

IN THE FAIR WORK COMMISSION

Matter No: B2022/1726

Re Svitzer Australia Pty Limited

**OUTLINE OF SUBMISSIONS FOR THE
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS**

1. On 14 November 2022, Svitzer Australia Pty Limited (**Svitzer**) issued a media release stating 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 lockout that will take place from 12:00pm AEDT, Friday 18 November 2022, and will continue indefinitely (**Employer Response Action**).¹ That is deliberate action which will cause very significant damage to the economy of Australia if it is taken. It will also threaten the safety and welfare of the population of Australia. For the reasons set out below, and on the evidence filed by the Minister, he submits that the Commission should terminate the Employer Response Action before it occurs and has those serious impacts.

Proceedings

2. On 15 November 2022 the Fair Work Commission determined, pursuant to section 424(2)(a) of the *Fair Work Act 2009* (**FW Act**), that it would consider, on its own initiative, whether to make an order suspending or terminating the Employer Response Action.
3. Directions made by Vice President Hatcher on 16 November 2022 require bargaining representatives, the Minister for Employment and Workplace Relations and other interested parties to file, by 11.00am on Thursday, 17 November 2022:
 - a. an outline of submissions; and
 - b. any witness statements, or alternatively, an outline of the oral evidence which any witness is expected to give at the hearing.
4. The Minister files this outline of submissions and statements of:

¹ Statement and Directions *Re Svitzer Australia Pty Limited* [2022] FWC 2038, Paragraph [2]

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- a. Mark Cully, Acting Deputy Secretary, Macroeconomic Group, Department of the Treasury dated 17 November 2022; and
 - b. Mark Morrow, Executive Director - Response Division, Australian Maritime Safety Authority (**AMSA**) dated 17 November 2022.
5. The directions provide that submissions and evidence may address any of the following questions, and any other matter which a party considers to be relevant:
- (a) Whether the indefinite lockout of employees commencing Friday, 18 November 2022 notified by Svitzer Australia Pty Ltd on Monday, 14 November 2022 is protected industrial action for a proposed enterprise agreement that is threatened, impending or probable?
 - (b) If the answer to (a) is "yes", whether the protected industrial action is threatening or would threaten to cause significant damage to the Australian economy or an important part of it?
 - (c) If the answer to (b) is "yes", whether the Commission should suspend or terminate the protected industrial action.

SUMMARY OF MINISTER'S SUBMISSIONS

6. The Minister's submissions proceed on the basis that the Fair Work Commission will find that the answer to Question (a) is "Yes". Based on the media release issued by Svitzer, it appears the Employer Response Action is threatened, impending and probable. Svitzer has not agreed to postpone the lockout or to engage in conciliation in lieu of the action proceeding (see transcript of mention: PN [33], [64], [146]).
7. With respect to Question (b), the Minister submits that, having regard to the evidence of Mark Cully, Acting Deputy Secretary, Macroeconomic Group, Department of the Treasury, the answer is "Yes", the Employer Response Action will have critical implications for the Australian economy, and cause significant damage to it (In addition, based on the evidence of Mr Morrow, Executive Director - Response Division, AMSA the Commission may also be satisfied that Employer Response Action will endanger the safety and welfare of the population or a part of it).
8. With respect to Question (c), the Minister submits that the action will cause significant damage to the economy of Australia, and also threatens to endanger the safety and welfare of the population of the country. For the reasons set out in these submissions, the Commission should terminate the Employer Response Action. .

PRINCIPLES

9. The relevant principles with respect to the making an order to suspend or terminate protected industrial action pursuant to section 424(1)(d) of the FW Act are well settled:
 - (a) section 424(1) *requires* that the Commission make an order suspending or terminating protected industrial action if the Commission is satisfied that the action threatens to cause significant damage to the Australian economy or an important part of it;
 - (b) there must be an appropriate evidentiary basis upon which to form the requisite satisfaction over and above generalised predictions;² and
 - (c) it is not intended that these mechanisms are 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.³
10. Section 424 directs the Commission's attention to significant damage to the Australian economy or an important part of the Australian economy.
11. The surrounding provisions in Part 3-3, Division 6 of the FW Act inform the nature of the Commission's inquiry:
 - (a) section 423 refers to protected industrial action causing or threatening to cause "significant economic harm" relevantly to the employer(s) who will be covered by a proposed agreement. Section 423(5) requires that if the harm is threatened then the harm must be "imminent"; and
 - (b) section 426 refers to protected industrial action causing or threatening to cause "significant harm" to third parties.
12. In context, section 424 allows the Commission to consider economy-wide consequences of protected industrial action and take a broad-based approach to the evidence before it.

Significant damage to the Australian economy

13. There is a proper evidentiary foundation upon which the Commission can and must find that the Employer Response Action is threatening to cause significant damage to the Australian economy.

² *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47; (2000) 203 CLR 194, *Victorian Hospitals' Industrial Association v Australian Nursing Federation* (2011) 214 IR 148, [2011] FWAFB 8165 at [49].

³ *National Tertiary Education Industry Union v University of South Australia* [2010] FWAFB 1014, (2010) 194 IR 30 at [8].

14. The references to action that is "threatened", "impending" or "probable" (section 424(1)(b)) that "would threaten" (section 424(1)) damage make it clear that pending industrial action is amenable to an order under section 424. The Commission is required to assess whether such pending action *would threaten* to cause significant damage.
15. The Commission's principal task is to assess whether the Employer Response Action would threaten to cause significant damage to the Australian economy.
16. In *Svitzer Australia Pty Limited v the Australian Maritime Officers' Union* [2022] FWC 493, Deputy President Easton relevantly found:

[55] The anchor term in s.424(1)(d) is "the Australian economy" – which directs the Commission's inquiry to whether there is a threat of damage to the whole Australian economy, or to a significant part of the Australian economy, or not.

[56] The Commission must start with an economy-wide perspective. If necessary the inquiry might then narrow to only a "part" of the economy. In the authorities cited above the Commission considered the impact of protected industrial action nationally⁹ , across whole states¹⁰, whole major cities¹¹ and across whole industries.¹²

17. In that case, Deputy President Easton suspended protected industrial action in the form of 48 hour stoppages at various port locations between 17 February 2022 and 4 March 2022 on the basis that the action threatened to cause significant damage to an important part of the Australian economy, being the state economies of relevant ports.
18. In the current circumstances, the Employer Response Action is a lockout of all harbour towage employees covered under Svitzer's 2016 National Towage Enterprise Agreement from 12:00 pm AEDT, Friday 18 November 2022 for an indefinite period. Svitzer has advised that:

When the lockout becomes effective, no shipping vessels will be towed in or out of 17 Australian ports otherwise serviced by Svitzer.

This will impact shipping operations at major metropolitan and regional Australian ports nationwide in Queensland, New South Wales, South Australia and Western Australia.

19. With respect to the state of the Australian economy, the evidence of Mark Cully, Acting Deputy Secretary, Macroeconomic Group, Department of the Treasury, is that:
 - a. while Australia has withstood the pandemic and global challenges well, the Australian economy will not be unaffected by global challenges, and domestic disruptions including the recent floods will test our resilience further;

- b. business confidence has softened in recent months in response to an increasingly negative global outlook and ongoing interest rate rises domestically;
- c. businesses are facing increasing costs for a variety of outputs;
- d. consumer confidence has fallen across 2022 and remained around recessionary levels since June 2022, driven by high inflation and increases in interest rates, and is currently only slightly above its low point in April 2020 during the depths of the first COVID-19 lockdown;
- e. inflation is expected to peak at 7¾ per cent, but to be more persistent than forecast in the July Ministerial Statement, owing to expectations of further electricity and gas price increases in 2023; and
- f. high inflation remains the key challenge to the global economy, with disruptions to supply chains contributing to inflation pressures.

20. Mr Cully's evidence with respect to the Employer Response Action and its impacts is that:

- a. Australia's ports are a critical piece of economic infrastructure, facilitating the transport of our exports to global markets and access to imports that are key components of production processes and bringing goods to our shores that will be on-sold through retail stores;
- b. the magnitude of Australia's trade that passes through the 17 affected ports is very significant, covering 65 per cent (\$256 billion) of total imports and 26 per cent (\$137 billion) of total exports per annum;
- c. the effective closure of these ports, and the limited availability of alternative freight options, would cause significant economic harm to many sectors of the Australian economy, especially those that are reliant on imports as business inputs, would exacerbate supply chain pressures that are already strained, and would put considerable upward pressure on business costs and prices at a time when inflation is already at the highest it has been for three decades;
- d. these costs would cumulate and grow considerably in scale the longer the duration of the lockout; and
- e. if the Commission allows the Employer Response Action to occur, there will be a negative impact on consumer and business confidence. This is particularly so given that the industrial action has a national footprint and because there is limited capacity to otherwise mitigate the impact of the action, particularly where Svitzer is the only operator.

Termination or suspension?

21. Having formed the requisite satisfaction, the Commission is *required* to make an order suspending or terminating the protected industrial action.⁴
22. Primarily, that is a matter for the Commission placing weight on the interests of the parties.
23. Having regard to the effect of the impending protected industrial action on the Australian economy, a suspension that leaves open the possibility of further damage by protected industrial action with its attendant risks for the economy (and relevant parts of it) ought to be guarded against.⁵
24. On the evidence filed by the Minister, it is clear that the Employer Response action will cause very significant damage to the economy of Australia. It will have a critical impact on those industries which rely upon the free movement of goods to and from the Ports, and the broader impact of the action upon the economy by severely impacting supply chains.
25. At this stage, given: the statement of Svitzer on 14 November 2022; its indications in the proceedings that it does not intend to defer the action; the indefinite nature of the action which has been announced; the protracted duration of the bargaining between the parties; and the history of action having been previously suspended (and the parties then not having reached agreement)⁶ – the Commission may find that the termination of the Employer Response Action is more likely to have the effect of permanently quelling the threat of damage to the economy (or the safety and welfare of the population).
26. The effect of such a termination would be that due to the operation of section 413(7), no further protected industrial action could be taken by any of the parties.
27. The Commission may, of course, decide that suspension of the action is the more appropriate course, having regard to the objects of the FW Act including achieving fairness through enterprise-level collective bargaining underpinned by good faith bargaining obligations (section 3(f), FW Act), and all the circumstances of the bargaining and the Employer Response Action.

⁴ *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982 at [54]:

As a result of our conclusion that the s.424(1)(c) criterion has been satisfied in a number of respects, we are required by the Act to make an order suspending or terminating protected industrial action. The only protected industrial action to which the required order may apply is that which we have found satisfies the s.424(1)(c) criterion - that is, the Results Ban only. However, once such an order is made, any other industrial action notified by the NTEU ceases to be protected by reason of s.413(7).

⁵ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA 7444 at [15].

⁶ *Svitzer Australia Pty Limited v the Australian Maritime Officers' Union* [2022] FWC 493.

Endangering the safety or welfare of the population

28. In addition, the Commission may consider whether the action is threatening to endanger the safety or welfare of the population or part of it (section 424(1)(c)), having regard to the statement of Mr Morrow.
29. Section 424(1)(c) does not require the Commission to make a finding that the protected industrial action will endanger the life, personal safety or health, or welfare of the population or part of it. Rather, as Harrison SDP stated in *Ausgrid, Endeavour Energy, Minister for Industrial Relations (NSW) v CEPU, ASU, AMWU*⁷:
- ... s.424(1)(c) is concerned with action that threatens to endanger persons in the manner described ... It may be that, ultimately, no such adverse impact in fact occurs.
30. In *Coal & Allied Operations Pty Ltd* (1998) 80 IR 14 Guidice J, with whom Larkin C concurred, addressed the meaning of the language that now finds expression in s.424 (at 32-33) as follows:
- The ordinary meaning of the expression "the welfare of the population" is a general invocation of the considerations that go to the well being of the total number or body of the inhabitants of Australia.
31. The term "welfare" has been given its ordinary meaning by the Commission, and found to mean the "state of faring well, or well-being".⁸
32. The statement of Mr Morrow details that:
- a. under the Inter-Governmental Agreement on the National Maritime Emergency Response Arrangement, an appropriate level of emergency towage capability and availability around the Australian coastline must be maintained, in line with assessed levels of risk;
 - b. Svitzer is primarily responsible for providing emergency towage capability. It provides capability for 8 of the 11 regions around Australia;
 - c. If Svitzer ceased to provide emergency towage services from particular ports as a result of the Employer Response Action, there would be a substantial reduction in the availability of suitably equipped vessels to provide those services and it is possible that there would be no suitable vessels to perform the service from some ports;
 - d. the inability to fulfil emergency towage services or delays in the provision of emergency towage services, could lead to:

⁷ [2015] FWC 1600.
⁸ *Transit Australia Pty Ltd v Transport Workers' Union of Australia* [2011] FWA 3410 at [8]

- i. risks to the ships and the safety of those onboard; and
 - ii. serious environmental incidents, such as oil spills.
- 33. The social welfare of the population includes the maintenance and protection of the environment and ecological systems from harm. The evidence of Mr Morrow demonstrates that the Employer Response Action threatens to endanger the "state of faring well" of the population or part of it, being that part of the population who may be affected by the circumstances set out in paragraph 28(d), due to the increased risk of an environmental event (such as a significant oil spill) from a vessel running aground, and the likely ecological impact such an event would have. The risk of a vessel running aground also gives rise to the risk to the health and safety of vessel crew who may need to be rescued in challenging weather conditions.
- 34. Further, given the evidence of Mr Cully and the significant import trade through Australian ports, it may be safely inferred to that such imports include containerised essential goods for the population of Australia, such as medical supplies, liquid fuels and other welfare products. A delay of those goods being imported and supplied to consumers will threaten to endanger the welfare of that part of the population that is desperately in need of those goods.
- 35. In circumstances where the Commission is satisfied that the action would threaten to endanger the safety or welfare of the population or part of it, the Minister repeats his submissions the submission at [25] to [27] above.

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17 November 2022