IN THE FAIR WORK COMMISSION

B2023/543

S 234 APPLICATION FOR AN INTRACTABLE BARGAINING DECLARATION BY VIRGIN AUSTRALIA REGIONAL AIRLINES PTY LTD

SUBMISSIONS BY THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

1. BACKGROUND

1.1 These submissions are filed in accordance with the amended Directions issued on 14 July 2023 and are made on behalf of the Australian Chamber of Commerce and Industry (**ACCI**).

1.2 ACCI has limited its intervention in the proceedings to making submissions regarding the general principles applicable in the determination of an application for an intractable bargaining declaration (**IBD**).

1.3 ACCI's submissions focus on the proper construction to be given to sub-paragraphs (b) and (c) of s 235(2) of the *Fair Work Act* 2009 (Cth) (**Act**) and how these provisions should be applied. Namely, ACCI will focus on how the following expressions should be applied by the Commission:

(a) whether "*there is no reasonable prospect of agreement being reached*" (s235(2)(b)) in a particular bargaining dispute; and

(b) whether the making of an IBD is "*reasonable in all the circumstances*" (s235(2)(c))

2. PRINCIPLES RELEVANT TO STATUTORY CONSTRUCTION GENERALLY

2.1 A recent authoritative discussion of the principles relevant to the construction of the Act is in *Mondelez Australia Pty Ltd & Anor v AMWU & Ors*.[1] They are as follows:

(a) The expressions in a statue must be construed in the context of the Act as a whole, and "*in light of the relevant extrinsic materials and legislative history*".[2]

(b) The starting point is the language of the statute, including consideration of its objects and relevant provisions. The objects of the Act as it then was, "*show*

[1] (2020) 271 CLR 495; [2020] HCA 29.
[2] At [13] per Kiefel CJ, Nettle and Gordon JJ.

that the Act is intended to provide fairness, flexibility, certainty and stability for employers and their employees".[3]

(c) The provisions should be given a "*purposive contextual construction*". The context includes the mischief that the statute was intended to remedy. To that end, explanatory memoranda, although not to displace the statutory text, provide a reliable guide to the Parliament's "*policy intentions*" and the "*overall legislative design and the intended practical operation*" of the relevant provisions.[4]

(d) The Commission must "*give effect to the meaning of the statutory words as intended by Parliament*", in their context, and presume that "*common or ordinary words are intended to bear their ordinary meaning*" and, importantly, "*that words repeated in a statute are used with the same meaning*".[5]

3. THE CONTEXT OF THE ACT AS A WHOLE

3.1 Section 235 appears in Subdivision B of Division 8 of Part 2-4 of the Act.

3.2 Based on its title, Division 8 concerns the Commission's role in facilitating enterprise bargaining, with which Part 2-4 is concerned. This Division gives effect to one of the objects of the Part, which his to "*enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through… dealing with disputes…*"[6]

3.3 Relevantly, Division 8 gives the Commission power to make an IBD if the conditions of that Division are met. Before the Commission may make the declaration, it must be satisfied inter alia that:

(a) "*there is no reasonable prospect of agreement being reached if the [Commission] does not make the declaration*" (s 235(2)(b)); and

(b) "*it is reasonable in all the circumstances to make the declaration*".

3.4 After a declaration has been made or the post-declaration negotiating period (if one has been specified under s 235A) has ended, the Commission must as quickly as possible make an intractable bargaining workplace determination to resolve the dispute under Division 4 of Part 2-5 of the Act (s 269). The exercise of this power is

[3] At [13]-[14] per Kiefel CJ, Nettle and Gordon JJ.
[4] At [46], [66], [70]-[71] per Gageler J.
[5] At [95], [98] per Edelman J.
[6] S171(b) of the Act

mandatory and to be completed expeditiously, indicating the importance the Act gives to the resolution of intractable bargaining scenarios.

3.5 In short, the provisions create a novel mechanism by which the Commission can arbitrate enterprise bargaining disputes and facilitate the making of enterprise agreements in circumstances where bargaining has become, what the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Revised EM**) describes as, - "intractable"[7] or where "*intractable disputes*"[8] have arisen.

3.6 This is consistent with the mischief that the statute seeks to address. Namely, the *prevention of enterprise agreements being made* due to intractable bargaining. The provisions give greater scope for the Commission to intervene to assist bargaining and agreement making than was previously the case.

4. THE CONTEXT WITHIN S235 ITSELF

4.1 The actual text pertaining to the tests outlined in sections 235(2)(b) and 235(2)(c) will be addressed in further detail at sections 7 and 8 below. The text in s235(2)(b) and 235(2)(b) importantly outline the jurisdictional facts[9] of which the Commission must be satisfied before it has authority to issue an IBD.

4.2 However, there are contextual considerations within the section that the Commission should take note of in applying these tests.

4.3 Primarily, these contextual considerations relate to the title of the section and the title of the type of declaration to which s235 relates - namely an "*intractable*" bargaining declaration.

4.4 The term "*intractable*" gives colour to the circumstances in which the Act envisages the declarations are to be made - notwithstanding that the jurisdictional facts need to be present prior to issuing an IBD. The ordinary meaning of "*intractable*" includes "*not easily controlled*",[10] "*not easily treated or dealt with*",[11] "*hard to deal with, unmanageable*",[12] "*difficult to manage or govern*".[13]

4.5 The use of the term intractable directs attention to circumstances in which the bargaining representatives need the assistance of the Commission to resolve

---

[7] Revised EM at [33]
[8] Revised EM at [107]
[9] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 356 ALR 535; [2018] FCAFC 77 at [98]
[10] Merriam-Webster's Dictionary and Thesaurus, 2014 ed.
[11] The Oxford English Dictionary, 2nd ed.
[12] Macquarie Concise Dictionary, 3rd ed.
[13] The American Heritage Dictionary, 4th ed.

impasses or difficulties in bargaining. In light of the Act's use of the language of reasonableness in s 235(2)(b) and (c), ACCI submits that "*intractable*" should not refer to only those situations that are impossible to deal with or in which no prospect of resolution is possible, but rather to those disputes that are challenging or difficult to manage, such that the intervention of the Commission is warranted to facilitate[14] agreement making.

5. LEGISLATIVE HISTORY

5.1 Consideration of the legislative history of the relevant provisions invites a comparison with previous legislation.

5.2 The current Subdivision B of Division 8 of Part 2-4 of the Act was inserted into it by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* 2022 (**SJBP Act**).

5.3 By the SJBP Act, the new subdivision replaced the previous one, which concerned the making by the Commission of serious breach declarations. A serious breach declaration enlivened the Commission's ability to make a workplace determination under the previous version of s 269. The Commission could make these declarations when contraventions of bargaining orders prohibitively hindered the reaching of agreement.

5.4 Plainly, by reference of the legislative history, the Parliament was unsatisfied with the operation of the Subdivision.

5.5 The history of the repeal of the former subdivision and its replacement with the new one, evinces a legislative intention to broaden the factual circumstances in which the Commission can make workplace determinations. The language of "*serious and sustained*" (s 235(2)(b)(i)) and "*significantly undermined*" (s 235(2)(b)(ii)), "*exhausted all other reasonable alternatives to reach agreement*" (s 235(2)(c)), "*agreement… will not be reached*" (s 235(2)(d)) in the previous legislation point to a high threshold of satisfaction on the Commission's part before it could make a serious breach declaration.

5.6 The repeal and replacement of this regime with a regime concerning IBDs, with its touchstone of reasonableness, lowers the threshold requirements necessary before the Commission can intervene to make workplace determinations. It is clearly intended to broaden access to the making of workplace determinations in circumstances where bargaining has stalled or become difficult to manage.

[14] See section 3 above

6. LEGISLATIVE PURPOSE: EXTRINSIC MATERIALS

6.1 Consideration of extrinsic materials supports adopting a construction of the relevant provisions to the effect that they are intended to operate in broad circumstances.

6.2 In the Second Reading Speeches to the House of Representatives and the Senate, the relevant Ministers stated that the purpose of the intractable bargaining changes is:

> *to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes*.[15]

6.3 The Revised EM states that the provisions regarding serious breach declarations and bargaining-related workplace determinations had "*not been effective in assisting parties to resolve bargaining disputes*"[16]. The new regime is intended to be more efficacious than what preceded it in ending bargaining disputes.

7. THE ACTUAL TESTS: "NO REASONABLE PROSPECTS OF AGREEMENT BEING REACHED"

7.1 Section 235(2)(b) of the FW Act provides that the FWC must be satisfied that:

> *there is no reasonable prospect of agreement being reached if the FWC does not make the declaration*

7.2 The natural and ordinary meaning of the phrase "*reasonable prospect*" is broken into its two components:

(a) Reasonable is relevantly defined to mean:

> *1. Endowed with reason. 2. Agreeable to reason or sound judgment: a reasonable choice…*[17]

(b) Prospect is relevantly defined to mean:

> *5. A mental looking forward, or contemplation of something future or expected*[18]

7.3 The ordinarily language therefore focuses on whether there is a reasonable or sound basis to expect that agreement will be reached.

---

[15] Given respectively by Tony Burke MP, Minister for Employment and Workplace Relations, Minister for the Arts and Leader of the House to the House of Representatives on 27 October 2022 and Senator Carol Brown, Assistant Minister for Infrastructure and Transport to the Senate on 21 November 2022.
[16] At [826]
[17] The *Concise Macquarie Dictionary*, 3rd ed
[18] The *Concise Macquarie Dictionary*, 3rd ed

Previous consideration of the phrase

7.4 The phrase "*no reasonable prospect of reaching agreement*" in the context of enterprise bargaining is not foreign to the Federal industrial regulatory regime.

7.5 The phrase appears in s423(4)(f) of the FW Act, which provides that, when considering whether to terminate protected industrial action (on the grounds of significant economic harm), the Commission is to have regard to:

> *(i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and*
>
> *(ii) whether there is no reasonable prospect of agreement being reached;*

7.6 The phrase also appeared in the former *Workplace Relations Act 1996* (**WR Act**), where the Australian Industrial Relations Commission held a power to suspend or terminate bargaining in certain circumstances. The WR Act relevantly provided as follows:

> *170MW Power of Commission to suspend or terminate bargaining period*
>
> *(1) Subject to subsection (8), the Commission may, by order, suspend or terminate the bargaining period if, after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2) to (7) exists or existed….*
>
> *(7) A circumstance for the purposes of subsection (1) is that:*
>
> > *(a) immediately before the commencement of this section, the wages and conditions of the kind of employees whose employment will be subject to the agreement were determined by a paid rates award, or would have been so determined if a certified agreement, an enterprise flexibility agreement (within the meaning of this Act as then in force) or a State employment agreement had not prevailed over the award; and*
> >
> > *(b) so far as the wages and conditions of the kind of employees whose employment will be subject to the agreement were, before the commencement of this section, customarily determined by an award or a State award, they were determined by a paid rates award; and*
> >
> > *(c)* ***there is no reasonable prospect of the negotiating parties reaching an agreement under Division 2 or 3 during the bargaining period****.*
> >
> > (emphasis added)

7.7 As a general rule, the authorities have underlined that a reasonable prospect of agreement directs focus on the *probability* of agreement and does <u>not</u> direct focus on what is *possible* in some indefinite timeframe.

7.8 This was the type of approach adopted by Commissioner Lewin in *Yallourn Energy Pty Ltd v Construction, Forestry, Mining and Energy Union and Ors*. - T2538 [2000] AIRC 513 (**Yallourn**) (at [56]):

> "*I have utilised what judgement I am able to bring to bear having regard to what I consider to be the probability of an agreement being reached during the bargaining period. I have approached the matter from this perspective because I do not think that to speculate on the possibility of agreement being reached during an indefinite period is fruitful.* ***Anything is possible. In my view, a "reasonable prospect" is the same as a fair level of probability or at least some probability discernible from available facts***."
>
> (emphasis added)

7.9 This approach is embodied in the Revised EM, which provides as follows:

> *The next matter of which the FWC would be required to be satisfied before making an intractable bargaining declaration is that there is no reasonable prospect of agreement being reached if the FWC does not make the declaration.* ***This does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance.*** *It is unlikely that the FWC would reach such a state of satisfaction unless the parties had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration.*[19]
>
> (emphasis added)

7.10 Again, the focus of the Revised EM is on the probability ("reasonable chance") as opposed to a possibility of agreement. Although caution must be exercised in giving weight to the reference in the Revised EM to the Commission being satisfied that there has been an 'exhaustion' of "*all reasonable efforts to reach agreement*". In this case, the Revised EM is using language that has been removed from the Act (see repealed s 235(2)(c)) and the removal of this language is part of the lowering of the threshold needed to be overcome before a relevant declaration can be made. This specific phrase from the Revised EM is not a separate jurisdictional fact necessary to issue an IDB and must not replace the test in the Act.

[19] Revised EM [846] – Page 148

Conclusion on "no reasonable prospect of agreement being reached"

7.11 Ultimately, both the caselaw cited above and the Revised EM point towards the provisions being given practical, sensible operation in an industrial context, to allow the Commission to intervene to promote agreement making.

7.12 The test contemplates circumstances in which the intervention of the Commission facilitates bargaining that has become intractable, in the sense of difficult to control or manage by the parties, such that the probability of agreement being reached is now no longer fairly probable or a reasonable chance.

Over what period is one to assess whether there is a reasonable prospect of agreement being reached?

7.13 The FW Act is silent regarding the period over which the Commission is to assess whether there is a reasonable prospect of agreement being reached.

7.14 Based on the authorities above, it is unlikely that the legislature intended the period to be an indefinite one extending over a protracted period.[20] As identified in Yallourn, given enough time, *anything is possible*. Such an outcome is also inconsistent with:

(a) the objects behind Part 2-4 of the FW Act, which focuses on "*facilitating good faith bargaining and the making of enterprise agreements*" by way of the Fair Work Commission dealing with bargaining disputes;[21]

(b) the mischief with which the provisions were intended to address;[22] and

(c) the extrinsic materials identified above[23], which include making it "*easier to bargain*"[24].

7.15 Rather, it is likely that the Commission should have regard to the foreseeable future, over which the Commission can discern some inference as to probability of agreement based on available facts.[25]

[20] *Yallourn* at [56]
[21] S171(b), FW Act
[22] See paragraph 3.6 above
[23] See section 6
[24] Revised EM, page iii
[25] See *Yallourn* at [56]

Factors relevant to ascertaining whether there is a reasonable prospect of agreement being reached

7.16 Naturally, there is not and should not be an exhaustive list of factors relevant to whether there is a reasonable prospect of agreement being reached in a particular case. Rather, the Commission will need to have regard to a broad range of circumstances pertaining to each case.

7.17 Nevertheless, the previous consideration of this test under the WR Act provides a helpful guide as to some of the matters that have been considered relevant or persuasive historically.

7.18 These factors include:

(a) the length of the negotiations to date[26] - including negotiations prior to formal bargaining[27];

(b) the nature of the areas of continuing disagreement - including whether they are "*substantial*"[28] or "*fundamental*"[29];

(c) whether there has been a consistent failure by the parties to agree on one or more substantive elements, provided such are significant enough to prevent the making of an agreement;[30]

(d) the resort of one party to industrial action to date;[31]

(e) in relation to future industrial action, whilst the Commission might form a view that prolonged future action might change the negotiation position of a party, the Commission must focus its attention on whether future industrial action will change the negotiating position of the parties in such a manner that agreement will be reached;[32] and

(f) where there has been an overwhelming rejection of the deal proposed by an employer by way of a vote.[33]

7.19 Other factors which ACCI says should self-evidently be relevant include:

---

[26] *Ansett Australia Limited v The Australian Workers' Union* [2000] AIRC 1379 at [54], *CPSU v Australian Protective Service - T3458* [2000] AIRC 570 at [44]
[27] *(DETE) v Australian Education Union* - 431/99 Print R4349 [1999] AIRC 450; *CPSU v. The State of Victoria* Print R1878 at page 13; [1999] AIRC 152.
[28] *Ansett Australia Limited v The Australian Workers' Union* [2000] AIRC 1379 at [54]
[29] *CPSU v Australian Protective Service - T3458* [2000] AIRC 570 at [44]
[30] *P & O Catering v. Australian Workers Union* Print R0148; [1998] AIRC 1765; *(DETE) v Australian Education Union* - 431/99 Print R4349 [1999] AIRC 450
[31] *Ansett Australia Limited v The Australian Workers' Union* [2000] AIRC 1379 at [54]
[32] *Yallourn* at [54]
[33] *CPSU v Australian Protective Service - T3458* [2000] AIRC 570 at [44]

(a) the views of the respective bargaining representatives; and

(b) the stated preparedness of the bargaining representatives to change from their positions - in this regard, the focus should be on their "*genuinely held*" positions.[34]

8. THE ACTUAL TESTS
IS THE DECLARATION "REASONABLE IN ALL THE CIRCUMSTANCES?"

8.1 The phrase "*reasonable in all the circumstances*" as conditioning the Commission's power recurs throughout the Act and conditions the Commission's exercise of power.

8.2 For example, a serious breach declaration could not have been made under the previous version of s 235 without the Commission being satisfied that it was reasonable to make the declaration in all the circumstances.[35] Satisfaction of a similar condition is necessary before a bargaining order (s 230(1)(c)) or scope order can be made (s 238(4)(d)). As previously stated, the legislature is presumed to give this phrase the same meaning in each of the places that it appears.[36]

8.3 The Commission has broad latitude in determining whether it is satisfied that it is "*reasonable in all the circumstances*" to make the declaration.

8.4 Reasonableness in this context is concerned with the presence of a rational foundation for the judgment that it is reasonable to make the declaration, not whether the Commission has made the 'right' determination. In *CEPU v Utilities Management*, which concerned s 238(4)(d), Hatcher VP and Bissett C observed that:

> "*The provision clearly requires the exercise of a broad judgment, subject only to the requirement to take into account all the relevant circumstances… and is concerned with the identification of a sound rational basis for the making of the scope order sought rather than the more general question as to whether the scope order should be made.*"[37]

8.5 The Revised EM gives the following examples of factors relevant to whether the Commission's be satisfied under s 235(2)(c)[38]

(a) the whole relationship between the parties and the dispute in that context;

(b) bargaining history;

(c) parties' conduct;

---

[34] *(DETE) v Australian Education Union* - 431/99 Print R4349 [1999] AIRC 450
[35] Although the former s 235(2)(e) has been repealed, the new s 235(2)(c) is in identical terms.
[36] *Mondelez* at [95], [98] per Edelman J
[37] (2022) 313 IR 376; [2022] FWCFB 42 at [70].
[38] At [847]

(d) prevailing economic conditions; and

(e) bargaining environment.

8.6 In addition to those set out in the Revised EM, ACCI considers that the following will likely be factors relevant to the Commission coming to the requisite satisfaction, especially in light of the legislative intention to facilitate bargaining and end intractable disputes:

(a) a mandatory consideration will be the views of the bargaining representatives;

(b) if there is no reasonable prospect of agreement being reached (s 235(2)(b)), that will itself be a compelling relevant circumstance as to the reasonableness of making the declaration in light of the statutory purpose;

(c) the length of the bargaining;

(d) the reasons for the intractability of the bargaining;

(e) any ongoing threat of industrial action;

(f) delays in payments, including pay increases, to employees;

(g) any impact on the employer's services and client base, which could in turn affect job security (compare the amended s 3(a) of the Act, which includes the promotion of job security as one of the Act's objects); and

(h) whether there is any alternative 'circuit-breaker' other than the declaration that will enable the parties to move on with their bargaining, that is, whether absent the Commission's intervention, the bargaining would founder.

JESSICA TINSLEY | jessica.tinsley@acci.com.au
Australian Chamber of Commerce and Industry
17 July 2023