HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S153 of 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Minister has no right to intervene

1. Section 569(1) of the *Fair Work Act 2009* (Cth) (**the Act**) does not give the Minister a right to intervene in High Court proceedings if not a party below. Read in the context of Part 4-2 of the Act, "court" in s 569 does not include the High Court: **AR[41]-[43]**. There is not "a matter arising under this Act" where this Court is exercising its appellate jurisdiction in accordance with s 73 of the *Constitution*: **AR[44]-[48]**. Section 569(1) lacks the clear language required to regulate this Court's appellate jurisdiction: **AR[46]**. It does not refer expressly to the Minister intervening in this Court (contra *Judiciary Act 1903* (Cth) s 78A(1), *Native Title Act 1993* (Cth) s 84A, *Migration Act 1958* (Cth) s 486AA), uses language that appears in s 76(ii) of the *Constitution* (a provision that relates to additional "original jurisdiction") and is in a division titled "Miscellaneous": **AR[49]-[50]**. Leave to intervene should either not be granted or be limited: **AR[51]**.

The facts of the case in the light of the architecture of the Act

2. The TWU wrongly compresses the findings of fact made at trial. The correct position is that Qantas proved three lawful and compelling commercial reasons for making a decision to its outsource groundhanding services (J[156] **CAB 73**, J[177] **CAB 78,** J[187] **CAB 81**). Outsourcing *per se* is not prohibited by the Act. What Qantas could not disprove, given the onus in s 361, was that the "subjective consciousness" of Mr David (the key decision-maker) of a relevant feature of the architecture of the Act did not so intrude upon his thinking as to the management of implementation risks as to rise to the level of a reason for choosing November 2020 to announce the outsourcing decision, as opposed to delaying it until some time in 2021: J[194] **CAB 84**; J[201] **CAB 86**; J[272(1)] **CAB 104**; J[274] **CAB 104**; J[276] **CAB 105**; J[277] **CAB 105**, J[287] **CAB 108**, J[302] **CAB 113**.

3. That feature of the Act was that, as of November 2020, if the TWU and Qantas employees had sought to engage in industrial action under s 19 to oppose the outsourcing decision, that conduct would, in the case of QAL employees, have been a civil penalty contravention of s 417 and restrainable by injunction; and, in the case of QGS employees, would have led to a swift stop order from the Fair Work Commission

under s 418, breach of which would have been another civil penalty contravention and restrainable by injunction under s 421. By contrast, if Qantas deferred its decision to outsource until some time in 2021, its freedom from oppositional industrial action might have been diminished by reason of s 417 no longer biting for QAL employees and s 418 being potentially overcome if the numerous conditions under s 409 for industrial action to become protected could be satisfied: J[211] **CAB 88**, **AS[14]-[16]**, **AS[46]-[47]**.

4. On the findings, what Qantas did was choose November 2020 as the preferable time to announce an otherwise lawful and proper decision to outsource because part of its overall assessment of implementation risk included a comparative assessment of the degree of 'industrial muscle' the Act likely permitted the TWU and employees at different points in time: cf **RS[13]**.

Qantas' core legal contentions

5. (Narrower contention) An employer does not take adverse action to prevent the exercise of a workplace right within s 340(1)(b) where the action involves an otherwise lawful and proper decision (such as outsourcing) even if a reason for the timing of the decision is to take advantage of an architectural feature of the Act which positively denies to the TWU and employees the right to oppose the decision by industrial action, a denial which delay might reverse. The dividing line postulated by the TWU between (lawfully) identifying comparative risks at different points in time and (unlawfully) taking that comparison into account as a reason for a decision at a given point in time is a slippery one, especially in the context of a reverse onus provision. But in any event, neither scenario involves 'prevention' in the relevant sense within s 340(1)(b): **AR[3]-[4]**.

6. (Broader contention) Section 340(1)(b) bites only where there is a workplace right presently in existence. It is apt to protect those workplace rights which are in existence and capable of exercise throughout the whole of the employment relationship, even if the quantum of their enjoyment depends on the relationship as it unfolds. However, where the right is 'time-bound', in that the entire existence of the right depends on the circumstances - whether the employment relationship continues into a given phase or whether particular events occur - the right is not protected by s 340(1)(b) before it comes into existence: **A[19]-[20]**, **AR[5]-[6]**.

7. ***Text***: The "prevent" limb in s 340(1)(b) adopts the definition of a "workplace right" in s 341, which is framed in the present tense. The person must have an existing workplace

right and not the mere hope of acquiring one at some point in future. Otherwise, a person could run a "prevent" case as their primary case, because it would not require proof of a "workplace right" to prove a contravention. This inverts s 340, giving primacy to (b), which is a complementary limb to (a): **A[44]**; **AR[9]**, **[12]-[15]**; cf **RS[14]-[18]**.

8. ***Context***: The Full Court's construction would defeat the legislative choices inherent in the limitations placed around PIA and unfair dismissal rights (cf ss 382, 383, 390(1)(a)). Such limitations are enforced by the commands of s 194(c) and (e). Other entitlements that may arise after a minimun qualifying period and can be protected by s 340(1)(b) after that period is satisfied include requests for flexible arrangements (ss 65-66), parental leave (ss 67-85), casual conversion (ss 66A-66M) and redundancy pay (ss 119-123): **A[48]-[54]**, **AR[32]-[33]**. No difficulty is produced with ss 343 and 345.

9. ***History***: No antecedent provision with the reach which the TWU gives to s 340(1)(b) has been identified. Neither the legislative history nor the extrinsic material point towards a deliberate legislative expansion of the scope of protection against adverse action to include workplace rights not presently in existence: **A[60]-[71]**; **AR[28]**.

10. ***Purpose***: The Full Court's invocation of a general purpose of "protecting workplace rights" in s 336(1)(a) (FC [120] **CAB 192-3**) begs the question by assuming the concept of "workplace rights" extends to future rights (**A[72]**; **AR[25]-[27]**). None of the examples identified by the Full Court or the TWU deprive Qantas' construction of s 340(1)(b) of plausibility: **A[73]-[81]**; **AR[22]–[24]**; **[29]-[35]**.

Notice of Contention Ground 1

11. This extends "presently existing rights" beyond any coherent limit: **AR[36]**.

Relief

12. The declaration at **CAB 120-121** should be set aside. There is no freestanding workplace right to "participate in enterprise bargaining", nor any finding Qantas acted to prevent employees engaging in bargaining (DJ [19]-[21] **CAB 127-128**; **AR[37]-[39]**). There is no basis for any remitter to the Court below: cf **RS[61]**.

Dated: 9 May 2023

Justin Gleeson

Justin Gleeson SC