

STUCK IN THE TERMINAL WITH THE GATES FIRMLY SHUT: SUSPENSION AND TERMINATION OF INDUSTRIAL ACTION AFTER QANTAS

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The foreshadowed lockout by Qantas on Saturday, 29 October 2011 of approximately 3000 employees affecting potentially hundreds of thousands of passengers globally, with no warning to the public, sharply focused the public mind on the powers of the Federal industrial tribunal to intervene in industrial disputes. Scenes of stranded passengers, late night Fair Work Australia (FWA) hearings and the interventions by Federal and state governments captured the public's attention in ways reminiscent of some of the nation-stopping oil industry disputes of the 1970s and 1980s.

Why, people asked, did Qantas have to act so precipitously? Why couldn't the industrial relations system have avoided such a calamity? Trade unions were quick to claim that Qantas had it all planned,¹ which was denied vigorously by Qantas' CEO, Alan Joyce.² Federal minister for Workplace Relations, Bill Shorten MP labelled Qantas' decision as a 'radical over-reaction [with] certainly no warning.'³ Approximately one month later, the unions and the Australian Labour Party (ALP) would combine at the ALP National Conference to formally respond to the dispute through policy. A plan to investigate whether FWA should be handed greater powers to arbitrate Qantas-type disputes now forms part of the ALP National Policy Agenda.⁴

For practitioners and scholars, the Qantas dispute has created an important debate about FWA's power to arbitrate these kinds of damaging industrial disputes. FWA's swift response to terminate Qantas' intended lockout, in a decision handed down at 2:00 am on the morning on 31 October 2011,⁵ invites analysis of the powers of FWA to deal with protracted disputes and the legislative policy drivers at work.

The purpose of this article is to do just that, by first providing the context and history of how such disputes were settled by predecessor industrial tribunals. The authors then summarise FWA's current jurisdiction and give a précis of relevant decisions that have been handed down since the passage of the Fair Work Act 2009 (Cth) ('FW Act'). That analysis colours the subsequent discussion of the Qantas dispute. In concluding, the authors join the chorus and offer their thoughts on policy and possible changes to the FW Act.

I THE HISTORY OF INDUSTRIAL ACTION AND TRIBUNAL INTERVENTION

A New Beginnings

Until Paul Keating's reforms (the *Industrial Relations Reform Act 1993* (Cth)), Federal industrial legislation (and also generally state industrial legislation) was dominated by an award system, which set wages and conditions for employees in a centralised way. The Federal industrial tribunal (known as the Australian Conciliation and Arbitration Commission until 1 March 1989, and subsequently, the Australian Industrial Relations Commission (AIRC) until 1 July 2009) achieved this through a combination of compulsory arbitration underpinned by

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¹ Simon Lauder, 'Unions Say Qantas Grounding was Premeditated', *ABC News* (online), 30 October 2011 <<http://www.abc.net.au/news/2011-10-30/unions-say-qantas-grounding-was-premeditated/3608726>>.

² Senate Rural Affairs and Transport Legislation Committee, Parliament of Australia, *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and Qantas Sale Amendment (Still Call Australia Home) Bill 2011* (2010) 8-10.

³ ABC, 'Interview with Bill Shorten', *Insiders*, 30 October 2011 (Bill Shorten), available at <<http://www.abc.net.au/insiders/content/2011/s3351474.htm>>.

⁴ See Australian Labor Party, *Platform* (as enacted at the 46th ALP National Conference, Sydney, 4 December 2011), ch 5.

⁵ *Re Minister For Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA 7444 (31 October 2011) ('Qantas').

conciliation.⁶ A central feature was that any legislative regulation of industrial action was largely non-existent, and industrial action was treated as a *de jure* civil wrong.⁷

The major change arising from Keating's reforms was the introduction of 'certified agreements', a vehicle for setting employee conditions at the enterprise-level. Part-and-parcel with this reform was the legalisation of industrial action by making industrial action taken in support of enterprise bargaining immune from civil suit (hence the notion 'protected industrial action'). The reforms provided for the initiation of 'bargaining periods' by unions, and during the bargaining period, protected action taken by a union in support of enterprise bargaining claims would be immune from civil suit.⁸ A precondition to taking protected action was that 72 hours notice of the protected action had to be given to the employer and the union parties had to have first tried to reach an agreement with the employer.⁹

Importantly, the AIRC was given the power to suspend or terminate the bargaining period. The grounds upon which the AIRC could suspend or terminate the bargaining period were limited compared to provisions in later legislation. The AIRC had to be satisfied that:

- (a) a negotiating party that has organised or is organising, or has taken, industrial action to support or advance claims that are the subject of the industrial dispute:
 - (i) *is not genuinely trying to reach an agreement with the other negotiating parties in settlement of the industrial dispute; or*
 - (ii) *has failed to comply with any directions by the Commission relating to negotiating in good faith; or*
- (b) industrial action that is being taken to support or advance claims that are the subject of the industrial dispute is threatening:
 - (i) *to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or*
 - (ii) *to cause significant damage to the Australian economy or an important part of it; or*
- (c) if the bargaining period relates to employees employed in a part of a single business, or at a single place of work in a single business, and the initiating party is not complying with an award or order, or a direction of the Commission, in relation to another part of the single business or another place of work in the single business.¹⁰

If a bargaining period was terminated under this section, then the AIRC could, after exercising conciliation powers, arbitrate the outcome.¹¹ In other words, the AIRC was given a power to determine the terms of the enterprise agreement, and the arbitrated outcome was referred to as an award (in reality it was not an award but an arbitrated enterprise agreement).¹² In addition, suspending or terminating the bargaining period meant that the industrial action ceased to be protected. The sanctions for taking *unprotected* action were to be found outside the confines of the Federal industrial legislation. The union parties and the employees became susceptible to common law legal action by the employer, under what are generally referred to as the industrial torts.¹³

B The Workplace Relations Act Reforms

The election of John Howard's coalition saw the passage of the *Workplace Relations Act 1996* (Cth) ('*WR Act*'). In many ways, changes created by the *WR Act* were evolutionary rather than revolutionary. The *WR Act* did introduce provisions allowing the AIRC to order a 'secret ballot' to establish whether employees wanted to take protected action.¹⁴ But otherwise, the provisions relating to initiation of bargaining periods and allowing for protected action were at least conceptually the same.

⁶ See generally Malcolm Rimmer, 'Unions and Arbitration' in Joe Isaac and Stuart MacIntyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004); Bill Harley, 'Managing Industrial Conflict' in Joe Isaac and Stuart MacIntyre, *The New Province for Law and Order: 100 Years of Industrial Conciliation and Arbitration* (Cambridge University Press, 2004).

⁷ See generally Bill Harley, above n 6, 338-45.

⁸ *Industrial Relations Act 1988* (Cth) (as enacted at 18 February 1994) s 170PM.

⁹ *Ibid* ss 170PH(1)-PI(1).

¹⁰ *Ibid* s 170PO (emphasis added).

¹¹ *Ibid* s 170PP(2).

¹² *Industrial Relations Act 1988* (Cth) (as enacted at 18 February 1994) s 170PP(3).

¹³ 'Industrial torts' are actions that grant relief for the wrongful infliction of economic loss in an industrial context. The most commonly litigated industrial tort is interference with contract. See generally Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 797 - 806; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 93-108.

¹⁴ See *Workplace Relations Act 1996* (Vic) (as enacted at 20 January 1997) pt VI div 4.

The AIRC's jurisdiction to suspend or terminate a bargaining period was slightly altered. Most significant was a new ground that allowed suspension or termination if protected action was being taken against an employer to advance claims in respect of employees who were not members of the union or eligible to be members of the union.¹⁵ The grounds for suspension or termination if life, safety, health was threatened, or if significant economic damage was threatened, were substantially replicated within s 170MW(3) of the *WR Act*.

Significantly, the High Court in *Coal and Allied Operations Pty Ltd v AIRC* examined the scheme as it stood under the *WR Act*, and made the following comments about some of the statutory language that would be replicated in later legislation:

*The nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment. A decision under that sub-section would involve appealable error if, for example, regard was had to irrelevant material, relevant material was disregarded, or, although there was some factual material by reference to which the decision-maker might be satisfied, he or she mistook those facts. If the Full Court intended to suggest otherwise, it was wrong. More to the point, however, is that a decision under s 170MW(3)(b) that industrial action is 'threatening ... to cause significant damage to the Australian economy or an important part of it' is not simply a matter of impression or value judgment. The presence of the words 'significant' and 'important' in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question.*¹⁶

C *The WorkChoices Reforms*

By enacting the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*WorkChoices*'), the Howard government removed a number of powers that had traditionally been given to Federal industrial tribunals. For example, even the power to scrutinise and approve enterprise agreements was removed from the AIRC and given to a new entity (the Office of the Employment Advocate).¹⁷ That said, changes in relation to the taking of protected action and the powers of the AIRC to suspend or terminate were again evolutionary rather than revolutionary.¹⁸ One important change was the removal of protection for industrial action taken in support of 'pattern bargaining' claims¹⁹ (i.e. bargaining claims across two or more agreements to obtain common wages and conditions across two or more enterprises).²⁰

Two new grounds for suspending or terminating a bargaining period were given to the AIRC. Negotiating parties were now able to obtain a 'cooling-off'. The AIRC was required to suspend if it considered suspension was appropriate, having regard to whether suspending the bargaining period would be beneficial in assisting to resolve matters at issue. The AIRC was also required to consider whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of the *Workplace Relations Act*.²¹

The second new ground was directed at significant harm to a third party, or in other words, a party that that was not a negotiating party. If third party harm was established, the AIRC was required to suspend (but could not terminate) for a period not exceeding three months. Again, the AIRC had to take into account a public interest test. Factors that the AIRC was required to consider before suspension on this ground included:

- (a) if the [third party] was an employee - the extent to which the industrial action affected the interest of the person as an employee;
- (b) the extent to which the [third party] was particularly vulnerable to the effects of the industrial action;
- (c) the extent to which the action threatened to:
 - damage the ongoing viability of a business carried on by the [third party]; or
 - disrupt the supply of goods or services to a business carried out by a [third party]; or

¹⁵ *Workplace Relations Act 1996* (Vic) (as enacted at 20 January 1997) s 170MW(4).

¹⁶ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 208 [28] per Gleeson CJ, Gaudron and Hayne JJ (emphasis added).

¹⁷ *WorkChoices* (the *Workplace Relations Act* as enacted at 27 March 2006) pt 8 div 5.

¹⁸ See generally Greg McCarry 'Industrial Actions under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133; Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *Australian Journal of Labour Law* 198.

¹⁹ *WorkChoices* (the *Workplace Relations Act* as enacted at 27 March 2006) pt 9 div 3 subdiv B.

²⁰ *Ibid* s 421.

²¹ *Ibid* s 432.

reduce the [third party's] capacity to fulfil a contractual obligation; or
cause other economic loss to the [third party].²²

The third party harm ground recognised that protected action, whilst justified as a tool for creating pressure to reach agreement, could cause other persons significant damage. The Minister for Workplace Relations was given standing to apply under this ground in order to facilitate such applications.²³ The Minister was also empowered to terminate the bargaining period upon their own motion if satisfied that the protected action was adversely affecting the parties and a threat to health, safety or welfare of the population, or a threat of significant damage to the economy, existed.²⁴

D *The Fair Work Act Reforms*

The election of the Rudd government, on the back of a fierce campaign to abolish the controversial aspects of WorkChoices, resulted in passage of the *Fair Work Act 2009* (Cth) ('FW Act'). Instead of working within existing legislation and institutions, the Rudd government consolidated and revamped the existing framework, and established the supposed 'one-stop-shop', FWA.²⁵

Insofar as the law regarding the powers to suspend or terminate, one new ground was created to cater specifically for the bargaining parties. FWA was given the discretion to suspend or terminate if a protected action was causing or threatening to cause significant economic harm to both the employees and employer.²⁶ The other grounds established through the successive reforms were maintained, although the machinery behind them was slightly altered. A wider range of options for affected parties to pursue suspension or termination has resulted.

II THE SCHEME IN THE FAIR WORK ACT

Changes made to suspension and termination of industrial action by the *Fair Work Act 2009* (Cth) is best understood when considered against the scheme underpinning them. That scheme commences in section 3, which sets out a number of objects of the legislation including:

- (f) achieving productivity and fairness through an emphasis on enterprise-level bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.²⁷

Part 3-3 of the *Fair Work Act* gives effect to this object allowing employees and unions to organise and engage in protected action in support of claims for improvements in wages and conditions. As the explanatory memorandum explains:

The bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.²⁸

²² Ibid s 433.

²³ Ibid s 433(1)(b)(ii).

²⁴ Ibid s 498. Note that under s 30J of the *Crimes Act 1914* (Cth), the Federal Government can issue a proclamation that prohibits industrial action in connection with the transport of goods, the conveyance of passengers, or the provision of any Commonwealth public service. Any person that engages, incites or encourages such industrial action after a proclamation is guilty of an offence punishable by a maximum of 1 year imprisonment. Section 30J has not been utilised since its inception in 1926.

²⁵ See generally Andrew Stewart, 'Fair Work Australia: The Commission Reborn?' (2011) 53(5) *Journal of Industrial Relations* 563.

²⁶ *Fair Work Act 2009* (Cth) s 423.

²⁷ *Fair Work Act 2009* (Cth) s 3(f).

²⁸ Explanatory Memorandum, Fair Work Bill 2008 (Cth) cl 267-68.

Implicit in the structure of the *FW Act* is recognition that the right to strike is the primary bargaining tool open to employees and their unions. This reflects the obligations Australia has entered into under International Labour Organisation treaties,²⁹ but also is a long-standing principle of labour law aptly articulated by Sir Otto Kahn Freund, who argued that the right to strike counters the power imbalance in the employee-employer relationship:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.' The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.³⁰

The *FW Act* continues to restrict protected action to certain times or circumstances, but has eliminated the concept of a 'bargaining period' and replaced it with the right to take protected action after the expiry date of an existing enterprise agreement.³¹ A ballot is still required to approve the taking of protected action.³² Notably, the only form of protected action allowed by employers is a limited form of lockout, termed an 'employer response action'. The employer can only lawfully lockout its employees *in response* to protected action organised or engaged in by employees and their unions.³³

III SUSPENDING OR TERMINATING PROTECTED ACTION UNDER THE FW ACT: AVENUES, OUTCOMES AND GROUNDS

Under the *FW Act*, termination and suspension of protected action has become a prescriptive and complex area of labour law. In order to demystify it, it is useful to categorise the key requirements into categories; being 'avenues' (pathways that can lead to the protected action ceasing), 'outcomes' (how the protected action can cease) and 'grounds' (circumstances that give rise to the jurisdiction to cease the protected action). Under the scheme, avenues and outcomes differ depending upon each ground.

There are five 'avenues' through which protected action could be suspended or terminated under part 3-3 of the *FW Act*. They are:

- (a) upon an application to FWA by the parties (i.e. the employer or trade union);
- (b) upon an application to FWA by a third party;
- (c) on FWA's own initiative;
- (d) upon application to FWA by the Federal Minister for Workplace Relations or a state/territory minister with responsibility for workplace relations; or
- (e) by a ministerial declaration by the Federal Minister for Workplace Relations (without application to FWA).

There are three 'outcomes'. Protected action can be terminated, and the right to protected action ceases. FWA is then able to arbitrate the dispute (termed a 'workplace determination') if the parties fail to negotiate an agreement after a 21 day period (extendable to 42 days).³⁴ Secondly, it can be suspended for a defined period of time that FWA determines as appropriate.³⁵ Thirdly, FWA can order a cooling-off if satisfied that it would assist the parties in resolving the dispute at hand. Only one extension of the period of suspension or cooling-off is

²⁹ *Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87)*, open for signature 31 August 1948, 68 UNTS 17 (entered into force 4 July 1950); *Right to Organise and Collective Bargaining Convention (ILO No. 98)*, opened for signature 18 August 1949, 96 UNTS 257 (entered into force 18 July 1951). Both treaties were ratified by the Whitlam government on 28 February 1973.

³⁰ Otto Kahn-Freund, *Labour and the Law* (Stevens and Sons, 2nd ed, 1977) 6.

³¹ *Fair Work Act 2009* (Cth) s 417(1). Conceptually this has always been the case since the *WR Act* was enacted.

³² *Ibid* s 409(3).

³³ *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360, 370 [27]; Shae McCrystal, 'The Fair Work Act 2009 (Cth) and the Right to Strike' (2009) 23(1) *Australian Journal of Labour Law* 3.

³⁴ *Fair Work Act 2009* (Cth) s 266.

³⁵ *Ibid* ss 423–27.

available.³⁶ Importantly, if one of these outcomes is ordered, it applies to *all* the protected action on foot in the dispute, not just the protected action that is threatened or being taken and is the subject of the application.³⁷

The three outcomes, through the five avenues, can only be triggered if certain 'grounds' are occurring or are likely to occur. There are six separate grounds. The grounds have mostly been adapted from the successive reforms to industrial legislation described above, in that they focus on harm to health and welfare of persons and/or the economy. However they have been slightly expanded in each case. In its short history, FWA has been required to adjudicate upon each ground brought under almost every avenue. A summary of each ground, along with the major cases that have been brought under them, is offered below.

A *Ground 1: Significant Economic Harm to the Employer and Employees (s 423)*

Under s 423, FWA has discretion to suspend or terminate protected action should it be causing 'significant economic harm' to the employer and employees. Applications may be made under all avenues, except by application from a third party. FWA must be satisfied that:

- the protected action is causing, or threatening to cause, significant economic harm to the employer and employees;³⁸
- the protected action must be occurring and have occurred for a protracted period of time;³⁹
- the dispute that is subject of the protected action will not be resolved for a protracted period of time;⁴⁰ and
- if the significant economic harm has not yet eventuated, the risk of it occurring must be imminent.⁴¹

If the protected action is a retaliation in response to other protected action (for example, a lockout in response to employee protected action), then FWA will only consider the harm that is borne by the employees in such action.⁴² In determining what constitutes 'significant economic harm', the factors that FWA is to have regard to include the following:

- (4) the source, nature and degree of harm suffered or likely to be suffered;
 - (a) the likelihood that the harm will continue to be caused;
 - (b) the capacity of the person (i.e. employee or employer) to bear the harm;
 - (c) the views of the person and the bargaining representatives for the agreement;
 - (d) whether the bargaining representatives have met the good faith bargaining requirements during negotiations;
 - (e) whether the bargaining representatives have not contravened any bargaining orders in relation to the agreement;
 - (f) the objective of promoting and facilitating bargaining for the agreement; and
 - (g) if FWA is considering terminating the protected action (rather than suspend it):
 - (i) whether the bargaining representatives genuinely are 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.⁴³

At the time of writing, s 423 had been considered five times by FWA,⁴⁴ and in all but one case the application has failed. This can be explained by the fact that employees will usually collectively endorse the

³⁶ Ibid s 428.

³⁷ *National Tertiary Education Union v University of South Australia* (2010) 194 IR 30, 33 [11].

³⁸ *Fair Work Act 2009* (Cth) s 423(2).

³⁹ Ibid s 423(6)(a).

⁴⁰ Ibid s 423(6)(b).

⁴¹ Ibid s 423(5).

⁴² Ibid s 423(3).

⁴³ *Fair Work Act 2009* (Cth) s 423(4).

⁴⁴ Successful cases: *Schweppes Australia Pty Ltd v United Voice* (B2012/461, Kaufman SDP, 10 February 2012, decision delivered on transcript) ('*Schweppes*'). Unsuccessful cases: *Prysmian Power Cables and Systems Australia v National Union of Workers* [2010] FWA 9402 (7 December 2010); *Nyrstar Port Pirie v Construction, Forestry, Mining and Energy Union* [2009] FWA 1148 (16 November 2009) and *Schweppes Australia Pty Ltd v United Voice* [2011] FWA 9329 (29 December 2011); *POAGS Pty Ltd v Maritime Union of Australia* [2012] FWA 114 (9 January 2012).

protected action, despite any suffering that may be inflicted, and will campaign against such an order.⁴⁵ In those circumstances, and noting that employee harm is a prerequisite to an order even when employer harm is evident, it is difficult to establish that protected action is causing significant economic harm upon employees. In *Schwepes*, the only successful case to date, this issue was overcome when a number of employees wrote to FWA (on an anonymous basis) to ask that the protected action stop. Based on the contents of those letters, Kaufman SDP summonsed the parties to FWA, and requested submissions as to whether he ought to terminate the protected action on his own motion. After an affidavit was filed confirming the thrust of those letters, Kaufman SDP terminated the protected action after a lockout that had lasted 58 days.⁴⁶

B *Ground 2: Endangering the Life, Safety or Wellbeing of the Population (s 424(1)(c))*

Under s 424(1)(c), FWA must suspend or terminate protected action if satisfied that the action is or is going to endanger life, personal safety, health or welfare of the population or part of it. Applications may be made under all avenues, except by application from a third party. The concepts of 'endanger', 'life', 'health', 'safety' and 'welfare' are not defined in the *FW Act*, and the Explanatory Memorandum is of little assistance. The concepts take their ordinary English meaning.

At the time of writing, FWA has been called upon to interpret s 424(1)(c) twelve times, and six applications have resulted in either suspension or termination.⁴⁷ Cases to date have concerned service providers of essential goods such as health care and utilities, and accordingly, FWA has taken a more sensitive and interventionist approach. FWA has not looked favourably upon a failure to customise protected action in order to limit any potential harm that may be caused to life, safety or wellbeing.⁴⁸

C *Ground 3: Significant Harm to a Third Party (s 426)*

Under s 426, FWA has power to suspend, but not terminate, protected action should it be causing significant harm to a person that is not the employer, employees or bargaining representative. Only two avenues, being upon application by a third party or application by the Minister, are available under this ground. Whilst the inquiry is directed at 'significant harm', and not 'significant economic harm' (as in s 423), FWA has equated the tests to be of the same nature.⁴⁹ To gain such an order FWA must be satisfied of the following:

- (a) the protected action must be causing significant economic harm to a third party;⁵⁰
- (b) the protected action must be 'adversely affecting' either the employer or the employees;⁵¹ and
- (c) protected action must be on foot (rather than merely threatening, pending or probable).⁵²

⁴⁵ See, eg, *Prysmian Power Cables and Systems Australia v National Union of Workers* [2010] FWA 9402 (7 December 2010) [47], [92] where a unanimous resolution was passed by employees requesting the tribunal not to order a termination of the protected action. Cargill C concluded that the resolution indicated that the protected action did not meet the requisite magnitude to be significant for employees.

⁴⁶ *Schwepes*, Transcript, PN5-15, 503-530.

⁴⁷ Successful cases: *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (2009) 187 IR 119; *National Tertiary Education Union v University of South Australia* (2010) 194 IR 30; *Re Pelican Point Power Limited* [2010] FWA 8666 (10 November 2010); *State of Victoria v Community and Public Sector Union* [2011] FWA 9245 (23 December 2011); *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWA 8165 (15 December 2011). Unsuccessful cases: *Tyco Australia Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2011] FWA 1598 (24 March 2011); *Minda Inc v Liquor, hospitality and Miscellaneous Union* [2010] FWA 3753 (14 May 2010); *Minda Inc v Liquor, Hospitality and Miscellaneous Union* [2010] FWA 3217 (27 April 2010); *Geo Group Australia Pty Ltd v United Voice* [2011] FWA 9025 (22 December 2011); *St John Ambulance Australia (NT) Inc v United Voice* [2011] FWA 4782 (21 July 2011); *Toyota Motor Corp Australia Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2011] FWA 6268 (12 September 2011); *G4S Custodial Services Pty Ltd v Health Services Union of Australia* [2011] FWA 5902 (1 September 2011).

⁴⁸ See *University of South Australia v National Tertiary Education Union* [2009] FWA 1535 (4 December 2009) [39] where O'Callaghan SDP was implicitly critical of the NTEU's refusal to modify a ban on marking student assessments to accommodate graduating students.

⁴⁹ The test under the *Fair Work Act 2009* (Cth) s 423, while setting out a greater number of factors, does not direct that FWA consider only the listed factors. As such, it can be inferred that FWA has discretion to consider anything additionally relevant, akin to the test in s 426. See *Prysmian Power Cables and Systems Australia v National Union of Workers* [2010] FWA 9402 (7 December 2010) [84] per Cargill C.

⁵⁰ *Fair Work Act 2009* (Cth) s 426(3).

⁵¹ *Fair Work Act 2009* (Cth) s 426(2).

⁵² *Fair Work Act 2009* (Cth) s 426(1).

FWA must also be satisfied that the suspension is ‘appropriate’, by taking into account:

- (a) whether the suspension would be contrary to the public interest or the objectives behind the *FW Act*; and
- (b) any other matter that FWA considers relevant.⁵³

In assessing significant harm, FWA is again entitled to take account of any matter it considers relevant, but can consider the extent that the protected action threatens to:

- (a) damage the ongoing viability of the third party's enterprise;
- (b) disrupt the supply of goods or services to the third party;
- (c) reduce the third party's capacity to fulfil a contractual obligation; and
- (d) cause any other economic loss caused to the person.⁵⁴

This ground has only been determined once, unsuccessfully, in *CFMEU v Woodside Burrup*.⁵⁵ In *Woodside*, a Full Bench of FWA confirmed how the suspension and termination provisions generally operate in light of the legislative intention behind the *FW Act*, and has proved to be the most significant decision concerning suspension or termination of protected action to date. In an expansive interpretation, the Full Bench concluded that ‘substantial harm to third parties is a common consequence of effective industrial action,’⁵⁶ and went on to hold:

*[T]he word ‘significant’ indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under s 426 in very rare cases ... Unless the harm is out of the ordinary then suspension would be contrary to the legislative intention that suspension should not be able to be used generally to prevent legitimate protected industrial action in the course of bargaining.*⁵⁷

The Full Bench reasoned that the basis for such a high threshold was justified once the right to strike, as enshrined in international law and reflected in the *FW Act*’s extrinsic materials, was duly considered and applied.⁵⁸ Arguably, this reasoning goes further than that articulated by the High Court in *Coal and Allied Operations Pty Ltd v AIRC*, extracted above. The reasoning in *Woodside* has been influential in subsequent decisions and partly explains the number of failed applications across each ground.

D Ground 4: If FWA Considers that a Cooling-Off is Appropriate (s 425)

Under s 425, FWA must suspend protected action for a cooling-off period if FWA is satisfied it is appropriate. Only one avenue, being an application by the bargaining representatives, is available. In determining such an application, FWA is to take into account:

- (a) whether the suspension would be beneficial to the bargaining representatives in assisting in the resolution of outstanding matters;
- (b) the duration of the protected action;
- (c) whether the suspension would be contrary to the public interest or inconsistent with the objects of the *FW Act*; and
- (d) any other matters that FWA considers relevant.

At the time of writing, six applications for a cooling-off have been made before FWA, and only one has been granted.⁵⁹ The general trend of FWA decisions under s 425 has been to refuse a cooling-off ‘unless there

⁵³ *Fair Work Act 2009* (Cth)s 426(5).

⁵⁴ *Fair Work Act 2009* (Cth)s 426(4).

⁵⁵ (2010) 198 IR 360 (*‘Woodside’*).

⁵⁶ *Woodside*’ 375 [44].

⁵⁷ *Woodside*’ 375 [44] (emphasis added).

⁵⁸ *Woodside*’ 372-75 [37]-[44].

⁵⁹ Successful cases: *Nyrstar Port Pirie v Construction, Forestry, Mining and Energy Union* [2009] FWA 1144 (17 November 2011). Unsuccessful cases: *Tas Paper Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2009] FWA 1872 (22 December 2009); *Transit Australia Pty Ltd v Transport workers Union of Australia* [2011] FWA 5006 (29 July 2011); *Mammoet*

was a finding that a cooling-off period would assist in the resolution’ of an agreement.⁶⁰ However, and taking the holdings of *Woodside* to their full extent, it could be argued that the existence of the possibility of protected action ‘has the effect of reducing the differences between the parties and making agreement more likely.’⁶¹ So construed, it seems that cooling-off will only be ordered by FWA if there is a real and probable prospect that such an order would shepherd the parties to agreement.

E *Ground 5: Significant Damage to the Australian Economy or an Important Part of it*
(s 424(1)(d))

Under s 424(1)(d), FWA must suspend or terminate protected action if satisfied that the action is or is going to cause significant damage to the Australian economy or an important part of it. Again all avenues may be used under s 424(1)(d), except upon application by a third party. The terms ‘significant damage’ and ‘important part [of the Australian economy]’ are not defined and thus take their ordinary meaning.

Applications under s 424(1)(d) have been brought before FWA three times, and two have been successful.⁶² Cases brought under this ground commonly involve economic forecasting as to how protected action will impact on parts of the Australian economy, and are thus necessarily imprecise.⁶³ Whilst the Qantas dispute could have been brought under any number of different grounds, it was pleaded under s 424(1)(d). This was due to the fact that the Federal minister had to act immediately, and evidence of damage to the Australian economy was readily available by calling senior public officials with expertise in affected sectors of the economy.

F *Ground 6: If the Federal Minister is Satisfied that a Threat to Health, Safety, Welfare or Economic Damage Exists (s 431)*

The final ground for intervention is through a declaration published by the Federal minister under s 431, which is effected if the minister is satisfied that:

- (a) the protected action is being engaged in, or is threatened, impending or probable; and
- (b) the protected action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.⁶⁴

A declaration can only terminate and not suspend protected action. The Federal minister must publish the declaration in the Government Gazette and make all bargaining representatives aware of the declaration as soon as practicable.⁶⁵ The *FW Act* does not provide a mechanism to review a declaration; however, judicial review would be available.

Australia Pty Ltd v Construction, Forestry, Mining and Energy Union [2010] FWA 4389 (14 June 2010); *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia* [2011] FWA 3059 (18 May 2011); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Carter Holt Harvey Wood Products Australia Pty Ltd* [2011] FWA 101 (11 January 2011).

⁶⁰ *Mammoet Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4389 (14 June 2010) [27] per McCarthy DP; applied in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Carter Holt Harvey Wood Products Australia Pty Ltd* [2011] FWA 101 (11 January 2011) [6] per Blair C.

⁶¹ *Mammoet Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4389 (14 June 2010) [31] per McCarthy DP.

⁶² Successful cases: *Qantas* [2011] FWAFB 7444 (31 October 2011); *Sucrogen Australia Pty Ltd v Australian Workers Union* [2010] FWA 6192 (27 August 2010). Unsuccessful cases: *Toyota Motor Corporation Australia Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2011] FWA 6268 (12 September 2011).

⁶³ Cf *Sucrogen Australia v Australian Workers Union* [2010] FWA 6192 (27 August 2010), where industrial action was suspended to prevent a sugar harvest from being compromised, with *Toyota Motor Corporation Australia Ltd v AMWU* [2011] FWA 6268, where a suspension order was refused despite protected action potentially delaying a refit of plant and equipment. The delay in the latter case eventuated in a stand down: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Toyota Boshoku Australia Pty Ltd* [2012] FWA 1135 (8 February 2012).

⁶⁴ *Fair Work Act 2009* (Cth) s 431(1).

⁶⁵ *Ibid* s 432. While unclear, it seems that publication in the Government Gazette is not a precondition for the declaration to take effect. The declaration takes effect on the day that it is ‘made’, rather than published: *FW Act* s 431(2).

Such a declaration has not yet been made, and the Gillard government came under some criticism for refraining from issuing a declaration during the Qantas dispute.⁶⁶ However, a declaration made under s 431 is an administrative process, subject to the principles of procedural fairness and natural justice. If it is assumed that the government was notified of the lockout around the same time the public was, the urgent application to FWA would have produced a quicker outcome. That said, the Qantas dispute shows that it is highly unlikely that a declaration will ever be made under the Gillard government.

IV THE QANTAS DISPUTE

On Saturday, 29 October 2011 Qantas issued a media release announcing that from 8:00 pm on Monday, 31 October 2011, it would lockout, in effect, all of its licensed engineers, ramp staff and baggage handlers and Australian and international pilots. The media release went on to state that aircraft currently in the air would complete their sectors but that there would be no further Qantas domestic departures or international departures anywhere in the world. Qantas stated that the lockout would continue until the relevant unions (the Australian Licensed Aircraft Engineers Association (ALAEA), the Transport Workers Union (TWU) and the Australian and International Pilots Union (AIPA)) drop their 'extreme demands that have made it impossible for agreements to be reached'.⁶⁷ These demands had persisted despite 14 months of negotiations, including 99 bargaining meetings and at least 18 formal mediations/conciliations before FWA.⁶⁸

The lockout was an 'employer response action' legally brought under the *FW Act*. For legal purposes, it was 'in response' to protected action being taken by all three unions; being one hour stoppages proposed by the ALAEA, the various work bans and stoppages proposed by the TWU, and the wearing of red ties and the making of bargaining related in-flight announcements by the AIPA.⁶⁹ In reality, the lockout was a response to a 'slow-bake' tactic engineered by the ALAEA and TWU. The tactic was to notify Qantas of a pending stoppage, and after Qantas had cancelled flights and rearranged schedules, cancel the stoppage.⁷⁰ This tactic ensured employee wages were preserved but the damage done to Qantas remained. The cost this inflicted upon Qantas had had reached \$68 million and approximately \$15 million per week in loss of revenue. Approximately 7,000 passengers had been affected and 600 flights had been cancelled.⁷¹

Practitioners and HR professionals in aviation will be attuned to the crucial importance labour cost commands in the industry. As Doganis observes:

because the unit price of labour differs significantly between airlines – even neighbouring airlines on the same continent – labour cost is a major factor in differentiating costs between competing airlines. In short, reducing labour costs is critical because they are the highest single cost and because they are a major cost differentiator between airlines.⁷²

Sue Bussell, Group General Manager of Industrial Relations for Qantas, has stated that labour cost:

rather than any particular ideological or political perspective, drives Qantas' industrial relations policy as the airline addresses how to best operate under the rules that apply on any given day. Our objective is to maintain a competitive advantage and to provide a sustainable rate of return to fund investment, maintain job security and reward investors.⁷³

The protected action taken by the union parties leading up to the proposed lockout was primarily in pursuit of the aforementioned job security. According to Qantas, it was pursued by the three unions' in a number of ways:

⁶⁶ Eric Abetz, 'Qantas Evidence is Clear: Government Could Have Acted But Didn't' (Media Release, 4 November 2011).

⁶⁷ Qantas, 'Qantas Responds to Industrial Action' (Media Release, 29 October 2011).

⁶⁸ *Qantas* [2011] FWAFB 7444 (31 October 2011) [4] – [6].

⁶⁹ Minister's Form F37 Application in *Qantas* [2011] FWAFB 7444 (31 October 2011) attachment 1.

⁷⁰ Such a tactic is permissible under the *Fair Work Act 2009* (Cth): see *Re Boral Resources (NSW) Pty Ltd* (2010) 193 IR 286.

⁷¹ *Qantas*, above n 68.

⁷² Rigas Doganis, *The Airline Business* (Routledge, 2nd ed, 2006) 119, cited in Sue Bussell and John Farrow, 'Continuity and Change: The Fair Work Act in Aviation' (2011) 24(3) *Journal of Industrial Relations* 392, 393.

⁷³ Bussell and Farrow, above n 72, 393.

1. In relation to the ALAEA, that:
 - a. Qantas build a fully tooled and staffed heavy maintenance facility;
 - b. third party labour providers be controlled and restricted;
 - c. Qantas' access to productivity improvements, including those conferred by technology and regulatory changes, be restricted;
 - d. other unions' members in competition with the ALAEA be excluded from undertaking certain functions;
2. In relation to the TWU, that:
 - a. third party labour providers be controlled and restricted;
3. In relation to AIPA, that:
 - a. terms and conditions of employment of employees who work for other companies (whether associated entities of Qantas or not) be regulated by Qantas; and
 - b. terms and conditions of other Qantas employees, including those who reside overseas, be overridden or supplemented by the agreement at hand.⁷⁴

Considering the wide scope of these claims, their likely negative impact on Qantas' flexibility and profitability, as well as the questionable legality of some of them,⁷⁵ it is unsurprising that Qantas vigorously opposed their inclusion in the agreements throughout the 14 months of negotiations. Viewed in this context, it is tolerably clear that Qantas had resigned to the fact that negotiations had failed. It instigated the lockout in order to have it terminated. This in turn would trigger FWA's jurisdiction to arbitrate each enterprise agreement and end the costly industrial tactics inflicted by the ALAEA and the TWU.

V THE HEARING BEFORE FWA

Qantas' lockout, and its obvious consequences for the economy, forced the hand of the Federal minister to intervene in dramatic circumstances in the evening of Saturday, 29 October 2011. FWA listed the matter before a Full Bench (Giudice J, Watson SDP and Roe C) for 10:00 pm that night, and initial arguments were heard until 2:00 am the following morning. The matter resumed on 2:00 pm that afternoon and judgment was handed down at 2:00 am on Monday, 31 October 2011. The minister and the four respondents (i.e. Qantas and the three unions) were joined by the Victorian, New South Wales and Queensland governments, as well as the Australian Council of Trade Unions (ACTU), who all intervened to make submissions.

The minister lead evidence from Mike Mrdak, Secretary, Department of Infrastructure and Transport and Drew Clarke, Secretary, Department of Resources, Energy and Tourism to establish the extent the extent to which the Australian economy would suffer damage if the lockout proceeded. Collectively, the Secretaries testified that:

- (a) Qantas accounts for 65 per cent of domestic aviation capacity, 20 per cent international capacity and 80 per cent of airfreight delivery services;
- (b) the aviation sector directly employs 50,000 Australians and the downstream effects of employment in the aviation industry represents up to half a million Australians employed in tourism and other sectors;
- (c) in-bound tourists contribute \$24 billion to the Australian economy per annum;
- (d) any reduction in aviation capacity has immediate and severe impacts on all sectors of the economy; and
- (e) if the proposed lockout was not put to an end within 24 hours, the tourism sector and the wider economy would suffer because of reduced international and domestic bookings.

⁷⁴ Qantas, *Qantas Group Submission to the Review of the Fair Work Act* (17 February 2012) Fair Work Act Review, <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/Qantas.docx>>.

⁷⁵ As 'permitted matters' allowed to be included in agreements under the *FW Act*: see s. 172(1)(a). The legality of the unions' claims is outside the scope of this paper. See generally *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWAFB 6684 (13 October 2011), which is subject of a Full Federal Court appeal at the time of writing.

This evidence, not unexpectedly, went unchallenged.⁷⁶ The significance of the damage to the Australian economy was not in dispute. What was in dispute was whether FWA should terminate and trigger its jurisdiction to arbitrate, or suspend and keep negotiations open ended. Set out below are summaries of the arguments advanced by each party as recorded on transcript.⁷⁷

A Arguments of the Federal minister: terminate, or in the alternative, suspend for a 120 day period

The Federal minister argued that FWA must terminate rather than suspend the protected action in light of the uncertainty that the unions' protected action was causing and the lockout would make worse. The temporary nature of suspension would only preserve uncertainty and further escalate it as time passed. Upon the expiry of a suspension, the economy would face the same danger if the unions took further protected action and Qantas responded with another lockout. Thus, if FWA was not satisfied that it should terminate, the Federal minister submitted that it should suspend for a 120 day period.

B Arguments of the state ministers: terminate

The Victorian, New South Wales and Queensland ministers made submissions in support the Federal minister's application (although the Victorian and New South Wales ministers did not support the alternative application for suspension). The state ministers did not call evidence, but added that:

- (a) the unions had not provided any evidence that they were willing to withdraw or modify their claims, and as such, extending a negotiation period via suspension would have no effect;
- (b) a termination would give effect to the *FW Act's* objective to promote productivity and economic growth by ensuring that Qantas flights would not be grounded by a second lockout; and
- (c) the grounding of the Qantas fleet had potential to devastate remote areas of the economy, such as Mt Isa, where Qantas is the only aviation provider.

C Qantas: terminate

Qantas chose not to make any submission concerning the damage caused by the lockout, but instead lead evidence from an economist and three Qantas managers which sought to establish that:

- (a) the agreement content sought by the three unions was not viable;
- (b) all three unions had refused to resile from their claims for a prolonged period of time, and as such, there was no prospect of reaching an agreement with any of the unions;
- (c) the lockout was issued to quell safety concerns that the Civil Aviation and Safety Authority had expressed in regards to the impact of the unions' protected action; and
- (d) the unions' protected action had caused a collapse in forward bookings in recent months, and as such, Qantas was required to take preventative action.

In light of this evidence, Qantas vigorously opposed a suspension of all protected action and argued that termination was the appropriate order. At a late stage of the hearing, Qantas foreshadowed the possibility of Qantas reissuing a lockout after a period of suspension, and advised that a suspension would not necessarily mean that the Qantas fleet was to resume operation.

⁷⁶ *Qantas* [2011] FWAFB 7444 (31 October 2011) [9].

⁷⁷ Transcript of Proceedings, *Qantas* (FWA, B2011/3816, Giudice J, Watson SDP and Roe C, 29-30, October 2011).

D *ACTU, TWU, ALAEA and AIPA: suspension for a period of 90 or 120 days*

The ACTU and the three union parties all accepted that Qantas' proposed lockout was going to cause significant damage to the economy. While arguments slightly differed, all pressed for a suspension for a period of 90 or 120 days. Arguments in advance of that position included:

- (a) Qantas' lockout was capricious and disproportionate to the action that had been taken by the unions, and as such, terminating their right to take protected action would be unfair;
- (b) the 21 day negotiating period that arises from a termination order is not sufficient time for the unions to reach agreement with Qantas; and
- (c) due to the dramatic developments, the unions would reconsider and amend their demands.

VI THE FINDINGS

FWA's decision to publish reasons when handing down judgment, rather than making an order and publishing reasons later, meant the reasoning and legal analysis in the decision is minimalist. The reasoning within the decision may not be of significant precedential value for the future, but that said, the inferences drawn from it will.

Firstly, the Full Bench concluded that it was 'unlikely' that the protected action that had been taken by the three unions, even taken together, was threatening to cause significant damage to the tourism and aviation industries.⁷⁸ Qantas' losses of \$68 million and \$15 million per week in revenue, together with the cancellation of 600 flights affecting 7,000 passengers, did not amount to damage of the requisite significance. Thus, a suspension based on the unions' protected action alone would not have succeeded. In terms resonating with *Woodside*, the Full Bench opined:

There is a need to balance this issue against the fact that protected industrial action is permissible under our system and has been now for many years and has been taken relatively frequently in the airline industry with successive bargaining rounds. It is also important that encouragement of enterprise bargaining is also part of the system. In that respect, what we have heard indicates there are still prospects for a satisfactory negotiated outcome in all three cases. The prospect of a negotiated resolution in relation to the three proposed enterprise agreements still remains.

It was Qantas' lockout, and its effect on consumers of airline passenger and cargo services, that satisfied the Full Bench that significant damage was being threatened in the tourism industry, the aviation industry and industry more generally.⁷⁹ FWA's jurisdiction to suspend or terminate pursuant to section 424(1)(d) was therefore enlivened, and in coming to their decision to terminate, the Full Bench held:

It is apparent that a suspension of all action on an interim or short term basis is not appropriate and in the end no party supported that course. Some of the principal issues in the negotiations have so far proved very difficult to resolve. Other matters may be easier to resolve.

On the evidence there is significant uncertainty arising from the protected action initially of the unions but in particular arising from the lockout and the grounding of the airline. We should do what we can to avoid significant damage to the tourism industry.

...

We have decided that in the particular circumstances of this case, which on the evidence include the particular vulnerability of the tourism industry to uncertainty, suspension will not provide sufficient protection against the risk of significant damage to the tourism industry and aviation in particular. Suspension is necessarily temporary - it leaves open the possibility there may be a further lockout with its attendant risks for the relevant part of the economy. That is, a risk the situation we are now dealing with will recur.⁸⁰

⁷⁸ *Qantas*, [2011] FWAFB 7444 (31 October 2011) [10].

⁷⁹ *Ibid* [10].

⁸⁰ *Ibid* [12] - [13], [15].

VII THE AFTERMATH

By obtaining the termination, Qantas was able to bring an end to the protracted negotiations and trigger arbitration of the agreements. In the weeks following, Qantas and the ALAEA were able to come to terms. The ALAEA-Qantas deal was treated as a consent based workplace determination before the Full Bench, and was the first workplace determination ever made under the *Fair Work Act 2009* (Cth).⁸¹ Predictably, the ALAEA did not achieve many of the bargaining objectives outlined above.⁸² The workplace determination more or less replicates the previous Qantas-ALAEA agreement, with the job security clause remaining the same. The ALAEA was however able to negotiate a significant increase of redundancy pay.⁸³ TWU and AIPA were unable to come to a like agreement. FWA began arbitrating the Qantas-TWU agreement in March 2012 and the Qantas-AIPA agreement in April 2012.⁸⁴

AIPA also appealed the decision to terminate, which was heard on an urgent basis by a Full Federal Court (Lander, Buchanan and Perram JJ). AIPA argued that Qantas' lockout was unlawful industrial action in as far as it was responding to AIPA. This was because Qantas' lockout was really a response to the industrial tactics taken by the TWU and ALAEA; it was not in response to the wearing of red ties and the bargaining related in-flight announcements by AIPA members. Taken in isolation, the lockout was entirely disproportionate to AIPA's industrial action. AIPA argued that it therefore followed that it was not 'as a response' as required by the *FW Act*.

This argument was categorically rejected by the Court in three separate judgments. For example, Perram J accepted the 'rhetorical force in the proposition that the lockout of the pilots could not sensibly be seen to have been done in response to [AIPA's] industrial action'⁸⁵ but nonetheless concluded that a lockout:

does not have to be reasonable, proportionate or rational. Indeed, it would be a response under s 411 even if Qantas' motives were shown to be, as in the case of the pilots they probably were, opportunistic. Further, s 411 neither requires that the response action be taken solely in response to the industrial action of the party with whom the proposed enterprise agreement may be made nor that it be predominantly or even substantially in response to the employee claim action. All that is required is that it is a response. The threshold is low ... an opportunistic response is a response none the less.⁸⁶

VIII CONSIDERATION OF THE POLICY DEBATE

The *Qantas* case has prompted debate as to whether the *Fair Work Act 2009* (Cth) is effective in assisting parties during protracted industrial disputes. A diverse range of views have been shared, including a call for a complete overhaul modelled on the interest-arbitration systems in North America.⁸⁷ Former ACTU Secretary, Jeff Lawrence, has adopted a more constrained but similar opinion:

Fundamentally we think that the whole question of arbitration really needs to be revisited....We've got the ability to get arbitration where an employer takes an extreme step like Qantas and threatens to lockout people. But the ability for workers to get arbitration is really quite confined.⁸⁸

Recently retired Chief Executive of the Australian Industry Group, Heather Ridout, has retorted by declaring:

⁸¹ *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited* [2012] FWAFB 236 (23 January 2012).

⁸² Cf *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited* [2012] FWAFB 236 (23 January 2012) [11], [17] for a comparison between the claims that remained outstanding after the lockout and what was eventually agreed.

⁸³ See also Joellen Riley, 'A Safe Touch-down for Qantas?' (2012) 25 *Australian Journal of Labour Law* 76.

⁸⁴ Workplace Express, 'Qantas-TWU Arbitration to Begin in March, Pilots in April, as ALAEA Asks Members to Consider Status Quo on Job Security', *Workplace Express* (online), 25 November 2011.

⁸⁵ *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65 (10 May 2012) [156].

⁸⁶ *Ibid* [157]. Other more technical legal issues dealt with in this case warrant more detailed analysis than is possible in this article.

⁸⁷ Alex Bukarica and Andrew Dallas, *Good Faith Bargaining Under the Fair Work Act 2009* (Federation Press, 2012) 131-50; Anthony Forsyth, 'Qantas Case Shows the Need for Interest Arbitration', *The Conversation* (online), 28 November 2011 <<http://theconversation.edu.au/qantas-case-shows-the-need-for-interest-arbitration-4436>>.

⁸⁸ Mark Skulley 'Unions Want Stronger Hand', *Australian Financial Review* (Australia), 14 November 2011, 3.

We would be vehemently opposed to reintroducing arbitration in bargaining between employers and unions of course in the old days, the unions would rock up with an ambit claim. They'd pull on industrial action. We'd have a big stoush. Then we'd end up in arbitration and they'd get half too much, and then that would flow on to the rest of the economy. So it is much better that employers and employees can work out their own agreements under the rules.⁸⁹

As the juxtaposition of the both views demonstrates, any policy response arising out of *Qantas* will be controversial. In the view of the authors', *Qantas* may demonstrate a case for improvement, but wide scale reform is unnecessary. If anything, *Qantas* demonstrates the need for legislative change to make it easier for an affected party to apply for suspension or cooling-off of protected action. The grounds for suspension and termination, as outlined above, set too high a bar for temporary respite for employers (and arguably third parties) from protected action. The *Fair Work Act 2009* (Cth), as it presently stands, fails to adequately recognise the facilitative role FWA can play during suspension of industrial action. Parties all too often become deadlocked during damaging industrial action, and continuation of it often entrenches that deadlock.

Suspension provides an opportunity to re-evaluate those positions without loss of face. It can increase the likelihood of resolution and agreement without necessarily diminishing the fairness and equity of the outcome. For this reason, it is regrettable that policy-makers have failed to distinguish suspension from termination and make use of this fact. However, this could be easily achieved with minor amendment to the cooling-off provisions in s 425. Ancillary provisions mandating and enhancing FWA conciliation powers during a cooling-off may be appropriate in this context.

The issues are finely balanced, in a policy sense. Australia is obliged to, and will, continue to observe its obligations entered into under international treaties concerning freedom of association and industrial action, and the right to strike in certain circumstances will remain in Australia's industrial legislation for many years to come. But there is no policy reason why suspension of protected action should be available only 'in very rare cases' and unless harm is 'out of the ordinary.'⁹⁰ As with all civil rights, the right to strike is not absolute; it may be limited to the extent as can be demonstrably justified, taking into account the rights and liberties of others. From a fair and holistic standpoint, the economic viability of enterprises that employ people ought not be of lesser importance than the right to strike. So construed, it is the authors' view that there is scope for making suspension and cooling-off periods more accessible in order to prevent more protracted and economically damaging disputes of the kind endured in *Qantas*.⁹¹

These policy choices, as represented in the legislation, have now been in evolution since 1993. The balance is a fine one, but wide-scale revision against the evolution of these provisions is unnecessary. Slight amendments, perhaps to the cooling-off ground outlined in s 425, is all that may be required to strike the right balance. At the time of writing, a review panel appointed by the Gillard Government (consisting of Emeritus Professor Ron McCallum, former Federal Court Justice Michael Moore and Reserve Bank Board Member John Edwards) is due to report on the operation of the *Fair Work Act 2009* (Cth), including the provisions that have been considered by the authors in this article.⁹² It remains to be seen if further legislative changes will emerge from that review.

⁸⁹ Heather Ridout, 'Taking Charge of Our Future' (Speech delivered at the National Press Club, Canberra, 30 November 2011); as cited in Rae Cooper, 'Testing Fair Work: Australian Industrial Relations in 2011' (2012) 54(3) *Journal of Industrial Relations* 267, 270.

⁹⁰ Woodside (2010) 198 IR 360, 375 [44].

⁹¹ For a contrasting viewpoint (albeit in a differing context) see McCrystal, above n 13, 251-56, 277-82.

⁹² Bill Shorten, 'Fair Work Act Review Announced' (Media Release, 20 December 2011). See generally *Fair Work Act Review*, available at <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx>>.

