Supplementary Submission to the "Select Committee on Job Security"

13 October 2021

Transport Workers Union of Australia

1. This submission has been prepared to supplement those submissions that have already been prepared by the Transport Workers Union of Australia (TWU) to the Select Committee on Job Security (the Committee) dated 5 April 2021 & 11 October 2021.

2. The following submission will provide evidence pertaining to the decision by Qantas Airways Limited to *unlawfully* outsource its ground handling operations in 2020. This decision, which has since had major ramification for thousands of former Qantas staff, demonstrates the lengths to which companies like Qantas have gone to undermine job security.

Overview

1. On 30 November 2020, **Qantas** Airways Limited announced a decision to outsource its ground handling functions at ten airports that it directly engaged or through a subsidiary, Qantas Ground Services Pty Ltd (**QGS**). Approximately 2000 ground handling employees were affected by the decision.
2. On 9 December 2020, the Transport Workers' Union of Australia (**TWU**) commenced **proceedings** in the Federal Court of Australia (NSD1309/2020) and, on 25 August 2021, Justice Lee of the Federal Court declared the decision to be unlawful.[1]
3. The case is significant because the *Fair Work Act 2009* (Cth) (**FW Act**) has not provided effective mechanisms for workers and their representatives to challenge outsourcing decisions. It is one of only a handful of challenges to an employer's decision to outsource a part of its business under the FW Act[2] and it is the largest of its kind since the MUA's dispute with Patrick Stevedores in 1998.[3]

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[1] *Transport Workers' Union of Australia v Qantas Airways Limited (No 2)* [2021] FCA 1012; *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873 (**Liability Judgment**).
[2] Arguably, *National Tertiary Education Industry Union v Swinburne University of Technology (No 2)* [2015] FCA 1080 could be considered an outsourcing decision, though the contravening conduct involved a corporate restructuring decision.
[3] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.

4. The Federal Court is currently dealing with issues relating to remedies that should be granted in favour of the employees affected by Qantas' unlawful decision.

Facts and background

Pre-COVID-19 history of outsourcing and animus

5. Qantas' ground handling employees worked in the areas of baggage handling, ramp services and fleet presentation services. They have historically enjoyed good conditions of employment. Qantas has, for decades, attempted to reduce the conditions of employment of its ground handling employees, including in relation to security of employment. The TWU has opposed and fought these incursions.
6. In the late 1990s, Qantas sought to introduce labour hire in various parts of its business. In response, the ACTU negotiated a protocol concerning outsourcing by Qantas or any of its subsidiary companies (**ACTU Protocol**). The ACTU Protocol required Qantas to engage in a comprehensive consultation process with relevant unions, including the TWU, if it was considering contracting out any services provided directly by Qantas employees.
7. In the 2000s, Qantas made various attempts to outsource ground handling services at airports around Australia and the TWU, in response, sought to ensure that, where outsourcing occurred, a third-party ground handling company would pay Qantas rates of pay (through "site rates" agreements).
8. Following the commencement of the WorkChoices amendments to the *Workplace Relations Act 2006* (Cth) on 27 March 2006, matters such as site rates and restrictions on labour hire and outsourcing were considered to be "prohibited content" and could not be included in enterprise agreements under WorkChoices. The TWU was unable to include these restraints in their enterprise agreements, though managed to secure agreement in a side letter in December 2008 that provided for restrictions on outsourcing and labour hire.
9. From the time that Alan Joyce AC commenced as CEO of Qantas, the relations between Qantas and the TWU deteriorated. In an affidavit filed in the proceedings sworn by Scott **Connolly**, then a TWU official, Mr Connolly deposes that when he first met Mr Joyce, Mr Joyce stated words to the following effect:

> "(a) He had difficulty rationalising paying ground handling staff in Australia as well as Qantas pays them in a globally competitive aviation industry;

(b) Pay relativity needs to reflect the reality that, globally, Qantas can pay ground handling staff in foreign ports as little as $4.00 per hour;
(c) Being cost competitive and driving change to this end were significant priorities for him."

10. In 2009, over the TWU's fierce opposition, Qantas created an internal labour hire company, QGS, which provided inferior terms and conditions of employment for its employees compared to Qantas employees who did the same ground handling work.
11. In 2011, the TWU's key bargaining claims involved seeking security of employment provisions, eg., site rates and restrictions on labour hire and outsourcing.
12. In September to October 2011, the TWU and its members organised and took widespread protected industrial action.
13. On Saturday, 29 October 2011 at approximately 5:00pm, Mr Joyce announced that Qantas was grounding all its flights with immediate effect and Qantas gave notice to the TWU that it proposed to lockout all TWU members on and from 31 October 2011.
14. On the same day (29 October 2011), the Minister for Tertiary Education, Skills, Jobs and Workplace Relations made an application under s 424 of the FW Act seeking an order to terminate the TWU's protected industrial action or, alternatively, suspending the protected industrial action for a period of 90 days.
15. Following the termination of protected industrial action in relation to the proposed EBA8, the TWU sought the assistance of Fair Work Australia to conciliate the dispute. The TWU and Qantas were unable to reach agreement during conciliation. Fair Work Australia subsequently arbitrated the dispute and made the Qantas Airways Limited and QCatering Limited - Transport Workers Workplace Determination 2012. In the proceedings, Qantas management conceded that it considered its direct employees to be a legacy workforce:

> "[Counsel for the TWU] what this proceeding is about is the pay and conditions of what might be called a legacy workforce which it foresees as dwindling over time, eventually to nothingness, one presumes?
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> [Peter Smith, Qantas' then Industrial Relations Manager] ---Well, potentially, yes."[4]

[4] (B2011/3993, Transcript of Proceedings [2012] FWATrans 354 (4 April 2012) at PN3932 to PN3946).

16. Since the 2011 lockout of its members, the TWU and Qantas have had a fractious relationship.

COVID-19

17. In 2020, Qantas management considered measures to be taken to address the challenges of the COVID-19 pandemic.
18. In late April 2020, Qantas management considered that the global pandemic presented "transformation opportunities". These included the full or partial outsourcing of Qantas' ground handling work. They noted that the "current environment reduces transaction risks." This was due to a near total reduction in flights due to the pandemic.
19. Qantas' most senior management committee (the Group Management Committee or **GMC**) met in early May 2020 and considered that there was a "vanishing window of opportunity" to implement transformational opportunities. At the meeting, Paul Jones, a then senior Qantas manager, noted that the two applicable enterprises agreements would be "open" in December 2020. That is, they would be past their nominal expiry dates and the employees employed under those agreements could bargain for replacement enterprise agreements and take protected industrial action in support of their claims.
20. In a 15 June 2020 GMC meeting, Qantas management spoke to a document in which it was recorded that having open enterprise agreements would "concentrate power back into the [Union] early in the new calendar year when [Qantas] are growing domestic demand back and Virgin is potentially up on its feet". Further, the "longer a decision is deferred the greater the increase in operational continuity risk; [and Qantas] are also unlikely to make any significant change during 2021 with an open QAL EA".[5] The document noted, in relation to timing:

> "If we do not make the decision to exit at this time and select Option 1 [rightsizing and not a complete outsourcing], it is hard to see the conditions in which we would ever have the opportunity to execute full exit again."

21. His Honour Lee J found that Qantas' key decision makers 'considered that a one-off and vanishing opportunity was being presented to adopt outsourcing of ground

[5] Exhibit 1, p 1813.

handling operations and that operational risk would increase in 2021 in circumstances of "open EBAs"'.[6]

22. On 19 June 2020, the Qantas Board approved a 3-year recovery plan.
23. In July and August 2020, considered the risks and rewards of outsourcing its ground handling functions.
24. On 25 August 2020, Qantas announced that it was proposing to outsource its ground handling operations. It needed to undertake a tendering process with third party ground handling companies and, due a term in its enterprise agreement, consider that it needed to provide an opportunity for employees to provide an "in-house bid" (**IHB**). However, the decision to outsource its ground handling functions was effectively made at this time[7] given that, his Honour considered, the IHB process was very unlikely to succeed.
25. Based on a recommendation by Mr Paul Jones (Chief Operating Officer, Qantas Airlines), Mr Andrew David (Chief Executive Officer, Qantas Domestic and International) decided to outsource its ground handling operation ostensibly for three operational reasons:
    a. deliver cost savings of around $103 million;
    b. provide the ground operations on a fully variabilised "cost per turn" basis; and
    c. eliminate the need for capital expenditure of $80 million.
26. The decision was announced on 30 November 2020.

Decision

27. Lee J held that:

> "I am affirmatively satisfied that part of Mr Jones' reasons for recommendation to Mr David to make the outsourcing decision was to prevent affected employees disrupting services in 2021 by taking protected industrial action when, it was hoped, services might be getting back to usual; the key concern of all within the Australian Airports business in making the outsourcing decision at the time that it was made was because of the vanishing window of opportunity caused by the operational disruption. Further, in relation to Mr Jones, I am satisfied that the existence of the open Enterprise Agreements was a consideration."

[6] Liability Judgment at [131]. See also [201]; [257].
[7] Liability Judgment at [157]; [186]; [194].

Further:

> "I am not satisfied there was any difference between Mr David and Messrs Jones and Hughes in the way they thought about the proposed differences in approach between above the wing and below the wing workforces or any different views as to the risks and rewards of outsourcing."

28. Based on these findings, Lee J held that Qantas had not discharged its onus to prove that the outsourcing decision was not made to prevent affected employees from exercising workplace rights, that is, to engage in enterprise bargaining and to organise and take protected industrial action.[8] Put differently by Lee J:

> "[I]t may be that a substantial and operative reason for Mr David making the outsourcing decision was not the Relevant Prohibited Reason, but by reference to all the evidence, I am not reasonably satisfied on the preponderance of probabilities that this fact has been proved by Qantas. In these circumstances, and in this respect, Qantas has not discharged its onus. In reaching this conclusion I have been conscious of the nature of this finding of contravening conduct and of its consequences."

29. Lee J's findings were made, in large part, due to credibility findings about various Qantas managers. His Honour approached Mr David's affidavit and oral evidence with caution;[9] Mr Jones' oral evidence was considered to be not compelling ("I regret to say that Mr Jones was an unimpressive witness"[10]); Mr Hughes was also, in part, considered to be not compelling ("Although he was a somewhat more impressive witness than Mr Jones, to the extent he was pressed on what he perceived to be critical aspects of this evidence, his desire to not depart from his affidavit evidence led him to give evidence that was, in some respects, less than compelling"); and Mr Finch's affidavit evidence was approached cautiously.[11]

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[8] Liability Judgment at [282]; [288].
[9] Liability Judgment at [288] – [302].
[10] Liability Judgment at [61].
[11] At [86] of the Liability Judgement: "The nature of the evidence adduced in chief has caused me disquiet, but it is open to think the draftsman may have mistakenly but genuinely thought he was preparing an affidavit that was appropriate." However, Lee J did not find that Mr Finch consciously gave false evidence.

Conclusion

30. The case is an illustration of where a company has used apparently benign commercial reasons to justify an unlawful outsourcing decision. It is a reminder that such reasons can, and should, be scrutinised.

31. The TWU would like to refer the committee to a submission it made to the Senate inquiry into "*The future of Australia's aviation sector, in the context of COVID-19 and conditions post pandemic*". This submission calls on the Government to respond to 'fundamental market imbalances in aviation' which have allowed airlines like Qantas to use its monopolistic position to create increasingly low paid and insecure terms of employment by (1) Establishing a standing tribunal to establish appropriate standards in the industry; AND (2) Developing a national plan for the aviation industry which seeks to protect jobs, business and passenger interests.