

Form F37 Application for an order for suspension or termination of protected industrial action

Fair Work Act 2009—ss. 423–426

This is an application to the Fair Work Commission for an order for suspension or termination of protected industrial action in accordance with Part 3-3 of the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making the application.

Postal address	Gate B105A, Penrhyn Road		
Suburb	Port Botany		
State or territory	NSW	Postcode	2036
Phone number	1800 430 948	Fax number	
Email address	M.Zoras-Christo@patrick.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Patrick Stevedores Holdings Pty Ltd
Trading name of business	—
ABN/ACN	63 060 462 919
Contact person	Maria Zoras-Christo

Do you need an interpreter?



If you require an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Do you require any special assistance at the hearing or conference (e.g. a hearing loop)?

Yes – Please specify the assistance required

No

Do you have a representative?



A representative is a person or organisation who is representing you. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Your representative

These are the details of the person or organisation that is representing you (if any).

Name of person	Darren Perry		
Firm, organisation, company	Seyfarth Shaw Australia		
Postal address	Level 40, Governor Phillip Tower, 1 Farrer Place		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	0429 299 616	Fax number	
Email address	dperry@seyfarth.com		

Is your representative a lawyer or paid agent?

Yes

No

The Respondent

These are the details of the bargaining representative(s) against whom the application to suspend or terminate protected industrial action is sought. Attach additional pages, if necessary.

Legal name of business	Construction, Forestry, Maritime, Mining and Energy Union		
Trading name of business	The Maritime Union of Australia		
ABN/ACN	105N		
Contact person	Wendy Carr		
Postal address	Level 1, 365 Sussex Street		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	(02) 9265 8444	Fax number	(02) 9261 3481
Email address	muano@mua.org.au		

1. Preliminary**1.1 What industry is the employer in?**

Stevedoring industry

2. What orders are you seeking in relation to the protected industrial action?

the protected industrial action be terminated;

the protected industrial action be suspended for a period of [specify period]:

3. Is protected industrial action:

being engaged in; and/or,

threatened, impending or probable (applies where the application relates to endangering life, the personal safety or health or the welfare of the population or part of it see s.424)

[Specify by name or reference to a class who is taking and/or threatening to take protected industrial action.]

Employees of Patrick Stevedores Holdings Pty Ltd who are members of the Construction, Forestry, Maritime, Mining and Energy Union.

4. What is the basis for your application?

Protected industrial action is causing, or threatening to cause significant economic harm (see s.423)

Protected industrial action is endangering life, or personal safety, health or welfare of the population or part of it, or is causing significant damage to the Australian economy or an important part of it (see s.424)

A cooling off period is appropriate (see s. 425)

Protected industrial action is threatening to cause significant harm to a third party (see s.426)

4.1 Particulars

1. The applicant (**Patrick**) is part of the Patrick Terminals group, which operates container stevedoring terminal at four ports in Australia - Port Botany NSW, Melbourne VIC, Brisbane QLD, and Fremantle WA (**Terminals**).
2. In each of Botany, Melbourne and Brisbane, Patrick is one of only three container stevedores. In Fremantle, it is one of only two. In the financial year ending June 2020 it handled approximately 45% of total container volumes and lifts in the four ports. Its volume share ranges from roughly a third in Melbourne to approximately 70% in Fremantle.
3. Patrick employs persons to perform tasks associated with the stevedoring of container ships (**Employees**). The vast majority (if not all) of the Employees are members of the respondent Union (**Union**).
4. Since February 2020, Patrick has been engaged in bargaining with the Employees for a new enterprise agreement known as the *Patrick Terminals Enterprise Agreement 2020* (**Proposed EA**). The Union is a bargaining representative for the Proposed EA, representing the Employees.
5. The *Patrick Terminals Enterprise Agreement 2016* reached its nominal expiry date on 30 June 2020. Since that time, the Union has sought, obtained, and notified protected industrial action by Employees pursuant to the results of a protected action ballot order (**PABO**) made on 20 July 2020.

6. Significant industrial action has been notified and occurred since 27 August and 4 September 2020 respectively. The Union has outright rejected Patrick’s draft of the Proposed EA, consistently referring to it in correspondence with members as a “*shit-agreement*”.
7. Currently, employees at all Terminals are engaged in indefinite bans on:
 - (a) the performance of upgrades and work at higher levels, where Employees perform work above the level of their substantive classification. “Upgrades” and the working of shifts at a higher level are very common during normal operations and relied on in order to ensure that adequate skills are available to make a crane gang;
 - (b) the performance of shift extensions, where employees perform overtime following the end of an ordinary eight-hour shift to complete required work; and
 - (c) work on vessels subcontracted from other stevedoring operators.(collectively, the **Common Bans**).
8. Additionally:
 - (a) Employees at Botany, Melbourne and Fremantle have imposed indefinite bans on the working of all types overtime, not only shift extensions (**Overtime Ban**);
 - (b) Employees at Brisbane and Fremantle have imposed indefinite bans on coming in to work and working a shift when they are either on the “standby list” or were not initially allocated for work (**Call-in Bans**);
 - (c) Employees at Fremantle have imposed an indefinite ban on working when their roster reads “off/avail” (**Off/avail Ban**); and
 - (d) Employees at Port Botany have imposed an indefinite ban on work on Project SABRE, which is a redevelopment of the Botany Terminal’s rail yard which is due to go live in December 2020 (**SABRE Ban**).
9. The above work bans limit Patrick’s productive capacity by limiting its ability to allocate labour to meet its resourcing needs. Particular areas in the Terminals require specific staffing, which is especially the case in relation to quay crane operations. The absence of an employee with a key skill can mean that a whole crane team cannot operate. Insufficient crane and yard resources in turn means that vessels cannot be stevedored within planned windows, causing delays which affect both the vessel’s arrival into subsequent ports and other vessels waiting in the queue at the port where the delay occurs.
10. Delays from reduced operating capacity are compounded by stoppages and bans on particular vessels. The MUA has notified an upcoming 24 hour stoppage in in each of Brisbane and Port Botany. At Fremantle, the MUA has notified a 31-hour ban on working a particular vessel, to commence on 29 September 2020, plus two hours of stoppages at the end of each 8 hour shift, indefinitely.
11. Where Patrick cannot stevedore vessels in a timely fashion it would ordinarily explore whether it can subcontract the working of a vessel to a competitor in the same port. However:
 - (a) DP World operates container terminals in every port where Patrick operates. In Fremantle it is the only other operator. In three ports, DP World is subject to industrial action by its own employees which include indefinite bans on employees vessels subcontracted to it by Patrick. This ban is not currently in place at Port Botany, but DP World is working through a considerable backlog and could not accept a subcontract.
 - (b) In Port Botany and Brisbane, the third operator is Hutchison. Hutchison is subject to industrial action by its own employees. It thus cannot accept a subcontract from Patrick.

(c) In Melbourne, the third operator is Victoria International Container Terminal (VICT). VICT has limited capacity to accept subcontracts and Patrick has not successfully subcontracted to it in the last 12 months.

12. The position is therefore that Patrick cannot subcontract, and that vessels contracted to Patrick will be worked by it (late), or not at all.

5. What grounds are being relied on?

5.1 Using numbered paragraphs, specify:

- **the provision(s) of Division 6 of Part 3-3 of the Act upon which the Applicant relies; and**
- **by reference to those provision(s) in Division 6 of Part 3-3 of the Act briefly specify how the requirements of such provision(s) are satisfied.]**

1. The Applicant relies on section 424(1)(d) of the *Fair Work Act 2009 (FW Act)*.
2. The Union has given Patrick notice of the industrial action pursuant to s 414 of the FW Act. That action is happening in the form of work bans, and threatened in the case of 24 hour stoppages at two terminals, and recurring two-hour stoppages and a ban on the working of a vessel for 31 hours at Fremantle.
3. Containerised trade makes up a significant proportion of gross State product (**GSP**) around Australia. Relevantly, this ranges from 7.8% in Western Australia to 16.4% in Victoria. Some 12% of Australian economic activity is underpinned by containerised freight.
4. The industrial action which is happening in the form of work bans, and which is threatened and impending in the form of the stoppages and vessel ban, would in all the circumstances threaten to cause serious harm to:
 - (a) at least the New South Wales, Victorian, Queensland and Western Australian economies, each being an important part of the Australian economy; and
 - (b) the stevedoring industry, being an important part of the Australian economy by virtue of its place in the export/import supply chain and its importance to many other industries, including for example agricultural exports and retail imports.

Similar impacts can be found to exist in relation to other industries that are important parts of the Australian economy, including the transport and logistics industry generally, the retail trade industry and agricultural industries.
5. Patrick Terminals moves around 45% of the containerised freight which passes through the four ports where it operates, equating to many thousands of containers each day. For each day of lost operations, the value of disrupted goods is approximately \$165.6 million in imports and \$66.9 million in exports. That is between 4.6% and 5.6% of daily GSP, and 4.4% of daily Gross National Product (**GNP**).
6. While not all of this value will be lost, Patrick's ability to "catch up" on delayed operations, and the utility of doing so, is significantly limited by:
 - (a) free berth time at its larger Terminals, given their busy vessel schedules;
 - (b) the ability and willingness of shipping lines to have vessels remain in port rather than "sail light" or omit a port;

- (c) the time-sensitive nature of goods such as agricultural exports (which may have an expiration date or be subject to seasonal patterns of demand), goods which are inputs to other processes such as manufacturing, and just-in-time imports e.g. in the retail industry; and
 - (d) the potential that “catch up” capacity might quickly be overwhelmed by the sheer weight of delayed vessels and containers in the event of the lengthy industrial action, noting that the current work bans are all indefinite.
7. On highly conservative best-case assumptions, at least 5% of import and export values will be lost for each day of disruption. That is millions of dollars per day in lost GSP and GNP, to say nothing of the businesses directly affected. The real position is very likely to be significantly worse.
 8. The bans currently in place at Patrick’s Terminals have the effect of reducing crane and yard capacity at every Terminal. Nationally, Patrick has been unable to man 31% of crane teams it would otherwise deploy to service customers; in Port Botany, the reduction has been in the order of 42%, so that Patrick can staff only approximately 6 out of every 10 quay cranes it would otherwise operate. It cannot complete 37% of container exchanges (45% in Port Botany). This position is continuing to deteriorate.
 9. While vessel calls might otherwise be subcontracted and worked by a competitor to alleviate these effects:
 - (a) based on existing commitments and capacity constraints, Patrick estimates that under ideal conditions only a very limited amount of its volumes (if any) could be subcontracted; and
 - (b) the bans in place at other operators and conditions in Australian stevedoring mean that DP World and Hutchison cannot service a subcontract at all, and VICT (which operates only in one port) has a very limited theoretical maximum capacity to take subcontracts. Real subcontracting capacity is, therefore, effectively zero.
 10. Over time as the indefinite bans continue, delays as a result of the capacity limitations will cascade, becoming unrecoverable and leading to port omissions and lost voyages. This has already started to occur. Vessels have omitted ports where they are serviced by Patrick on 15 occasions, 11 of them in Port Botany.
 11. The situation is becoming untenable for shipping lines and those dependent on them. That has been made clear to Patrick in no uncertain terms:
 - (a) Facing increased costs, several shipping lines have begun to charge congestion charges for cargo moving in and out of Port Botany. This adds hundreds of dollars to the cost to an exporter of moving a container.
 - (b) Maersk, the world’s largest container shipping operator, has temporarily ceased taking new orders for transport of containers to Sydney. It says that “few supply chains can accommodate disruption of this nature and certainly not those of essential cargoes”, and that “the situation in Australia is critical and requires [Patrick’s] utmost attention”
 - (c) MSC points to over 100,000 tonnes of containers Sydney import cargo stranded in Sydney due to delays at Port Botany. It has expressed its “grave concerns” relating to “extended delays... being experienced at both container terminals and container depots”.
 - (d) Fletcher International Exports, a large exporter of lamb and sheep products which operates trains taking agricultural produce to port, notes that in light of drought, bushfires and COVID-19, “many Aussie farmers have not made it through and the rest that have made it, have done so by the skin of their teeth, with crippling debt and the constant hope that this bumper season will swing fortune in their favour for the first time in many years... if this season is not a good one, there will be no coming back”.


- (e) The Manildra Group, an exporter of flour and related products, has been able to ship only 60% of their throughput requirements. The rest is stored in container parks to await vessel receipts, with extra per-container costs of \$712 plus storage. A further 1800 containers for export have accumulated. The result of this is ultimately that Manildra says “we cannot meet our international customer orders and some of these customers are heavily dependent on our product. If we lose these customers, which is currently a high risk, we will struggle to maintain these business relationships.”
12. The effects of port delays moreover cascade throughout the economy in the form of lost sales, costs of transport and storage, and losses in production or productivity where the delayed goods are inputs to other processes such as manufacturing. Fletcher and Manildra are but two examples of what will be thousands of businesses affected to some degree, as is inevitable in a country with no land borders and where the vast majority of marine freight is containerised. These “multiplier effects” are likely to be significant, and compounded by the length of the industrial action.
 13. In the above respects, the impacts of industrial action are worsened by the current COVID-19 pandemic. This is so both in respect of potential disruption to the import of essential supplies, and the fragility of the State and Australian economies, and numerous affected industries and sectors at present.
 14. Having regard to the indefinite nature of the bans that are in place, the effect of them will inevitably be to cause significant damage to the Australia economy and the relevant important parts of it.
 15. For all the above reasons Patrick contends that the combined effect of industrial action which is happening and further action which is threatened and impending would, over time, threaten serious damage to important parts of the Australian economy. If it is satisfied of that matter, the Commission must either suspend or terminate protected industrial action for the Proposed EA.
 16. Should the Commission reach that state of satisfaction, Patrick submits the proper order is one terminating industrial action. In that respect:
 - (a) Bargaining for the Proposed EA has been ongoing for 7 months.
 - (b) The Union has rejected utterly Patrick’s proposals for the new EA, and shows no signs of compromising on this position.
 - (c) Industrial action for the Proposed EA has, given the above matters, already inflicted a significant degree of harm generally.
 - (d) In light of the above, the Commission could have no confidence that a suspension of industrial action will facilitate the parties reaching an agreement. Rather, it risks the infliction of further harm on the economy once the period of suspension ends and industrial action can re-commence, and the need for further proceedings before the Commission.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Darren Keith Perry

Date	28 September 2020
Capacity/Position	Solicitor for the Applicant



Where this form is not being completed and signed by the Respondent, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS