IN THE FAIR WORK COMMISSION
AT MELBOURNE

B2022/1726

Re Svitzer Australia Pty Limited

AMOU'S OUTLINE OF SUBMISSIONS

A. Introduction

1 The Commission has, on its own initiative,[1] invited submissions and evidence on the question of whether it should make an order under s 424(1) of the FW Act to suspend or terminate industrial action threatened by Svitzer Australia Pty Limited (**Svitzer**) in the form of an indefinite lockout of employees commencing Friday 18 November 2022 notified by Svitzer Australia Pty Ltd on Monday 14 November 2022 (**lockout**).

2 The Commission has proposed three issues for determination:

(1) Is the lockout protected industrial action for a proposed enterprise agreement that is threatened, impending or probable?

(2) Is the lockout threatening or would it threaten to cause significant damage to the Australian economy or an important part of it?

(3) Should the Commission suspend or terminate the lockout (and/or protected industrial action more broadly)?

3 The AMOU's position is that the hearing of evidence and submissions on these questions has come prematurely, with undue haste in the context of an industrial dispute that has spanned more than three years, in a way that prejudices the AMOU's capacity to properly put its case in response to the questions. Even acknowledging the imminence of the threat of damage to the Australian economy, the Commission has procedural powers capable of neutralising that threat for so long as is necessary to give every affected party a fair opportunity to put its case.

4 For those reasons, the AMOU seeks the following orders:

(1) The lockout be suspended until the Commission hears and determines proceeding B2022/1726.

(2) In the alternative, Svitzer take no steps to give effect to the lockout.

[1] Under s 424(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**).

(3) The hearing of proceeding B2022/1726 be adjourned to a date to be fixed not before 24 November 2022.

5 If the Commission does not make the orders sought by the AMOU, its position in relation to the questions posed for determination is that they should be answered as follows:

(1) Yes.

(2) Yes.

(3) The Commission should suspend industrial action until 1 January 2023.

6 In support of its position, the AMOU relies on the evidence of Jarrod Moran, Senior Industrial Officer, whose anticipated evidence is the subject of an outline.

B. Relevant background

7 Svitzer employs approximately 540 workers including approximately 150 members of the AMOU.

8 The *Svitzer Australia Pty Limited National Towage Enterprise Agreement 2016* (**Agreement**) commenced operation on 17 February 2016 with a nominal expiry date of 31 December 2019. It covers Svitzer and employees of Svitzer working at ports recorded at Schedule 1 to the Agreement.

9 Bargaining for a new enterprise agreement commenced in September 2019.

10 Within six months, by February 2020, there was substantial agreement on the terms of a replacement agreement. In about March 2020, purportedly in response to the COVID-19 pandemic, Svitzer withdrew its agreement on matters which had to that point been negotiated. It was not until September 2020 that Svitzer provided a revised log of claims. Bargaining has continued from that time.

11 On 18 January 2022, Svitzer applied to the Commission to terminate of the Agreement under s 225. That application before the Commission is ongoing.[2]

12 In February 2022, the AMOU gave notice of its intention to take protected industrial action in the form of a series of 48-hour stoppages commencing on 17 February 2022 and related work bans. On 18 February 2022, pursuant to an application by Svitzer, the Commission made orders under s 424 of the FW Act suspending the AMOU's proposed industrial action on the

[2] Proceeding number AG2022/123.

basis that the 48-hour stoppages proposed were likely to cause significant damage to the Australian economy or an important part of it.[3] The AMOU did not engage in protected industrial action from the suspension decision until August 2022. It resumed protected industrial action on August 2022.

13 On Monday, 14 November 2022, Svitzer gave notice to the AMOU that it proposed to engage in the lockout.

C. Interim orders and/or iInterim suspension of the lockout

C1. Sources of power

Section 424(4)

14 Sections 424(3)-(5) of the FW Act create a scheme by which matters concerned with the suspension or termination of protected industrial action that would threaten personal injury or damage to the Australian economy be resolved promptly. They relevantly provide as follows:

> *Application must be determined within 5 days*
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> (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.

15 In circumstances where a proceeding under s 424 may be initiated by the Commission,[4] a question arises whether an *application* for orders under s 424 is a necessary precondition of the Commission's power to make interim orders under s 424(4).

16 The starting point of construing the provision is consideration of the ordinary and grammatical sense of the statutory words used having regard to their context and the legislative purpose.[5]

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[3] *Svitzer Australia Pty Ltd v Australian Maritime Officers' Union* [2022] FWC 493 (**suspension decision**).
[4] Section 424(2)(a).
[5] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4] (French CJ); [47] (Hayne, Heydon, Crennan and Kiefel JJ).

17 The evident purpose of the scheme of ss 424(3)-(5) is to mitigate the potential for harm that may be caused by protected industrial action with capacity to cause relevant injury or damage, either by resolving the proceeding promptly before such harm may occur, or, where the Commission is unable to deal with the matter promptly, to make interim orders preventing the proposed protected industrial action.

18 That purpose applies with equal force to a proceeding initiated by the Commission and a proceeding initiated on application of an interested party. There is no plausible or coherent reason for there to be any distinction based upon the method by which a proceeding commenced. On one view, a proceeding commenced on the initiative of the Commission will have even greater need for the protections of ss 424(3)-(5). Such proceedings, by their nature, relate to protected industrial action that has more obvious capacity to cause relevant injury.

19 It should be concluded that the word application in s 424(3)-(4) is used as a synonym for proceeding, and that it is not a precondition on the Commission's exercise of power that the proceeding be commenced by application.

Section 589(2)

20 In the alternative, the Commission should find that it has power to make interim suspension orders under s 589(2), which provides as follows:

> **Subdivision B—Conduct of matters before the FWC**
>
> **589 Procedural and interim decisions**
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> …
>
> (2) The FWC may make an interim decision in relation to a matter before it.

21 To the extent that the reasoning of the Full Bench in ***Wills*** *v Grant, Marley and the Government of New South Wales, Sydney Trains* (2020) 298 IR 254 applies to constrain the Commission's power to make interim orders only in circumstances where the preconditions on the exercise of power in s 424(1) are met,[6] the AMOU says two things.

22 First, the AMOU formally submits that the decision in *Wills* was wrongly decided. It proceeded on a conflation of the distinct concepts of a *matter* and a *dispute* about which the

[6] *State of NSW, NSW Trains and Sydney Trains v Australian Rail, Tram and Bus Industry Union and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2022] FWC 1724.

Commission is empowered to make orders.[7] Even where a court or tribunal has no jurisdiction to make the orders sought, there is a relevant matter upon a claim for relief.[8]

23 Secondly, and in any event, on material foreshadowed by Svitzer and the interveners in the present proceeding, there appears to be agreement in relation to issues 1 and 2 proposed by the Commission. In other words, it appears there is common ground that the lockout is or would be protected industrial action that would threaten to cause significant damage to the Australian economy or a part of it. In those circumstances, the Commission can be satisfied that the preconditions on its power in s 424(1) are met and that it may make an order suspending the lockout on that basis. Applying the reasoning in *Wills*,[9] the Commission's suspension orders (and, indeed, its state of satisfaction as to the preconditions of its power) may be made on an interim or interlocutory basis, until such time as the proceeding can be fairly resolved on a final basis.

C2. Contentions

24 The Commission is able to be satisfied as to the preconditions in s 424(1). The sole remaining issue in the substantive proceeding is whether the lockout and/or protected industrial action more broadly should be suspended or terminated. This is a matter of some significance. Termination would deny the AMOU and its members the right to take industrial action that is presupposed by the system of bargaining established by the FW Act. Moreover, the statutory consequences of termination would be to initiate a pathway towards workplace determination.[10]

25 Besides the imminent threat of the lockout causing injury to the Australian economy, there is no good reason for the proceeding to be rushed. The Commission, having the power to neutralise the threat to the Australian economy by making interim suspension orders, should do so to give parties time to prepare their cases. In the context of an industrial dispute that has been ongoing for more than three years,[11] the extension of the dispute by a further few

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[7] At [34(a)], adopting the reasoning of Colman DP in *Leanne Mayson v Mylan Health Pty Ltd* [2020] FWC 1404; 294 IR 274.

[8] *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; 264 FCR 342 at [101]-[103] (Rares and Barker JJ) citing *Re McJannet; Ex parte Australian Workers' Union of Employees Queensland (No 2)* (1997) 189 CLR 654.

[9] At [48]-[49].

[10] Section 266.

[11] Of those three years, there was a period of about six months of inactivity while Svitzer reconsidered its position in light of the COVID-19 pandemic.

weeks can cause no prejudice to any party. AMOU considers it is prejudiced in its preparation of this case absent an interim order giving it more time to prepare.

D. Final orders: suspension or termination

D1. Relevant principles

26 The FW Act does not specify criteria for the Commission to decide between suspension or termination of protected industrial action under s 424. Where suspension would be sufficient to protect against the risk of protected industrial action causing relevant injury, it should be the Commission's first choice, ahead of termination.[12] Understood in context, termination should be regarded as a step of last resort.

27 As the Full Bench recognised in *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367,[13] protected industrial action is not only permitted, but encouraged by our industrial system. So much was confirmed in the explanatory memorandum to the *Fair Work Bill 2008* (Cth), which provided as follows in relation to Div 6 of Part 3-3 of the FW Act:

> 1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.
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> 1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.

28 In *Essential Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWC 3338, Hamburger SDP listed factors relevant to a decision between termination and suspension as follows:

> [37] These decisions indicate that the following factors are relevant:
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> i. the length of time negotiations had been going on;
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> ii. the progress that had been made in negotiations;
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> iii. whether there had been prior industrial action;

[12] *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930 citing *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367.

[13] At [14].

iv. the views of the parties (especially where both parties agree on the appropriate course of action); and

v. the potential for further industrial action that would endanger the general welfare etc.

D2. Contentions: suspension appropriate

29 The Commission should suspend and not terminate protected industrial action for the following reasons.

(i) The length of negotiations

30 The headline *three years* and *70 meetings* since bargaining commenced is misleading. Bargaining has reset and restarted more than once in that time. Svitzer provided a revised log of claims in September 2022 in response to the COVID-19 pandemic and again revised its position on 26 October 2022 in response to the unions' resumption of industrial action.

31 Indeed, the process of member-assisted conciliation (currently before Commissioner Riordan) is in its relative infancy, having commenced in August 2022. Before Svitzer withdrew from that process, real progress was made between the parties. There was an expectation that a result would be achieved through that process by Christmas 2022, had Svitzer not withdrawn.

(ii) Progress that has been made

32 Substantial progress has been made in bargaining. Parties have been close to agreement on at least three occasions, including reaching what was believed to be in-principle agreement in May 2022 and as recently as last month.

(iii) Prior industrial action

33 Industrial action was first notified by the AMOU in about February 2022. Before the AMOU's members could complete its proposed stoppage pursuant to that notice, the Commission made the suspension decision. Between March 2022 and early August 2022, the AMOU took no industrial action. The AMOU also took no industrial action between 12 August 2022 and 26 October 2022. The AMOU resumed protected industrial action on 26 October 2022. That protected industrial action comprised confined stoppages and limited work bans. Svitzer gave notice of its intention to engage in the lockout on 14 November 2022, 19 days after the AMOU resumed protected industrial action.

(iv) Views of the parties

34 Each union party agrees that the protected industrial action should be suspended and not terminated.

(v) Potential for further that would

35 Termination is not necessary to protect against the risk of damage to the Australian economy from future, as-yet unspecified, protected industrial action. There is no basis for the Commission to find there to be any likelihood of Svitzer threatening a further lockout in the future if protected industrial action is suspended and not terminated. The mere possibility that Svitzer may threaten a further lockout in the future should not be a sufficient basis to terminate protected industrial action. Even if that possibility were to eventuate, the protection of s 424 to suspend such action would remain.

D3. Conclusion in relation to

36 For the above reasons, if a final order is made under s 424, that order should be to suspend, and not to terminate the protected industrial action.

E. Disposition

37 For the above reasons, an interim order should be made preventing the lockout and the proceeding should be adjourned to give parties time to prepare their cases. In the alternative, an order should be made suspending protected industrial action until 1 January 2023.

Date: 17 November 2022

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