the primary consideration, however, as required by s.424 (1), is the effect of the protected action on the wider aviation and tourism industries. We have decided that in the particular circumstances of this case, which on the evidence include the particular vulnerability of the tourism industry to uncertainty, suspension will not provide sufficient protection against the risk of significant damage to the tourism industry and aviation in particular. Suspension is necessarily temporary - it leaves open the possibility there may be a further lock out with its attendant risks for the relevant part of the economy. That is, a risk the situation we are now dealing with will recur."

29. Particular regard should be had to the stage of negotiations between the parties to determine whether a termination or suspension order should be made (see *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 at [60]):

"*In considering whether a termination order or a suspension order should be made we have had particular regard to the stage reached in the negotiations between the parties and to the recently commenced conciliation processes. We note that the negotiations between the parties for the new agreement only commenced in mid-September 2011 and that the s.240 dispute resolution processes before a member of FWA began on 8 November. Although there will undoubtedly be a range of difficult issues to be addressed by the parties, we consider that the negotiations are still at a relatively early stage. We have therefore sought to provide a basis for the parties to continue with the negotiations in a way which is consistent with the bargaining scheme of the Act but without the continued damaging effects of the industrial action. An order suspending the protected industrial action for a period of 90 days will bring to an end the protected industrial action and will allow the discussions and negotiations between the parties to proceed, with the assistance of FWA. It will also allow the parties to focus their efforts on seeking to resolve the differences between them as to the new agreement rather than dealing with the problems associated with the bans and other industrial action. Further, it will provide an opportunity for the ANF to consider ways of giving effect to its stated intention of ensuring that any protected industrial action taken in the course of bargaining does not endanger anyone's*

safety, health or welfare. The VHIA also sought that any suspension of the protected industrial action be for at least three months."

30. Future prospects of reaching an agreement in negotiations are relevant. We say the Commission would be satisfied, having regard to the history of the matter, that there are no reasonable prospects of bargaining resolving the issues in dispute (see *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982 at [55]):

"We have a discretion as to whether to make a suspension or termination order. We initially considered making a termination order, on the basis that negotiations have been occurring for about 12 months with little progress and that a suspension order might simply lead to a later recurrence of the Results Ban during Semester 2 examinations. However, both parties expressed a strong preference for a suspension order if any order was required to be made, and we accept the submission of the University that the evidence simply did not go to the issue of the future prospects of the parties reaching an agreement should only a suspension order be issued. We have therefore determined to issue a suspension order."

31. An order for termination is more likely in circumstances where the protected action is not the first action taken and/or the parties have been bargaining for an extended period of time (see *Ausgrid; Endeavour Energy; Minister for Industrial Relations (New South Wales) v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; the Australian Manufacturing Workers' Union* [2015] FWC 1600 at [59]):

"Ausgrid, Endeavour and the Minister each sought in their applications, as filed, for the termination of the protected industrial action. I was not persuaded I should make such an order. In final submissions, the Minister did not express a preferred view about one or other of these outcomes. The employers' submissions, as they were developed, did not press for termination, but rather a suspension. On the facts in these applications, this was an appropriate concession. If I was to terminate the protected industrial action then no further protected industrial action could be taken and the terms of Division 3 of Part 2-5 of the Act would come into operation. These provisions relate to the making of a workplace determination. No persuasive case was established for me to do so. The protected industrial action, as notified, was the first to be taken of those which had been authorised by the protected action ballot. I am aware the parties have been, and still are, negotiating the new enterprise agreements that will cover them. No case was made out warranting the interruption of that process and a requirement for the parties to participate in another process that may see the imposition on them of an arbitrated outcome."

32. Lastly, a range of factors are relevant for consideration when to determining whether protected industrial action should be suspended or terminated (see *Essential Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWC 3338 at [37]):

".... the following factors are relevant:

- *the length of time negotiations had been going on;*
- *the progress that had been made in negotiations;*
- *whether there had been prior industrial action;*
- *the views of the parties (especially where both parties agree on the appropriate course of action); and*
- *the potential for further industrial action that would endanger the general welfare.*

These are the factors upon which I have based my decision. Taken together, they support a decision to terminate, rather than suspend, the protected industrial action. I have also had regard to the management initiated ballot. Whether the decision is to suspend or terminate the industrial action, this would not prevent the ballot going ahead."

33. If the Commission were to apply the (relevant) factors to the present circumstances, we submit that termination would be the appropriate and fair and just outcome in all the circumstances.

34. Accordingly, NSW Ports respectfully submits that the answer to the question posed by Issue 3, is that the Commission should terminate the Protected Action.

Dated: 17 November 2022

Julian Sefton, General Counsel, NSW Ports