In the Fair Work Commission

Matter No: B2022/1726

Re Svitzer Australia Pty Limited

Outline of submissions for the MUA

A. Introduction

1. **Svitzer** Australia Pty Limited issued a media release on 14 November 2022 asserting that it would, effective from midday Friday 18 November 2022, lockout its employees who are covered by the *Svitzer Australia Pty Limited National Towage Enterprise Agreement 2016* (**EA**) indefinitely. By this radical and escalatory step, Svitzer asserts that it will engage in conduct that *threatens to cause significant damage to the Australian economy or an important part of it.* Svitzer makes this belligerent and bellicose threat in circumstances where:
   a. Svitzer has recently changed its position in bargaining, withdrawing previously agreed claims and refusing to engage in meetings with bargaining representatives;
   b. the MUA and other union bargaining parties are willing ready and able to continue bargaining, including with the assistance of the Commission. Svitzer has adopted a recalcitrant and inappropriate attitude to bargaining;
   c. the outstanding issues are relatively confined; and
   d. those issues cannot be said to be insoluble.
2. Svitzer asks the Commission to save the Australian economy or an important part of it from the significant economic harm it is apparently intent on wreaking by its indefinite lockout. Svitzer does so in circumstances where it can be inferred that it has sought to engineer a situation where proceedings under s 424 of the *Fair Work Act 2009* (Cth) (**FW Act**) would be instigated by the Commission or one of the persons specified in s 424(2) and for the purposes of obtaining a termination order so as to avoid any further bargaining under the FW Act. That this is its purpose is apparent from its recalcitrant refusal to withdraw its lockout in circumstances where the union bargaining representatives offered before the Commission on Friday to cease all protected industrial action until after Christmas 2022 to enable intensive negotiations to occur.

3. Svitzer's threatened lockout and its position in these proceedings in support of the termination of its own threatened industrial action is a patently opportunistic exercise. It seeks to rely on the asserted harmful consequences of its own threatened conduct to achieve its desired result of extricating itself from bargaining and remove the capacity of the union bargaining representatives and their members to bargain and to organise and take protected industrial action.
4. Given the asserted dire consequences asserted by Svitzer of its lockout, the Commission has moved quickly to deal with the matter and listed the matter for a hearing to commence at 1pm on 17 November 2022. The Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union (**MUA**) is unlikely to be able mount on a positive case against an order for termination (which is sought by Svitzer and supported by various stevedoring companies and port authorities) by that time. Nor is it likely to be able to respond to the anticipated evidentiary case which Svitzer, the stevedores and port authorities will doubtless seek to marshal in favour of termination, particularly given that these entities are due to file and serve their evidence and submissions only 2 hours prior to any hearing.
5. The rules of procedural fairness require a tribunal such as the Commission, which is bound to act judicially, to afford parties a reasonable opportunity to be heard. The MUA resists the making of a termination order, which will effectively terminate bargaining and mean that it and its members are no longer able to lawfully organise or take protected industrial action, radically undercutting their bargaining power. It is likely that a reasonable opportunity can only sensibly be provided to the MUA to defend its position if a final hearing is deferred.
6. The Commission has power to make an interim decision under s 424, subject to being satisfied of one of the jurisdiction preconditions under s 424(1), to suspend protected industrial action until further hearing. Such an order will mean that Svitzer's lockout cannot proceed and will remove the asserted threat to the Australian economy or an important part of it posed by Svitzer's lockout. An interim order should be made and the hearing deferred to enable the proper preparation of the MUA's case against termination. In the alternate, the Commission should not terminate Svitzer's protected industrial action, but make a suspension order, which should operate until 1 January 2023 to enable the parties to continue bargaining.
7. These submissions first set out the Commission's task under s 424 of the FW Act. Why the Commission can (and should) make a suspension order that will operate on an interim

basis until further hearing is next detailed. Why a suspension, if the jurisdictional preconditions under s 424(1) are established, is appropriate order in lieu of a termination is finally considered.

B. Legislative context—s 424

The jurisdictional question

8. Section 424(1) of the FW Act requires the Commission to make an order either terminating or suspending *protected industrial action* if that protected industrial action is, relevantly for the purposes of the present application, *threatened* and the Commission is satisfied the protected industrial action is threatening to cause significant damage to the Australian economy or an important part of it.
9. Employer response action will be protected industrial action if it conforms to the requirements of s 411(1), namely, that it is action by the employer:
   a. organised or engaged in *in response to* industrial action by an employee; and
   b. is organised or engaged in by an employer against employees that will be covered by the agreement; and
   c. meets the common requirements set out in Subdivision B.
10. The focus of the Commission in determining whether the criterion under s 424(1)(d) is established is on *the* protected industrial action the subject of the application.[1] Hence, the Commission must be satisfied that Svitzer's threatened lockout *has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it*. Svitzer's lockout has not yet commenced. Hence, the 'has threatened' limb of s 424(1)(d) does not apply.
11. The adjective 'threatening' means 'tending or intended to menace' or 'causing alarm as being imminent'. The third person present indicative 'is' in the collocation points to the phrase 'is threatening to' as requiring that the 'threat' be extant. As explained by Giudice J in *Coal & Allied v CFMEU,*[2] the industrial action must give an ominous indication of being the direct or reasonably proximate cause of danger, peril or damage.
12. It is accepted that the proposed lockout could fall within the parameters of action that *'is threatening'* or *'would threaten'* to cause the asserted damage. The issue for the Commission, therefore, is whether it is satisfied that the action is or would threaten to

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1 *NTEIU v Monash University* [2013] FWCFB 5982 at [24] and [54].
2 (1998) 80 IR 14 at 32.

cause *significant damage* to the Australian economy or an important part of it. The focus of s 424(1)(d) is on whether there is a threat of damage to the whole of the Australian economy or an important part of it.[3] Hence, the Commission commences with an 'economy wide' focus in relation to whether the action is threatening or would threaten to cause *significant damage* to the entire Australian economy.

13. Alternatively, the precondition can be satisfied where an 'important part' of the Australian economy is threatened with significant damage. It will be insufficient that a *part* of the Australian economy is so threatened. The Commission must be satisfied that the *part* threatened is *important.* The prefatory adjective *important* conveys that the part must be 'critical, vital, essential, significant or key'. Harm to the employer's business (or even the business of its customers) will not usually constitute harm to an *important part* of the Australian economy. It is essential that the part of the Australian economy relied on be identified such that an evaluative assessment of whether that part of the economy is *important* can be made.

14. It will obviously be insufficient that the industrial action threaten *damage* to the Australian economy or an important part of it. The damage threatened must be *significant.* This prefatory adjective requires that the damage be 'substantial, major or momentous'. Damage which does not meet these descriptors will not establish the precondition.

15. The concepts of legal and evidentiary onuses do not apply neatly in proceedings in administrative tribunals where the tribunal's jurisdiction is premised on it forming an opinion or state of satisfaction based on a particular matter.[4] However, where a tribunal's jurisdiction is premised on it reaching a state of satisfaction about a particular matter, the party seeking to invoke the Commission's jurisdiction will bear the risk of failure if the material before the Commission is inadequate to permit the requisite state of satisfaction to be reached.[5] Whilst this proceeding has been commenced on the Commission's own initiative, Svitzer (who seeks a termination order) for practical purposes bears the risk of failure in establishing the precondition under s 424(1).

Discretion to terminate or suspend

3 *Svitzer Australia Pty Ltd v AMOU* [2022] FWC 493 at [55].
4 *Jain v Infosys Ltd* [2014] FWCFB 5595 at [34]-[37].
5 *RFFWUI v Coles Supermarkets Australia Pty Ltd* [2021] FWCFB 4414 at [16].

16. If the Commission is satisfied that threatened industrial action is protected industrial action and that it is threatening or would threaten to cause significant damage to the Australian economy or an important part of it, it has a discretion to grant a termination or suspension.[6] That discretion is unconstrained by the language of s 424(1), but must be exercised for a proper purpose in light of the subject matter, scope and purpose of the provision and objects of the FW Act, in particular, the bargaining regime effected by Part 2-4 and the capacity of employees to take protected industrial action under part 3-3.[7]

17. The FW Act seeks to achieve the overarching object detailed in s 3 by the means set out in s 3(a)-(g). An important means by which the overarching object is to be achieved is via an emphasis on enterprise-level collective bargaining. The focus of the FW Act on, and its preference for, collective bargaining is manifest from s 3(g) as well as the objects detailed in s 171. The exercise of the discretion under s 424(1) should be guided by the preference the FW Act gives to enterprise-level collective bargaining.

18. The consequences of a termination or suspension are relevant in assessing whether the Commission should determine to terminate or suspend the protected industrial action. Termination of the protected industrial action entails that the common requirement set out in s 413(7) cannot be satisfied and no further protected industrial action is capable of being taken by either party, including protected industrial action that does not have the effect or consequence detailed by s 424(1). This has the evident potential to radically alter the bargaining dynamics and to undermine the bargaining position of the parties.

19. As was observed by Easton DP in *Svitzer Pty Ltd v AMOU*:[8]

> *One consequence of making an order under s.424 is that any other industrial action, including action that does not threaten significant damage to the Australian economy, loses the protection that s.418 otherwise provides (per s.413(7)). That is, making orders about one form of industrial action may dramatically affect a bargaining party's capacity to take other forms of industrial action.*

20. The importance of protected industrial action is recognised in the fact that it is a workplace right for the purposes of s 341(1)(b) (being a process under the FW Act as detailed in s 341(2)(c)). Bromberg J explained in *Esso v AWU*:[9]

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6 *AIPA* at [92] (Lander J).
7 See generally: *Sanctuary Lakes Pty Ltd v Commissioner of Taxation* (2013) 212 FCR 483 at [193].
8 [2022] FWC 493 at [98] (Easton DP).
9 (2016) 245 FCR 39 at [240].

> *Broadly stated, and consistently with the objects set out at ss 3(f) and 171(a) of the FW Act provides for enterprise-level collective bargaining for the making of enterprise agreements, as a means of enabling industrial parties to resolve their industrial disputes. Collective bargaining is a process in which employees bargain with their employer as a collective rather than individually. To be successful, bargaining usually involves the making of concessions. Sometimes concessions are freely made, but an inherent feature of a collective bargaining regime is the recognition that concessions may need to be extracted through the application of industrial pressure. Industrial action is an available form of pressure and the capacity to lawfully exert such pressure, including by inflicting loss or damage, is permitted but is subject to certain conditions. As to the last-mentioned characteristic of collective bargaining, the FW Act calls permitted industrial action "protected industrial action".*

21. The right of an employee to take protected industrial action for the purposes of imposing pressure on an employer to agree to more favourable terms and conditions is a valuable one.[10] That termination of protected industrial action under s 424(1) will remove that right is a relevant matter to consider in exercising the discretion to order a suspension or termination.

22. Termination also brings bargaining to an end. A post-industrial action negotiating period of 21 days commences[11] and, if agreement is not able to be reached in that period, the Commission is required by s 266(1) to make a workplace determination. During that period, parties are unable to advance their positions in bargaining by organising and taking industrial action for the reason detailed above. In other words, termination has marked consequences. It brings the capacity of employees to take protected industrial action to an end, regardless of the severity of that action or its relative triviality. Subject to a short window in which further bargaining is to occur, it also causes bargaining to end.

23. Other matters relevant to whether a suspension or termination should be ordered include:
    a. the consequences for bargaining and the parties' bargaining positions if termination (as opposed to suspension) is ordered;[12]

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10 *CFMEU v Anglo Coal (Capcoal Management) Pty Ltd* (2016) 266 IR 185 at [73] (Katzmann J).
11 FW Act s 266(3). This period can be extended by the Commission to 42 days under s 266(4).
12 *Svitzer* at [102].

b. the history of bargaining and predictions or concerns about future bargaining;[13]
c. the capacity to remove or avoid the danger posed by the extant or threatened, impending or probable industrial action which is the subject of the application;[14]
d. the length of time negotiations has been progressing and progress in negotiations;
e. previous industrial action;
f. the parties' views; and
g. the potential for further industrial action that would endanger the welfare of the population etcetera.[15]

24. To these may be added the context in which the proceedings are commenced. It will be a circumstance militating against termination where an employer seeks a termination order under s 424(1) by reason of its own industrial action threatening to cause significant damage to the Australian economy or an important part of it, and the employer has the capacity to remove the threat by withdrawing its action and has not done so. Additionally, when a lockout is concerned, it will be pertinent to consider in exercising the discretion the nature of the employee action the lockout is responsive to. A disproportionate or irrational or unreasonable lockout in response to employee claim action is a factor that bears on the exercise of the discretion to suspend or terminate the employer's protected industrial action.

C. Interim orders in s 424 proceedings

25. In ***Wills*** *v Grant & Ors* [2020] FWCFB 4514, the Full Bench considered, in the context of an anti-bullying application, whether s 589(2) of the FW Act conferred power to make interim orders in the nature of interlocutory or interim injunctions conventionally issued by Courts. The appellant contended, in effect, that s 589(2) provided a free-standing power to make interim orders which could be exercised where an applicant for such an order could establish a prima facie case and that the balance of convenience favoured the grant of an interim order.

26. The Full Bench held (at [34]) that s 589(2) did not confer an independent source of power to make interim orders. It explained that an anti-bullying order could be made only if the Commission was satisfied that the state of affairs prescribed by the FW Act existed and

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13 *Svitzer* at [101].
14 *Svitzer* at [101].
15 *Application by Essential Energy* [2016] FWC 3338 at [37] (Hamberger SDP).

that an arguable or prima facie case was not sufficient to achieve the requisite state of satisfaction. Significantly, the Full Bench reasoned that:

> *There is nothing to prevent the Commission from issuing interim decisions in an anti-bullying matter, consequent upon having reached the required state of satisfaction as to the matters set out in s.789FF(1). For example, the Commission might be satisfied that a worker has been bulled at work and that there is a risk of continued bullying but require further submissions from the parties as to final orders; an interim order might be made 'in the interim' on the material before the Commission at that time. But what the Commission cannot do is issue an order under s.789FF, without being satisfied that a worker has been subjected to bullying at work, and that there is a risk that the bullying will continue. To make an order in such circumstances would be beyond power.*

27. Consideration of making orders 'in the interim' antecedent to any final determination of a matter before the Commission has occurred in line with the analysis in *Wills* in a number of different contexts under the FW Act.[16]

28. The reasoning in *Wills* applies *mutatis mutandi* to s 424 of the FW Act. *If* the Commission is satisfied in the present case of the jurisdictional preconditions to the making of a suspension or termination order under s 424, being that specified in s 424(1)(d), then it has power to make an order in the nature of an interim suspension, suspending the protected industrial action pending further or final hearing.

29. That course is available as a matter of power. It is also one which should be embraced as a matter of discretion. The MUA (and likely the other union bargaining representatives) cannot properly interrogate Svitzer's case (or the cases which are proposed to be advanced by the stevedoring companies and the port authorities who have indicated that they propose to put on evidence and submissions) in the two-hour window prior to the commencement of any hearing. Such a time period is likely to be insufficient for the legal representatives of the MUA to read and consider the evidence and submissions which are to be filed the panoply of interested parties. It is also likely to be insufficient for the MUA to obtain instructions about evidentiary matters raised in that evidence in order to properly test them in cross-examination. It also affords no time to seek the production of potentially relevant documents to test evidentiary matters.

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[16] See: *FAAA* [2021] FWC 6537 at [41]-[44] (Ryan C); *AMWU v Orontide Group Ltd* [2021] FWC 5953 at [52]-[56] (Beaumont DP).

30. If evidence is filed by Svitzer, the stevedoring entities, port authorities or Minister which provides a proper basis for the formation of a state of satisfaction of the precondition under s 424(1)(d), an interim decision can and should be made suspending protected action until further hearing. Such an order would be an order made under Division 6 of Part 3-3 of the FW Act, entailing that s 413(7) would operate to preclude any further protected action by the industrial parties whilst ever the suspension remains extant. This would eliminate the threat posed by Svitzer's threatened lockout. It would also, significantly, provide the MUA (and other union bargaining representatives) with sufficient time and a proper opportunity to advance a case against termination.
31. The Commission should make an interim order under s 424(1) suspending Svitzer's threatened industrial action. That order should apply until further order and the proceedings should be listed for a final hearing at a time convenient to the Full Bench.

D. Analysis—jurisdictional question

32. Svitzer must establish that the threatened lockout will meet the common requirements detailed in s 413 in order to prove that the threatened lockout will be protected industrial action. Further submissions will be made on whether these requirements are satisfied in the present case after receipt of Svitzer's evidence and cross-examination of its witnesses.
33. It is unclear at this point whether Svitzer asserts that its lockout will threaten to cause *significant damage*:
    a. to the Australian economy as a whole;
    b. to a specified part of the Australian economy that is relevantly 'important'.
34. Submissions will be made on these matters after receipt of Svitzer's evidence and that of the stevedores and port authorities, and cross-examination of their witnesses.

E. Suspension is appropriate

35. It would be inappropriate for a termination order to be made for the following reasons:
    a. bargaining, whilst protracted, has not reached an insoluble impasse;
    b. bargaining has been productive, particularly with the assistance of the Commission;
    c. the MUA seeks to continue bargaining, including with the assistance of the Commission;

d. the MUA and its members' bargaining power will be diminished substantially if termination is granted and the MUA and its members are precluded from organising and taking protected industrial action;

e. the MUA is of the view that progress is being made in bargaining and the parties should continue to bargain in good faith to reach agreement;

f. Svitzer has continued with its lockout in circumstances where the MUA and other unions have withdrawn employee claim action and undertaken to the Commission not to notify such action until the New Year. Svitzer can remove the basis for the proceedings and the asserted threat to the Australian economy or a part of it and not face any further protected industrial action in the short term. It has elected not to do so. This militates against it being rewarded in achieving its industrial objectives in this application of: (1) removing the MUA and its members' ability to take protected industrial action; and (2) bringing bargaining to an end and having the parties proceed to workplace determination proceedings before the Commission;

g. Svitzer has effectively withdrawn from bargaining and refused to engage in bargaining since 20 October 2022;

h. Svitzer has changed its position in bargaining since 20 October 2022 in such a manner as to frustrate and undermine negotiations;

i. Svitzer's threatened lockout is manifestly disproportionate to the low-level and small-scale employee claim action it is likely to be said to be responsive to.

36. The MUA also undertakes to participate in conciliation of the outstanding issues before the Commission. The parties have been capably and usefully assisted by Commissioner Riordan and the MUA undertakes to the Commission that it will participate in conciliation in an intensive manner to seek to resolve the outstanding issues.

37. In addition to the above factors, termination be inappropriate given it will remove the valuable workplace right of employees to take protected industrial action and undermine a means by which an object of the FW Act is to be achieved by causing enterprise-level collective bargaining to effectively come to an end.

38. A suspension of Svitzer's protected industrial action to 1 January 2023 should be imposed. This will ensure that the (asserted) danger posed by Svitzer's threatened lockout to the Australian economy or a significant part of it does not crystallise. It will enable the parties to dedicate their time and effort in December 2022 to resolving their outstanding issues and be consonant with the object prescribed in s 3(g) to the FW Act.

F. Conclusion

39. The Commission should make an interim suspension decision and program the matter for further hearing. In the alternative, if the Commission is satisfied that Svitzer has threatened to engage in protected industrial action and that threatened action is threatening or would threaten to cause significant damage to the Australian economy or a part of it, the Commission should suspend Svitzer's protected industrial action. Such suspension should be until the New Year.

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