

EMPLOYMENT UPDATE

NOVEMBER 11

THE QANTAS DISPUTE – WHAT WAS IT ALL ABOUT?

In this Employment Update, we provide an overview of the key issues in the long-running dispute and a summary of the action taken to bring it to an end.

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The much publicised dispute between Qantas and key unions has dominated news headlines over the past month. Unlucky travellers who had their flights disrupted will know firsthand of the ramifications of enterprise bargaining turned sour.

Between 13 April 2011 and 28 October 2011, Qantas and three of the unions with traditional membership coverage of a large percentage of Qantas employees - the AIPA (Australian and International Pilots Association), the ALAEA, (Australian Licensed Aircraft Engineers Association) and the TWU (Transport Workers Union) were engaged in enterprise bargaining negotiations in relation to three proposed enterprise agreements that would apply to long haul pilots, licensed aircraft engineers and ground staff. As a part of the process, the three unions obtained orders granting protected industrial action in the form of overtime bans, go-slows, work-to-rule campaigns and full stoppages.

Some of the reported key issues in dispute included demands for limits on the use of contractors, guarantees on job security and

commitments regarding 'no offshoring' of positions.

At approximately 2pm on 29 October 2011, after a sustained period of the various forms of protected industrial action which has been reported as costing Qantas up to \$95 million, Qantas announced it would ground its entire fleet from 5pm that day in anticipation of employer response action being taken to lock out employees participating in the protected industrial action.

The effects of the grounding were immediate, causing passenger chaos all over the world and leading to demands for the Federal Government to take action.

Federal Government applies for termination of industrial action

The following evening, Federal Workplace Relations Minister, Senator Chris Evans, made an application to Fair Work Australia (FWA) pursuant to section 424 of the



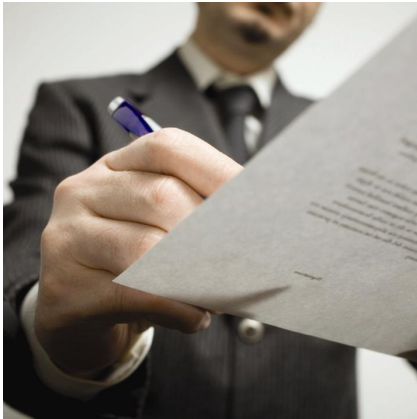
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Fair Work Act 2009 (Cth) (Act).

The Minister's application sought an order terminating or suspending for a period of 90 days, protected industrial action being engaged in by Qantas and the unions.

Section 424 of the Act provides that FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

- a) is being engaged in; or
- b) is threatened, impending or probable;

if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
- d) to cause significant damage to the Australian economy or an important part of it.

An application made under section 424 must be determined, as far as practicable, within 5 days after it is made.

After hearings that commenced at 10pm on Saturday night, 30 October 2011 which adjourned at 2am, and

further hearings that resumed on 2pm on Sunday, a Full Bench of FWA consisting of President Justice Geoffrey Giudice, Senior Deputy President Ian Watson and Commission Julius Roe delivered their judgement at 2am on Monday morning, 31 October 2011, terminating the protected industrial action between Qantas and the three unions.

In its decision, the Full Bench found that it was *'unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries'*.

However, the Full Bench went on to find that *'the response industrial action of which Qantas had given notice, if taken, threatens to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of its effect on consumers of air passenger and cargo services'*.

In deciding to terminate the protected industrial action, FWA said that suspension would not provide sufficient protection for the tourism industry, and that its temporary nature would likely give rise to a reoccurrence of the employer response action.

FWA therefore ordered an immediate end to the protection industrial action. In accordance with section 266 of the Act, the termination gave rise to a 21 day post industrial action negotiating period which could be extended for a further 21 day period if all of the bargaining representatives for the agreement jointly applied to FWA for the extension.

Outcome of post-industrial action negotiations

The parties failed to make any headway during the 21 day post-industrial action negotiations and no request was sought to have this period extended. As a result of this, FWA is now required to impose an arbitrated outcome on the parties in accordance with section 266 of the Act.

Arbitration

Although the Act requires that FWA make a determination 'as quickly as possible' after the end of the post industrial action negotiations, the reality is that the process will take some time to complete.

The first of three unions to have the matter arbitrated will be the TWU, with arbitration set to commence in late March – early April next year.

The ALAEA enterprise agreement is unlikely to proceed until after this time given that this matter is only set down for a directions hearing on 19 December 2011 with a date for arbitration to be set at this time.

The AIPA arbitration is even less advanced and no current date for a directions hearing has been set.

It is important to note that the AIPA have appealed to the Federal Court challenging the FWA Full Bench decision to terminate the protected industrial action. The union will allege that FWA had no jurisdiction to make that order against it on the basis that the purported employer response action was being taken as a result of damaged being caused by TWU and ALAEA members and not AIPA members.

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Criticism of the failure of Federal Government to rely on section 431 of the Act

Much criticism has been made of the Federal Government's failure to utilise section 431 of the Act which allows the Minister to make a declaration terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:

- a) the industrial action is being engaged in, or is threatened, impending or probable; and
- b) the industrial 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.

In essence, the Federal Government could have theoretically made the orders that it sought from FWA without the need to make that application.

In response to this criticism, the Prime Minister was quoted as saying that the Federal Government didn't rely on this provision because 'it had never been used before' and would have been 'subject to judicial review'. This has been criticised in some parts given the Federal Government was responsible for its drafting and, as has turned out to be the case, the decision of the FWA is being appealed in any event by one of the unions.

Industrial strategy by Qantas

As has been widely reported, the grounding of its entire fleet which all

but forced the Federal Government to step in was a well thought out industrial strategy by Qantas. With industrial action now terminated, the parties are on their way to arbitration, where it is expected that the unions will have some difficulty getting the job security protections they are seeking.

In this regard, history would suggest that Qantas is likely to get a more favourable outcome through arbitration. Previously arbitrated determinations under the former section 170MX of the *Workplace Relations Act 1996* (Cth) would suggest that industrial tribunals are reluctant to interfere with management decisions.

However, one cannot discount the possibility of FWA having an appetite to depart from this approach. In this regard, some commentators have suggested that FWA should revisit the decision in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* [1987] HCA 28 and in particular, the following statement:

... it was the prerogative of management to decide how a business enterprise should operate and whom it should employ, without the workforce having any stake in the making of such decisions ... Over the years that climate of opinion has changed quite radically ... Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an "industrial matter".

We will of course await the determination of FWA in relation to these matters, but there is certainly support for the proposition that Qantas is just where it wanted to be.

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