THE FAIR WORK AUSTRALIA DECISION ON QANTAS: ENTRENCHING THE IMBALANCE OF POWER BETWEEN EMPLOYEES ADN EMPLOYERS?

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I. INTRODUCTION

Although it is unusual to see a case note written on a decision by Fair Work Australia (FWA), the recent decision by FWA on the disputes between Qantas and their employees was unusual as it was initiated by the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (the Minister). On 29 October 2011 the Minister made an application to FWA to terminate or suspend industrial action at Qantas Airways Limited (Qantas).[1]

The decision is important as it has the potential to provide further encouragement to employers to use the tactic of locking out their employees and forcing them into binding arbitration rather than engaging in good faith bargaining.

At the time of the Minister's application three groups of Qantas employees, represented by three unions, had been engaged in protected industrial action against Qantas. The employee groups had 'been negotiating with Qantas for three separate enterprise agreements to apply to pilots on long haul routes, ramp, baggage handling and catering employees and licensed aircraft engineers.'[2]

The unions involved were:

- The Australian Licensed Aircraft Engineers Association (the Engineers)

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[1] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011), 1 [1] ('*Qantas decision*').

[2] *Qantas decision*, 2 [3].

- The Transport Workers' Union of Australia (TWU) and
- The Australian International and Pilots Association (the Pilots).

At the time the Minister made the application Qantas had given notice that it proposed to engage in protected industrial action by way of a lockout of its employees. The application made by the Minister was against all of the above parties, that is, the employee organisations and the employer. This case note will consider the protected industrial action taken by the employee groups and intended to be taken by the employer, the government reaction and the decision of FWA. The note will then argue that the impact of the legislation, the *Fair Work Act 2009 (Cth),* and this decision is to entrench the power imbalance between employers and employees. It is also argued that the decision sends a signal to employers that, if faced by employee industrial action when negotiating workplace enterprise agreements, then the legislation and FWA will support employer protected industrial action. The impact of the legislative right of employers to engage in lockouts of their employees as protected industrial action, supported by this decision, has given employers a de facto power to impose 'unilateral arbitration' on their employees.[3]

II. THE EMPLOYEES' PROTECTED INDUSTRIAL ACTION

At the time of this decision Qantas was engaged in negotiations for three separate enterprise agreements with three of their employee groups represented by their unions; the Engineers, the TWU and the Pilots. In all cases the negotiations had not progressed to resolution and the workers, through their union representatives, were undertaking protected industrial action. FWA accepted the following evidence from Qantas as to the status of negotiations and subsequent protected industrial actions:

1. The Engineers had been in negotiations with Qantas since August 2010. The negotiations comprised 47 formal bargaining meetings, other meetings and 27 conferences of the parties conducted by Senior Deputy President of FWA, Kaufman and at FWA.[4]

[3] Unilateral arbitration is arbitration imposed by one party to a dispute on the other party to the dispute. Peter Scherer, 'The Nature of the Australian Industrial Relations System: A Form of State Syndicalism?' in GW Ford, JM Hearn and RD Lansbury (eds), *Australian Labour Relations: Readings* (Macmillan, 1987) 81, 83.

[4] *Qantas decision,* 2 [4].

The Engineers had undertaken protected industrial action since 12 May 2011.[5] However, this protected action did not commence in any substantive way until 25 August and continued intermittently until 3 October with the Engineers announcing a suspension of all protected action for three weeks commencing 20 October.[6]

The actual industrial action by the Engineers consisted of the following:

i. 12 May 2011, a one hour stoppage by a single employee;
ii. 25 August 2011, one hour stoppages at the commencement of night shifts each weekday evening at various airports;
iii. 3 September 2011, weekend overtime bans;
iv. 30 September 2011, full shift stoppages, for one shift, at the heavy maintenance facilities at Avalon and Tullamarine in Victoria;
v. 3 October 2011, full shift stoppages at the heavy maintenance facilities; and
vi. 14 October 2011, Sydney based Engineers hold a four hour stop work meeting.[7]

As can be seen from the above breakdown of actual industrial action undertaken by the Engineers, at no time, except for weekend overtime bans, did the stoppages engage all the Engineers in industrial action at the same time. In other words, the Engineers managed the stoppages so that the business of Qantas could continue.

2. The TWU had been in negotiations with Qantas since May 2011. The negotiations consisted of 17 formal negotiating meetings.[8] The TWU had undertaken protected industrial action since 20 September 2011.[9] The actual industrial action by the TWU consisted of the following:

i. 20 September 2011, four hour stoppages at all mainland capital cities, except for Darwin, and higher duties bans for 48 hours;
ii. 30 September 2011, a one hour stoppage at each major airport, again, excepting Darwin;

[5] Ibid.
[6] *Qantas decision*, Chronology, Attachment 1.
[7] Ibid.
[8] *Qantas decision*, 2 [6].
[9] Ibid.

iii. 13 October 2011, two, two hour stoppages by the TWU baggage handlers and ground crew at Sydney and Melbourne airports; and
iv. 28 October 2011, a nationwide one hour stop work meeting by ground staff.[10]

As with the industrial action by the Engineers it can be seen that the TWU stoppages were managed so that the business of Qantas could continue, albeit with interruptions.

3. The Pilots had been in negotiations with Qantas since August 2010. The negotiations consisted of 35 formal negotiating meetings and a number of mediation sessions conducted by Vice President Watson of FWA.[11]

The Pilots had undertaken protected industrial action since July 2011.[12] The actual industrial action by the Pilots consisted of the following:

i. 22 July 2011, the Pilots start making passenger announcements endorsed by their Association and not according to Qantas' passenger announcement policy;
ii. 23 July 2011, one pilot implements a ban on working on days off;
iii. 24 July 2011, one pilot engages in two, two minute stoppages; and
iv. 29 July 2011, one pilot refuses to work beyond scheduled times on a flight from Hong Kong to Melbourne.[13]

Again, it can be seen that the industrial action by the Pilots was managed so as to cause virtually no interruptions to the normal business operations of Qantas.

III. THE QANTAS PROTECTED INDUSTRIAL ACTION IN RESPONSE TO EMPLOYEE INDUSTRIAL ACTION

Qantas had given notice on 29 October 2011 'of a lock out of pilots, ramp, baggage handling and catering employees and licensed aircraft

[10] *Qantas decision*, Chronology, Attachment 1.
[11] *Qantas decision, 2* [5].
[12] Ibid.
[13] *Qantas decision*, Chronology, Attachment 1.

engineers' which was to take effect from 31 October 2011.[14] In other words Qantas was proposing to lock out the members of the three unions where there had been no resolution of the workplace agreement negotiation. This proposed industrial action by Qantas is also classed as protected industrial action under the *Fair Work Act 2009 (Cth)*. Section 408(c) provides that industrial action is '***protected industrial action*** for a proposed enterprise agreement' if it is an employer's response action to employee industrial action.[15]

Employer response action is defined in s 411 as follows:

> **Employer response action** for a proposed enterprise agreement means industrial action that:
> a) is organised or engaged in as a response to industrial action by:
> i. a bargaining representative of an employee who will be covered by the agreement; or
> ii. an employee who will be covered by the agreement; and
> b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
> c) meets the common requirements set out in Subdivision B.

On the day that Qantas announced the impending lock out it grounded its worldwide fleet indicating 'that the lock out will continue until the three unions abandon a number of identified claims'.[16] The industrial action by Qantas halted the international business of Qantas. The proposed industrial action would have halted all of the business of Qantas.

IV. GOVERNMENT REACTION

Until the announcement of the lock out there had been no Government reaction to the long running disputes between Qantas and its employees. These disputes had been in progress for five months in the case of the TWU, and fourteen months in the Engineers' and Pilots' cases. However, on the day that Qantas gave notice of a lock out to take effect from 8pm on 31 October 2011[17] the Minister applied to FWA to terminate or suspend 'protected industrial action being engaged in and/or threatened impending or probable by…'[18] Qantas, the Engineers, the TWU or the Pilots.

[14] *Qantas decision, 3* [8].
[15] *Fair Work Act 2009* (Cth), s 408(c).
[16] *Qantas decision,* 3 [8].
[17] Ibid.
[18] *Qantas decision,* 1 [1].

Although not a party to the disputes, the Minister made the application pursuant to s 424(1) of the FW Act *2009 (*Cth*)* which provides as follows:

FWA must suspend or terminate protected industrial action – endangering life etc.

(1) FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
   (a) is being engaged in; or
   (b) is threatening, impending or probable:

if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:
   (c) to endanger the life, personal safety or health, or the welfare of the population or of part of it; or
   (d) to cause significant damage to the Australian economy or an important part of it.

The government reaction was immediate and the operation of the FW Act ensured a swift decision. The FW Act provides, in s 424(3), that:

> If an application for an order under this section is made, FWA must, as far as is practicable, determine the application within 5 days after it is made.

At the hearing, unchallenged evidence 'as to the importance of airline passenger and cargo transport to the economy and the effect of grounding of the Qantas fleet on the aviation and tourism industries'[19] was presented by the Secretary, Department of Infrastructure and Transport and the Secretary, Department of Resources, Energy and Tourism.[20]

V. THE DECISION

Section 424 of the FW Act provides that FWA must suspend or terminate protected industrial action 'if FWA is satisfied that the protected industrial action has threatened, is threatening or would threaten ... to cause significant damage to the Australian economy or an important part of it.'[21] The unchallenged evidence presented at the hearing was that 'the tourism industry, including aviation, was estimated as contributing 2.6 per cent to GDP and as having 500,000 employees. The value of inbound tourism is estimated at $24 billion a

[19] *Qantas decision*, 3 [9].
[20] Ibid.
[21] *Fair Work Act 2009* (Cth), s 424(1)(d).

year.'[22] Further, Qantas provided evidence that the cost to Qantas, of their proposed lockout of employees, is '$20 million per day'.[23]

It appears that all the evidence mentioned above was unchallenged, which combined with the fact that FWA was required 'as far as practicable, (to) determine the application within 5 days after it is made',[24] meant that the evidence was not able to be analysed to determine its relevance to the protected industrial action.

The size of the Australian tourism industry, the number of its employees and its dollar value do appear significant. However, the significance of the contribution of Qantas to that industry was not presented in evidence. The fact that the lockout would cost Qantas $20 million per day is not actually relevant to the matter of economic harm to the Australian economy or part of the Australian economy. In fact, the potential economic harm to Qantas was self inflicted as it only arose because of the lockout threat initiated by Qantas itself.

FWA acknowledged that '(i)t is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries.'[25] FWA found that it was the 'response industrial action of which Qantas has given notice'[26] that would cause the economic damage.

Once this finding had been made FWA had to consider whether to make an order to suspend or terminate protected industrial action 'for a proposed enterprise agreement'.[27] The application to FWA was in respect of three proposed enterprise agreements: the agreements for the Engineers the TWU, and the Pilots. Even though FWA had determined that the protected industrial action taken by the Engineers the TWU, and the Pilots was unlikely to 'cause significant damage to the tourism and air transport industries'[28] the final order was to terminate, not only the response industrial action of Qantas, but also the protected industrial actions of the Engineers the TWU, and the Pilots. FWA stated that '(w)e find that the requirements of s 424(1)

[22] *Qantas decision*, 3 [9].
[23] Ibid 3 [10].
[24] *Fair Work Act 2009* (Cth), s 424(3).
[25] *Qantas decision*, 3 [10].
[26] Ibid.
[27] *Fair Work Act 2009* (Cth), s 424(1).
[28] *Qantas decision*, 3 [10].

have been made out with respect to the action of which *Qantas*[29] has given notice in relation to the three proposed enterprise agreements.'[30]

The final order of FWA was 'to terminate protected industrial action in relation to each of the proposed enterprise agreements immediately.'[31] The order provided 'an opportunity for further negotiation during a period of 21 days, extendable for a further 21 days, if the parties agree that progress is being made.'[32] The reasons for the final order were that FWA:

1. Should act 'to avoid significant damage to the tourism industry';[33]
2. Considered 'that there were still prospects for a satisfactory negotiated outcome in all three cases';[34] and
3. Considered that the option of suspending the protected industrial action 'leaves open the possibility there may be a further lockout with its attendant risks for the relevant part of the economy.'[35]

In considering the three reasons for the decision it appears that:

1. The uncontested evidence as to the value of Australia's tourism industry to the Australian economy and the losses to the corporation, Qantas, were taken by FWA to equate to 'significant damage to the tourism industry' when that is not necessarily the case;
2. The fact that at the time of the lockout two of the employee groups had been in negotiation with Qantas for 14 months and the other employee group for 5 months would appear to suggest that the 'prospects for a satisfactory negotiated outcome' were not good. However, FWA still decided that there were 'good' prospects of a negotiated outcome even though the history of the negotiations to date would have suggested the opposite to be the case; and
3. The final reason given for terminating rather than suspending protected industrial action was that suspension left open the risk that Qantas could engage in a further lockout. In other

[29] Author's emphasis.
[30] *Qantas decision*, 3 [11].
[31] Ibid 4 [16].
[32] Ibid 4 [17].
[33] Ibid 4 [13].
[34] Ibid 4 [14].
[35] Ibid 4 [15].

> words, the protected industrial action by Qantas provided the economic risk, not the protected industrial actions by the employee groups. This leaves open the question of why FWA did not terminate the protected industrial action of just Qantas. FWA could have allowed the employee groups to continue with their industrial actions as they did not pose a threat to the tourism industry.

Examining the reasons for the decision makes it clear that FWA considered that the threatened protected industrial action[36] by Qantas posed the economic risk to the Australian economy. However, the order terminating the protected industrial action did not differentiate between the differing types of protected industrial action that were taking place. Section 424 of the FW Act provides that FWA must suspend or terminate protected industrial action if satisfied that the industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy.[37] It was found that the industrial action by Qantas, not their employees was causing the economic harm. The decision could, therefore, have terminated only the industrial action causing the economic harm, that is, the protected industrial action by Qantas.

VI. IS THE DECISION A RETURN TO COMPULSORY ARBITRATION?

The question arises as to whether this decision represents a return to compulsory arbitration?

The FW Act gives employers the right to take industrial action in response to action by employees, or their bargaining representatives,[38] for a proposed enterprise agreement.[39] This gives employers a statutory right to engage in a lockout of their employees. This right was first introduced in the Federal jurisdiction in 1993 by the *Industrial Relations Reform Act 1993* (Cth) and maintained in the *Workplace Relations Act 1996* (Cth).[40] In 2007, when Briggs was writing, lockouts were 'almost entirely concentrated in the Federal jurisdiction'.[41] However, since 2010, 'with the exception of non-constitutional

[36] The proposed action by Qantas is defined as protected industrial action by the *Fair Work Act 2009* (Cth), s 408.
[37] *Fair Work Act 2009* (Cth), s 424(1)(d).
[38] Ibid s 411.
[39] Ibid s 408.
[40] Chris Briggs, 'Lockout Law in Australia: The Case for Reform' (2007) 49 *Journal of Industrial Relations* 167, 168.
[41] Ibid 170.

employers in Western Australia, the private sector throughout Australia is now covered by the ... Fair Work Act'.[42] Therefore the Act now covers all Australian employers with the exception of 'state government employment and, in most States, local government employment'[43] and of course non-constitutional employers in Western Australia, that is, employers in Western Australia that are not 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.[44] This means that most employers in Australia now have a statutory right to engage in a lockout of their employees.

Briggs states that:

> If employers have an equal right to lockout, the lockout is too powerful a weapon and therefore undermines the capacity of employees to access and exercise these legal rights. While the parties must be allowed to deploy coercive power as part of the bargaining process, strikes and lockouts should be regulated differently to maintain the broad equilibrium of power that underpins effective agreement making.[45]

The legal rights of employees that Briggs was referring to were 'freedom of association, collective bargaining and to strike.'[46]

In Australia employees have a number of legal workplace rights which are derived from Chapter 3 of the FW Act. These include:

1. Protection from adverse action for exercising or proposing to exercise workplace rights;[47]
2. Protection from adverse action for engaging, or proposing to engage in industrial activity;[48]
3. Protection from discrimination;[49]
4. Protection from unfair dismissal;[50]
5. The right to take protected industrial action;[51] and

[42] Geoffrey Guidice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 556, 560.
[43] Ibid.
[44] *Commonwealth of Australia Constitution Act* (Imp), s 51(xx).
[45] Chris Briggs, above n 40, 169.
[46] Ibid.
[47] *Fair Work Act 2009* (Cth), s 340(1).
[48] Ibid s 346.
[49] Ibid s 351.
[50] Ibid Part 3-2.
[51] Ibid Part 3-3.

6. The right to enter workplaces by employee representatives.[52]

Briggs was also suggesting that strikes and lockouts by employers should be more heavily regulated and encumbered than employee rights to take industrial action. As will be shown, however, the FW Act does the opposite leaving employer industrial action less regulated and encumbered than it does employee action.

Although employees have the right to take protected industrial action this right is heavily encumbered with restrictions and procedural requirements. For example protected industrial action can only be engaged in for a range of 'permitted matters'[53] and only in respect of negotiating a proposed enterprise agreement.[54]

The procedural requirements imposed on employees and employee groups intending to take protected industrial action are procedurally onerous and time consuming. For example, Division 8 of the FW Act sets out the requirements to hold protected action ballots. These requirements include making application to FWA for a protected action ballot order,[55] giving notice to the employer of the application to hold the ballot,[56] directions for the conduct of the ballot[57] and a timetable for the ballot.[58] In addition to the requirements for a ballot, employees must give the employer written notice of any action proposed with a minimum period of notice of three days.[59]

In contrast, for an employer to take protected response action to employee action all that is required is for written notice to be given to the employees' bargaining representatives and for reasonable steps to be taken to notify affected employees.[60] Briggs, above, stated that giving employers an equal right to take industrial action as that given to employees would undermine the power of employees to exercise their rights. The FW Act however, gives employers a less encumbered right than employees to take industrial action.

[52] Ibid Part 3-4.
[53] Ibid s 409(1)(a).
[54] Ibid s 409(1).
[55] Ibid s 437.
[56] Ibid s 440.
[57] Ibid s 449.
[58] Ibid s 451.
[59] Ibid ss 414(1)-(2).
[60] Ibid s 414(5).

The decision of FWA in this matter, to terminate all protected industrial action had the effect of 'rewarding' the employer action by forcing all parties into binding arbitration.[61] Unsurprisingly, none of the parties in dispute with Qantas managed to negotiate a 'satisfactory outcome' within the 21 days specified in the FWA decision. This allowed the Qantas chief, Alan Joyce to announce on 22 November that:

> Fair Work Australia arbitrating and imposing an outcome in the airline's disputes with pilots, licensed engineers and ground workers was the best move after 21 days of fruitless talks since the airline was grounded.[62]

This statement by Joyce confirms that the decision by FWA in this matter led to the imposition of arbitration on the employee groups as a direct result of the employer's actions.

[61] Kim Arlington, 'Qantas Engineers Happy but Pilots, Handlers Fight On', *Sydney Morning Herald* (Sydney), 19 December 2011.
[62] Neil Wilson, 'Fair Work Australia to Settle Qantas Dispute After Union Talks Fail', *Herald Sun* (Sydney), 22 November 2011.