



QANTAS

Spirit of Australia

Qantas Group
Submission to the
Productivity Commission in
response to its Draft Report on the
Workplace Relations Framework

1 INTRODUCTION

The *Productivity Commission Draft Report - Workplace Relations Framework (Draft Report)* proposes relatively modest and incremental changes to the current workplace relations system.

The recommendations in the Draft Report adopt a number of the changes sought by Qantas Airways Limited (**Qantas**) in its initial submission to the Productivity Commission.

In this response, Qantas addresses only the issues that, in its view, require further clarification and / or where Qantas seeks a further role in respect of subsequent reviews recommended by the Draft Report. It otherwise relies on its initial submission.

2 CHAPTER 5 - UNFAIR DISMISSAL

2.1 Response to Draft Recommendation 5.2

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct*
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.*

Qantas supports Draft Recommendation 5.2. However, it submits that the first limb of the recommendation should be amended to '*reasonable evidence of persistent underperformance or conduct warranting dismissal*' (rather than 'serious misconduct'). This is because, otherwise, an employee may be found to have engaged in conduct other than serious misconduct (including on a repeated basis) which constitutes a valid reason for termination and still be awarded compensation. There appears to be no justification for this limitation in the Draft Report.

3 CHAPTER 6 - THE GENERAL PROTECTIONS

3.1 Current test and the need for legislative reform

The Draft Report states the following in relation to calls for the reintroduction of the 'sole or dominant' test, at pages 29 to 30:

Courts are now also successfully addressing a previously identified prime problem. Some key High Court cases have established legal precedents that an adverse action case will not succeed because of some coincident possible breach of a workplace right (such as dismissal of a union official who has performed poorly). To the extent that the precedent is observed in other cases, adverse action would require that such a breach was, on examination of the subjective intentions of the decision maker, the main reason for the dismissal. [Emphasis added]

Also, at pages 259 to 260:

There are several counterarguments regarding the reintroduction of the sole or dominant test. First, the High Court's decision in the Barclay case has clarified to a considerable degree the operation of the test within the general protections. As is now clear, a prohibited reason must still be a 'substantial or operative' factor influencing an employer's decision to dismiss an employee, or an 'operative or immediate' reason for acting. If there were other strong grounds for dismissal — such as poor performance — the dismissal would unlikely be adverse action. This judgment has provided guidance, particularly for employers, on the operation of the test. [Emphasis added]

Qantas respectfully submits that this is not the position that has been adopted by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education (BRIT) v Barclay* [2012] HCA 32 and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41A. Qantas understands those cases to be authority for the position that if adverse action is taken for reasons including a proscribed reason, the action will still amount to unlawful adverse action even if the proscribed reason is not the main, or even if it is not a substantial, reason for the decision. The test is whether a proscribed reason is any part of the reasons for the adverse action. It is irrelevant that there may have been other lawful reasons justifying the action.

Given this, it is inherently difficult for an employer to satisfy the reverse onus where there is a temporal (but not causal) relationship between the protected attribute (e.g. the relevant employees have an entitlement under an industrial instrument) and the adverse action, even where all of the reasons for the action are lawful. This has the effect of unduly fettering management discretion where the administrative burden and / or possibility of an expensive (and inherently risky - given the reverse onus) legal challenge overrides the management decision to be made.

For these reasons, Qantas supports the insertion of a 'sole or dominant' test, which requires that the unlawful factor be the 'sole or dominant' reason why the employer engaged in the adverse action. In Qantas's view this test achieves a better balance where a reverse onus continues to apply.

A further reason for such a consideration is that the High Court cases to which the Productivity Commission has referred do not deal with the operation of the General Protections provisions in the context of organisational change and restructuring. As Qantas has previously submitted, the provisions can inadvertently operate as an impediment to business transformation for established firms within Australia.

The Productivity Commission has recognised this in its Draft Report, at page 259:

A particular issue in this regard concerns the potential misuse of the adverse action provisions to frustrate commercial restructures, with both direct effects (such a delay) and indirect, 'chilling' effects on future restructure.

Applying the 'sole and dominant' test in this context would still require employers to only implement organisational change or restructures for legitimate commercial purposes but would have the benefit of alleviating employers' concerns that they will be caught up in costly litigation in order to establish that the reasons for their actions were lawful.

3.2 Response to draft recommendation 6.2

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the Fair Work Act 2009 (Cth), which deals with the meaning and application of a workplace right.

- *Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.*
- *The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.*

Qantas supports the first limb of this recommendation and the requirement that complaints be made in good faith.

However, in relation to the second limb, Qantas submits it will be very difficult for the Fair Work Commission to determine whether a complaint has been made in good faith before hearing from the opposing party in relation to the relevant factual matrix.

Qantas submits that if the employer challenges the assertion that a complaint has been made in good faith, the applicant should be required to establish this as threshold matter, ie. as a separate question immediately upon the commencement of proceedings in a court.

4 CHAPTER 8 - MINIMUM WAGES

4.1 Response to Draft Recommendation 9.2

DRAFT RECOMMENDATION 9.2

The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- *the role of the current system within the broader set of arrangements for skill formation;*
- *the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression*
- *the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.*

Qantas has been a significant employer of Apprentices. We support a further review on this and related issues and welcome the opportunity to make further submissions in respect of any review of Apprenticeship and Trainee arrangements.

5 CHAPTER 15 - ENTERPRISE BARGAINING

5.1 Response to Draft Recommendation 15.4

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

Qantas supports this draft recommendation. In particular it supports a No-Disadvantage Test applied on a global (rather than line-by-line) basis. In Qantas's view, this would be achieved by reverting to the test that applied under the *Workplace Relations Act 1996* (Cth) immediately prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

5.2 Response to Draft Recommendation 15.5

DRAFT RECOMMENDATION 15.5

The Australian Government should amend the Fair Work Act 2009 (Cth) so that:

- a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted*
- a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.*

Qantas supports this draft recommendation and submits that the reasonable period in which nominations to be a bargaining representative must be submitted should be no longer than 21 days, given that is the minimum period that must elapse between the issuing of the last notice of employee representational rights and when the employer can ask the relevant employees to approve the proposed agreement.

Qantas also supports a requirement that an employee representative represent at least a specified proportion of the workforce throughout the bargaining in order to participate in the bargaining as a bargaining representative.

6 CHAPTER 19 - INDUSTRIAL DISPUTES AND RIGHT OF ENTRY

6.1 Proposed amendments to protected action ballot order process

INFORMATION REQUEST

The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:

- *removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action*
- *amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared*
- *granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.*

Qantas strongly opposes the proposed simplification of protected action ballot orders.

Qantas submits that the removal of the current requirement that a protected action ballot specify the types of actions to be voted on by employees will result in:

- (a) employees being required to approve all forms of potential employee claim action (including indefinite strikes) or not approve any form of action at all;
- (b) employees being inadvertently deprived of the anonymity of a secret ballot in respect of specific forms of industrial action, resulting in employees needing to publically 'opt out' of the specific forms of industrial action in which they do not wish to engage;
- (c) it is likely to escalate rather than deescalate the industrial tension between the parties - this has the potential to complicate and prolong the bargaining rather than precipitate its resolution; and
- (d) employers will effectively be prevented from undertaking contingency planning as they will not be aware of the nature or duration of the proposed action until they are notified by the employee representatives, i.e. 3 days before it commences, unless the protected action ballot order states a longer notification period – this will likely increase the impact of the action and, in many cases, result in services or production being cancelled impacting customers and other third parties.

Qantas also submits that the proposed amendment or removal of the requirement that industrial action be taken within 30 days of ballot results being declared will result in:

- (a) the AEC being forced to dedicate resources to conduct ballots where there is no intention on the part of those requesting the ballot for the proposed industrial action to be taken in the foreseeable future (or even at all);
- (b) employees being asked to approve (unknown forms of) industrial action in circumstances where they do not know the period in which they are likely to engage in the action, which is clearly relevant when industrial action will result in the deduction of pay; and
- (c) employers will not be able to assess the risk of industrial action occurring in any given period, again hampering contingency planning efforts and leading to the undesirable outcomes identified above.

Qantas is not in a position to support the proposal to grant the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot given it is unclear what kinds of 'procedural defects' the Fair Work Commission would be able to overlook. It requests the Productivity Commission provide further information in this regard.

6.2 Graduated options for employer industrial action

INFORMATION REQUEST

The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.

Qantas supports the expansion of employer response action provided the taking of such action would attract the usual immunities associated with protected industrial action (including immunity in respect of any General Protections claims) and would not trigger employee response action.

7 TRANSFER OF BUSINESS

7.1 Response to Draft Recommendation 22.1

DRAFT RECOMMENDATION 22.1

The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.

Qantas supports this recommendation. However, the Draft Report does not address the issue raised by Qantas in section 4.1 of its initial submissions regarding the treatment of voluntary transfers¹. As explained in that section, two recent single Member decisions of the Fair Work Commission refused to issue s.318 orders because they were found to be beyond the jurisdiction of the Fair Work Commission (on the basis that the Fair Work Commission would have been required to establish a jurisdictional fact in order to make the orders sought²).

If it is the case that the Fair Work Act prevents the Fair Work Commission from making a s.318 order in respect of a conditional offer of employment, Qantas and its related entities will have no choice but to cease offering employment to employees currently employed by other entities within the Group to ensure that the integrity of enterprise specific arrangements is maintained. Draft recommendation 22.1 will not address this issue as there will be circumstances in which an employee genuinely wishes to be redeployed to a position with an associated entity in a redundancy situation (as this may not be at 'his or her instigation'). Given this, Qantas submits that the transfer of business provisions should be amended to make it clear that the Fair Work Commission has the jurisdiction to issue s.318 orders where conditional offers of employment have been made and accepted.

¹ Indeed, the Draft Report states that voluntary transfers are obtained with 'apparent ease' – see page 758.

² *Lend Lease Engineering Pty Ltd and others* [2014] FWC 5499; *ABnote Australasia Pty Ltd* [2015] FWC 1032.

7.2 Obligation to redeploy

Qantas also raised in section 4.1 of its initial submission the interaction between the transfer of business provisions and the genuine redundancy exemption in the unfair dismissal provisions. That is, if Qantas determines that it no longer requires an employee's job to be performed by anyone because of changes in the operational requirements, it is then required under s.389(2) of the Fair Work Act to redeploy the employee to an associated entity, if it is 'reasonable in all of the circumstances' and it intends to rely on a defence of 'genuine redundancy' in response to any unfair dismissal application brought by the employee. However, any such redeployment will likely result in a 'transfer of business' and the consequent transfer of the employee's industrial instrument to the associated entity.

Where this is undesirable, the associated entity would ordinarily make employment conditional on a s.318 order issued by the Fair Work Commission. However, if this is no longer available for the reasons identified above, then the associated entity will have no option but to refuse to facilitate the redeployment in order to avoid the transfer (as it is expressly permitted to do so under s.341(5) of the Fair Work Act). Yet, this refusal would potentially preclude Qantas from relying upon the 'genuine redundancy' defence to any unfair dismissal application brought by the employee, if the Fair Work Commission concluded that redeployment was reasonable in all of the circumstances even though the associated the entity had refused the transfer.

This issue has not been addressed in the Draft Report.

In order to resolve these tensions, Qantas presses its submission that the Productivity Commission recommend that for the purposes of s.389(2) of the Fair Work Act, redeployment is not 'reasonable in all of the circumstances' if such redeployment would likely give rise to a transfer of business and the relevant associated entity exercises its legal right to rely upon the exemption in s.341(5) of the Fair Work Act to avoid the transfer, unless the Fair Work Act is amended as submitted above.

8 LEGAL REPRESENTATION BEFORE THE FAIR WORK COMMISSION

The Draft Report has not addressed the need for parties to seek permission to be legally represented before the Fair Work Commission. Qantas presses its initial submissions in that regard on the basis that a refusal by the Commission to grant permission for legal representation effectively prevents an employer from putting its best case forward in circumstances where:

- (a) resourcing and time constraints may actively prevent an internal representative of the employer (employee) appearing for the company or, at least, from being adequately prepared in respect of any such appearance;
- (b) the outcome of the dispute may have significant financial and other implications for the business, including beyond the realm of employee relations;
- (c) permission is often refused in cases where an applicant is a self-represented litigant – these are often the very cases when legal representation operates to the greatest benefit of the parties and the Commission in identifying and addressing the key legal issues;
- (d) legal representatives have a primary duty to the court / Commission and are obliged to assist the Commission to arrive at the correct legal conclusion, including by raising any authorities of which they are aware that are prejudicial to their client's case; and

- (e) a refusal to grant a legal representative or paid agent permission to appear does not (and cannot) prevent those representatives from attending and assisting an employer at a hearing – it merely increases the cost to the employer.

For these reasons, a refusal of permission can operate contrary to the administration of justice.

