IN THE FAIR WORK COMMISSION

Matter No: B2022/1726

Re Svitzer Australia Pty Ltd

OUTLINE OF SUBMISSIONS FOR AIMPE

A. Introduction

1. AIMPE submits that the Commission should proceed by:

   (a) making an interim order suspending Svitzer's action for a period of four weeks;

   (b) fixing a final hearing in two weeks to determine whether to make final orders suspending or terminating Svitzer's action; and

   (c) making directions for filing of material in advance of that final hearing.

B. Is there power to make an interim order?

2. Section 589(2) of the FW Act deals with interim decisions and provides that "*The FWC may make an interim decision in relation to a matter before it*". In *Wills v Grant* [2020] FWCFB 4514; 298 IR 254 a Full Bench explained that the s589(2) power is not equivalent to the courts' power to make interlocutory orders preserving the subject matter of a proceeding; that is, the power cannot be exercised simply on the basis that there is a *prima facie* case and the balance of convenience favours the order. Rather, interim orders may be made only where the Commission is in fact satisfied that the preconditions to the exercise of a substantive power exist. Dealing specifically with bullying orders under s789FF the Full Bench said:

> [34] … 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 bullied at work and that there is a risk of continued bullying but require further submissions from the parties as to the 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.

3. That view was held to apply to s424 in the single member decision in *State of NSW and others v ARTBIU and another* [2022] FWC 1724.

4. Section 424 provides an express power to make interim orders, but only in cases where an application has been made, and where the application cannot be determined within 5 days of having been made: s424(3) and (4). It does not appear that either of those conditions exists here.

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5. That being the case, the Commission may make an interim order under s424 but only if satisfied that the preconditions for making the order exist. That is to say, in this case, the Commission must be satisfied that:

   (a) there is protected industrial action which is threatened, impending or probable;

   (b) the protected industrial action would threaten, or is threatening:

      i. to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or

      ii. to cause significant damage to the Australian economy or an important part of it.

C. Jurisdictional prerequisites

6. The material currently before the Commission suggests that the lockout is likely to threaten to cause serious damage to the economy or at least a significant part of it. That is likely to be confirmed in evidence lead by Svitzer (including in relation to the mitigation strategies, if any, it has put in place) and by the various third parties who have appeared in the proceeding.

7. Further and in any case, the AIMPE evidence indicates that the lockout threatens to endanger the life, the personal safety or health, or the welfare of part of the population. In particular the evidence indicates that:

   (a) the unavailability of tugs to bring passenger ships into harbour creates a risk to those passengers; and

   (b) the unavailability of tugs to respond to emergencies creates a risk to the safety of seafarers and port workers.

D. Should the Commission hear the matter to finality on 17 adn18 November?

8. Svitzer gave notice of the lockout on Monday 14 November 2022. On 15 November the Commission commenced these proceedings on its own application. The matter came before the Commission at midday on 16 November, and directions were made for the filing of evidence by 11am on 17 November in advance of a hearing at 1pm on 17 November. To state the obvious, this compressed timetable poses a challenge for the parties other than Svitzer and whichever third parties were privy to Svitzer's lockout plans.

9. AIMPE accepts that procedural considerations would not outweigh the need to move to prevent Svitzer's lockout, given its potentially catastrophic implications. It is however possible to balance the need to prevent the lockout with the requirement to afford the union parties procedural fairness by making an interim order suspending the action, and setting the matter down for final hearing at a later date.

10. This is appropriate because:

    (a) the Commission would readily be satisfied that the jurisdictional preconditions for the making of an interim order are met;

    (b) on that basis, an interim order can be made, thus addressing the urgent need to prevent the lockout;

    (c) to move to final hearing on 17 November would be procedurally unfair to the union parties because they are unable to properly prepare their cases for hearing, noting that:

        i. the consequences of the hearing are potentially very significant; and

        ii. Svitzer has necessarily been aware of the impending lockout for some time, and has had a significantly larger opportunity to prepare for the hearing.

11. For its part, AIMPE has made its best effort to prepare material relevant to the issues in the time allowed. It has not however had sufficient opportunity to prepare the material on which it would intend to rely, and would be significantly prejudiced by any requirement to conduct its case to finality on 17 and 18 November 2022.

E. Should the Commission suspend or terminate the action?

12. For the reasons set out above, AIMPE resists the determination of the question of whether the action should be terminated or suspended on a final basis at the hearing on 17 November 2022. Assuming however that its position is rejected, AIMPE contends as follows.

13. The question of whether industrial action should be suspended or terminated is a broad discretionary question. The factors previously treated as relevant to the exercise of the discretion include the duration of negotiations; progress made in negotiations; whether there had been prior industrial action; the views of the parties and the potential for further industrial action that would endanger the general welfare etc.[1]

14. Another factor which should in AIMPE's contention be taken into account is the need to avoid rewarding behaviour of the kind engaged in by Svitzer in this case.

Duration of bargaining

15. It is plain that bargaining has been on foot for an extended period. However any recitation of numbers of meetings or other statistics must be understood in their proper context, which includes the following:

    (a) the negotiations were completed and an agreement imminent in March 20202;

[1] *Essential Energy v CEPU* [2016] FWC 3338 at [37].

(b) the negotiations were paused at Svitzer's initiative from March to September 2020;

(c) when negotiations recommenced, Svitzer's position had shifted dramatically such that the earlier negotiations were rendered irrelevant;

(d) the nature of Svitzer's claims, being radical change to very long standing industrial arrangements, would inevitably and in any case require extended negotiation;

(e) there have been a rotating cast of negotiations acting for Svitzer; and

(f) a significant contributor to the length is Svitzer's resiling from agreed positions—not only the wholesale departure from the agreed position in September 2020, but also more recently on more discrete issues. One such departure is described in the statement of Greg Yates and is subject of a good faith bargaining application.

Progress in negotiations

16. The evidence of Greg Yates indicates that there has, despite the many challenges thrown up by Svitzer's ambitious claims and shift sands approach, been considerable progress in negotiations. He describes considerable progress in recent times and identifies the matters remaining in issue. None of them appear to be intractable.

17. It is also critical to bear in mind that the unions have made no claims for improvements in conditions and a series of concessions in respect of existing conditions. That is to say, when Svitzer says matters have been unable to be agreed, what is means is that the concessions already made by the unions are insufficient for its purposes and that it insists of further concessions and reductions to conditions (along with a four year wage freeze).

Prior industrial action

18. The prior industrial action taken by the union parties has been limited. Despite the misleading references by Svitzer to thousands of hours of strikes, the true position is that stoppages have been few and far between. As the Schedule to the Greg Yates statement identifies, in most ports there have been only two four hour stoppages, both used as broad report back meetings. There have otherwise been scattered short stoppages in various ports (not coordinated across ports) generally of 2 or 4 hours, with one 24 hour stoppage in the quiet ports of Cairns and Mourilyan.

19. That limited prior industrial action does not weigh in favour of termination.

Potential for further industrial action

20. The unions have volunteered to suspend any industrial action for three months.

View of the parties

21. The parties disagree about the appropriate course. This is therefore a neutral factor.

Svitzer's conduct

22. Svitzer, when asked, immediately accepted that its proposed action created a threat to the Australian economy or a significant part of it. If asked, it is likely to accept that its lockout threatens the safety, health or welfare of the population or a part of it.

23. That is to say, in pursuit of its radical industrial agenda, Svitzer willingly threatened the economy of Australia and the safety of the Australian people in pursuit of its preference to opt out of bargaining and into arbitration. It has "done a Qantas", except that the implications in this case are not only immense distress and inconvenience to customers but threats to the Australian economy and the safety of the Australian people.

24. That Svitzer has ruthlessly pursued its own interests in slashing unit labour costs is not necessarily a cause for criticism. The fact that it is willing to compromise the public interest so recklessly is a cause for harsh criticism, and a matter squarely relevant to the exercise of the Commission's discretion in this case.

25. It is critical that Svitzer's approach of reckless pursuit of its industrial goals at any cost not be rewarded by delivering to Svitzer its preferred outcome of termination of bargaining. To do so would be inimical to the statutory objection of the provision of a balanced framework for cooperative and productive workplace relations that promotes national prosperity by providing laws that are fair to working Australians, promote productivity and economic growth, emphasise collective bargaining.

26. Svitzer's approach of using its considerable economic influence to opt out of bargaining by threatening the economy, if vindicated by the Commission, would involve the statute operating in a way which was unbalanced, unfair, antithetical to national economic prosperity, productivity and economic growth, and would undermine collective bargaining.

27. For that reason alone, Svitzer's preferred outcome of termination should be rejected.

F. Conclusion

28. For the reasons set out above, the Commission should make an interim order suspending Svitzer's industrial action for four weeks, or alternatively a final order suspending the action for three months.

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