IN THE FAIR WORK COMMISSION

Matter No: B2023/543

Appellant: VIRGIN AUSTRALIA REGIONAL AIRLINES PTY LTD

Respondent: AUSTRALIAN LICENSED AIRCRAFT ENGINEERS ASSOCIATION

OUTLINE OF SUBMISSIONS FOR THE AUSTRALIAN COUNCIL OF TRADE UNIONS

Introduction

1. Virgin Australia Regional Airlines Pty Ltd (**VARA**) has applied pursuant to s 234(1) of the *Fair Work Act* 2009 (Cth) (**FW Act**) for an intractable bargaining declaration in relation to a proposed enterprise agreement to replace the *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2017*. VARA contends that the Commission can be satisfied that the requirements for the making of an intractable bargaining declaration in s 235 have been met and the Commission should make such a declaration.

2. The ACTU is a peak council for the purposes of s 6 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) Act and s 12 of the FW Act and seeks to intervene in the proceedings for the purpose of making submissions in relation to the questions of statutory construction which arise. The ACTU seeks to be heard with respect to the proper interpretation of new provisions introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* 2022 (Cth), primarily ss 234-235A. The present proceedings represent the first occasion on which the Commission has been required to construe and apply these important new provisions.

3. The ACTU, and its affiliates, have an obvious interest in the proceedings. The Full Bench is likely to be required to consider questions as to the proper application of the new ss 234-235A in setting out when the Commission can make an intractable bargaining declaration. A declaration has significant consequences for unions and their members when participating in bargaining, including curtailing further bargaining[1], precluding protected industrial action[2] and opening the possibility of a workplace determination being made in

[1] Subject to any post-declaration negotiating period.
[2] FW Act, s 413(7)(c).

place of an agreement voted on by employees.[3] Affiliates of the ACTU are frequently bargaining representatives for proposed enterprise agreements and the ACTU wishes to be heard with respect to the proper construction of the new provisions.

Context of New Provisions

4. As will always be the case, it is necessary to understand the new provisions in their statutory context and having regard to the policy of the legislation. The FW Act continues, after the amendments implemented by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* 2022 (Cth), to demonstrate an emphasis on collective bargaining as the primary mechanism for a determining conditions of employment above the safety net of minimum terms and conditions established through the National Employment Standards, modern awards and national minimum wage orders. The Act, in s 3(f), continues to indicate the over-arching object of the Act is sought to be achieved, in part, by:

> *(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;* …

5. The objects of Part 2-4 in s 171(a), similarly, indicate that the Part is intended to "provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits."

6. As is explained in the Revised Explanatory Memorandum, the new provisions are intended "support the FWC to assist parties involved in bargaining for an new enterprise agreement to resolve disputes arising in bargaining" and to "support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them."[4] The "primary focus of the FW Act [remains] on supporting parties to reach their own agreements through collective bargaining in good faith", although the Commission would "have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties

[3] FW Act, s 269.
[4] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* 2022 at [821] and [827].

reaching agreement."[5] The focus of the new provisions is to enhance the support for industrial parties to reach agreement through the bargaining process.

Section 234

7. Section 234 sets out when an application can be made by a bargaining representative for an intractable bargaining declaration. Specifically, a bargaining representative may apply for such a declaration other than with respect to a greenfields agreement (s 234(1)) or in relation to a multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation (s 234(2)).

Section 235

8. Section 235 then sets out when the Commission may make an intractable bargaining declaration. Section 235(1) sets out objective circumstances that must exist for the Commission to be able to make a declaration, namely, that an application has been made, the Commission is satisfied of the matters in subsection (2) and it is after the end of the minimum bargaining period as determined in subsection (5) and (6).

9. Section 235(2) sets out the matters about which the Commission must be satisfied for it to make a declaration for the purposes of s 235(1)(b). There is a degree of overlap between paragraphs (a), (b) and (c) of s 235(2). It is possible for some factual circumstances to be relevant to whether the Commission can be satisfied as to one or more of those matters. It is, nonetheless, appropriate to address each of those matters in turn.

(a) Section 240 dispute

10. The matter in s 235(2)(a) is that the Commission be satisfied of two matters: (1) that it has dealt with "the dispute about the agreement" under s 240; and (2) that the applicant for a declaration "participated in the FWC's processes to deal with the dispute". In many cases, the matter in s 235(2)(a) will raise a relatively straightforward factual issue as to whether application has been made under s 240 for the Commission to deal with a dispute about

[5] Revised Explanatory Memorandum at [108].

the agreement and whether the applicant participated in the process. There may, however, be issues which arise in relation to the satisfaction of the requirement:

11. First, s 235(2)(a) refers to "the dispute about the agreement" not any dispute about the agreement. Section 240(1) permits any dispute about the agreement to be subject of a bargaining dispute application. The reference to "the dispute about the agreement" in the context of s 235(2)(a), having regard to the fact that the application is for an intractable bargaining declaration, must be understood to be a reference to "the dispute" which is impeding resolution of the bargaining. Prior proceedings under s 240 might not be sufficient if unconnected with the impediments to the resolution of the bargaining at the time of the application.

12. Second, s 595(2) makes clear that the Commission has broad powers as to how to "deal with" a dispute notified under s 240 however it considers appropriate, including by mediation or conciliation or by making a recommendation or expressing an opinion albeit it can only arbitrate if the bargaining representatives agree.[6] Whether the applicant has "participated in the FWC's processes" for the purposes of s 235(2)(a) must be assisted by reference to whether it has participated in whatever steps or processes the Commission has considered appropriate in the context of the particular dispute.

13. Third, the concept of the Commission having "dealt with" the dispute contemplates that the Commission has dealt with the proceedings under s 240 to conclusion. In the context of s 235, and particularly having regard to the consideration in s 235(2)(b), it is apparent that the intention of the provision is that an intractable bargaining declaration be available only if all efforts of the Commission to revolve the dispute, using its powers under s 595, have not been successful. The Commission having dealt with the dispute to any extent may not be sufficient.

(b) No reasonable prospect of agreement

14. The matter raised in s 235(2)(b) is that the Commission must be satisfied there is no reasonable prospect of agreement being reached if a declaration is not made. Whether there is a reasonable prospect of agreement being reached invites objective speculation as

[6] FW Act, s 240(4).

to what is likely to occur if a declaration is not made and, presumably, bargaining continues. The explanatory memorandum indicates, consistent with the language, that:[7]

> *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.*

15. The threshold of there being a "reasonable prospect" of a future event occurring is not unknown in other contexts. Ordinarily, a reasonable prospect of an event coming to pass means a real chance as opposed to a prospect that should be treated as merely fanciful or as one that should sensibly be ignored by a reasonable person.[8] A reasonable prospect obviously does not entail that it is more likely than not that agreement will be reached, merely that there be a chance which is not able to be dismissed as not being reasonable.[9] The prospect of an event occurring will not be reasonable if it is "obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous."[10]

16. Although it is, of course, necessary to construe a provision in its particular statutory context,[11] the context here does not suggest an appreciably different meaning should be applied to the expression in s 235(2)(b). As has been explained, the context is that the FW Act continues to prioritise bargaining being resolved between bargaining representatives through the bargaining process. That is consistent with the Commission being empowered to make an intractable bargaining declaration if satisfied that the prospect of agreement being reached is not reasonable in the sense that it not fanciful to suggest that agreement might not be reached if bargaining continues.

17. There are obviously a range of circumstances that may be relevant in a particular case when the Commission comes to assessing whether it can be satisfied there is no reasonable prospect of agreement being reached. Relevant considerations are likely to include:

    (a) Whether the parties have explored reasonable options and processes for the resolution of the bargaining. The explanatory memorandum, for example, suggests

---

[7] Revised Explanatory Memorandum at [846].
[8] See, in various contexts, *Cadogan v McCarthy & Stone (Developments) Ltd* [2002] L&TR 249 at 253-254; *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284 at [23]-[24]; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [131].
[9] *Cadogan v McCarthy & Stone (Developments) Ltd* [2002] L&TR 249 at 253-254; *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284 at [23].
[10] *East v Repatriation Commission* (1987) 16 FCR 517 at 532; *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 414, 428.
[11] Virgin Submissions at [24].

that the Commission is unlikely to reach the relevant state of satisfaction unless the parties have exhausted all reasonable efforts to reach agreement.[12] Until there is exploration of options for resolution of outstanding issues, it is not be able to be said that there is no reasonable prospect of resolution.[13]

(b) The nature of the issues which remain in dispute and the state of the bargaining is likely to be relevant. Although not dictating that the parties should reach agreement on particular terms, the Commission would be entitled to consider the matters that remain in dispute and whether the positions of the parties with respect to those issues are apparently unbridgeable having regard to their nature, the interests of the parties and the parties' conduct in bargaining.

(c) The history of past bargaining periods involving the same industrial parties. If, for example, the industrial parties have in the past managed to reach agreement after protracted bargaining and following apparently intractable disputes, the Commission may not be satisfied there is no reasonable prospect of agreement being reached on a later occasion. The Commission is "well populated with enterprise agreements that have experienced an impasse or stalemate."[14]

(d) The passage of time may be relevant to the assessment but ought not be treated as determinative. Although s 235(5) and (6) set a minimum period before an intractable bargaining declaration can be made, the mere passage of time does not necessarily suggest there is no reasonable prospect of agreement being reached. The assessment must be made by reference to the circumstances as they exist at the time of the application looking forward.

(e) The stated position of an applicant that, in its view, there is no reasonable prospect of agreement being reached should be treated with circumspection and the actual position of the parties revealed in bargaining examined. Otherwise, there is a danger that such an assertion would be self serving and at odds with past practical experience.[15] An examination of the actual conduct of the parties and the objectively likely course of bargaining is likely to be a better guide.

---

[12] Revised Explanatory Memorandum at [846].
[13] *Prysmian Power Cables and Systems Australia Pty Ltd v National Union of Workers* [2010] FWA 9402 at [94]-[95].
[14] *United Voice v MSS Security Pty Ltd* [2013] FWC 4557 at [91].
[15] *United Voice v MSS Security Pty Ltd* [2013] FWC 4557 at [91].

18. Section 235(2)(b) has an historical analogue in s 89A(7)(b) of the *Workplace Relations Act* 1996 (Cth). That section permitted an "exceptional matter" to be part of an industrial dispute if the Commission was satisfied, among other things, that "there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission." Authorities applying the section, such as they are, generally involved an examination of the history of the negotiations and the basis of the positions of the parties.[16]

(c) Reasonable in all the circumstances

19. The matter raised in s 235(2)(c) is that the Commission must be satisfied it is reasonable in all the circumstance to make the declaration taking into account the views of all the bargaining representatives for the agreement. The formulation "reasonable in all the circumstances" is utilised in provisions dealing with majority support determinations, scope orders and bargaining orders and plainly involves a very broad value judgment having regard to all of the circumstances existing at the date of the determination is to be made.[17]

20. Circumstance that are likely to relevant to an assessment as to whether it is reasonable to make a declaration will vary from case to case, but may include:

    (a) The conduct of the parties in bargaining and the history of the bargaining is likely to be relevant.[18] In particular, if the evidence demonstrates that the applicant seeking the making of a determination has been intransigent, uncooperative or recalcitrant in the bargaining process, that is likely to tend against a conclusion that it is reasonable in the circumstances to make a determination.

    (b) The history of the relationship and of collective bargaining between the parties is likely to be relevant. The explanatory memorandum indicates that the Commission may consider the dispute in the context of the whole of the relationship between the parties.[19] If the industrial parties, or the relevant industry, has historically been subject to collective agreements and heavily contested bargaining ultimately, that

[16] See, for example, *Australian Collieries' Staff Association v Gordonstone Coal Management Pty Ltd* (1999) 89 IR 229 at 235-236; *Community and Public Sector Union v State of Victoria* (1999) 89 IR 270 at 278-279.
[17] *Donnybrook Holdings Pty Ltd t/a TES Electrical v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2021] FWCFB 1825 at [20].
[18] Revised Explanatory Memorandum at [847].
[19] Revised Explanatory Memorandum at [847].

may be a factor against a declaration being made. On the other hand, if the industrial parties or the relevant industry does not have a history of successful bargaining or the advancement of conditions of employment through collective bargaining, that fact may be a factor in favour of a declaration being made.

(c) The fact of protected industrial action being taken in the course of bargaining, or the impact of protected action, is unlikely to be a relevant or persuasive factor. If protected action is causing, or threatening to cause, undue economic harm, endangering the life, the personal safety or health, or the welfare, of the population or of part of it or damaging third parties, other avenues are available to curtail protected action.[20] The focus of s 235 is on the state or intractability of the bargaining rather than protected action. In fact, continuing or threatened protected action may indicate that there are prospects of the bargaining being resolved.

(d) The impact of the difficulties being encountered in resolving the bargaining on the parties may also be relevant. For example, if the failure to resolve bargaining has resulted in employees not receiving a pay rise for an extended period during a period of high inflation, that circumstance may favour a conclusion that the making a declaration would be reasonable in all the circumstances thereby permitting the bargaining to be resolved by determination.

21. VARA suggests that the views of bargaining representatives is a neutral consideration in this case on the basis, it appears, that the views of ALAEA and VARA cancel each other out.[21] With respect, that represents a remarkably simplistic approach. Consideration of the views of the bargaining representatives is not a mere numerical exercise of counting how many bargaining representatives favour or oppose a declaration. The Commission would consider not merely the stated position of the bargaining representatives, but also the rationale for their respective views, the reasonableness of their positions and consistency with statutory policy.

[20] FW Act, ss 423, 424 and 426.
[21] Virgin Submissions at [31].

Residual Discretion

22. VARA suggest that there is no residual discretion conferred on the Commission as to whether to make an intractable bargaining declaration despite the use of the word "may" in s 235(1).[22]

23. The better view is that s 235(1) confers a discretion albeit the discretion will likely add little in most cases in light of the consideration in s 235(2)(c). The use of the word "*may*" in relation to an act or thing indicates, in the absence of contrary intention, that the act or thing is at the discretion of the person, court or body.[23] The explanatory memorandum supports the view that Parliament intended that the Commission have a discretion to make a determination if the requirements in s 235(1) are met, including the Commission being satisfied of the matters in s 235(2).[24]

24. The immediate statutory context is also instructive. The contrast between the use of the word "may" in s 230(1) (bargaining orders), s 235(1) (intractable bargaining determinations) and s 238(4) (scope orders) and the word "must" in s 237(1) (majority support determinations) suggests that the word "may" was deliberately used to confer a discretion. Each of those sections requires that the Commission be satisfied it is reasonable in all the circumstances to make the relevant order or determination. Nonetheless, the language used indicates a deliberate choice to confer a residual discretion in the case of s 235(1) as to whether to make an intractable bargaining declaration.

Post-Declaration Negotiating Period

25. VARA submits that no post-declaration negotiating period should be specified in the event that a declaration is made because it would be inutile. It suggests that satisfaction as to s 235(2)(b) effective makes it so.[25]

26. Such an approach is inconsistent with the statutory scheme. Although it has been left to the discretion of the Commission as to whether a post-declaration negotiating period should be specified, the fact that Parliament has made provision for such a period suggests

[22] Virgin Submissions at [38]-[39].
[23] *Acts Interpretation Act* 1901 (Cth), s 33(2A).
[24] Revised Explanatory Memorandum at [842].
[25] Virgin submissions at [43].

that satisfaction of s 235(2)(b) is not intended to foreclose that a post-declaration negotiating period is appropriate. The making of a declaration (and the prospect of an intractable bargaining workplace determination) has the potential at least to change the position of the parties and the dynamics of the negotiations so as to warrant consideration of whether a negotiating period should be specified.

MARK GIBIAN SC

Counsel for the ACTU

HB Higgins Chambers – gibian@hbhiggins.com.au

Dated: 17 July 2023