HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S153 OF 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901

First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692

Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS (INTERVENING)

PART I: CERTIFICATION

This Outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

Intervention – MS [5]-[24]

1. Section 569(1) of the *Fair Work Act* 2009 (Cth) (**FW Act**) gives the Minister a right of intervention in this appeal; so much is clear from the statutory text, context and purpose.

2. **Text**. "A court" in s 569(1) includes the High Court of Australia: cf **AR[41]-[43]**. A matter arises under the FW Act where the right or duty sought to be enforced owes its existence to the provisions of the Act: **MS[6]-[8]**.

3. This appeal is a proceeding "in relation to" a matter arising under the FW Act: **MS[6]-[8]; cf AR[45], [50]**.

   - *Minister for Home Affairs v DMA18 as Litigation Guardian for DLZ18* (2020) 95 ALJR 14 at [43] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) (**JBA 7, Tab 50**)
   - *Joseph v Parnell Corporate Services Pty Ltd* (2021) 284 FCR 546 at [87]-[121] (**JBA 7, Tab 47**)

4. **Context**. Section 570 was amended so as to apply in appeals, to reverse the decision in *Construction, Forestry, Mining and Energy Union v CSBP Limited (No 2)* (2012) 202 FCR 149. To achieve that result, Parliament chose identical language to that which appears in s 569(1). It is clear Parliament is concerned with the substance of the proceeding, not the source of jurisdiction: **MS[9]-[11]; cf AR[44]**.

5. **Purpose**. Qantas' construction would have the consequence that both s 569(1) *and* s 570 do not apply in these proceedings, contrary to the legislative purpose of both provisions.

6. As for s 569(1), Parliament would not be taken to have impliedly excluded the Minister's right to intervene at the apex of the judicial hierarchy, where decisions of greatest consequence to the operation of the FW Act are likely to be made (noting the Minister would be a party in the High Court appeal if he had intervened below: s 569(2)).

7. As for s 570, it is a remedial and beneficial provision directed to overcoming the deterrent which may prevent a person from seeking to right a wrong because of the burden of costs they might incur. Parliament would not have *only* intended a person be subject to that deterrent in the High Court.

8. **Conclusion:** It may be accepted that the Court is exercising its appellate jurisdiction under s 73 of the *Constitution* and in so doing will determine the correctness of the Full Court's decision. The appeal is nonetheless a proceeding "in relation to" the "matter" which existed before the Full Court. That matter is not extinguished by the grant of special leave; it now simply includes the correctness of the judgment below: **MS [8], [18]-[20]; cf AR[47]-[48]**. Nor does a right of intervention alter the nature of a s 73 appeal (**cf AR [46]**); it simply permits a person to be heard, and in a manner that is within the control of the Court.

Construction of ss 340 and 341 of the FW Act – MS[25]-[60]

9. ***Understanding s 340 as a civil remedy provision supports the Full Court's construction.*** The "general protections" provided by the FW Act are secured through civil regulatory remedies. The regime adopts a familiar and "essentially similar" approach to many civil regulatory regimes. Such civil remedies serve public protective purposes. In particular they seek to ensure compliance through the deterrent effect of civil penalties.

- *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [23]-[24], [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) (**JBA 4, Tab 25**)
- *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426 at [9], [66] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (**JBA 6, Tab 35**)

10. So understood, s 340(1)(b) is not to be read down by reference to other parts of the FW Act.

11. *First*, s 340(1)(b) should not be read down as secondary to other limbs in s 340. Part 3-1 contains broad and overlapping provisions to ensure protection of workplace rights without "gaps": see ss 340, 343-345 and Division 4. These provisions do not sit in a hierarchy: see ss 539 and 545-546. The possibility that the same conduct may breach multiple provisions is understood: see s 556: **MS[37]-[41], [44]; cf AS[44]**.

- *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at [218]-[219] (**JBA 6, Tab 34**)

12. *Second*, s 340(1)(b) should not be read down by reference to the unfair dismissal provisions. The regimes have a different purposes and address different subject matters in different ways: compare s 340 and ss 381-392. Additionally, the long history of general protections provisions makes it improbable they were intended to be confined so as not to overlap with unfair dismissal remedies. In any case, express provisions regulate the relationship between the regimes: see ss 725, 728 and 729: **MS[45]; cf AS[50]**.

13. *Third,* for similar reasons, s 340(1)(b) should not be read so as to avoid creating rights additional to those provided elsewhere in the FW Act: **MS[46]; cf AS[55]**.

14. ***Section 341 does not limit "workplace rights" in the way Qantas contends.*** Section 341 states, in broad terms, when a person has a "workplace right". It does not require that, in order for a workplace right to exist, it must be capable of some minimum degree of immediate or unconditional exercise. Nor does the general law reveal some settled minimum precondition to the existence of a right, which Parliament can be taken to have intended to adopt when enacting s 341: **MS[47]-[54]; cf AS[19], [21], [34]-[35], [46]-[54]**; **AR[6]-[8]**.

- Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [1362]-[1363] (**JBA 8, Tab 59**)
- *Black's Law Dictionary* (11th ed, 2019) 'right' (**JBA 8, Tab 57**)

15. In contrast to s 341, the exercise of workplace rights is expressly addressed in other provisions of Part 3-1: see ss 334, 340, 343, 345. Those provisions protect against interference with the exercise of workplace rights, including where that exercise is conditional or contingent on circumstances and events.

16. This structure does not make the general protections uncertain or unbounded. A person who takes adverse action will simply not be liable if it is done for reasons unrelated to the other person's workplace rights. And if the "workplace right" which is alleged to have motivated the adverse action involves events or contingencies that are remote or improbable, it may readily be established it was not a substantial reason for the adverse action: **MS [54]**.

Dated: 9 May 2023

TIM BEGBIE **IRENE SEKLER** **NAOMI WOOTTON**