

OF 'KAMIKAZES' AND 'MAD MEN': THE FALLOUT FROM THE QANTAS INDUSTRIAL DISPUTE

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[The Qantas industrial dispute made headlines around the world, after the airline took the drastic step in October 2011 of grounding its fleet ahead of a proposed lockout of a large proportion of its workforce. Essentially a contest between job security and employment flexibility, the dispute was one of the most significant in Australia for some time. This article examines the origins and circumstances of the Qantas dispute and the issues it highlighted as to the operation of key aspects of the Fair Work Act 2009 (Cth). We conclude that, particularly in light of the federal industrial tribunal's endorsement of the airline's strategy and support for the concept of 'managerial prerogative', the dispute may have long-term implications for workplace regulation in Australia.]

CONTENTS

I	Introduction.....	786
II	Background to the Qantas Dispute	789
	A The Battlegrounds Are Drawn: Company and Union Perspectives	789
	B The Battle Begins	792
III	The Dispute Takes Off	796
	A Qantas's Grounding and Proposed Lockout.....	796
	B The Federal Government's Response and FWA's Termination Decision	797
	C The Workplace Determination Phase and Subsequent Events	799
IV	Key Legal Issues in the Qantas Dispute	803
	A Legality of the Unions' Job Security Claims	803
	1 The Debate over Limits on Contracting Out.....	803
	2 Evolution of the 'Matters Pertaining' Formulation.....	803

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3	The <i>Fair Work Act's</i> Restrictions on Agreement Content	805
4	Operation of the Agreement Content Rules in the Qantas Dispute.....	806
B	Good Faith Bargaining: 'Missing in Action'?	809
C	Legality of Qantas's Proposed Lockout and Grounding of the Fleet....	813
D	The Minister's Power to Terminate Industrial Action.....	817
E	The Tribunal's Powers to Arbitrate Bargaining Disputes.....	820
V	Conclusion: Winners, Losers and Implications for the Future.....	827

I INTRODUCTION

This article examines the industrial dispute between Australia's 'flagship' airline, Qantas Ltd ('Qantas'), and three trade unions — the Transport Workers' Union ('TWU'), the Australian and International Pilots Association ('AIPA') and the Australian Licenced Aircraft Engineers Association ('ALAEA') — which occurred from mid-2010, throughout 2011 and into 2012.¹ The dispute arose out of negotiations between Qantas and the three unions, under pt 2-4 of the *Fair Work Act 2009* (Cth) ('*FW Act*'), for new enterprise agreements to regulate the terms and conditions of employment of relevant Qantas employees. Following many months of 'protected' (lawful) industrial action by members of the three unions, Qantas took the controversial and dramatic step of grounding its worldwide fleet on 29 October 2011.² This was accompanied by the company giving notice that it would lock out employees covered by the three unions, with effect from 31 October. The federal government then applied to Fair Work Australia ('FWA') to have all protected industrial action by parties to the Qantas dispute terminated. This application was granted by a Full Bench of FWA,³ providing the basis for the tribunal to make a workplace determination resolving the matters in dispute

¹ For other consideration of the Qantas dispute, see Joellen Riley, 'A Safe Touch-Down for Qantas?' (2012) 25 *Australian Journal of Labour Law* 76; Alex Bukarica and Andrew Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press, 2012) 131–50.

² The company's actions attracted media attention globally: see, eg, 'Labour Row Grounds Qantas Flights', *BBC News* (29 October 2011) <<http://www.bbc.co.uk/news/world-us-canada-15504838>>.

³ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367.

between Qantas and each of the unions (after a statutory negotiation period had been exhausted).

The title of this article owes something to the heated nature of the Qantas dispute, which was ratcheted up by Qantas CEO, Alan Joyce, in a speech in April 2011.⁴ Joyce attacked the three unions for running a ‘kamikaze campaign’ based on ‘completely unacceptable’ bargaining demands. This was a reference to the central issue in the dispute — the unions’ claims for enhanced job security protections — which Joyce labelled as ‘commitments that would kill the jobs of their members’.⁵ In turn, Joyce was labelled by the AIPA as a ‘madman’ following the grounding of the airline’s fleet.⁶ Prime Minister Julia Gillard went so far as to describe Qantas’s actions as rogue corporate behaviour that was unjustified under the Fair Work system.⁷

The Qantas dispute merits detailed analysis and assessment for three main reasons. First, it was probably the most significant industrial dispute to have occurred in Australia since the 1998 waterfront dispute between Patrick Stevedores and the Maritime Union of Australia.⁸ Secondly, the dispute re-focused the attention of the major political parties on issues of industrial relations regulation.⁹ After the turmoil of the period in which the Coalition government’s *Work Choices* legislation was in operation, and its replacement by Labor’s Fair Work laws,¹⁰ there had been something of a lull in the lead-up to the 2010 federal election — with both parties committing to policies of making no major changes to the major federal industrial statute, the *FW Act*.¹¹

⁴ Alan Joyce, ‘Strategic Decision Making’ (Speech delivered at the Australian Institute of Company Directors, Sydney, 19 April 2011).

⁵ Ibid.

⁶ See Peter van Onselen, ‘Joyce’s Gamble May Put IR Policy Back on the Table’, *The Australian* (Sydney), 2 November 2011, 40.

⁷ See Paul Kelly, ‘Labour Laws a Barrier in New Asian Century’, *The Australian* (Sydney), 5 November 2011, 15.

⁸ See, eg, Helen Trinca and Anne Davies, *The Battle That Changed Australia: Waterfront* (Doubleday, 2000); Graeme Orr, ‘Conspiracy on the Waterfront’ (1998) 11 *Australian Journal of Labour Law* 159.

⁹ Van Onselen, above n 6; Shaun Carney, ‘Qantas Has Helped Labor Fly with Some Bedrock Themes’, *The Saturday Age* (Melbourne), 5 November 2011, 22.

¹⁰ See, eg, Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009). The *Work Choices* legislation involved complex and substantial amendments to the *Workplace Relations Act 1996* (Cth), effected by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹¹ See Rae Cooper, ‘Industrial Relations in 2010: “Dead, Buried and Cremated”?’ (2011) 53 *Journal of Industrial Relations* 277.

And thirdly, the Qantas dispute was a major test of the Fair Work system,¹² raising arguments about whether the system sufficiently promotes productivity and supports employers' rights to manage businesses; the ability of unions to protect their members' jobs against the chill winds of global competition; the legality of certain industrial tactics; and the role of FWA in resolving collective bargaining disputes.¹³

In this article, we begin by examining the background to the dispute, including the respective positions of the airline and the three unions, and how the dispute unfolded (Parts II and III). We then analyse the key legal issues that arose in the dispute: the legality of the unions' job security claims; the role of good faith bargaining; whether Qantas's proposed lockout and grounding were legitimate; the federal government's response; and FWA's powers to arbitrate bargaining disputes (Part IV). Finally, we examine the key implications of the Qantas dispute for workplace regulation in Australia (Part V).

Throughout the article, the discussion takes account of the findings of a government-initiated review of the operation of the Fair Work legislation, which was released in July 2012.¹⁴ Some of the less contentious reforms proposed by that review have already been implemented, by virtue of the *Fair Work Amendment Act 2012* (Cth). Among other things, FWA has been renamed the Fair Work Commission (FWC). At the time of writing, the Gillard government had not yet announced a response to many of the other recommendations contained in the review, although some further amendments have been proposed in the Fair Work Amendment Bill 2013, introduced into Parliament on 21 March 2013.

¹² See, eg, Anthony Forsyth and John Howe, 'Fair Work at Work', *The Age* (Melbourne), 31 October 2011, 13; Editorial, 'So Far, Fair Work Has Been a Fair Cop', *The Saturday Age* (Melbourne), 19 November 2011, 18. Cf Louise Dodson, 'Fair Work Is the Great Flaw: BCA Chief', *Australian Financial Review* (Melbourne), 25 November 2011, 1.

¹³ See, eg, Marcus Priest, 'Fair Work Umpire Back on Centre Stage', *Australian Financial Review* (Melbourne), 31 October 2011, 1; Mark Skulley, 'Unions Want Stronger Hand', *Australian Financial Review* (Melbourne), 14 November 2011, 3; Judith Sloan, 'Back to the Future as Industrial Umpire Steps In', *The Australian* (Sydney), 26 November 2011, 22.

¹⁴ Ron McCallum, Michael Moore and John Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Australian Government, 2012).

II BACKGROUND TO THE QANTAS DISPUTE

Before going on to consider the various legal issues that ultimately arose in the Qantas dispute, and their impact on the broader debate about workplace regulation in Australia, it is helpful first of all to set the dispute in its commercial and industrial context and explain how it evolved.

A The Battlelines Are Drawn: Company and Union Perspectives

Qantas entered into negotiations with the ALAEA and AIPA in August 2010, and with the TWU in May 2011, in a defensive position, seeking to remain competitive in an increasingly difficult climate in the global aviation industry. A fascinating insight into the airline's approach to industrial relations was provided in a journal article by two of its senior employment relations personnel, published in mid-2011, in which the authors stated that:

Airlines are a low-margin, low-return, labour intensive and very competitive business, requiring high levels of investment ... This set of economic drivers, rather than any particular ideological or political perspective, drives Qantas's industrial relations policy ...¹⁵

The authors went on to argue that established or 'legacy' carriers like Qantas are at a labour cost disadvantage compared with newer entrants to the Australian aviation industry, such as Virgin Australia and Tiger Airways. This is because employment conditions at Qantas were originally set down in awards and agreements when the airline was publicly owned and operating in a 'protected' market.¹⁶ Therefore, and with labour costs a key element of its overall cost structure, Qantas had for some time adopted a strategy of seeking to narrow the labour cost gap with its competitors by holding real wage increases to three per cent per annum.¹⁷ With some prescience, the authors observed that:

¹⁵ Sue Bussell and John Farrow, 'Continuity and Change: The *Fair Work Act* in Aviation' (2011) 53 *Journal of Industrial Relations* 392, 393.

¹⁶ *Ibid.* For a broader discussion of these issues in the context of developments in the global aviation industry, see, eg, Greg Bamber et al, *Up in the Air: How Airlines Can Improve Performance by Engaging Their Employees* (Cornell University Press, 2009); Matthew Benns, *The Men Who Killed Qantas* (William Heinemann, 2009); Sarah Oxenbridge et al, 'A Comparative Analysis of Restructuring Employment Relationships in Qantas and Aer Lingus: Different Routes, Similar Destinations' (2010) 21 *International Journal of Human Resource Management* 180.

¹⁷ Bussell and Farrow, above n 15, 394.

There is a tension ... at the heart of the [*FW Act*], which is its focus on the collective when all the indicators in the broader society, not least in the decline of actual paying union members, point towards greater variegation and individualization, and it will be interesting to watch this tension play out over coming years.¹⁸

As events unfolded, the Qantas dispute became a stark illustration of this 'tension'. The fact is that union membership among the parts of the airline's workforce covered by the TWU, AIPA and ALAEA is far higher than overall union density in Australia.¹⁹ And it is not just these unions that have a role within the company. As the dispute discussed in this article was getting under way, Qantas had 48 different collective agreements with 16 unions.²⁰ So Qantas has been (and continues to be) bound to engage in labour relations on a 'collective' basis — with consequent exposure to protected industrial action during collective bargaining negotiations.

To return though to the unions that featured in this particular dispute, the TWU covers ground service employees (ramp and baggage handling) and catering staff engaged by Qantas and a related entity, QCatering Ltd; the AIPA represents pilots employed on the airline's long-haul routes; while the ALAEA covers licensed aircraft engineers.²¹ The central bargaining claims of the three unions related not to wages or other minimum employment conditions. Rather, the unions' main concern was to guarantee the security of their members' jobs. This was largely a response to measures taken by Qantas in recent years to obtain greater efficiencies in its operations through reduced labour costs, including through increased use of contractors and labour hire employees and the 'offshoring' of job functions.

For example, in 2001 Qantas established Jetconnect, a wholly-owned subsidiary company registered in New Zealand that flies under the Qantas brand. Jetconnect operates the majority of Qantas flights between Australia and New Zealand, using pilots who are employees of Jetconnect and engaged pursuant

¹⁸ Ibid 400–1.

¹⁹ Union membership density in Australia was 18.4 per cent of the workforce in 2011, with just 13.2 per cent of private sector workers being members of trade unions: Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia* (ABS Catalogue No 6310.0, 2011) 30.

²⁰ Bussell and Farrow, above n 15, 397.

²¹ As to the scope of the ALAEA's coverage, see *Australian Workers' Union v Australian Licenced Aircraft Engineers Association* [2012] FWAFB 7398 (29 August 2012).

to individual and collective employment agreements negotiated under New Zealand labour laws. In September 2011, a Full Bench of FWA rejected an application by AIPA to make Jetconnect a respondent to the Qantas Shorthaul Pilots' Award 2000, a step that would have ensured the Jetconnect pilots were engaged under Australian employment conditions.²² A majority of the Full Bench rejected AIPA's argument that Qantas and Jetconnect were in reality a single entity, and that the corporate veil should be pierced to ensure that Qantas could not avoid its obligations under an Australian award through artificial arrangements. According to Boulton J and Hampton C:

the Operating Agreements between Qantas and Jetconnect and the employment contracts entered into between Jetconnect and its pilots cannot be held to be shams. Even though Qantas exercises a considerable degree of control and influence over the operation of its subsidiary, this is not sufficient to disregard the separate legal personality of the subsidiary.²³

In light of the outsourcing of its members' jobs through the creation of offshore entities, one of the AIPA's main claims in the enterprise agreement negotiations was that only Qantas-employed pilots could operate any flight with the 'QF' code.²⁴ The union also embarked on a major public relations campaign, seeking to obtain the support of the travelling public — and Qantas shareholders — for its position in the dispute. This included the placement of full-page advertisements in national newspapers,²⁵ a dedicated website,²⁶ and pilots making the following announcement from the cockpit on some international flights:

We are proud of our profession and our airline and trust you will support us in keeping Qantas pilots in Qantas aircraft and ensuring our great iconic airline

²² *Australian and International Pilots Association v Qantas Airways Ltd* (2011) 211 IR 220.

²³ *Ibid* 233 [54]. See also at 234 [57], [59]–[60].

²⁴ 'Qantas Wrap-Up: Arbitration "Favours Employers"; Greens Seek Lockout Limits; and the Clauses Qantas Rejects', *Workplace Express* (online), 3 November 2011. The claim was subsequently described by Perram J in the Federal Court as a 'demand that Jetstar pilots on Qantas codeshare flights be paid the same salaries as Qantas pilots': *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 239 [166].

²⁵ See, eg, AIPA, 'A Message to Qantas Shareholders from Qantas Pilots' (advertisement), *Australian Financial Review* (Melbourne), 13 October 2011, 13.

²⁶ See AIPA, *Qantas Pilots* <<http://web.archive.org/web/20120327122013/http://qantaspilots.com.au>>.

remains uniquely Australian. For more information and to register your support, please make your next destination qantaspilots.com.au.²⁷

The TWU's bargaining claims included limits on Qantas's ability to contract out job functions, for example by restricting the proportion of contractors to no more than 20 per cent of the workforce; and the extension of enterprise agreement wage rates and conditions to any outsourced or labour hire workers.²⁸ This latter type of provision is commonly known as a 'site rates' clause. For its part, the ALAEA sought commitments from the airline to retain the performance of maintenance functions by licensed aircraft engineers; and to continue carrying out maintenance checks on the new fleet of A380 aircraft 'in-house'.²⁹ The ALAEA was also concerned about the introduction of 'maintenance-on-demand' technology, which reduces the need for more regular manual checks.³⁰ With further signs during 2011 that Qantas would expand its offshore operations, particularly in Asia — and reduce staff numbers³¹ — the three unions' claims for enhanced protections of employment security were at the heart of the Qantas dispute.

B *The Battle Begins*

From an early stage in its negotiations over new enterprise agreements with each of the three unions, Qantas made it clear that it would not be giving in to the unions' job security claims. For the company, these claims threatened management's right to run the business as it saw fit — or 'managerial prerogative', a long-established concept in Australian industrial law that acknowledges that there are limits to the permissible reach of regulatory intrusion on

²⁷ AIPA, "Proud of Our Airline": Qantas Pilot In-Flight Announcements Commence' (Media Release, 22 July 2011) <<http://www.aipa.org.au/mediaroom/2011/470--proud-of-our-airline-qantas-pilot-in-flight-announcements-commence>>.

²⁸ 'Qantas Wrap-Up', above n 24.

²⁹ *Ibid.*

³⁰ Mark Skulley and Andrew Cleary, 'D-Day: Bitter Qantas Row Heads for Arbitration', *Australian Financial Review* (Melbourne), 21 November 2011, 4. The union's concerns were ultimately realised: see 'Qantas Cuts 500 Jobs, Reviews Heavy Maintenance', *Workplace Express* (online), 16 February 2012.

³¹ See, eg, John Durie, 'Captain Joyce Charts New Course', *The Australian* (Sydney), 17 August 2011; Matt O'Sullivan, "'New Qantas' to Slash About 1000 Jobs', *Sydney Morning Herald* (online), 16 August 2011 <<http://www.smh.com.au/business/new-qantas-to-slash-about-1000-jobs-20110816-1ivcn.html>>.

business decisions.³² We have referred already to the view of Qantas's CEO, articulated in April 2011, as to the unreasonableness of the unions' bargaining demands. By October 2011, by which time the airline had been the subject of many months of industrial action (as discussed below), Alan Joyce's criticisms of the three unions had become even more pointed:

Not only are they seeking pay and conditions that would put us even further beyond our competitors, they want the right to control key elements of how we run the company ... They want to be paid to do work that no longer exists due to the advent of new aircraft. They want to retain outdated work practices. They want to tell us what we can and can't change ...

In the modern world, no company can promise a job for life. The best way to deliver job security is to have a strong and viable business.³³

Qantas also sought to explain its position through advertisements in national newspapers,³⁴ as the dispute increasingly came to be fought in the media as well as in FWA.

As for the unions, their tactics in the dispute increasingly came to revolve around the taking of protected industrial action. Under pt 3-3 of the *FW Act*, employees and their bargaining representatives are permitted to organise and engage in such action in support of claims made in negotiations for a new enterprise agreement.³⁵ In the absence of such statutory protection, industrial action is invariably unlawful both at common law, and under other statutory provisions.³⁶ The limited right to strike, or to engage in other forms of industrial action such as work bans and 'go slows', is subject to many procedural requirements — including that any proposed action is approved by a majority of the relevant employees in a secret ballot.³⁷ Employers may also take protected industrial action in the form of a 'lockout', but only in response

³² See text at below nn 96–100, 110, 206–9.

³³ Qantas, 'Industrial Relations Update (Alan Joyce Speech): Apology to Customers' (Media Release, 13 October 2011) <<http://www.qantas.com.au/travel/airlines/media-releases/oct-2011/0000/global/en>>.

³⁴ See, eg, 'We're Sorry' (advertisement), *Australian Financial Review* (Melbourne), 11 October 2011, 9.

³⁵ The permitted forms of protected industrial action by employees are 'employee claim action' (*FW Act* s 409) and 'employee response action' (s 410). See also the definition of 'industrial action': at s 19. See also Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 6.

³⁶ See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) ch 22.

³⁷ *FW Act* pt 3-3 div 8.

to protected action taken by employees.³⁸ This framework for the taking of lawful industrial action by parties involved in agreement negotiations sits — albeit somewhat uneasily — alongside the obligation to bargain in good faith under s 228 of the Act.³⁹

In March 2011 the ALAEA took steps to enable its members to take protected action in support of their bargaining claims against Qantas, by obtaining a protected action ballot order ('PABO') from FWA.⁴⁰ Following approval by the required majority of employees voting in a secret ballot on 13 April, protected action commenced in May after negotiations between the union and the company stalled.⁴¹ The AIPA and the TWU also obtained PABOs from FWA, with their members voting in favour of protected action on 11 July and 23 August respectively. Protected action ensued soon afterwards in both instances.⁴²

The industrial action taken by ALAEA and TWU members consisted of work bans (such as restrictions on overtime or the performance of higher duties), working to rule, and stop-work meetings of varying duration. These are fairly standard forms of industrial action, although the ALAEA had to take some innovative steps to keep its rights to take such action 'alive' at several stages of the dispute. This was necessary due to the requirement that each particular form of industrial action approved in an employee ballot must be taken within 30 days of the ballot result.⁴³ So, for example, licensed engineers around Australia 'downed tools' for one minute in mid-July, and some members of the union's federal executive used the alternate to their natural hand when working with tools for a short period.⁴⁴ AIPA members engaged only in 'low-level' forms of industrial action during the dispute,

³⁸ See *ibid* s 411 (definition of 'employer response action').

³⁹ For discussion of the relationship between protected action and good faith bargaining, see text at below nn 128–44.

⁴⁰ As required under *FW Act* pt 3-3 div 8 sub-div B.

⁴¹ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367, 'Attachment 1: Chronology'. The chronology is available from the Fair Work Commission website: [2011] FWAFB 7444 (31 October 2011).

⁴² *Ibid*.

⁴³ *FW Act* s 459(1)(d).

⁴⁴ 'Engineers Notify Qantas of 60-Second Stopworks', *Workplace Express* (online), 13 July 2011.

consisting of the making of cockpit announcements during flights,⁴⁵ and the wearing of red ties (in contravention of Qantas's uniform policy).

The protected action taken by ALAEA and TWU members increased in regularity in September and October 2011.⁴⁶ Other tactics were employed by the unions, such as notifying Qantas of proposed protected action (for example, a stop-work meeting), then calling the action off at the last minute.⁴⁷ This had the dual benefit (for the unions) of causing maximum disruption to the airline, and ensuring that their members did not lose any pay by actually taking industrial action.⁴⁸ Qantas described this as a 'cynical tactic' and part of a campaign of 'strikes — both actual and threatened — by ground handlers and licensed engineers' that had (by mid-October) 'caused mass disruption to our customers and our business'.⁴⁹ By 29 October, the industrial action had resulted in the cancellation of 600 flights and seven aircraft being grounded, affecting 70 000 passengers and causing \$70 million damage to the airline.⁵⁰

In Qantas's view, all three unions had engaged in 'a coordinated campaign' of industrial action that had hurt not only the company and its customers but also the broader Australian community.⁵¹ The unions' strategy of taking intermittent industrial action over a drawn-out period was described by critics as the 'slow bake' of Qantas.⁵² Some conservative commentators maintained that this exposed a major flaw in the Fair Work system, in that unions could take protected action in the form of work stoppages, overtime bans and strikes, to bleed an employer into submission over time.⁵³ This led a number of employer organisations to argue, in their submissions to the

⁴⁵ See above n 27 and accompanying text.

⁴⁶ 'Qantas Grounds Planes, as Industrial Action Takes Its Toll', *Workplace Express* (online), 13 October 2011.

⁴⁷ As to the legality of this tactic, see text at below nn 134–5.

⁴⁸ Employees must not be paid for any period in which they are taking protected industrial action: see *FW Act* pt 3-3 div 9.

⁴⁹ Qantas, 'Industrial Relations Update', above n 33.

⁵⁰ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367, 370 [7] (Giudice J, Watson SDP and Roe C).

⁵¹ Qantas, 'Industrial Relations Update', above n 33. Cf 'Unions Reject Qantas Claim of "Coordinated" Industrial Action', *Workplace Express* (online), 11 October 2011.

⁵² See, eg, Judith Sloan, quoted in Annabel Hepworth and Patricia Karvelas, 'Business to Fight Union "Wishlist"', *The Australian* (Sydney), 2 November 2011, 1.

⁵³ *Ibid.* See also Paul Kelly, 'Blame Game Misses Need for IR Reform', *The Australian* (Sydney), 2 November 2011, 12; Editorial, 'PM Must Stand Up for Productivity and Qantas', *The Australian* (Sydney), 2 November 2011, 13, describing the unions' strategy in the dispute as 'guerilla industrial action'; Gerard Phillips, 'Protected Industrial Action: Legitimate Employee Right or Legally Sanctioned Extortion?' (2011) 2 *Workplace Review* 130.

Gillard government's Fair Work Act Review, for the introduction of new limits on protected industrial action by employees or unions — including a requirement that such action only be permitted as a 'last resort'.⁵⁴

III THE DISPUTE TAKES OFF

A *Qantas's Grounding and Proposed Lockout*

As mentioned earlier, on Saturday 29 October 2011 Qantas gave notice to the three unions and all employees who would be covered by the proposed enterprise agreements under negotiation that those employees would be locked out from 8:00 pm on Monday 31 October. A 'lockout' occurs, within the meaning of *FW Act* s 19(3), when an employer 'prevents the employees from performing work under their contracts of employment without terminating those contracts'. This is the only form of protected industrial action that may be taken by employers in enterprise agreement negotiations.⁵⁵ Under s 411, such action may be organised or engaged in 'as a response to' industrial action by employees or their bargaining representatives. While protected industrial action taken by employees or unions must be preceded by the giving of three clear working days' written notice to the employer,⁵⁶ a lockout can take place with immediate effect following the provision of written notice.⁵⁷

In announcing the proposed lockout, Qantas CEO Alan Joyce stated:

We have got to achieve a resolution to this crisis. We have got to bring this to an end. So I have no option but to force the issue. I have to activate the one form of protected industrial action that is available to me to bring home to the unions the seriousness of their actions, and to get them to forge sensible deals with us. I am using the only effective avenue at my disposal to bring about peace and certainty.⁵⁸

⁵⁴ See, eg. Australian Industry Group, Submission to the Department of Education, Employment and Workplace Relations, *Fair Work Act Review*, February 2012, 25–6.

⁵⁵ It was described by Perram J as 'the only bargaining tool available to an employer': *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 236 [154].

⁵⁶ *FW Act* ss 414(1)–(3).

⁵⁷ *Ibid* s 414(5).

⁵⁸ Alan Joyce, 'Announcement: Alan Joyce, Qantas CEO' (Announcement, 29 October 2011), quoted in *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 213 [52] (Lander J).

Joyce added that because the Qantas staff to be locked out were ‘essential to the running of the airline, the lock-out makes it necessary for us to ground the fleet’ immediately.⁵⁹ As a result, flights in the air were directed to complete their sectors, but there would be ‘no further Qantas domestic or international departures anywhere in the world’.⁶⁰ The main reason provided by the airline for the decision to ground the fleet prior to the lockout taking effect was to ensure safety.⁶¹ However, the motivation for the lockout was clearly (as Joyce stated) to bring the dispute to a head — by creating a circumstance in which the federal government would be forced to intervene and seek a resolution of the dispute in the national interest.

B *The Federal Government’s Response and FWA’s Termination Decision*

Only a few hours after Qantas’s announcement of the grounding and proposed lockout on Saturday 29 October 2011, the federal government made an application to FWA under s 424 of the *FW Act*. The application, which was supported by the governments of Victoria, New South Wales and Queensland, sought the termination by FWA of the protected industrial action being taken, or proposed, by all parties to the dispute. The ground upon which the government sought such termination was that set out in s 424(1)(d): that the protected action was threatening, or would threaten, ‘to cause significant damage to the Australian economy or an important part of it’ — specifically in this case, the aviation and tourism industries. The effect of such a termination would be to give Qantas and each union a short period in which to conclude an enterprise agreement. Otherwise, FWA would be required to resolve the matter by arbitration.

The power to use compulsory arbitration to resolve a bargaining dispute in this situation has been a feature of the federal industrial statute since 1993,⁶²

⁵⁹ Alan Joyce, ‘Announcement’, above n 58, quoted in *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 214 [52] (Lander J).

⁶⁰ Alan Joyce, ‘Announcement’, above n 58, quoted in *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 213 [52] (Lander J).

⁶¹ Steve O’Neill, *The Gods Must Be Crazy: Chronology of and Issues in the Qantas Industrial Dispute 2011* (Background Note, Parliamentary Library, Parliament of Australia, 2011) 2. See also *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 238 [163] (Perram J).

⁶² See *Industrial Relations Act 1988* (Cth) ss 170PO–170PP, as inserted by *Industrial Relations Reform Act 1993* (Cth), which gave the federal tribunal power to terminate what was then known as a ‘bargaining period’ (and therefore, the right to take protected industrial action) on grounds including the industrial action causing damage to an important part of the Aus-

when the Keating government legislated to encourage enterprise-level bargaining and introduced the concept of protected industrial action. Besides cases of significant economic damage, the power may also be exercised under s 424 where protected action is threatening the life, safety, health or welfare of the population, or part of it.⁶³ The drafting of the provision has been influenced by (though does not wholly reflect) an interpretation of international labour standards relating to the right to take industrial action, whereby it is acceptable to deny 'essential service' workers the right to strike, provided they have access to some form of independent procedure to resolve bargaining deadlocks.⁶⁴

In this case the federal government argued that if FWA was not prepared to terminate the industrial action at Qantas, it should at least impose a *suspension* of all protected action for 90 days. That would have left it open for the industrial action to resume after that period, and there would have been no process of compulsory arbitration in the meantime.

A Full Bench of FWA was convened almost immediately to deal with the application, and commenced hearings that continued (on and off) for the next day and a half. In the early hours of Monday 31 October, the Full Bench handed down its decision granting the federal government's application.⁶⁵ The Full Bench indicated that it had heard unchallenged evidence as to the importance of airline passenger and cargo transport to the national economy,

tralian economy. For examples of the rare application of similar provisions in subsequent legislation, see *Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; *JSM Trading Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Unreported, Australian Industrial Relations Commission, Lacy SDP, 9 April 2001); *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (Unreported, Australian Industrial Relations Commission, Bacon C, 17 April 2001).

⁶³ FW Act s 424(1)(c). See, eg, *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* (2009) 187 IR 119.

⁶⁴ See Creighton and Stewart, above n 36, 828–32.

⁶⁵ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367.

and the effect of the grounding of Qantas's fleet on the aviation and tourism industries. Most importantly, it determined:

It is 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. The response industrial action of which Qantas has given notice, if taken, threatens to cause significant damage to the tourism and air transport industries ...⁶⁶

On this basis, the Full Bench found that the requirements of s 424(1) were made out in respect of Qantas's proposed lockout; and that, although protected industrial action was permissible under the *FW Act*, in this case the 'primary consideration' had to be 'the effect of the protected action on the wider aviation and tourism industries'.⁶⁷ This justified the immediate termination (rather than suspension) of all protected industrial action in relation to each of the proposed agreements. The effect of the Full Bench's decision was to enable Qantas to resume normal operations (which occurred within a few days).⁶⁸ The decision also triggered the commencement of a 21-day period (extendable by a further 21 days) during which all parties to the dispute were required to resume negotiations with a view to reaching agreements — or face the prospect of having outcomes determined by FWA.⁶⁹

C *The Workplace Determination Phase and Subsequent Events*

The Full Bench of FWA noted, in its decision terminating the industrial action of all parties involved in the Qantas dispute, that the tribunal could assist the parties in their efforts to reach agreements during the 'post-industrial action negotiating period'.⁷⁰ The *FW Act* does not mandate the tribunal's involvement in such negotiations. Nevertheless, the tribunal did play a significant role in facilitating discussions in respect of each of the three proposed Qantas

⁶⁶ Ibid 370 [10] (Giudice J, Watson SDP and Roe C).

⁶⁷ Ibid 371 [14]–[15].

⁶⁸ See, eg, Miki Perkins, 'Gates Open but Public Sentiment Still Grounded', *The Age* (Melbourne), 1 November 2011, 7; 'Qantas Is Back on Schedule' (advertisement), *Australian Financial Review* (Melbourne), 4 November 2011, 23.

⁶⁹ *FW Act* s 266. See Jessica Wright, 'Fair Work Ruling Sets Timeline', *The Age* (Melbourne), 1 November 2011, 7.

⁷⁰ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367, 371 [17] (Giudice J, Watson SDP and Roe C).

agreements.⁷¹ Despite these efforts, no agreements were reached during the 21-day period following the termination of protected action. Two of the unions (the TWU and AIPA) wanted to extend the negotiating period for a further 21 days, but Qantas preferred to move straight into arbitration.⁷² Section 266 of the Act provides that, if no agreement is reached during the post-industrial action negotiating period — and that period is not extended for a further 21 days by agreement between the parties — then the FWC (as it now is) must make an ‘industrial action related workplace determination’ under pt 2-5 div 3. This is one of the few grounds upon which the tribunal may arbitrate the outcome of bargaining disputes under the legislation,⁷³ reflecting the shift away from compulsory arbitration in Australia’s industrial relations system over the last 20 years.⁷⁴

As the disputes headed into the workplace determination (or arbitration) phase, Joyce indicated that Qantas would accept whatever outcome FWA decided upon.⁷⁵ The company and the unions then entered into discussions to identify which issues in the three sets of negotiations had resulted in agreement, and which remained for arbitration by FWA.⁷⁶ Under ss 267(2) and 274(2) of the *FW Act*, the tribunal must include in an industrial action related workplace determination any terms that had been agreed between the bargaining representatives as at the end of the post-industrial action negotiating period. The remainder of the determination is made up of terms resolving

⁷¹ ‘Unions and Qantas in Talks, as End of Negotiating Period Looms’, *Workplace Express* (online), 21 November 2011.

⁷² Skulley and Cleary, above n 30; ‘Qantas Talks with LAMEs Continuing, but FWA Set to Arbitrate after Breakdown of TWU and AIPA Negotiations’, *Workplace Express* (online), 21 November 2011.

⁷³ The others are where all the parties to a bargaining dispute wish the tribunal to arbitrate: *FW Act* s 240(4); where a serious breach declaration has been made, following repeated breaches of good faith bargaining orders: at s 269; and where parties are unable to reach agreement after extensive efforts in the ‘low-paid’ bargaining stream: at ss 262–3. See generally Creighton and Stewart, above n 36, 731–4, 749–55.

⁷⁴ See, eg, Braham Dabscheck, ‘The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration’ (2001) 43 *Journal of Industrial Relations* 277.

⁷⁵ Mark Skulley and Joanna Mather, ‘Qantas Flies to Fair Work as Talks Fail’, *Australian Financial Review* (Melbourne), 22 November 2011, 1.

⁷⁶ Steve Creedy, ‘Qantas in the Dark on IR Issues Set for Arbitration’, *The Australian* (Sydney), 23 November 2011, 6.

the matters that were still at issue between the parties at the end of that period⁷⁷ and certain 'core' and 'mandatory' terms.⁷⁸

Following further talks after the conclusion of the post-industrial action negotiating period, Qantas and the ALAEA announced on 19 December 2011 that they had reached an agreement to resolve their dispute. The new, four-year agreement included three per cent annual pay increases — but no improvements on the job security measures contained in the previous agreement between the parties.⁷⁹ In particular, the union acknowledged that it had been unable to secure a commitment from Qantas to retain A380 heavy maintenance functions within Australia.⁸⁰ The agreement was submitted to FWA that day, with the parties asking the tribunal to make an industrial action related workplace determination under s 266 consisting of the terms that had been agreed between them.⁸¹ A Full Bench of FWA did so in a decision handed down on 23 January 2012, which endorsed the first workplace determination made under the *FW Act* as an 'appropriate' package resulting from compromise between the parties that would achieve much-needed stability.⁸²

In contrast, the disputes between Qantas and the TWU and AIPA each advanced to the stage of workplace determination proceedings before Full Benches of FWA in 2012. FWA commenced hearing the TWU arbitration in March, with further hearings in May and June.⁸³ Hearings on the pilots' arbitration occurred in June, August and September.⁸⁴ In the meantime, the Full Federal Court had to resolve an application brought by the AIPA challenging the validity of FWA's decision on 31 October 2011 ending all

⁷⁷ *FW Act* s 267(3). Terms dealing with the matters at issue between the parties are to be determined with reference to the factors outlined in s 275: see below n 203.

⁷⁸ *Ibid* ss 267(1), 272–3.

⁷⁹ 'Qantas and ALAEA to Present Consent Deal to FWA This Afternoon', *Workplace Express* (online), 19 December 2011.

⁸⁰ Matt O'Sullivan, 'Engineers Scrap A380 Hangar in Qantas Deal', *Sydney Morning Herald* (online), 19 December 2011 <<http://www.smh.com.au/business/engineers-scrap-a380-hangar-in-qantas-deal-20111219-1p1gc.html>>.

⁸¹ 'Bench Reserves on First Workplace Determination, after Consent Qantas–ALAEA Deal Tabled', *Workplace Express* (online), 19 December 2011.

⁸² *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* (2012) 218 IR 165, 174–5 [34]–[35] (Watson V-P, Boulton J and Roe C).

⁸³ See, eg, 'Site Rates Key to Qantas Dispute: TWU', *Workplace Express* (online), 22 March 2012; 'We Won't Hire Any More Airport Workers: Qantas', *Workplace Express* (online), 30 May 2012.

⁸⁴ 'Pilots' Arbitration Continues', *Workplace Express* (online), 10 August 2012.

industrial action in the Qantas dispute.⁸⁵ The basis of the AIPA's challenge is discussed further below. It is sufficient at this point to note that the Full Court dismissed the AIPA's legal challenge on 10 May 2012,⁸⁶ with the result that the jurisdictional basis for FWA to proceed with the TWU and AIPA workplace determination matters was confirmed.

On 2 August 2012, a Full Bench of FWA handed down its decision in the TWU arbitration.⁸⁷ The outcome was widely regarded as a major victory for the airline,⁸⁸ as the Full Bench rejected (in particular) the TWU's claims for site rates and limits on contracting out and the use of labour hire staff. The Full Bench also recognised Qantas's need to reduce labour costs in response to the competitive pressures at play in the domestic and international airline industry — and essentially endorsed the steps the airline had taken during the dispute, including the lockout and grounding.⁸⁹ On the same day, Qantas confirmed that the total number of redundancies to be effected in its engineering, maintenance and catering operations amounted to 2800 jobs — although most of these redundancies had been announced previously.⁹⁰ A separate Full Bench's decision in the AIPA arbitration was handed down on 17 January 2013, which also found mostly in favour of the airline.⁹¹

⁸⁵ 'Pilots' Union Challenges FWA's Qantas Ruling', *Workplace Express* (online), 10 November 2011; Mark Skulley, 'Pilots Appeal on Qantas Ruling', *Australian Financial Review* (Melbourne), 5 March 2012, 8.

⁸⁶ *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200. See also text at below nn 145–63.

⁸⁷ *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) ('*TWU v Qantas*').

⁸⁸ 'Victory for Qantas in Ground Employees' Workplace Determination', *Workplace Express* (online), 8 August 2012; Mark Skulley, 'Win for Qantas in Fair Work Ruling', *Australian Financial Review* (Melbourne), 9 August 2012, 8.

⁸⁹ See text at below nn 210–12.

⁹⁰ Andrew Heasley, 'Qantas Seeks Savings from 2800 Job Cuts', *The Age* (Melbourne), 9 August 2012, 2.

⁹¹ *Australian and International Pilots Association v Qantas Airways Ltd* [2013] FWCFB 317 (17 January 2013) ('*AIPA v Qantas*').

IV KEY LEGAL ISSUES IN THE QANTAS DISPUTE

A *Legality of the Unions' Job Security Claims*1 *The Debate over Limits on Contracting Out*

The attempt by the three unions to secure commitments about the future of their members' jobs was, as we have suggested, at the heart of the bargaining disputes that blew up in 2011. Qantas was pursuing a vision of the airline that would see a leaner and more efficient Australian operation, with key jobs increasingly sent offshore to be performed at much lower rates of pay. The unions were just as intent to stop this happening.

At a broader level, this conflict was played out against the backdrop of increasing complaints by certain employer groups that the Labor government's Fair Work regime had radically boosted 'union power', increased industrial disputation, and hampered attempts by Australian businesses to operate more productively.⁹² As we have previously noted,⁹³ there is very little hard evidence to back up these claims, a conclusion also reached by the Fair Work Act Review.⁹⁴ Nevertheless, the calls from some quarters for new limits on the capacity of trade unions to 'interfere' in the running of businesses have intensified. In particular, the idea that unions should be prohibited from even seeking to *negotiate* restrictions on outsourcing has become a totemic issue for bodies such as the Australian Industry Group ('AiG').⁹⁵

2 *Evolution of the 'Matters Pertaining' Formulation*

At the core of this debate is a legal issue that has created uncertainty for over a century.⁹⁶ Under the *Conciliation and Arbitration Act 1904* (Cth), the federal industrial tribunal could only deal with disputes concerning 'industrial matters', a term defined in s 4 to include 'all matters pertaining to the relations of employers and employees.' This spawned a series of confusing and often contradictory High Court decisions that sought to draw a line between

⁹² See, eg, Heather Ridout, 'Taking Charge of Our Future' (Speech delivered at the National Press Club, Canberra, 30 November 2011); Australian Mines and Metals Association, 'Fair for Who? Rhetoric v Reality of the *Fair Work Act*' (Media Release, 30 June 2011).

⁹³ See Anthony Forsyth and Andrew Stewart, Submission to the Department of Education, Employment and Workplace Relations, *Fair Work Act Review*, February 2012, 2–5.

⁹⁴ See McCallum, Moore and Edwards, above n 14, ch 4.

⁹⁵ See Australian Industry Group, above n 54, 62–4, describing restrictions on agreement content as '[p]erhaps the most important change that needs to be made to the agreement making laws'.

⁹⁶ See Creighton and Stewart, above n 36, 305–11.

matters *directly* pertaining to the employment relationships at issue, and those having merely an ‘indirect’ or ‘consequential’ effect.⁹⁷ In particular, the Court struggled to settle on a consistent view on whether matters that appeared to be ‘managerial’ in nature could legitimately be the subject of industrial disputation, and hence regulation by award.⁹⁸ During the 1980s, the Court rejected the idea of a simple distinction between ‘industrial’ and ‘managerial’ matters, ruling that claims could be made about issues such as staffing levels.⁹⁹ But by 1994 it had reverted to a narrow and technical approach that suggested it might be hard for matters of collective concern to employees to be regarded as ‘industrial’.¹⁰⁰

Despite the shift that occurred in the 1990s away from the arbitration of industrial disputes, and in favour of the setting of wages and employment conditions by registered workplace agreements, such agreements were still required to deal with matters pertaining to the relations of the employers and employees in question.¹⁰¹ In 2004, the High Court confirmed in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*¹⁰² that if a particular matter did not satisfy the ‘matters pertaining’ test, it could not validly be the subject of a registered agreement, and nor could employees take protected industrial action in relation to any proposed agreement that included a ‘non-pertaining’ provision.¹⁰³

The permissible content of registered workplace agreements was narrowed still further by the Howard government’s 2005 *Work Choices* legislation, which prohibited agreements from dealing with a number of matters that would or

⁹⁷ See, eg, *Re Manufacturing Grocers’ Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341, 353 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

⁹⁸ See, eg, L W Maher and M G Sexton, ‘The High Court and Industrial Relations’ (1972) 46 *Australian Law Journal* 109, 110; Andrew Stewart, ‘The Federated Clerks Case: Managerial Prerogative in Retreat?’ (1985) 59 *Australian Law Journal* 717.

⁹⁹ See *Re Cram; Ex parte NSW Colliery Proprietors’ Association Ltd* (1987) 163 CLR 117.

¹⁰⁰ See *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96; Esther Stern, ‘Industrial Disputes, the Employment Relationship and the FIMEE Case’ (1999) 3(2) *Newcastle Law Review* 66.

¹⁰¹ See, eg, *Workplace Relations Act 1996* (Cth) s 170LI.

¹⁰² (2004) 221 CLR 309.

¹⁰³ As to the legal arguments that resulted from this decision, see Jason Harris, ‘Federal Collective Bargaining after *Electrolux*’ (2006) 34 *Federal Law Review* 45.

might otherwise have satisfied the matters pertaining requirement.¹⁰⁴ Together with the *Electrolux* ruling, this led unions to seek to enter separate or ‘side’ agreements to deal with matters of mutual concern that could not now be included in a statutory agreement. Qantas was just one of many companies that were prepared to go along with this strategy.¹⁰⁵ Such unregistered agreements were only enforceable, if at all, at common law.¹⁰⁶

3 *The Fair Work Act’s Restrictions on Agreement Content*

Labor came to power in 2007 with a promise to ‘remove the [Howard] Government’s onerous, complex and legalistic restrictions on agreement content’ and allow parties to ‘reach agreement on whatever matters suit them’.¹⁰⁷ But under pressure from employer groups, it reneged on this commitment. The *FW Act* has removed many of the *Work Choices* restrictions; but s 172(1) retains (albeit in modified form) the requirement that what are now called ‘enterprise agreements’ deal only with matters pertaining to the employment relationship.¹⁰⁸ The government confirmed that this was intended to be read in accordance with the ‘substantial jurisprudence’ on the meaning of the phrase.¹⁰⁹ But its confusion on the point was evident in the then Workplace Relations Minister’s observation that the requirement would exclude from agreements ‘matters that are properly the prerogative of

¹⁰⁴ See *Workplace Relations Act 1996* (Cth) s 356, as inserted by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1; *Workplace Relations Regulations 2006* (Cth) ch 2 regs 8.5–8.7. As commentators have observed, the prohibited content rules betrayed a telling mistrust of employers, and were scarcely consistent with the ‘freedom’ of agreement-making that the Coalition professed to support: see, eg, Jill Murray, ‘*Work Choices* and the Radical Revision of the Public Realm of Australian Statutory Labour Law’ (2006) 35 *Industrial Law Journal* 343, 365; Andrew Stewart, ‘*Work Choices* in Overview: Big Bang or Slow Burn?’ (2006) 16(2) *Economic and Labour Relations Review* 25, 35, 52.

¹⁰⁵ A point noted in *TWU v Qantas* [2012] FWA 6612 (8 August 2012) [38] (Watson V-P, Harrison SDP and Harrison C).

¹⁰⁶ See Andrew Stewart and Joellen Riley, ‘Working around *Work Choices*: Collective Bargaining and the Common Law’ (2007) 31 *Melbourne University Law Review* 903.

¹⁰⁷ Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor’s Plan for Fairer and More Productive Australian Workplaces* (Australian Labor Party, 2007) 14.

¹⁰⁸ Under s 172(1) an agreement may also deal with matters pertaining to an employer–union relationship, agreed deductions from wages (ruled not to be a matter pertaining in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96: see above n 100) and ‘how the agreement will operate’.

¹⁰⁹ Explanatory Memorandum, Fair Work Bill 2008 (Cth) 107 [670]. The Explanatory Memorandum went on to observe, with questionable accuracy, that ‘[t]he courts’ interpretation of the formulation has evolved over time in line with changing community understandings and expectations about the kinds of matters that pertain to the employment relationship’.

management¹¹⁰ — an idea that, as noted above, the High Court had expressly repudiated in the 1980s.

As the *FW Act* stands, agreements can still be approved by the FWC even if they contain ‘non-permitted’ content, but any clause dealing with a matter not authorised by s 172(1) will be unenforceable.¹¹¹ Moreover, and just as in *Electrolux*, an attempt by a bargaining representative to propose a non-permitted term for inclusion in an agreement will mean that any industrial action they take or organise cannot be protected. This is because the representative concerned is regarded as not ‘genuinely’ seeking to reach agreement.¹¹²

4 Operation of the Agreement Content Rules in the Qantas Dispute

Returning to the issues that arose in the Qantas dispute, there has been perennial debate about whether a claim to restrict an employer from outsourcing labour to a subsidiary, contractor or labour hire agency can be said to ‘pertain’ to the relations between the employer and the employees who would otherwise be performing that work. Based on a pair of earlier High Court decisions,¹¹³ a crucial distinction has come to be drawn between *restricting* the use of outside labour, and imposing *conditions* on such an arrangement.

On the one hand, it is not considered legitimate for employees to seek to preclude their employer from obtaining labour from another source. The connection to the employees’ own employment relationship is considered too remote — even though it is hard to imagine an issue of greater significance to those affected! So, for example, a union cannot seek to negotiate a

¹¹⁰ Julia Gillard, ‘Introducing Australia’s New Workplace Relations System’ (Speech delivered at the National Press Club, Canberra, 17 September 2008).

¹¹¹ *FW Act* s 253(1)(a). By contrast, the tribunal is required by s 186(4) to refuse to approve an agreement if it contains an ‘unlawful term’. By virtue of s 194, terms are unlawful if they are discriminatory, require or permit certain conduct prohibited by the Act, or seek to expand certain rights (such as to take industrial action) beyond the limits set by the statute.

¹¹² This is a general requirement for any type of protected action: *FW Act* s 414(3). In the case of employee claim action, s 443(1)(b) also makes it a precondition for the tribunal issuing a PABO: see, eg, *Airport Fuel Services Pty Ltd v Transport Workers’ Union of Australia* (2010) 195 IR 384, where it was regarded as irrelevant that the union genuinely thought its claim would involve permitted content. Cf *FW Act* s 409(1)(a), which appears to suggest that it is enough that there be a reasonable belief that the content is permitted.

¹¹³ *R v Judges of the Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313; *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1978) 140 CLR 470.

requirement that an employer advertise any job vacancies internally and contract out a position only if it is not wanted by an existing employee.¹¹⁴ Nor can it require an employer to ensure that any entity to which the employer outsources work has a union-approved agreement.¹¹⁵

On the other hand, it has been treated as permissible to seek to oblige an employer to consult with its own workforce before proceeding to outsource work.¹¹⁶ Furthermore, it is considered acceptable to propose a 'site rates' clause, under which an employer must use their best efforts to ensure that any outside workers receive the same pay and conditions as those directly employed to do the same job.¹¹⁷ In *Australian Industry Group v Fair Work Australia*¹¹⁸ a Full Court of the Federal Court rejected a challenge to the approval by FWA of an agreement made by ADJ Contracting Pty Ltd that included both these types of provision. Besides confirming (although the point was not contested) that the agreement dealt with permitted matters within the meaning of s 172(1),¹¹⁹ the Court rejected an argument that the site rates clause would have the effect of requiring or permitting ADJ to breach certain of the 'general protections' against wrongful conduct in pt 3-1 of the *FW Act*.¹²⁰

It is important to note that under the *Work Choices* legislation that was in force from March 2006 until July 2009, the prohibited content rules did not just preclude registered agreements from restricting the engagement of contractors or labour hire workers, but also from including any 'requirements relating to the conditions of their engagement'.¹²¹ This plainly covered site rates provisions. It is this position that groups like the AiG have been seeking to restore, on the basis that clauses of this type 'restrict legitimate commercial arrangements between contractors and subcontractors' and 'inhibit the

¹¹⁴ See, eg, *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2009) 189 IR 262. See also *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [No 2]* (2004) 138 IR 362.

¹¹⁵ *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* (2010) 195 IR 384.

¹¹⁶ See, eg, *Re Liquor, Hospitality and Miscellaneous Union* [2009] FWA 920 (3 November 2009).

¹¹⁷ See, eg, *Re National Union of Workers* (2005) 146 IR 334; *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* (2010) 197 IR 365.

¹¹⁸ (2012) 205 FCR 339.

¹¹⁹ *Ibid* 364 [61] (North, McKerracher and Reeves JJ).

¹²⁰ *Ibid* 365 [65]–[67]. If true, this would have made the site rates clause an unlawful term: see above n 111.

¹²¹ *Workplace Relations Regulations 2006* (Cth) ch 2 reg 8.5(1)(h)–(i).

productive and cost-effective organisation of work'.¹²² However, the Fair Work Act Review rejected this and other proposed changes to the content rules for agreements, on the basis that 'the matters pertaining formulation ... accords a fair balance between the prerogative of management to manage and the reasonable desires of employees to jointly govern their terms and conditions of employment'.¹²³ It also noted analysis showing that under the new agreement content rules, clauses regulating the use of contract labour had actually become less common, compared to the pre-*Work Choices* system.¹²⁴

In its own submission to the Review, Qantas argued that the removal of the *Work Choices* prohibited content rules had directly resulted in union bargaining claims that 'sought to regulate, control and reduce Qantas access to third party labour and or business services and to control Qantas business strategy and the opportunities for the business to improve productivity'.¹²⁵ This suggests an acceptance that the claims in question were entirely legitimate under the *FW Act*. But as noted earlier, one of the TWU's demands was that contractors should make up no more than 20 per cent of the relevant part of Qantas's workforce. On the basis of what has just been explained, this would not have satisfied the matters pertaining requirement — and indeed Qantas argued as much during the arbitration proceedings that ultimately resolved its dispute with the TWU.¹²⁶ As it transpired, the Full Bench rejected the claim on 'merits' grounds rather than addressing the jurisdictional issue — a point to which we return later on. But it remains notable that Qantas did not seek at a much earlier stage to raise this issue, since it would have provided a basis for arguing that any industrial action taken by the TWU was unprotected, and therefore amenable to a 'stop order' by FWA under s 418 of the *FW Act*. A similar point can be made about the ALAEA's demand that Qantas build a new A380 maintenance facility in Australia, which would seem even more clearly to lack the requisite connection to the employment relationships of ALAEA members.

¹²² Innes Willox, Chief Executive, AiG, 'Full Federal Court Decision in *ADJ Contracting Case* Confirms the Need for Fair Work Amendments' (Media Release, 14 August 2012).

¹²³ McCallum, Moore and Edwards, above n 14, 159.

¹²⁴ *Ibid* 158–9.

¹²⁵ Qantas Group, Submission to the Department of Department of Education, Employment and Workplace Relations, *Fair Work Act Review*, February 2012, 4.

¹²⁶ *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [80] (Watson V-P, Harrison SDP and Harrison C).

The failure to raise the matters pertaining issue earlier highlights the fact that, despite Alan Joyce's complaints, Qantas evidently saw its long-term interests as being advantaged by the 'damaging' industrial action being permitted to go ahead. It also underscores the highly strategic nature of some employers' objections to the Act's agreement content rules. This was further emphasised by the revelation that Qantas was quite prepared to accede to certain union demands — so long as the commitments were expressed in a 'side' agreement, rather than in a statutory agreement or determination.¹²⁷

B Good Faith Bargaining: 'Missing in Action'?

One of the more notable features of the current enterprise agreement regime is its imposition on bargaining representatives of a requirement to negotiate in good faith, enforceable through 'bargaining orders' issued by the FWC.¹²⁸ According to the Fair Work Act Review, while 'the law on good faith bargaining is still developing', the new bargaining principles have to date been applied in a 'flexible and responsive' way and 'appear to be operating effectively to promote positive bargaining'. The review panel also noted that there have been relatively few applications for bargaining orders since the new legislation took effect in July 2009, suggesting that 'most parties voluntarily conduct bargaining in accordance with the principles'.¹²⁹

It is clear that a good deal of bargaining took place between Qantas and the three unions with which it was in dispute, even during periods when industrial action was being taken. In the case of the ALAEA, for example, negotiations commenced in August 2010 and over the ensuing 15 months there were 47 formal bargaining sessions, not to mention other meetings

¹²⁷ See, eg, *ibid* [76], concerning a commitment that no employee be made redundant as a result of outsourcing.

¹²⁸ *FW Act* ss 228–33.

¹²⁹ McCallum, Moore and Edwards, above n 14, 138. For consideration of what good faith bargaining entails under the Act, see, eg, *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* (2010) 195 IR 58; *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576. See also Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1; Bukarica and Dallas, above n 1; Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012); Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining under the *Fair Work Act 2009*' (2012) 25 *Australian Journal of Labour Law* 130; Anthony Forsyth et al, *Fair Work Australia's Influence in the Enterprise Bargaining Process* (Research Report, Fair Work Australia, 30 September 2012).

involving the bargaining representatives. From the time that the ALAEA started taking industrial action in May 2011, until the action was terminated some six months later, 18 conciliation conferences were convened by FWA to assist the parties in reaching a resolution.¹³⁰

What is interesting though is that despite the constant public complaints by each side about the other's behaviour and tactics, little attempt was made during the bargaining process to raise the issue of compliance with the good faith bargaining obligations in s 228 of the *FW Act*. For example, it was only during the 2012 arbitration proceedings that the TWU made a sustained attack on Qantas's bargaining tactics over the preceding year. As will be explained further in Part IVE below, the tribunal is specifically required to consider whether the parties have been bargaining in good faith before settling the terms of a workplace determination.¹³¹ The TWU complained in particular about Qantas 'advancing non-negotiable offers and placing deadlines on acceptance of package offers', as well as its 'disproportionate response' to the unions' industrial campaign in shutting down the airline.¹³² These tactics were said to breach the requirement in s 228(1)(e) of the *FW Act* to refrain from 'capricious or unfair conduct that undermines ... collective bargaining'. But the Full Bench gave short shrift to this argument:

It can be expected that bargaining in a hotly contested dispute will be robust and that parties will take steps to bring about a desired result that the other party will regard as unreasonable or uncalled for. Action which is provided for in the Act, of itself, will usually not amount to a breach of the legislation's good faith bargaining requirements. One may be critical of the amount of industrial action engaged in by both parties and the damage it caused to them, each other and the community generally. However it is quite a different thing to contend that the action was capricious or unfair and undermines collective bargaining. We do not think any of the actions of the parties can be so described.¹³³

As for Qantas, there was one issue that it clearly could have raised with FWA, but chose not to — again, presumably for strategic reasons. This was the

¹³⁰ See *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367, 369 [4] (Giudice J, Watson SDP and Roe C).

¹³¹ *FW Act* s 275(g).

¹³² *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [53] (Watson V-P, Harrison SDP and Harrison C).

¹³³ *Ibid* [54].

union tactic, mentioned earlier, of notifying the company of industrial action, then calling it off. There is nothing in the Act that specifically forbids this.¹³⁴ But as the Fair Work Act Review noted, there is also nothing to prevent employers from seeking to characterise this ‘aborted strike technique’ as a breach of the good faith bargaining requirements.¹³⁵ Since this possibility had not been fully explored yet, the Review declined to recommend any changes to the Act to deal with the issue, despite accepting that the tactic had been used ‘inappropriately’ by some unions.¹³⁶

What the Qantas dispute highlights at a more general level is the tension in the Act between the obligation to engage in good faith bargaining and the capacity to take protected industrial action in support of bargaining claims.¹³⁷ The legislation effectively provides for two processes that are fundamentally at odds with each other: cooperative negotiation and industrial conflict. In particular, the capacity of parties to utilise protected industrial action under pt 3-3 of the Act is not limited by any requirement to engage (first) in good faith bargaining — or indeed for bargaining to have commenced at all.¹³⁸ It is necessary, as has already been noted, for anyone taking protected action to be genuinely *trying* to reach agreement.¹³⁹ This is a concept that has been part of

¹³⁴ *Re Boral Resources (NSW) Pty Ltd* (2010) 193 IR 286.

¹³⁵ McCallum, Moore and Edwards, above n 14, 184. See also *ibid* 291 [15] (Boulton J and Hamberger SDPP and Deegan C).

¹³⁶ McCallum, Moore and Edwards, above n 14, 184.

¹³⁷ See generally Shae McCrystal, ‘The Relationship between Protected Industrial Action, Recognition and Bargaining in Good Faith under the *Fair Work Act 2009*’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 114.

¹³⁸ See *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297 (*‘JJ Richards’*), holding that a union may organise protected action against an employer that is refusing to bargain, without first seeking a ‘majority support determination’ from the tribunal under ss 236–7 of the *FW Act*. Such a determination may be made where there is evidence to suggest majority support for an agreement within a workplace group, and allows bargaining orders to be sought in the event that the employer fails to bargain in good faith: see, eg, *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576. Prior to the introduction of this mechanism, the taking of protected action was the only option available to employees under the *Workplace Relations Act 1996* (Cth) if they wanted to bring the employer to the bargaining table. The Fair Work Act Review, while not disagreeing with the interpretation in *JJ Richards*, recommended that the Act be amended to reverse the effect of the decision: McCallum, Moore and Edwards, above n 14, 175–7.

¹³⁹ See text at above n 112. In *JJ Richards* (2012) 201 FCR 297, this was satisfied merely by the TWU giving the employer some idea of what kind of agreement it wanted and making unsuccessful attempts to commence bargaining.

the legislation since the idea of protected action was introduced in 1993¹⁴⁰ and it has been noted that there is a considerable overlap with the more recently introduced notion of good faith bargaining.¹⁴¹ But it is also not hard to imagine circumstances in which a party may adopt unfair bargaining tactics that breach the good faith bargaining rules, yet still be able to establish that they are genuinely trying to reach agreement.

Of course, FWA's approach to the bargaining conduct of the parties in the Qantas dispute can be seen as entirely consistent with the non-interventionist role that the applicable legislation has accorded the federal industrial tribunal since enterprise bargaining commenced in the early 1990s. The logic has been, and remains under the *FW Act*, that the tribunal should play only a facilitative role in a system premised on agreement-making between the parties, rather than the central role it occupied in the conciliation and arbitration era.¹⁴² To a large extent, FWA's 'hands were tied' in the Qantas dispute, leaving it relatively powerless to intervene. When FWA was ultimately called upon to express a view about the bargaining tactics deployed by the parties in the TWU arbitration decision, it essentially endorsed their 'gloves off' approach.¹⁴³ Once again, this outcome reflected the tribunal's very limited capacity to step in and resolve bargaining disputes — and also the legislative context, which allows protected industrial action to be taken despite the parties' obligations to bargain in good faith.

Arguably, it would be more consistent with the overall scheme of the Fair Work legislation to make bargaining in good faith (and not merely genuinely

¹⁴⁰ See Richard Naughton, 'Just What Does "Genuinely Trying to Reach Agreement" Mean?' (Paper presented at the Australian Labour Law Association Fourth Biennial Conference, Melbourne, 14 November 2008); McCrystal, *The Right to Strike*, above n 35, 163–71.

¹⁴¹ See, eg, *National Tertiary Education Industry Union v University of Queensland* (2009) 187 IR 255, 259 [2(xvi)] (Richards SDP); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Rocla Pty Ltd* [2009] FWA 508 (5 October 2009); *Total Marine Services v Marine Union of Australia* (2009) 189 IR 407; Breen Creighton, 'Good Faith Bargaining under the *Fair Work Act* — Striking a Balance' (Discussion Paper, Business Council of Australia, January 2010) 21; McCallum, Moore and Edwards, above n 14, 178.

¹⁴² See, eg, *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385, 420–5 (O'Connor P, Ross and McIntyre V-PP, MacBean SDP and MacDonald C); Richard Naughton, 'The Role of Fair Work Australia in Facilitating Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 68.

¹⁴³ See the discussion of *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) in Part IVE below.

trying to reach agreement) a prerequisite to taking industrial action, and/or to give the tribunal an explicit discretion to halt protected industrial action and issue a bargaining order instead, where that would better promote the reaching of agreement. We would not dispute FWA's observation that taking protected action — which is, after all, a right expressly accorded to bargaining participants — should not ordinarily be treated as a failure to bargain in good faith. We also accept that 'robust' or 'hard' bargaining is an inevitable concomitant of a system that promotes negotiated rather than arbitrated outcomes.¹⁴⁴ Nevertheless, a more integrated approach would recognise that there are times when parties should be induced or required to adopt a more collaborative approach to bargaining, rather than simply using their industrial muscle.

C Legality of Qantas's Proposed Lockout and Grounding of the Fleet

It will be recalled that FWA's decision to terminate the industrial action at Qantas was based on its belief that the proposed lockout by the company, but *not* the prior industrial action taken by its employees, threatened the degree of economic harm necessary to satisfy the requirements of s 424 of the *FW Act*.¹⁴⁵ That, however, focused attention on the question of whether the lockout fell within the definition of 'employer response action' in s 411. If not, it would not have constituted protected industrial action — and the power under s 424 can only be exercised in relation to protected action. On the face of it, there was a lack of proportionality between the company's complete shutdown of its business and the industrial action previously taken by the unions — especially in the case of the AIPA, whose members had done no more than wear red ties and make cabin announcements. The question then was whether the lockout could be said to be 'organised or engaged in *as a response*' to the employee action, as required by s 411(a).

This point was not pressed at the time with FWA itself. The unions instead concentrated on arguing that the 'disproportionate' nature of the company's response warranted the suspension rather than the termination of the industrial action at Qantas.¹⁴⁶ But the AIPA subsequently argued before the

¹⁴⁴ This has also been recognised in cases not involving protected action: see, eg, *Liquor, Hospitality and Miscellaneous Union v Hall & Prior Aged Care Organisation* [2010] FWA 1065 (11 February 2010).

¹⁴⁵ See text at above n 66. FWA's view about the employee action was specifically endorsed by Lander J when the matter came before the Federal Court: *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 218 [69] (Lander J).

¹⁴⁶ *Ibid* 217 [59]–[60].

Full Federal Court that because Qantas had not proposed to engage in employer response action, FWA lacked the jurisdiction to make the order it did. If successful, this would have had the effect of quashing the decision to terminate, restoring the capacity to take industrial action and removing any basis for arbitration of the dispute — at least in relation to the AIPA.

As it turned out, however, the Court rejected the challenge.¹⁴⁷ It agreed that, having found that the employee action was not threatening significant economic harm, FWA should not strictly speaking have ordered the termination of *that* action. But that did not matter, because so long as the termination was valid in relation to Qantas's action, this would have the effect under s 413(7) of precluding any other action in relation to the same proposed agreement. The key issue then was whether FWA had made a jurisdictional error in relation to its order terminating Qantas's action. The Court held unanimously that, even if the existence of employer response action constituted a 'jurisdictional fact' that acted as a precondition to the exercise of FWA's jurisdiction,¹⁴⁸ Qantas's lockout satisfied the requirements of s 411(a).

Each member of the Court considered that there was evidence before FWA to support the view that Qantas had acted 'in response' to the prior employee action. It was sufficient for this purpose that the lockout be 'causally connected' to the various forms of industrial action taken by the employees, including AIPA members.¹⁴⁹ As Perram J put it, there is no requirement in the legislation that the response must be 'reasonable, proportionate or rational'.¹⁵⁰ His Honour went on to observe:

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.¹⁵¹

¹⁴⁷ Ibid 219 [73]–[75] (Lander J), 226 [118]–[121] (Buchanan J), 239–40 [170]–[173] (Perram J).

¹⁴⁸ According to Perram J, it was sufficient for FWA to act within its jurisdiction that it be *satisfied* that the basis for a s 424 order existed: *ibid* 233 [146]–[151]. Justice Buchanan was inclined to the same view: *ibid* 227–8 [123]–[126]. Justice Lander did not see it as necessary to decide the issue: at 221 [86]–[88].

¹⁴⁹ *Ibid* 225 [116] (Buchanan J), 236 [155] (Perram J).

¹⁵⁰ *Ibid* 236 [155].

¹⁵¹ *Ibid* 236 [157].

It is interesting to contrast this observation about the ‘opportunistic’ nature of Qantas’s behaviour with the comments by both Lander J and Buchanan J that what the company did was the ‘only’ step or legitimate response available to it in the circumstances.¹⁵² In fact, as Alan Joyce himself conceded (despite also saying he had ‘no other option’ than to fight back), Qantas had at least two other choices: give in to the unions’ job security demands, or continue to endure a drawn-out industrial campaign.¹⁵³ There were also other options available to it under the *FW Act*, including to seek a suspension of the union’s industrial action under s 425, which permits the tribunal to impose what is in effect a ‘cooling off’ period in order to allow negotiations to proceed.¹⁵⁴

What should also be emphasised is that while the *legal* basis for the termination may have been provided by the lockout and its threatened effects, it was the immediate grounding of the Qantas fleet and the suspension of all commercial operations that in reality prompted the government to intervene. It has been widely assumed that the motive for Qantas escalating the dispute so radically was to create a crisis that could only result in the dispute being sent into arbitration by FWA.¹⁵⁵ Qantas and its legal advisers evidently judged that they would do better out of an arbitration process than at the bargaining table — particularly given the prospect of a long campaign of damaging, ‘slow-bake’ industrial action. As matters have transpired to date, that judgment appears to have been vindicated.¹⁵⁶ From that perspective, it was the grounding, not the lockout that never technically commenced (since all industrial action was terminated before the lockout was due to start) which did the trick for the company.

The significant point about the grounding was that it did not just affect the three groups of employees involved in the disputes, but everyone else in the

¹⁵² Ibid 219 [75] (Lander J), 226 [120]–[121] (Buchanan J).

¹⁵³ Andrew Cleary, ‘Determined Joyce Says He Had No Choice’, *Australian Financial Review* (Melbourne), 31 October 2011, 1.

¹⁵⁴ See, eg, *Nyrstar Port Pirie Pty Ltd v Construction, Forestry, Mining and Energy Union* [2009] FWA 1144 (17 November 2009). It would have been harder to argue for a suspension or termination of the industrial action on two other grounds, those being the threat of significant economic harm to the bargaining parties (*FW Act* s 423) or to third parties (s 426). In both cases, the tribunal has tended to require something more than the harm ordinarily caused by industrial action before being prepared to intervene on those grounds: see, eg, *Prysmian Power Cables and Systems Australia Pty Ltd v National Union of Workers* [2010] FWA 9402 (7 December 2010); *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360.

¹⁵⁵ See, eg, ‘Qantas Wrap-Up’, above n 24.

¹⁵⁶ See text at below nn 197–212.

company, including short-haul pilots, cabin crew and administrative staff. The precise legality of the company's actions in relation to these other workers was unclear at the time, and has remained so since. It would plainly have been possible for the company to have stood many of them down *after* the lockout had commenced, on the basis that without engineers and ground crew even domestic flights would have had to be cancelled, leaving other affected workers with no useful work to perform.¹⁵⁷ But that would not have applied to everyone, and certainly not before the lockout had started. According to Lander J, the grounding was not itself a lockout and therefore could not constitute industrial action under the Act. Rather it was 'a commercial decision made as a consequence of taking industrial action' that 'had no economic consequences upon the employees'.¹⁵⁸ The basis for this latter observation is unclear, given the lack of information (publicly at any rate) about whether the affected employees would continue to be paid. As it was, the question of whether Qantas had the power (whether contractually or otherwise) to call a halt to all work *before* the lockout has not — at least to our knowledge — been the subject of legal argument.

Justice Lander did comment, on the other hand, on the 'curiosity' of Qantas being able to argue that its own industrial action should be terminated.¹⁵⁹ Indeed it seems clear that if the government had not made the application to FWA that it did, Qantas could and would have moved to take that step. There is nothing in s 424 that obviously prevents a bargaining representative from making an application based on its own conduct.¹⁶⁰ This aspect of the Qantas affair has certainly generated criticism from the union movement, with many officials commenting about the unsatisfactory nature of a system that effectively allowed the company to harm itself in order to send the

¹⁵⁷ As to the basis for standing down workers in this situation, see *FW Act* pt 3-5; Creighton and Stewart, above n 36, 363-4.

¹⁵⁸ *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 215 [53].

¹⁵⁹ *Ibid* 221-2 [93].

¹⁶⁰ For an example of a similar application by an employer to terminate its own lockout, albeit under s 423 rather than s 424, see *Schweppes Australia Pty Ltd v United Voice* (2011) 214 IR 282. The application was initially rejected, but eventually succeeded when supported by the union concerned: see 'FWA Terminates Lockout at Schweppes', *Workplace Express* (online), 10 February 2012; 'Schweppes Back in Production, as Pre-Arbitration Talks Commence', *Workplace Express* (online), 16 February 2012. On the Schweppes bargaining dispute, see also below nn 187, 222.

dispute into arbitration.¹⁶¹ But it should be noted that if it had been the employees and their unions who had seen a tactical advantage in pursuing arbitration rather than negotiation, they could have achieved exactly the same effect by calling an indefinite strike.

As it is, when it came to the review of the legislation, unions focused on the desirability of amending the Act to require employers to give the same notice of a lockout as required of employees (that is, three clear working days), and to make it clear that any lockout must constitute a ‘reasonable and proportionate response’ to the employee action that has preceded it.¹⁶² However, the review panel did little more than note these suggestions, dismissing them with the curt observation that the Act was ‘operating as intended’ in relation to employer industrial action.¹⁶³

D *The Minister’s Power to Terminate Industrial Action*

Both in the lead-up to the lockout and grounding, and in its immediate aftermath, there was much discussion about the power granted to the Minister for Workplace Relations under s 431 of the *FW Act*.¹⁶⁴ This allows the Minister to make a ‘declaration’ terminating protected industrial action on the same grounds as the tribunal can under s 424, including to avert significant damage to the economy. Such a termination has the same consequence of sending a bargaining dispute into compulsory arbitration, under pt 2-5 div 3.¹⁶⁵ The Minister may also follow up a declaration by giving directions to specified employees or bargaining representatives that will have the effect of removing or reducing the relevant threat of harm.¹⁶⁶ The opposition suggested

¹⁶¹ See, eg, ‘ACTU Details Changes Sought to ALP IR Platform’, *Workplace Express* (online), 22 November 2011; Ewin Hannan, ‘ACTU War on “Militant Employers” as Unions Urge ALP to Back “Job Security”’, *The Australian* (Sydney), 23 November 2011, 1. See also text at below n 183.

¹⁶² See, eg, AIPA, Submission to the Department of Education, Employment and Workplace Relations, *Fair Work Act Review*, 17 February 2012, 13. See also the Fair Work (Job Security and Fairer Bargaining) Amendment Bill 2012 (Cth), a private member’s bill introduced by the Greens that includes both of those changes, as well as greater options for the tribunal to deal with a Qantas-style attempt to send a dispute into arbitration. The Bill would also amend s 172 of the *FW Act* (see text at above n 108) to make it clear that job security and workloads are permitted matters for inclusion in an agreement: at sch 1 item 2.

¹⁶³ McCallum, Moore and Edwards, above n 14, 187.

¹⁶⁴ In addition to the discussion here, see Graeme Orr, ‘Ministerial Dictate in Labour Law’ (2012) 20 *Australian Journal of Administrative Law* 6.

¹⁶⁵ See *FW Act* s 266(2).

¹⁶⁶ *Ibid* s 433.

that the s 431 power should have been exercised well before Qantas escalated the dispute, or at the very least could have been used on the day the grounding was announced, rather than leaving the matter to FWA.¹⁶⁷

The capacity that is now conferred by s 431 was introduced by the *Work Choices* amendments.¹⁶⁸ The Howard government noted at the time that the new power was ‘similar to state essential services legislation’, and would ‘ensure the Government can respond to industrial action ... that has significantly damaging and wideranging effects on essential services’.¹⁶⁹ No explanation was offered, however, as to why this need could not be met by lodging an application for termination with FWA’s predecessor, the Australian Industrial Relations Commission (‘AIRC’). As it transpired, the Howard government never exercised its new power, and there was indeed no reported instance of it ever being asked to do so. Despite this, the Rudd government opted to retain the provision, as part of its ‘clear, tough rules’¹⁷⁰ on industrial action. Its only justification, if it can be called that, was the following:

Ministerial power to terminate industrial action will be restricted to ‘essential services’ only. This is likely to have a neutral impact, as, to date, the Ministerial power to stop industrial action has never been used. This will also help ensure the independence of FWA.¹⁷¹

Now in the first place, the power is framed broadly enough so as to apply even where there is no ‘essential service’ in the conventional sense of the term, just as was the case under *Work Choices*. Secondly, it is hard to see how the existence of a power that allows parties to bypass the tribunal and go straight

¹⁶⁷ See, eg, Paul Kelly, ‘Blame Game’, above n 53.

¹⁶⁸ See *Workplace Relations Act 1996* (Cth) s 498, as inserted by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1.

¹⁶⁹ Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) 22. As to the use of essential services legislation to control industrial action, see Creighton and Stewart, above n 36, 783–4.

¹⁷⁰ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) lxiii [r.315].

¹⁷¹ *Ibid* lxiii [r.314].

to the government for redress could ever be said to ‘ensure the independence’ of that agency. If anything, it diminishes the tribunal’s authority. At any event, it might have seemed that if ever there was a case for the government to use the power, it would have been in the Qantas dispute. It was clearly appropriate for the government to have declined to act when the only action being taken was by the unions, since there was not at that time sufficient reason to identify a threat of significant economic damage.¹⁷² But it was arguably a different matter when, on a Saturday afternoon, the country’s leading airline announced without warning that it was going to cease all flights with immediate effect. The government’s stated reasons for asking FWA to intervene, rather than acting itself, provide a telling insight into the problems attached to the s 431 power.

The first reason given was that any attempt to invoke the provision would simply have invited a legal challenge from the unions to a power that had never previously been used.¹⁷³ Section 431(3) makes it clear that a ministerial declaration is not a legislative instrument, and as such would not have had to be laid before Parliament for possible disallowance.¹⁷⁴ But there is every reason to believe that any exercise of the power could have been the subject of an application to the High Court or the Federal Court for judicial review, on a variety of administrative law grounds. In particular, had the Minister issued a declaration without first giving all affected parties a reasonable opportunity to express their views, or without giving proper reasons, this would likely have been treated as invalidating the decision.¹⁷⁵ Importantly too, anyone challenging the Minister’s decision would probably only have needed to establish a prima facie case as to its invalidity, in order to secure an interlocutory injunction restraining either the Minister or FWA from acting on the purported declaration.¹⁷⁶

The second reason given was more pragmatic. According to a ‘senior government source’, to use s 431 in such a case would mean that the government

¹⁷² See, eg, ‘Qantas Dispute Not at Intervention Stage Yet: Gillard’, *Workplace Express* (online), 17 October 2011.

¹⁷³ See, eg, ‘PM Speaks Out against Outsourcing, as Government Vents Anger at Qantas’, *Workplace Express* (online), 31 October 2011; Kelly, ‘Labour Laws a Barrier’, above n 7.

¹⁷⁴ See *Legislative Instruments Act 2003* (Cth) s 7(1)(b).

¹⁷⁵ As to the circumstances in which a power of this sort attracts the requirement to accord procedural fairness, and the scope of that requirement, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) chs 7–8.

¹⁷⁶ The other requirement that would need to be satisfied is that the ‘balance of convenience’ would favour the grant of injunctive relief: *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, 82 [65] (Gummow and Hayne JJ).

would end up ‘owning’ industrial disputes.¹⁷⁷ From a political perspective, it was easier and arguably far more defensible to put the matter in the hands of FWA, as the independent umpire. There is the added consideration too that to bypass the tribunal would have been seen, rightly or not, as a vote of no confidence in the agency. But all this begs the question — why reserve the power then in the first place? To the Review, the matter was clear cut. Recommending that s 431 be repealed, the panel observed:

In circumstances where the Minister is permitted to make application to FWA to obtain the same outcome, with the benefit of an independent decision maker hearing evidence and submissions from the parties, we consider that the exercise of this power would lack legitimacy.¹⁷⁸

At the time of writing, it remained to be seen whether the Gillard government would act on this proposal.

E *The Tribunal's Powers to Arbitrate Bargaining Disputes*

The final major legal issue highlighted by the Qantas dispute was the ability of FWA (or the FWC, as it now is) to arbitrate outcomes in the context of enterprise bargaining — and whether the tests for accessing arbitration are too stringent. We referred earlier to the fact that there are limited grounds on which arbitration of bargaining disputes may occur under the *FW Act*, and that this is the result of a profound shift away from the traditional Australian system of compulsory conciliation and arbitration.¹⁷⁹ Labor had originally insisted that compulsory arbitration would not be a feature of its Fair Work system.¹⁸⁰ Then, in late 2008, the government announced that there would be

¹⁷⁷ Priest, above n 13.

¹⁷⁸ McCallum, Moore and Edwards, above n 14, 187.

¹⁷⁹ See text at above nn 74, 142. This is another longstanding debate in Australian industrial relations and labour law: see, eg, Joe Isaac, ‘Labour Market Regulation, Arbitration and Enterprise Bargaining — Are They Compatible? An Introduction’ in Australian Centre for Industrial Relations Research and Teaching (ed), *Arbitration under Enterprise Bargaining: The Future Role of the Commission* (Working Paper No 30, University of Sydney, November 1993) 1, referring to a 1964 address by Sir Richard Kirby entitled ‘Compulsory Arbitration and Collective Bargaining — Can They Go Hand in Hand?’ See also Charles Mulvey, ‘Alternatives to Arbitration: Overview of the Debate’ in Richard Blandy and John Niland (eds), *Alternatives to Arbitration* (Allen & Unwin, 1986).

¹⁸⁰ See Gillard, ‘Introducing Australia’s New Workplace Relations System’, above n 110.

some limited circumstances in which arbitration would be available under the new collective bargaining framework:

The focus of the Fair Work Bill will continue to reflect the move away from the automatic arbitration of disputes by the industrial umpire ... But there are of course circumstances when bargaining 'goes off the rails' and when the industrial umpire will need to step in.¹⁸¹

This is reflected in the provisions of the *FW Act*, under which the tribunal can arbitrate bargaining disputes where all parties agree, after the termination of protected industrial action, following serious breaches of the good faith bargaining obligations, or where the parties are unable to negotiate a multi-enterprise agreement covering low-paid employees.¹⁸²

We have noted earlier that Qantas's actions in grounding its fleet and proposing to lock out employees covered by the TWU, ALAEA and AIPA were intended to create the circumstances in which protected industrial action would be terminated by FWA — and, ultimately, FWA would be able to arbitrate the three bargaining disputes. The steps taken by the airline triggered renewed debate about the role of arbitration in bargaining under the *FW Act*. In the immediate aftermath of the grounding, union representatives argued that the Qantas case illustrated a 'loophole' in the legislation which allowed a multinational employer to obtain arbitration by locking out its workforce — while the tests for employees or unions to access arbitration were too difficult to meet.¹⁸³ The ALP indeed subsequently varied its policy platform, with the support of the then Workplace Relations Minister, to call for FWA to be given greater power to arbitrate 'protracted and/or intractable bargaining disputes'.¹⁸⁴ Employer spokespersons and conservative commentators, by contrast, appeared somewhat divided on the issue. Some felt the Qantas dispute showed that an employer had to take quite extreme steps in order to

¹⁸¹ Julia Gillard, 'Address to the Australian Labour Law Association' (Speech delivered at the Australian Labour Law Association Fourth Biennial Conference, Melbourne, 14 November 2008). This policy shift came about partly in response to significant lobbying by the union movement: see, eg, 'ACTU Wants Labor to Do More on Collective Bargaining', *Workplace Express* (online), 11 November 2008.

¹⁸² See text at above n 73.

¹⁸³ See, eg, Hepworth and Karvelas, above n 52, quoting ALAEA federal secretary Steve Purvinas; Skulley, 'Unions Want Stronger Hand', above n 13.

¹⁸⁴ See 'ALP Considering Easier Access to Arbitration', *Workplace Express* (online), 3 December 2011. See also Australian Labor Party, *National Platform* (2011) 101.

gain access to arbitration — and therefore the tests should be relaxed.¹⁸⁵ Others argued that there should be no return to compulsory arbitration, as it is incompatible with the notion of enterprise bargaining and the goal of workplace productivity.¹⁸⁶

The evidence on the operation of the limited provisions under which the tribunal is currently empowered to arbitrate bargaining disputes indicates that they are very rarely utilised. The Qantas affair provides one of the few instances to date of the tribunal having to arbitrate to resolve a dispute following the termination of protected industrial action,¹⁸⁷ although in a number of cases parties have been able to reach agreement either just before or during such arbitration.¹⁸⁸ There have been no applications, to date, for the tribunal to make a bargaining-related workplace determination or a low-paid workplace determination, not least because the tests for accessing these provisions are so difficult to satisfy.¹⁸⁹ Voluntary arbitrations under s 240(4) have also been very few in number.¹⁹⁰

¹⁸⁵ See, eg, Judith Sloan, 'The *Fair Work Act* Has Three Big Flaws', *The Australian* (Sydney), 2 November 2011, 2; Malcolm Broomhead, 'Four Ways to Fix the *Fair Work Act*, Right Now', *Australian Financial Review* (Melbourne), 4 November 2011, 67. See also Bryan Belling, 'Bring Back the Arbitration Factor', *Australian Financial Review* (Melbourne), 3 November 2011, 87.

¹⁸⁶ See, eg, Judith Sloan, 'Back to the Future' above n 13; Mark Skulley, Alex Boxsell and David Crowe, 'Bosses Blast Labor on Arbitration', *Australian Financial Review* (Melbourne), 5 December 2011, 8; Heather Ridout, 'The Straitjacket of Arbitration', *Australian Financial Review* (Melbourne), 6 December 2011, 55.

¹⁸⁷ That is, the workplace determination reflecting the agreement reached between the airline and ALAEA: see above nn 79–82; and the workplace determinations resolving Qantas's disputes with the TWU and AIPA: see below nn 197–212. A bargaining dispute involving the soft drinks manufacturer Schweppes has been the subject of two workplace determination decisions: see below n 222. Another matter in the Victorian public sector has also led to an arbitrated outcome: see *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950 (11 February 2013).

¹⁸⁸ Besides the Qantas–ALAEA agreement (see above nn 79–82), see also 'Paramedics Dodge Arbitration with Late Deal', *Workplace Express* (online), 17 August 2009; *Victoria v Community and Public Sector Union* [2012] FWAFB 6139 (23 July 2012).

¹⁸⁹ See Creighton and Stewart, above n 36, 731–4, 749–54.

¹⁹⁰ See, eg, *North Goonyella Coal Mines Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 1112 (15 February 2010); *Australian Licenced Aircraft Engineers Association v Cobham Aviation Services Engineering Pty Ltd* [2012] FWA 9444 (21 November 2012). On the other hand, parties negotiating enterprise agreements have made considerable use of the ability to involve the tribunal in conciliation and other non-arbitral forms of assistance, under s 240(1)–(3): see, eg, FWA, *Annual Report of Fair Work Australia: 1 July 2010 – 30 June 2011* (2011) 80–3.

Many unions and other interested parties, including the present authors, argued for easier access to arbitration of bargaining disputes in their submissions to the Fair Work Act Review.¹⁹¹ For example, we contended:

There is a strong argument for adjusting the tests for accessing arbitration under the *FW Act*, so that the emphasis is not so much on establishing extreme bad faith (or ‘fault’) by one party, or that industrial action by one side is causing so much damage to the other that it should be ended. Rather, one of the tests for access to arbitration should be focused on whether parties — having negotiated with each other in good faith — have reached the point where further negotiation is unlikely to be productive.¹⁹²

However, the review panel was reluctant to expand the tribunal’s compulsory arbitration powers unless it could be shown that this was necessary to address a failure of the Fair Work bargaining system. The panel rejected the case for making such a change, because (in its view) the potential of good faith bargaining orders and the low-paid bargaining stream to deal with intractable disputes had not yet been fully explored.¹⁹³

The panel instead recommended a more proactive role for the tribunal through the expansion of its compulsory conciliation powers, including the ability for the tribunal to act on its own motion.¹⁹⁴ In our view, strengthening what is now the FWC’s powers to compel negotiating parties to participate in discussions does not go far beyond the existing good faith bargaining requirements in s 228. This measure is unlikely to have a great deal of impact on some of the more extreme cases of long-running bargaining impasses, such as those involving Cochlear and Endeavour Coal.¹⁹⁵ In any event, at the time of

¹⁹¹ See, eg, Health Services Union, Submission to the Department of Education, Employment and Workplace Relations, *Fair Work Act Review*; Community and Public Sector Union/State Public Services Federation Group, Submission to the Department of Education, Employment and Workplace Relations, *Fair Work Act Review*.

¹⁹² Forsyth and Stewart, above n 93, 26. These arguments are developed further in 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>>.

¹⁹³ McCallum, Moore and Edwards, above n 14, 148. There was one limited exception. The panel was prepared to countenance arbitration to resolve deadlocks over ‘greenfields agreements’, which can be made by employers and unions for a new project or enterprise ahead of any workers being hired: at 168–73.

¹⁹⁴ *Ibid* 149.

¹⁹⁵ See ‘Cochlear and Endeavour Decisions Show FWA Needs More Powers: Forsyth’, *Workplace Express* (online), 6 August 2012, citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* [2012] FWA 5374 (3 August 2012); *Endeavour Coal*

writing, the government had not yet formally responded to these recommendations of the review panel. There have been reports that the government is prepared — contrary to the panel's view — to countenance arbitration being available for certain 'intractable' disputes. But provisions to this effect were dropped at the last minute from the Fair Work Amendment Bill 2013 introduced on 21 March 2013, pending further consultation on the issue.¹⁹⁶

As for the outcome of the TWU arbitration in the Qantas dispute, we have already noted that the FWA Full Bench decision on 2 August 2012 was a resounding victory for the airline. Not only were the TWU's key job security claims rejected, but the Full Bench also awarded a three per cent per annum pay increase rather than the five per cent increases sought by the union.¹⁹⁷ The decision is significant, with potential ramifications for future instances where the FWC is required to make workplace determinations under the *FW Act*, for the following reasons.

First, the decision strongly endorses the position taken by Qantas in resisting the union's claims for site rates, limits on the use of contractors and labour hire, and other job security protections.¹⁹⁸ The decision is full of references to the competitive pressures Qantas faces in the domestic and international airline industry, and acknowledges its need to respond to these pressures.¹⁹⁹ The clearest indication of the Full Bench's approach is its statement that: 'Ultimately it is in the interests of both Qantas and its employees that Qantas operates a viable and competitive business and is able to retain, attract and

Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (2012) 206 FCR 576. For further examples of the debate over the tribunal's powers of arbitration in bargaining disputes, see Justice Roger Boland, 'Some Current Matters of Interest' (Paper presented at the Annual Conference of the Industrial Relations Society of NSW, Kiama, 18 May 2012) 7–16; 'McCallum Defends Panel Position on Arbitration', *Workplace Express* (online), 6 August 2012; 'Review's Rejection of Expanded Arbitration and Qantas Decision May Influence Employers: Forsyth', *Workplace Express* (online), 14 August 2012; 'Give FWA "Supervised Negotiation" Power in Intractable Disputes: Lawyers', *Workplace Express* (online), 23 August 2012.

¹⁹⁶ 'Shorten Dumps Arbitration Plans from Amendment Bill', *Workplace Express* (online), 21 March 2013. The proposed amendments would also have implemented the review panel's recommendations concerning the resolution of greenfields agreement disputes: see McCallum, Moore and Edwards, above n 14, 168–73.

¹⁹⁷ *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [97] (Watson V-P, Harrison SDP and Harrison C). See also *AIPA v Qantas* [2013] FWCFB 317 (17 January 2013) [324] (Watson and Acton SDPP and Gay C).

¹⁹⁸ See also *AIPA v Qantas* [2013] FWCFB 317 (17 January 2013) [411]–[426] (Watson and Acton SDPP and Gay C).

¹⁹⁹ See, eg, *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [11]–[12], [35], [40]–[41], [44] (Watson V-P, Harrison SDP and Harrison C). See also *ibid* [68].

reward skilled and motivated employees.²⁰⁰ This is not dissimilar to the language used by Alan Joyce himself during the dispute.²⁰¹ The Full Bench also treated as relevant the fact that the terms and conditions of Qantas employees 'are among the highest of comparable employees in the airline industry in Australia'.²⁰²

Secondly, the decision contains important observations about the tribunal's role in making a workplace determination, and how it should approach the factors set out in s 275 of the *FW Act* that guide its exercise of this power.²⁰³ The Full Bench followed a 1998 decision of an AIRC Full Bench in *Automotive Food, Metals, Engineering, Printing and Kindred Industries Union v Curragh Queensland Mining Ltd*,²⁰⁴ indicating that the role of the tribunal is to assess the parties' respective positions in relation to the matters at issue and 'arrive at a conclusion that would be regarded as appropriate ... had the bargaining concluded successfully'.²⁰⁵

Thirdly, and most notably, the Full Bench (which comprised Watson V-P, Harrison SDP and Harrison C) emphasised 'the general reluctance of industrial tribunals to interfere with the right of management to manage its business, unless some unfairness to employees is demonstrated'.²⁰⁶ This is not a new principle. Even when the High Court decided in 1987 that the concept of 'managerial prerogative' should no longer present a jurisdictional hurdle to the exercise of award and dispute settlement powers, it reaffirmed what had become a longstanding principle on the part of the federal industrial tribunal, that any 'substantial interference with the autonomy of management' would

²⁰⁰ *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [41] (Watson V-P, Harrison SDP and Harrison C).

²⁰¹ See Qantas, 'Industrial Relations Update', above n 33.

²⁰² *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [35] (Watson V-P, Harrison SDP and Harrison C).

²⁰³ Section 275 provides that, when making a workplace determination, the tribunal must take into account factors including the merits of the case; the interests of the employers and employees concerned; the public interest; how productivity might be improved in the enterprise; the extent to which the bargaining representatives behaved reasonably and met the good faith bargaining requirements; and incentives to bargain at a later time.

²⁰⁴ (Unreported, Australian Industrial Relations Commission, Giudice P, MacBean and Polites SDPP, 11 August 1998).

²⁰⁵ *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [29] (Watson V-P, Harrison SDP and Harrison C). See also at [25], [28]–[31]. See also *AIPA v Qantas* [2013] FWCFB 317 (17 January 2013) [65]–[77] (Watson and Acton SDPP and Gay C).

²⁰⁶ *Ibid* [36].

nonetheless require careful consideration.²⁰⁷ Over the past 20 years, it has been less common to encounter references to this principle, as greater emphasis has been placed on the use of bargaining rather than arbitration to regulate employment conditions. But as James Mattson has noted, the TWU arbitration decision is far from being the only recent case in which the tribunal has shown respect for the concept of managerial prerogative, particularly in settling disputes (under procedures laid down in enterprise agreements) over the introduction of operational changes.²⁰⁸ Nevertheless, the Full Bench's decision is significant for the premium that it placed on the 'right to manage'. This was particularly influential in the rejection of the TWU's job security claims, with the Bench commenting that

[t]he determination of how to engage labour, the extent to which contractors are utilised and the numbers of employees to be engaged in various categories are classically regarded as matters properly to be determined by the management of an enterprise.²⁰⁹

Finally, the TWU arbitration decision essentially vindicated Qantas's strategy and tactics during the dispute. The Full Bench found that so long as parties engaged in lawful conduct, including exercise of their rights under the *FW Act*, then their conduct would not be considered unreasonable.²¹⁰ This included Qantas's proposed lockout and grounding of the fleet, which were neither unreasonable nor in breach of the good faith bargaining requirements.²¹¹ The Full Bench's endorsement of robust negotiation tactics in bargaining under the *FW Act* is consistent with the tribunal's approach under

²⁰⁷ *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 136–7 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). See also *Australian Federated Union of Locomotive Enginemen v State Rail Authority (NSW)* (1984) 295 CAR 188, 191 (Moore P, Williams J and Johnson C). For a detailed study of the federal tribunal's approach to the issue of managerial prerogative, see Esther Stern, *'Industrial Disputes' and the Jurisdiction of the Federal Industrial Tribunal* (LLM Thesis, The University of Melbourne, 1993).

²⁰⁸ James Mattson, 'Managerial Prerogative: Myth or Fact' (Paper presented at Australian Labour Law Association Conference, Canberra, 16 November 2012) (copy on file with the authors).

²⁰⁹ *TWU v Qantas* [2012] FWAFB 6612 (8 August 2012) [81] (Watson V-P, Harrison SDP and Harrison C).

²¹⁰ *Ibid* [45].

²¹¹ *Ibid* [47]–[48], [50], [53]–[54]. See also text at above nn 131–3; *AIPA v Qantas* [2013] FWCFB 317 (17 January 2013) [87] (Watson and Acton SDPP and Gay C).

previous federal legislation, summarised in one well-known decision with the description ‘all is fair in love and war’.²¹²

V CONCLUSION: WINNERS, LOSERS AND IMPLICATIONS FOR THE FUTURE

A poll published on 7 November 2011, in the wake of the Qantas grounding, revealed that 55 per cent of the public approved of FWA’s handling of the dispute, followed by (in order) Qantas workers, Prime Minister Gillard and her government, Alan Joyce, opposition leader Tony Abbott and, last of all, the union leaders involved.²¹³ So if there were any winners out of the Qantas dispute, as far as the public was concerned it was the ‘independent umpire’, and to a lesser extent the government for its decisive intervention.

For many who follow industrial relations more closely, there is probably a tendency to see Qantas as the winner, based in particular on the outcome of the TWU and AIPA arbitrations. Its legal strategy was plainly to avoid trying to narrow its workers’ industrial action (as it might otherwise have been able to do), let that action take its toll for long enough to justify a response, then fight back in such an extreme way that the government and/or FWA would have no real option but to send each bargaining dispute into arbitration. This is exactly what FWA did, at the government’s behest. And if the company was banking on getting out of the resulting proceedings with no real concession to the union’s job security claims, other than those it was already prepared to offer, then that faith has clearly been rewarded. Certainly, the airline regards itself as the victor in the dispute²¹⁴ — although, not surprisingly, this view is contested by some of the other protagonists, such as the TWU and AIPA.²¹⁵

At the same time, however, the dispute came at a tremendous cost to the company. According to a statement given by Qantas to the Australian Stock Exchange, the loss was \$194 million, of which only \$68 million was directly attributable to the employees’ industrial action. The company in fact lost a higher amount (\$70 million) through the two-day grounding, together with a

²¹² *Construction, Forestry, Mining and Energy Union v Coal & Allied Operations Pty Ltd* (1999) 93 IR 82, 89 [23] (McIntyre V-P, MacBean SDP and Harrison C).

²¹³ See O’Neill, above n 61, 3.

²¹⁴ See ‘Company’s Right to Manage Reinforced by Last Year’s Dispute: Joyce’, *Workplace Express* (online), 2 November 2012; Rajiv Maharaj, ‘TWU Knocked Back Compromise Deal before Qantas Fleet Grounding’, *Workforce* (Sydney), 23 November 2012.

²¹⁵ See ‘Sheldon Rejects Qantas Line’, *Workplace Express* (online), 28 November 2012; Andrew Cleary, ‘No Winners in Qantas Arbitration: Union’, *Australian Financial Review* (Melbourne), 18 January 2013, 3.

further \$27 million in lost bookings, and \$29 million in ‘customer recovery initiatives’.²¹⁶ Some of that was always likely to be incurred given the nature of the dispute, and the costs of the employee action would have steadily increased as it continued to erode customer confidence, had Qantas not acted as it did.²¹⁷ But it is also necessary to bring into account the enormous damage that the dispute must have done to Qantas’s brand and customer relations,²¹⁸ not to mention relations with the staff members on whom its business depends. The way that the grounding was handled would have been particularly damaging, especially as there was no need (at least from a legal viewpoint) to leave passengers and staff stranded overseas or interstate, when it would have been just as feasible to wind operations down until the lockout started.

It may be in the end that there was only one undisputed winner from the affair: Qantas’s main rival, Virgin Australia. In August 2012, Virgin posted a net annual profit of \$22.8 million, a turnaround of over \$90 million from the previous year’s loss, and one recorded during what are otherwise very difficult times for the airline industry. It also claimed an increased market share, especially in the lucrative corporate travel sector.²¹⁹

What though of the broader implications of the Qantas dispute for the workplace relations system in Australia? An immediate assessment of FWA’s response to the grounding and proposed lockout would have given a tick to both the umpire and the legislation it was administering. Arguably, the system had worked exactly as it was intended, with FWA moving to balance the interest that workers and employers have in being able to take industrial action in support of their bargaining claims, with the public interest in the protection of health, safety or (in this case) the national economy.²²⁰ But there was also a sense at the time that the dispute was likely to have longer-lasting ramifications, especially in supporting moves to re-examine some of the key aspects of the Fair Work legislation discussed in this article: the permissible content of agreements, the use of protected industrial action by employers and

²¹⁶ ‘Qantas Claims Union Industrial Action, Lockout, Grounding Cost \$194m’, *Workplace Express* (online), 28 November 2011.

²¹⁷ According to Alan Joyce, the impact would have grown to \$85 million a month: *ibid.*

²¹⁸ See Cameron Stewart, ‘Tossed by Trade Winds’, *The Australian* (Sydney), 5 November 2011, 15.

²¹⁹ See Tony Webber, ‘Virgin Australia’s Risky Corporate Gamble’, *Sydney Morning Herald* (online), 28 August 2012 <<http://www.smh.com.au/business/earnings-season/virgin-australia-risky-corporate-gamble-20120828-24y2k.html>>.

²²⁰ See Forsyth and Howe, above n 12.

unions, and the mechanisms for the resolution of intractable bargaining disputes.

Since then, the Fair Work Act Review has significantly dampened expectations of significant changes to the *FW Act*, with no major recommendations to speak of in any of the areas just mentioned;²²¹ although, as noted earlier, it appears the Gillard government may be willing to expand the FWC's powers to deal with 'intractable' disputes. At the same time, FWA's enthusiastic endorsement in the TWU arbitration not just of Qantas's business strategy, but of the concept of 'managerial prerogative', will have left many supporters of compulsory arbitration wondering if it is really the answer — especially those in the labour movement. Indeed, in light of the Full Bench's decision, it can be expected that some major employers will now be considering the merits of adopting a Qantas-style strategy of engineering an arbitrated outcome to difficult enterprise agreement negotiations with a highly unionised workforce.²²²

As against that, the government's response to this part of the Review has yet to be announced — and it would not surprise if there was still some life left in the push to give the FWC (as it is now known) greater control over bargaining disputes, even if only around the margins. Furthermore, while the outcomes of the TWU and AIPA arbitrations were not unexpected, it is far from clear that other Full Benches would have been quite so willing to nail their colours to the mast of outsourcing and labour flexibility.²²³ It is also worth emphasising that the 'Qantas strategy' is not readily available to other

²²¹ Other than in relation to the *JJ Richards* issue (see above nn 138–9), which as the review panel itself noted has had only a 'minimal' impact in practice: McCallum, Moore and Edwards, above n 14, 176.

²²² See, eg, Matthew Stevens, 'A Victory for Arbitration', *Australian Financial Review* (Melbourne), 9 August 2012, 38. There is some evidence of this having started to occur, albeit in only a limited number of cases: see, eg, *Schweppes Australia Pty Ltd v United Voice — Victoria Branch* [2012] FWAFB 7858 (12 September 2012); *Schweppes Australia Pty Ltd v United Voice — Victoria Branch* [2012] FWAFB 8599 (8 October 2012).

²²³ In recent times, differently composed Full Benches of FWA have reached quite different conclusions on important points of principle, such as the legitimacy of 'opt-out' clauses in enterprise agreements: see, eg, *Construction, Forestry, Mining and Energy Union v New Oakleigh Coal Pty Ltd* [2012] FWAFB 5107 (18 June 2012); *Construction, Forestry, Mining and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551 (3 September 2012); *Construction, Forestry, Mining and Energy Union v New Oakleigh Coal Pty Ltd* [2012] FWAFB 8593 (8 October 2012); *ALDI Foods Pty Ltd v Transport Workers' Union of Australia* [2012] FWAFB 9398 (1 November 2012); and also the form in which an employer must issue a notice of representational rights to employees at the commencement of bargaining: see, eg, *Galintel Rolling Mills Pty Ltd* [2011] FWAFB 6772 (18 October 2011); *Ostwald Bros Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 9512 (8 November 2012).

employers, outside the (true) essential services. In other cases to date under the *FW Act*, even substantial costs from industrial action have generally not been treated as sufficient to trigger suspension or termination.²²⁴

Nonetheless, if both the current legislation and the status of the TWU decision as a precedent are left undisturbed, the Qantas dispute may yet come to be seen as an important turning point in the contest between job security and labour flexibility.

²²⁴ See, eg, *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360, where even millions of dollars a day in losses were not considered sufficiently 'significant' to warrant intervention, in the context of a construction project with a total value of some \$9 billion.