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### Employee opposition knocks out bid to terminate industrial action

23 January 2012 3:52pm

Fair Work Australia has refused a bid to terminate a lockout at a Schweppes factory in Melbourne, after taking into account employees' opposition.

In a novel strategy, Schweppes sought to end its own lockout at its Tullamarine production and warehouse site and embark on the process of a workplace determination.

It sought an order under s423(2)(b), on the basis that its lockout was causing significant economic harm to any of the 153 employees covered by the proposed agreement.

Senior Deputy President Les Kaufman said it was ironic that Schweppes' lockout was what it contended was causing the serious economic harm to its employees.

Such a s423 application would usually be brought by or on behalf of employees and inevitably they would provide evidence on economic harm, he said.

The company told the tribunal that negotiations were at an impasse, with parties deadlocked on Schweppes' key demand to move to 12-hour shifts, six or seven days a week.

The company's HR partner, supply chain, Peter Todd, told the tribunal that it intended to maintain the lockout until the union agreed to the 12-hour shift pattern.

Todd said that conciliation hadn't been successful and "the only resolution we'll get to getting a 12 hour shift pattern is through arbitration".

The Tullamarine employees currently work eight-hour shifts, and receive substantial overtime (worked on a voluntary basis on Saturdays and a rostered day off every second Monday).

The company told Fair Work Australia that with the current arrangement of 7.47-hour shifts and nine-day fortnights, it could utilise the Tullamarine site for only 108 of the 168 hours available per week.

Todd [said](#) that with overtime on Saturday and RDOs added, utilisation rose to 120 to 122 hours.

"A 12-hour arrangement over six days would give us 144 hours", he said.

"That's guaranteed hours rostered, not hours that are unrostered that have to be requested as overtime, which at this point is voluntary", he said.

A storeman and LHMU delegate, Reg Vesty, told the tribunal that the new shift arrangements would cut employees' earnings – through lost overtime and shift penalties – by \$12,000 to \$15,000 a year, but Todd said the company believed the reduction would be closer to \$5,000 to \$7,000.

### Workers with least savings could withstand only five to six week lockout: Schweppes

Former Fair Pay Commissioner Ian Harper conducted modelling for Schweppes of the effects on the workers' income from the lockout.

In support of the company's claim that terminating industrial action was warranted because it might be causing significant economic harm to some employees, Harper, an emeritus professor at Melbourne University, indicated some employees might have accumulated savings of less than \$5,000 and have limited capacity to weather the industrial action.

Such workers, he said, would be able to survive for about five to six weeks if they cut their spending in half.

Senior Deputy President Les Kaufman said he was prepared to infer that "at least some employees" would have accumulated savings of \$5,000 or less, while he also accepted that, for the purposes of s423(5), Professor Harper's evidence had at least theoretically established that economic harm was imminent.

He noted, however, that Professor Harper "readily conceded" he wasn't aware of the specific circumstances of particular employees, nor of the incomes of second earners in households, how



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much employees had put aside for the dispute, or of loans they might have obtained.

The union opposed ending the industrial action, arguing that negotiations were not exhausted.

It presented evidence that members had put aside funds to cover the dispute and wouldn't suffer significant economic harm into the foreseeable future and provided the tribunal with a petition from 120 of the 153 employees (a further 16 added their signatures later) opposing the termination.

Senior Deputy President Kaufman said that without the evidence presented by the LHMU, he "might have been able to infer that if the action was not in fact causing, it was threatening to cause, significant economic harm to any of the employees."

"This is because statistically, having regard to the methodology that [Professor Harper] adopted, it is likely that at least one employee would be in imminent danger of being unable to service his or her outgoings thus placing that employee under financial stress".

But the evidence from LHMU industrial officer Matt Kunkel and delegate Reg Vesty, along with the petition, meant he wasn't prepared to draw such an inference.

Senior Deputy President Kaufman said the attitude of the employees and the LHMU was "of particular significance" in the exercise of his discretion.

"It is these employees whom Schweppes submits are suffering as a result of its lockout.

"That the very employees who are losing income oppose the termination of the lockout is a powerful factor against exercising my discretion in favour of Schweppes".

Senior Deputy President Kaufman said leaving the parties to their own devices "may lead to the impasse being broken", noting that "whilst the employees are locked out and earning no income from Schweppes the company is still achieving some 60 to 70% of its normal production".

He refused to issue the order.

[Schweppes Australia Pty Ltd v United Voice - Victorian Branch \[2011\] FWA 9329 \(29 December 2011\)](#)

[Transcript of hearing before Senior Deputy President Kaufman, December 23, 2011](#)

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