IN THE FAIR WORK COMMISSION

AT SYDNEY

Matter: B2023/543

Virgin Australia Regional Airlines Pty Ltd (**VARA**)

Applicant

Australian Licenced Aircraft Engineers Association (**ALAEA**)

Respondent

Respondent's outline of submissions

Introduction

1. VARA has been bargaining with the ALAEA for a proposed enterprise agreement since 23 February 2021,[1] two weeks after the current agreement reached its nominal expiry date.[2]

2. The bargaining has been relatively sophisticated, in that it is not a simple line-by-line log of claims exercise; instead, whole-package offers, with various changing component parts, have been put forward by both sides. Nor has it involved any real ambit (at least not from the ALAEA). A moderate, and steadily escalating, campaign of protected industrial action has been underway since around March 2023; although this is expensive and inconvenient to VARA there is no suggestion that it is causing any actual disruption to flying activities.[3]

3. VARA commenced this proceeding on 8 June 2023 on the basis that the parties had reached *'an impasse in bargaining, and their positions are each resolute'*.[4]

---

[1] Glynn [76]

[2] An earlier in-term bargaining round, commenced to deal with the extraordinary circumstances facing Virgin Group as a whole following its entering voluntary administration in 2020, was abandoned by consent in mid-September 2020, as the purchase by BAIN went ahead regardless and the urgency dissipated.

[3] Strictly speaking the first protected industrial action was taken on 5 October 2022. Given that this was a one-minute stoppage of work, it is better understood as a demonstration of *willingness* to take further protected industrial action rather than a matter of particular significance.

[4] Application, [23](a).

In other words, at that point in time it apparently believed that there was no prospect, reasonable or otherwise, of the parties moving closer together.

4. This immediately proved to be wrong. At the hearing of the related s.425 application, VARA led evidence from Nathan Miller, who had been actively involved in enterprise bargaining since November 2022. Following his giving evidence in chief to the effect that he had not previously seen, and did not understand, a new proposal in ALAEA Federal Secretary Steven Purvinas' statement, he gave the following evidence:

> *So it's possible following today you could have a discussion with Mr Purvinas and find out what he means? --- That's possible.*
>
> *And it's possible…that it might open up new avenues by which the parties could reach agreement?--- It's possible.*[5]

5. Mr Miller has inexplicably disappeared from the dispute. He has been replaced with Joanna Glynn, who has been employed since February this year and attended perhaps two meetings before the s.240 processes began.[6] Ms Glynn, calling on her extensive experience as a lawyer, declared on 30 June 2023 her strong view that no such prospect exists; it is '*clear to [her] that the parties' positions in bargaining will not change.*'[7]

6. Of the two, Mr Miller has been proven correct. VARA and the ALAEA have in fact continued to have discussions since 30 June 2023. These discussions have been cordial and, more importantly, productive, with both parties altering their position on key items – including the matters identified by Ms Glynn as both critical and intractably stalled[8] - significantly, as set out in Mr Purvinas' evidence at [13].

7. Indeed, the only point of difference that appears to remain is the ALAEA's claim that the cap on redundancy payments ought to be lifted from the current 20 weeks to 52 weeks (a significant moderation of its job security claims at the

---

[5] Transcript, 13 July 2023, B2023/542; PN122-123. The ALAEA notes at footnote 4 of its submissions VARA intends to tender '*aspects*' (unspecified) of Mr Purvinas' evidence in the proceeding below. The ALAEA proposes to tender the full transcript.
[6] Purvinas at [23].
[7] Glynn at [276].
[8] Glynn at [263].

start of bargaining). This is a rational trade-off for the job security threat posed by one of VARA's key claims, the increase to the amount of Cat A license holders that can be employed (which it in turn has recently significantly compromised). The ALAEA has indicated that it would not run a 'no' campaign if VARA put a proposed agreement in the terms discussed absent this claim, which is its normal position when an agreement is in the realm of acceptability.[9]

8. The parties were, in reality, close to reaching an agreement when the proceedings were commenced. They have moved closer since. Bargaining has not '*failed'*; it has continued to function, and function well. The gap is clearly more than capable of being closed by negotiation.

9. Nevertheless, VARA continues to contend that this is somehow the '*quintessential'* intractable bargaining dispute. It is, when the true nature of the outstanding matters is considered, difficult to see how.

10. Notably, its central contention – that the ALAEA has been *'moving the goalposts'* – is fundamentally wrong. It relies on a mischaracterization, or perhaps simply Ms Glynn's misunderstanding, of the positions that have been advanced at various points in time, as well as half-hearted attempts to verbal Mr Purvinas throughout the evidence. The ALAEA, while maintaining a position that if no wage increases are applied for the first two years of the Agreement there ought to be adequate alternate compensation for this, has remained willing to compromise (and has indeed actually compromised) on what this compensation looks like.

11. In the circumstances, the Commission could not be satisfied that the statutory criteria set out by s.235 of the *Fair Work **Act** 2009* (Cth) are met, and the application ought to be dismissed.

The statutory scheme

12. Section 235(1) of the Act sets out the circumstances in which the Commission '*may'* make an intractable bargaining determination. Although the word '*may'* would ordinarily import a general discretion, given the nature of the

[9] Purvinas at [16].

considerations required by s.235(1)(b) and in turn s.235(2)(b) and (c), this is better interpreted as an empowering clause or jurisdictional threshold.

13. In other words, VARA is correct at [38] to submit that if the Commission were satisfied that there is no reasonable prospect of agreement being reached absent the declaration, and that it was otherwise reasonable in all the circumstances to make the declaration, no true discretion to nevertheless refuse remains notwithstanding the use of *'may'* in s.235(1). That said, the considerations required in particular by s.235(2)(c) are of such broad discretionary import that there is no real practical significance to this.

14. More importantly, for present purposes, each criteria is mandatory before the jurisdiction is enlivened, as shown by the use of the conjunctive '*and'*; they are in that sense jurisdictional facts that each must be made out. Absent their existence no residual discretion to make the declaration exists.

Section 235(1)

15. The ALAEA accepts that a competent application has been made per s.235(1)(a).

16. Section 235(1)(b) is discussed in further detail below; but in short, the Commission could not be satisfied that each of the matters set out in s.235(2) are made out, and accordingly the application fails on that basis.

17. As to s.235(1)(c), the correct position is that the minimum bargaining period started on 23 February 2021, as this is when the notification time for *this* proposed agreement occurred. It accordingly ended on 23 November 2021, and the section is satisfied.

18. It is noted that VARA contends that this is incorrect, and the starting date is the notification time for the earlier proposed agreement, 20 August 2020. From a jurisdictional standpoint it is of no consequence; it seems to be not much more than an attempt to bolster VARA's argument that bargaining is intractable because it has been going on for a while.

19. Some caution, discussed below, should be exercised before embracing this. The structure of the section makes it clear that the fact that a bargaining process has been lengthy is not itself sufficient to enliven the power to make a declaration. The imposition of a nine-month *minimum* threshold instead emphasizes that the statutory scheme continues to give primacy to enterprise bargaining and conditions being reached through agreement.

Section 235(2)

Section 235(2)(a) – s.240 conciliation

20. Section 235(2)(a) requires the Commission to be satisfied that the dispute has been conciliated under s.240, and the applicant participated in those processes. The second condition again emphasizes the primacy of non-arbitrated outcomes; it suggests that the section was contemplated as a pathway to assistance where *all alternative mechanisms* have failed; a last resort rather than a tool available where one party has had enough.

21. The use of the word '*dealt'* also suggests that it is intended that that mechanism be exhausted, in that it has a connotation of finality rather than just a requirement for there to have been a conference. This is bolstered by the fact that this obligation has been placed within the broad considerations required by s.235(2) rather than the more procedural matters at which s.235(1) is directed at; this evidences a clear statutory intention that this be more than a pro forma.

22. There is no contest that a bargaining dispute has been conciliated with under s.240 in respect of the proposed agreement. However, a question does arise as to:

    a. whether '*<u>the</u> dispute'* i.e. the quite different matters that *now* remain outstanding between the parties has been dealt with; or

    b. alternatively, if the concept of a bargaining dispute is given a more ambulatory meaning, if given the recent movement, whether it can be said given the significant recent movement that it has been fully '*dealt'* with.

23. This is of course resolvable with further processes under s.240, noting that the dispute has not to the ALAEA's knowledge been discontinued or dismissed. The ALAEA remains willing to participate in same if the Commission considers it necessary or appropriate.

24. No issue is taken with VARA's participation in the FWC's processes.

Section 235(2)(b) – no reasonable prospect of agreement being reached?

25. Section 235(2)(b) requires the Commission to be satisfied that '*there is no reasonable prospect of agreement being reached if the FWC does not make the declaration'*. The use of the word reasonable imports an objective test; while the (in Ms Glynn's case strongly expressed) subjective views of parties may inform likely future conduct they are not themselves determinative.

26. The phrase '*no reasonable prospect of reaching agreement'* has a lengthy legislative history, linked – as here – to the balancing and rebalancing of the primacy given to enterprise-level agreement relative to the Commission's power to intervene in same.

27. It was first introduced into the *Industrial Relations Act 1988* (Cth) via the *Industrial Relations and Other Legislation Amendment Act 1993* (Cth), initially as a basis upon which the Commission could:

    a. if the Commission were *not* so satisfied, refrain from hearing or determining an application for the variation of an award per s.113;

    b. vary an existing enterprise agreement (with the additional consideration of good faith efforts to negotiate having failed) per s.170MK; and

    c. make a paid rates award per s.170UA.

28. These were limitations on the Commission's prior powers, reflecting the significant reforms introduced by that bill i.e. a move from a centralized conciliation and arbitration focus to instead a role regulating and supervising enterprise bargaining, with the latter given primacy. This was reinforced in the pre-reform *Workplace Relations Act 1996* (Cth). The Commission's power to make awards was limited via s.89A to specified allowable award matters;

however, the Act at least in its initial incarnation allowed the Commission to avoid this limitation in respect of '*exceptional matters'* – the identification of which required, *inter alia*, the Commission to be satisfied that '*there [was] no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission'*.

29. The re-adoption of this language is plainly a deliberate choice by the legislature. It does not reflect a wholesale return to a conciliation and arbitration mechanism. Instead, the clear purpose is to preserve the primacy of enterprise-level negotiation and agreement, but enhancing the Commission's regulatory and supervisory role of same. Intervention, in other words, is *not* a default position or even lightly accessible – a substantive case as to the necessity of departing from the status quo must be made out.

30. The phrase itself requires a broad, and bespoke, evaluative judgement based on the facts at the time. Relevant considerations will vary matter to matter but a critical question involves the identification of what the actual obstacles to agreement have been and what remains.

31. VARA relies, in substance, on two contentions:

    a. **first,** the proposition that while it has been compromising, the ALAEA has been shifting its position: VS[26]; and

    b. **second**, it is constrained in what further offers it can make, and that there *'is no prospect of VARA moving any further'* from the position it last put to employees: VS[27].

32. The first is, as Mr Purvinas's evidence explains, completely wrong. It rests fundamentally on the idea that the ALAEA ever *unconditionally* agreed to a 2-year wage freeze period. This never happened. The ALAEA consistently communicated to VARA that it was willing to accept a wage freeze *if it was otherwise compensated for*, and throughout bargaining has both put and responded to proposals as to what that proposal looks like.

33. Indeed, in reality it is VARA who has been increasing its ask: most notably, by unexpectedly introducing a proposed major change to the Cat A license clause.

34. On one view, characterizing the ALAEA's willingness to *negotiate about* a wage freeze as unconditional agreement to same subsequently departed from (i.e. when VARA refused to agree to the proposed conditions) could be described as entirely disingenuous. However, in fairness to VARA, its submissions are plainly informed by Ms Glynn's evidence, which in turn is in this respect substantially based on what she has been informed about what was said in meetings she did not attend and, it seems, emails she has not read. It is easy to see, given the detailed nature of bargaining, how confusion could arise.

35. As to the second, the Commission would exercise some caution before accepting that the imposition of a corporate position is a real bar. These kind of corporate diktats are not acts of God; in reality it is not much more than a submission that Virgin Group does not want to go further than it has. That is not uncommon in bargaining. Absent evidence of necessity – or indeed anything more than preference – it is not persuasive.

36. Additionally, it should be observed that Ms Glynn's evidence demonstrates that VARA remains well within the outer bounds of its bargaining parameters. Indeed, it shows that throughout bargaining it has been putting positions lower than what it budgeted for. This is of course open to it, but it is a choice in bargaining that presents a risk that the negotiations will be prolonged.

37. In any event, the development of negotiations since Ms Glynn's statement was filed demonstrates that she is, and thus the submissions are, simply wrong in this respect. The parties remain capable of reaching agreement, which is a key consideration.[10] In the event that reply evidence is filed evidencing a change in position in this respect, this would simply indicate that the real obstacle to the parties reaching agreement is the distraction of this application, which once dismissed is removed.[11]

---

[10] *P & O Catering v AWU* (1998) 88 IR 108.
[11] See, e.g., *Prysmian Power Cables and Systems Australia Pty Ltd v NUW* [2010] FWA 9402.

38. Accordingly, the Commission could not be satisfied that there is no reasonable prospect that agreement will not be reached if the declaration is not made. For example, it remains open to VARA to put its amended position – quite different in key respects to what was previously rejected - to the workforce, and given the changes and the stated position of the ALAEA there is at least reasonable prospect that it would be approved.[12]

Section 235(2)(c) – reasonable in all the circumstances

39. Section 235(2)(c) requires the Commission to consider whether it is reasonable in all the circumstances to make the declaration, including with reference to the views of the bargaining representatives.

40. It is both a substantive consideration in its own right and one which stands alone from s.235(2)(b). Even if the Commission is satisfied that there are no reasonable prospects of agreement being reached this is *not sufficient* to enliven the jurisdiction; it is plainly contemplated that it nevertheless might not be reasonable to make the declaration sought.

41. The ALAEA opposes the declaration, for cogent reasons: it will strip employees of the right to:

    a. exercise, through the tactical withdrawal of their labor, influence over what offer is put forward by VARA; and

    b. more fundamentally, have collective control over what their terms and conditions of employment are to be.

42. These are significant matters. There are circumstances where these will not be of primary concern to employees – that is, where bargaining is simply not producing a result of any kind. This is not one of them. It weighs strongly against the state of satisfaction being able to be formed.

43. As to the other matters put forward by VARA:

[12] *Nyrstar v CFMEU* [1009] FWA 1148.

a. while bargaining has been lengthy, it has also been principally occurring during two of the most disrupted years in the aviation industry in living memory, and in conjunction with the notoriously industrially complicated introduction of COVID-19 vaccine mandates, both of which have contributed to delay;

b. the lengthy period has not been stagnant; the parties have incrementally moved and continue to do so; and

c. the options available to resolve the impasse have not, as set out above, actually been exhausted.

44. In respect of the latter, although matters may have appeared at the time of the earlier decision to have been '*nearing hopeless'* to Schneider C, it is apparent that – happily – that rubicon has not actually been crossed. The '*offer creep'* referred to in Ms Glynn's statement – an interesting way of describing '*ongoing negotiation'* – has continued.

45. As an aside, a matter which could potentially be relevant to considerations under s.235(2)(c) is the conduct of a particular party. It is entirely possible to envisage a situation where the state of satisfaction under s.235(2)(b) could be formed by reference to the applicant's behaviour – i.e. a rigid refusal to move, or a retraction of previous positions made for the purposes of hardening a dispute. If the Commission was nevertheless satisfied that *that* conduct was unreasonable, it could form a basis upon which it could be concluded that it would nevertheless not be reasonable in all the circumstances to make the determination. Of course, noting that VARA has in fact continued to engage in productive discussions which have further narrowed the issues in dispute between the parties, no such submission is presently made here.

Conclusions

46. The material before the Commission does not support a conclusion that:

a. there is no reasonable prospect that agreement will be reached absent a declaration; or

b. it is reasonable in all the circumstances to make the declaration,

and accordingly the application must be dismissed.

47. In respect of the '*oddity'* referred to at [42] of VARA's submissions, the statutory scheme reflects a recognition that the *fact* of a declaration is by itself such a significant alteration in respect of the rights and obligations of the parties (removing the ability to take protected industrial action, and imposing the inevitability rather than theoretical possibility of arbitration) that it itself might trigger an alteration in position (which is why s.235(2)(b) includes the phrase '*if the FWC does not make the declaration'* rather than simply being an absolute).

48. VARA's contention that it would be inutile is based on the same error as set out above, in that it assumes that both parties are rigidly locked into any one particular position, when in fact they are not. In any event its analysis – that the conclusion required by s.235(2)(b) leads to a finding that any post declaration bargaining period would be inutile – is obviously reductive. On that logic s.235A would never be enlivened.

49. In the event that the Commission does make the declaration sought, a post-declaration negotiating period is appropriate.

LEO SAUNDERS
Greenway Chambers | leo.saunders@greenway.com.au
16 July 2023