

AMBIGUOUS LAW: THE RIGHT TO BARGAIN FOR JOB SECURITY IN COLLECTIVE AGREEMENTS

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This article argues that the current provisions which govern job security clauses in collective agreements are ambiguous and problematic. Specifically, the ‘permitted matters’ law is unclear and inconsistently interpreted. Cases which concern almost identical job security clauses have received different treatments. The requirement to consider ‘the interests of employees and employers’ when arbitrating workplace determinations is also ambiguous. It is unclear whether employees’ job security is an interest that should be taken into account, and if so, how much weight should be placed on this consideration. This article argues that the law should be amended to address these ambiguities and to ensure more predictable and fairer outcomes. In contrast with the current provisions, the abolished rules ‘prohibited content’ were clearer and less ambiguous.

I: INTRODUCTION

It is the duty of a democratic parliament to enact statute which is clear, unambiguous, readily applicable and unproblematic so that it can be understood and followed without difficulty.¹ As legal philosopher Wesley Hohfeld sagaciously observed ‘[c]hameleon-hued words are a peril both to clear thought and to lucid expression.’²

This article will argue that the right to bargain for job security in collective agreements in the *Fair Work Act 2009* (Cth) (*Fair Work Act*) is not clear, unambiguous, readily applicable and unproblematic. The law is unclear because it lacks detail and specificity, both in the provisions themselves and in the explanation of the law provided by the Parliament.

Prior to the *Fair Work Act*, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices*) prohibited specific matters from being included in employment agreement negotiations and outcomes. These ‘prohibited content’ rules included restrictions on the engagement of independent contractors and labour-hire workers and requirements relating to the conditions of their engagement.³ These restrictions and requirements were described as ‘job security clauses’. Under the ‘prohibited content’ rules, if a trade union chose to pursue claims for job security clauses, then the trade union would lose their right to take protected industrial action.⁴ If an employer chose to agree to job security clauses, it would face potential legal action.⁵ The prohibited content laws were unambiguous and clear.

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¹ Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996) ch 6.

² Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 28.

³ *Workplace Relations Regulation 2006* (Cth) regs 8.5(1)(h)–8.5(1)(i). For a general discussion of agreement-making under *Work Choices*, see Christopher Jon Arup et al, ‘Assessing the Impact of Employment Legislation: The Coalition Government’s Labour Law Program 1997–2008 and the Challenge of Research’ (Research Report, Workplace and Corporate Law Research Group and Australian Centre for Research in Employment and Work, Monash University, 2009); Carolyn Sutherland, ‘Making the ‘BOOT’ Fit: Reforms to Agreement-Making from *Work Choices* to *Fair Work*’ cited in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 99.

⁴ *Workplace Relations Act 1996* (Cth) s 365.

⁵ *Ibid* ss 357, 365.

The *Fair Work Act* has now abolished the ‘prohibited content’ rules, so job security clauses are no longer prohibited in enterprise agreements certified under the Act. However, Parliament did not explain its intentions in regulating job security clauses.

This article will argue that the precedents dealing with ‘permitted matters’ are unclear and inconsistent. The Explanatory Memorandum provides only limited guidance on which job security clauses fall into the definition of ‘permitted matters’.⁶

Further, this article will argue that when making workplace determinations, the *Fair Work Act* requires the Fair Work Commission (‘FWC’) to take account of ‘the interests of employees and employers who will be covered by the determination’,⁷ but the meaning of this is ambiguous. The article will argue that it is unclear whether employees’ job security is an interest that should be taken into account, and if so, how much weight should be placed on this interest. The explanatory memorandum provides no guidance on this question either.⁸ The interpretations in *Transport Workers’ Union of Australia v Qantas Airways Ltd*⁹ (‘*Qantas Workplace Determination*’) will be discussed and used to illustrate the lack of clarity.¹⁰

Both ‘permitted matters’ and ‘interests of employees and employers’ will be considered in this article because both provisions have a direct impact on job security clauses. For example, if a job security clause falls within ‘permitted matters’, then it is permissible for employees to take industrial action to bargain for the clause. If the ‘interests of employees and employers’ includes job security interests then arguably the FWC must do more than just pay lip service to job security interests in deciding on job security clauses.

It is conceded at the outset that Parliament did intend to grant FWC wide discretion.¹¹ Despite this, it will be argued that the jurisprudence on these provisions is inconsistent and unpredictable, and therefore further legislative clarification is necessary.

II: THE DEFINITION OF JOB SECURITY AND JOB SECURITY CLAUSES

At the core of this article is the concept of job security. The word ‘security’ is defined in the Macquarie Dictionary as free from or not exposed to danger, safe, free from care, and without anxiety.¹² According to Standing, ‘security’ means a sense of being in control over one’s development and activities.¹³

This article defines ‘job security’ as a state where an employee’s ‘reasonable and probable expectation of continued employment’ are being met; that is, the absence of fear of loss of employment. In the English case of *Allen v Flood*, Hawkin J explained this concept:

⁶ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 110 [672].

⁷ *Fair Work Act 2009* (Cth) s 275(c).

⁸ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 177 [1118].

⁹ [2012] FWAFB 6612 (8 August 2012) [41].

¹⁰ *Ibid.*

¹¹ Breen Creighton and Andrew Stewart have commented that the Rudd government’s aim was to avoid micro-regulation by conferring broad functions and appropriate discretion on Fair Work Commission. See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 48; Explanatory Memoranda, Fair Work Bill 2008 (Cth) 1 [4].

¹² Arthur Delbridge et al (eds), *The Macquarie Dictionary Federation Edition* (1997) 1706.

¹³ See Guy Standing, *Global Labour Flexibility Seeking Distributive Justice* (Basingstoke, 1999) 52.

The daily labourer, whose tested character for steadiness, honesty, and industry has induced his master, as a matter of course, through a long series of years, week by week to renew or continue his employment finds in this the foundation for his 'reasonable and probable expectation' that he may rely on continual employment in the future.¹⁴

Generally speaking, when politicians, law makers, trade unions, and the media talk about 'job security', they are talking about meeting this expectation of continued employment.¹⁵ For the purposes of this article, a job security clause is defined as any intervention that restricts managerial decision making with regards to contracting out.¹⁶ Contracting out means hiring contractors who are not parties to a collective agreement to perform similar jobs to workers who are parties to a collective agreement.

A job security clause includes any clause that restricts contracting out, for example, a clause which states that contracting out is only permitted if internal employees are not interested in the jobs.

A job security clause also includes any clause that makes contracting out less attractive for an employer. For example, a clause which stipulates the employer must hire outside contractors on the same rates and conditions as the internal employees. Such a clause is commonly referred to as a 'site rates clause'.¹⁷ The intention of the site rates clause is to make it less attractive for the employer to use outside labour, and to increase job security for direct employees.

Any clause that prohibits contracting out all together is also a job security clause. Such clauses are less common than the clauses which restrict or remove the incentive for contracting out. Any clause that prohibits or restricts forced redundancies as a result of contracting out is also a job security clause.

By its very definition, job security clauses can be construed as an interference of managerial prerogatives. Once a job security clause is agreed to or arbitrated into an agreement, employers will not have complete freedom to do whatever they want in relation to hiring outside contractors. As will be discussed below, the view taken by FWC in the *Qantas Workplace Determination* was that key job security clauses were interfering with managerial prerogatives.

¹⁴ [1898] AC 1, 16.

¹⁵ See Peter Reith and Department of Employment, Workplace Relations and Small Business (Cth), *Job security in Australia* (Office of the Minister for Employment, Workplace Relations and Small Business, 2000); Australian Council of Trade Unions, 'Australian Workers Want Better Job Security, Not a Return to Work Choices-Style Policies' (Media Release, 17 July 2011); Amy Coderoy, 'Job Preservation a Concern for Nation of Insecure Workers', *The Sydney Morning Herald* (Sydney), 28 September 2011; John Gennard, *Job Security and Industrial Relations* (Paris Organisation for Economic Co-operation and Development, 1979); Di Yerbury, 'Redundancy: The Response of Australian Industrial Law' (Working Paper No 82-002, Australian Graduate School of Management, 1982); Di Yerbury and Robert Clark 'Redundancy and the Law: the Position in mid-1983' (1983) 25 *Journal of Industrial Relations* 353; Stephen Deery 'Trade Unions, Technological Change and Redundancy Protection in Australia' (1982) 24(2) *Journal of Industrial Relations* 155.

¹⁶ There are many cases involving job security clauses, both in the context of unions seeking to take protected industrial actions to obtain the clauses and in workplace determinations. See for example, *Liquor Hospitality and Miscellaneous Union v Coca-Cola Amatil* [2009] FWA 920 (3 November 2009); *Flinders Operating Services Pty Ltd v Australian Municipal, Administrative, Clerical Services Union* [2011] FWA 4506 (14 July 2011); *Re Schejacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement* (2005) 142 IR 289; *Australian Postal Corporation v Communicationa, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009]FWAFB 599 (12 October 2009).

¹⁷ Site rates clause was the number one issue for the unions in the Qantas dispute.; see *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012).

III: PROHIBITED CONTENT PROVISIONS IN THE *WORKPLACE RELATIONS ACT*

Prior to the *Fair Work Act*, Work Choices legislation prohibited an extensive list of matters from being included in employment agreements. The majority of these prohibited content related to employee and union rights and benefits.¹⁸ With regards to job security clauses, reg 8.5 of *Workplace Relations Regulation 2006* (Cth) stipulated that following job security clauses were prohibited content:

A term of a workplace agreement is prohibited content to the extent that it deals with the following:

- (h) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
- (i) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency

The prohibitions applied to both employees and employers. If a trade union chose to pursue claims for job security clauses, then the trade union would lose their right to take protected industrial action.¹⁹ If an employer chose to agree to job security clauses, it would face potential legal action.²⁰ The prohibited content restrictions led many unions to attempt to insert the prohibited terms into common law contracts or side agreements to operate alongside the statutory collective agreements.²¹ This side-stepping strategy was only successful if the employer was willing to agree to the side agreements.

IV: JOB SECURITY CLAUSES AND PERMITTED MATTERS PROVISIONS IN THE *FAIR WORK ACT*

As will be discussed below, in the Qantas Workplace Determination the FWC rejected job security clauses because it was of the view that they interfered with managerial prerogatives. *Work Choices* legislation prohibited certain job security clauses from enterprise agreements.²² The prohibitions were clear-cut and unequivocal. The *Fair Work Act* has now abolished the 'prohibited content' rules. Instead it confined the content of agreements to 'permitted matters'²³ and deemed certain matters 'unlawful terms'.²⁴

¹⁸ Sutherland, above n 3, 99, 109.

¹⁹ *Workplace Relations Act 1996* (Cth) s 365.

²⁰ *Ibid* ss 357, 365.

²¹ Andrew Stewart and Joellen Riley, 'Working Around Work Choices: Collective Bargaining and the Common Law' (2007) 31 *Melbourne University Law Review* 903.

²² *Workplace Relations Regulation 2006* (Cth) regs 8.5(1)(h)-8.5(1)(i). For a general discussion of agreement-making under *Work Choices*, see Sutherland, above n 3, 99.

²³ *Fair Work Act 2009* (Cth) s 172(1).

²⁴ *Ibid* s 194; Unlawful Content includes discriminatory terms, objectionable terms, unfair termination term, a term modifying unfair dismissal protection, a term inconsistent to industrial action laws, a term that interferes right of entry laws, a term which modifies State or Territory OHS rights.

Section 172(1) stated that the enterprise agreements can be made about the following ‘permitted matters’:

- Matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement;
- Matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- Deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- How the agreement will operate.

Employers have frequently argued that the job security clauses were not matters pertaining to the relationship between an employer or employer and employees and therefore were not permitted matters. For example it has been argued that the site rates clause was not a matter pertaining to the relationship between an employer and employees, because the clause did not govern the wages and conditions of employees.²⁵ It only governed the wages and conditions of contractors.²⁶ What, then, was the meaning of ‘matters pertaining to the relationship between an employer or employer and employees’ (‘matters pertaining’)? The Explanatory Memoranda answered this question only to some extent by providing that certain clauses were *not* matters pertaining, while certain other clauses were matters pertaining. The guidance provided was only partial and left many grey areas.

The Explanatory Memoranda stated that clauses that contain a general prohibition on the employer engaging labour hire employees or contractor were not matters pertaining to the relationship between an employer and employees, nor were clauses that contain a general prohibition on the employer employing casual employees.²⁷

Further, the explanatory memorandum stated:

It is intended that the following terms would be within the scope of permitted matters for the purpose of paragraph 172(1)(a): ... Terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms *sufficiently relate* to employees’ job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement.²⁸

It remains unclear what constitutes something which ‘sufficiently related to’ employees’ job security, other than the example given. A term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement is basically a site rates clause. Therefore explanatory memorandum stipulates that a site rates clause was a ‘permitted matter’. Accordingly, site rates clause had been accepted as permitted content

²⁵ A site rates clause is a clause which stipulates the employer must hire outside contractors on the same rates and conditions as the internal employees; see *Transport Workers’ Union of Australia v Qantas Airways Ltd* (2012) FWAFB 6612 (8 August 2012).

²⁶ *Liquor Hospitality and Miscellaneous Union v Coca-Cola Amatil* [2009] FWA 920 (3 November 2009); *Flinders Operating Services Pty Ltd v Australian Municipal, Administrative, Clerical Services Union* [2011] FWA 4506 (14 July 2011)

²⁷ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 108 [673].

²⁸ *Ibid* 108 [672], emphasis added.

in a number of cases, including *Liquor Hospitality and Miscellaneous Union v Coca-Cola Amatil*²⁹ and *Flinders Operating Services Pty Ltd v Australian Municipal, Administrative, Clerical Services Union* ('*Flinders*').³⁰

Whilst the explanatory memorandum provided guidance on specific clauses such as site rates clauses, it did not provide guidance on many other types of job security clauses. Whilst it is true that there is indeed a substantial jurisprudence about matters pertaining,³¹ many parts of this jurisprudence are uncertain, incoherent and inconsistent.³² The following section demonstrates the uncertain, incoherent and inconsistent case law concerning job security clauses.

V: INCONSISTENCIES IN CASES INTERPRETING 'PERMITTED MATTERS'

As discussed above, many parts of the jurisprudence of 'permitted matters' are uncertain, incoherent and inconsistent. Cases which concern almost identical job security clauses have often received very different treatments in different cases. The following two cases illustrate the inconsistencies.³³

In *Flinders*,³⁴ the Australian Municipal Administrative Clerical and Services Union wanted to insert the following clauses which limited the circumstances in which supplementary labour may be used:

The Company may from time to time use supplementary labour for the absence of direct employees on extended leave, temporary vacancies and peak workloads in areas normally staffed by direct employees.

Direct employees will be given the option of working overtime and/or being called back to work before external personnel are engaged.³⁵

²⁹ [2009] FWA 920 (3 November 2009).

³⁰ *Flinders Operating Services Pty Ltd v Australian Municipal, Administrative, Clerical Services Union* [2011] FWA 4506 (14 July 2011).

³¹ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 107 [670]. The law of 'matters pertaining to the relationship between an employer or employers and employees' is of long standing. Similar provisions had existed in both the *Industrial Relations Act 1988* (Cth) and the *Workplace Relations Act 1996* (Cth) before 27 March 2006. After 27 March 2006, a clause that was not about such matters was prohibited content.

³² Andrew Stewart made these observations in 2009. See 'FWA Tackles Content Rules on Contracting and Labour Hire', *Workplace Express*, 5 November 2009 <www.workplaceexpress.com.au>. For discussions of matters pertaining cases and legislation, see also Esther Stern, 'Industrial Disputes and the Jurisdiction of the Federal Industrial Tribunal: An Analysis of Recent Developments' (1990) 3 *Australian Journal of Labour Law* 130; J T Ludeke, 'Whatever Happened to the Prerogatives of Management?' (1992) 66 *Australian Law Journal* 11; Marilyn Pittard, 'Agreement Straying Beyond Employment Matters: The Impact of the Agreement Validation Matters Legislation' (2005) 18 *Australian Journal of Labour Law* 71.

³³ Both of these cases concerned the employees' right to take protected industrial action. It is well-settled case law that industrial action may not be taken in support of claims which are not permitted content in an agreement. This doctrine arose out of the High Court decision of *Electrolux Home Products Pty Ltd v The Australian Workers' Union and Others* (2004) 221 CLR 309 and this case was confirmed as good law in the Explanatory Memorandum of the *Fair Work Act 2009*. In addition, s 409 of *Fair Work Act 2009* also prevents employees and their bargaining representatives from organising or taking protected industrial action if their claims are not for permitted matters.

³⁴ [2001] FWA4506 (14 July 2011).

³⁵ *Ibid* 80.

Under these clauses, the employer could not use supplementary labour in circumstances other than absence, temporary vacancies or peak workloads, nor could it use supplementary labour without offering overtime or offering calling back direct employees first. The employer, Alinda Energy, refused to agree to these two clauses, as well as to other job security clauses proposed.³⁶ The union then gave the employer formal notice to take industrial action. The employer then applied to FWC in order to stop the industrial action, arguing, among other things, that the above clauses were not permitted matters because they did not pertain to the relationship between the employer and employees.³⁷ The employer argued that the clauses impermissibly restricted the employer's ability to engage outside labour to meet its operational needs.

Deputy President Bartel rejected the employer's argument. DP Bartel held that the clauses were permitted matters, because while these provisions may be construed as a partial restriction on the use of external employees, the overall intent is to maximise permanent employment.³⁸ DP Bartel compared these clauses with a clause in *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement* ('*Schefenacker*') which stipulated that the maximum level of labour hire workers to be 20 per cent of total employees.³⁹ In *Schefenacker*, the Full Bench ruled a 20 per cent cap was a permitted matter.⁴⁰ DP Bartel concluded that a 20 per cent cap was arguably more restrictive than the clauses in *Flinders*, and therefore the clauses in *Flinders* should be construed as permitted matters.

The reasoning in *Flinders* appears quite logical. However a very similar clause was held not to be permitted content in the case of *Australian Postal Corporation v Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*⁴¹ ('*Australian Postal Corporation*').

In *Australian Postal Corporation*, the trade union attempted to bargain for the following clause: 'Australia Post must advertise every position internally and to only contract out a position if it is not wanted by an Australia Post employee.'⁴²

This clause was very similar to the clauses in *Flinders* which required the employer to offer overtime to existing employees, and to only hire from outside in circumstances of extended leave, peak vacancy and extended workloads.

Australia Post argued that this clause was not a permitted matter, as it did not pertain to the relationship between the employer and employees.⁴³ The Full Bench, consisting of Senior Deputy President Acton, Deputy President Hamilton and Commissioner Blair, agreed with Australia Post.⁴⁴ The Full Bench cited French J's judgment in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)*⁴⁵ ('*Wesfarmers*'). In that case, French J found that 'provisions restricting or qualifying the employer's right to use independent contractors' are not matters pertaining to the

³⁶ Ibid 60.

³⁷ Ibid 60.

³⁸ Ibid 80.

³⁹ *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement* (2005) 142 IR 289.

⁴⁰ Ibid [73].

⁴¹ [2009] FWAFB 599 (12 October 2009).

⁴² Ibid [49].

⁴³ Ibid [33].

⁴⁴ Ibid [62].

⁴⁵ [2004] FCA 1737 (23 December 2004).

employment relationship. Surprisingly, the Full Bench made absolutely no mention of that fact the Explanatory Memorandum to the *Fair Work Act* expressly stated that clauses relating to conditions or requirements about employing casual employees or engaging labour hire or contractors are matters pertaining to the relationship between an employer and employees, if those clauses *sufficiently relate* to employees' job security.⁴⁶ The Full Bench failed to give any consideration to the question of whether the clause in question fitted into this category. Instead, the Full Bench relied heavily on the precedent set in *Wesfarmers*. *Wesfarmers* might be relevant but it was a case decided under the previous legislation, not the *Fair Work Act*.

VI: UNCLEAR PROVISION OF 'THE INTERESTS OF EMPLOYERS AND EMPLOYEES'

The previous section has shown that parts of the jurisprudence of 'permitted matters' are unclear and inconsistent. This section will argue that the requirement to take into account 'the interests of employers and employees' when deciding on workplace determinations is also unclear. In particular, it is unclear whether employees' job security is an interest that should be taken into account, and if so, how much weight should be placed on this interest. The explanatory memorandum does not provide guidance on this question.⁴⁷

It must be pointed out that the context in which workplace determinations are made are different from the cases where appropriate parameters of workplace bargaining are determined, such as *Flinders* and *Australian Postal Corporation* discussed in section V of this article. There has been the longstanding legal principle in workplace determinations that any substantial interference with managerial prerogatives requires careful consideration.⁴⁸

Despite this longstanding legal principle, s 275(c) provides that FWC must take into account interest of both employers and employees. However, the precise meaning of 'the interests of employers and employees' was not defined in the explanatory memoranda.⁴⁹ Therefore the courts and FWC were given wide discretion in the interpretation. In addition, the courts and FWC must also consider the following matters in deciding which terms to include in a workplace determination (broadly referred to as 'merit grounds'):

Section 275

- (d) the public interest;
- (e) how productivity might be improved in the enterprise or enterprises concerned;
- (f) the extent to which the conduct of the bargaining representatives was reasonable;
- (g) the extent to which the bargaining representatives have complied with the good faith bargaining requirements;
- (h) incentives to continue bargaining at a later time.

⁴⁶ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 108 [672].

⁴⁷ Ibid 177 [1118].

⁴⁸ *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 136-7.

⁴⁹ Explanatory Memoranda, Fair Work Bill 2008 (Cth) 177 [1118].

VII: 'INTERESTS OF EMPLOYERS AND EMPLOYEES' IN THE QANTAS WORKPLACE DETERMINATION

In the *Qantas Workplace Determination*,⁵⁰ the Full Bench of FWC had to apply s 275 and take account of the merit grounds in reaching its conclusion. As argued below, although the Full Bench paid lip service to employees' 'legitimate concerns as to their job security',⁵¹ it made a determination which effectively ignored these concerns.

The Transport Workers' Union failed to persuade the Full Bench on two major job security clauses: the site rates clause and the 20 per cent cap clause. Both of these major job security clauses had an immediate effect on the labour costs incurred by Qantas. The clauses the Union did persuade the Full Bench to accept had no effect on the labour costs incurred by Qantas: the no forced redundancies clause and the consultation and paid time off for Union representatives.

A: Site Rates Clause

The Transport Workers' Union sought a site rates clause, which stipulated that if, after consultation, Qantas decides to use supplementary labour and/or outsider hire, Qantas will ensure that they will receive the same rates and conditions as the direct employees.⁵² During the industrial dispute, the union told Qantas and the public that the site rates clause was the 'number one issue' for its members.⁵³ The union argued that it wanted the site rates clause in place because it wanted to ensure that the workplace determination will not be undermined or avoided by contracting out and the engagement of contractors.⁵⁴ It wanted to increase job security for the direct employees and to make contracting out less attractive for Qantas.

Qantas objected to this clause on merit grounds. Qantas argued that it was already paying its contractors lower rates than its direct employees. Qantas also argued that such a clause was unprecedented both in Qantas and in the airline industry, interfered in the 'heartland of managerial discretion', and will lead to an increase in costs, undermine competitiveness, and was 'inimical to improving productivity'.⁵⁵

The Full Bench viewed the site rates clause as a clause which dealt with contractors and labour hire employees, and not with Qantas's direct employees. Because the determination was for Qantas and Qantas's direct employees, the Full Bench held that it was inappropriate

⁵⁰ *Fair Work Act 2009* (Cth) pts 2-5 describes the circumstances in which FWA has the power to make Workplace Determinations. These circumstances include bargaining related workplace determinations, low-paid workplace determinations and industrial action related workplace determinations. Workplace determination must occur after a termination of industrial dispute instrument has been made on the grounds either of significant economic harm to the negotiating parties or of actual or threatened harm to the broader economy or community and a post-industrial action negotiation period expires. This was the trigger for the FWA arbitration in *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) [41].

⁵¹ *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) [41].

⁵² *Ibid* [63].

⁵³ See 'Site Rates Key to Qantas Dispute: TWU', *Workplace Express*, 22 March 2012 <www.workplaceexpress.com.au>; TWU's priorities are also stated in several media releases online, March 2012, see TWU website <www.twu.com.au>.

⁵⁴ *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) [64].

⁵⁵ *Ibid* [65].

for the Workplace Determination to directly or indirectly govern the terms and conditions of employment of employees not covered by it.⁵⁶ The Full Bench also observed that the use of contractors and labour hire employees was a widespread operational strategy in the airline industry and it allowed airlines to achieve operational flexibility and reduce costs.⁵⁷ Granting the site rate clause would overturn the current Qantas approach in using contractors and lead to immediate and significant increases in labour costs.⁵⁸ It also took into account Qantas's strong opposition and its expressed need to reduce costs in a difficult market environment. It concluded the site rates failed on the grounds of merit and because of its negative impact on efficiency and productivity.⁵⁹

What was noticeably missing in the Full Bench's reasoning was any genuine considerations of job security. As discussed above, s 275(c) required the Full Bench to take into account the interests of employers and employees.⁶⁰ The Full Bench paid lip service to job security by acknowledging that 'in the competitive environment and in the face of organisational restructure, the employees also have legitimate concerns as to their job security' and 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 reward skilled and motivated employees.'⁶¹ However, the Full Bench's actual reasoning on the site rates clause seemed to ignore employees' legitimate concerns as to their job security. The site rates clause was intended to bolster the employees' job security. In its reasons for rejecting the site rates clause, the Full Bench gave priority to Qantas's need to reduce costs over considerations of job security.

Further, the Full Bench's reasoning favoured the 'current Qantas approach' and what is 'widespread' in the airline industry. Whilst these considerations were certainly relevant, the Full Bench did not explain why these considerations should be given *more* weight than considerations of job security.

B: Cap on Supplementary Labour and Outside Hire

In addition to the sites rates clause, another job security clause the union wanted was a clause which required the total number of supplementary labour and outside hire to be no more than 20 per cent of the total number of directly hired employees at any given time.⁶²

This clause, in conjunction with the site rates clause was intended to limit the use of supplementary labour. TWU opposed the extent to which Qantas engaged labour hire and supplementary employees and argued that Qantas should not be permitted to allow the

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ The Full Bench also cited *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Curragh Queensland Mining Ltd* (Australian Industrial Relations Commission, Q4464, C2758, 983/98, 11 August 1998, in holding that the 'interests of employers and employees' in s 275(c) calls for an appropriate balance between the legitimate expectations of the employers and employees.

⁶¹ *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) [41].

⁶² Ibid [78]. A percentage cap clause has been accepted by previous courts and tribunals as 'permitted matter' and a 'matter pertaining to relationship of employers and employees'. See for example, *Re Schejkenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement* (2005) 142 IR 289.

number of direct Qantas employees to dwindle by attrition.⁶³ Qantas contended that this clause should fail on both merit grounds and on jurisdictional grounds. It argued that a percentage cap did not deal with a permitted matter and thus failed on jurisdictional grounds.⁶⁴ It also argued against the percentage cap on merit grounds: that it had no precedence within Qantas or the airline industry, it will increase costs and reduce flexibility and did not enhance productivity.⁶⁵

The Full Bench held that this claim failed on merit.⁶⁶ It ruled that using contractors and outside hire has been a long standing practice and it has not been shown that current Qantas employees have been adversely affected by this practice.⁶⁷ It went on to say:

To interfere with management's decisions on such a matter would require clear and strong evidence of unfairness. No such case has been established with respect to current employees or otherwise. In the light of this conclusion it is not necessary that we determine whether there is jurisdiction to insert the clause. Even if there is jurisdiction to grant such a clause we would dismiss it on the grounds of merit.⁶⁸

What the Full Bench meant by 'clear and strong evidence of unfairness' was ambiguous. The Full Bench did not explain why the fact full time employees were dwindling by attrition was not 'evidence of unfairness'. A higher and higher percentage of Qantas workers were becoming contractors engaged on worse terms than the direct employees. This was detrimental to the employees' interests.

Similar to its reasoning on the site rates clause, the Full Bench's reasoning on the 20 per cent cap clause again effectively ignored employees' legitimate concerns. It again favoured the 'current Qantas approach' and what was 'widespread' in the airline industry over the interests of the employees.

C: No Forced Redundancies Clause

Unlike the previous two clauses, TWU was able to persuade the Full Bench on a clause that stated that there will be no compulsory redundancies as a consequence of the utilisation of supplementary labour and outside hire.⁶⁹

Qantas opposed the insertion of the clause into the collective agreement but did agree to issue a side letter with slightly altered wording.⁷⁰ The Full Bench ruled that the commitment Qantas was willing to give should be included into the collective agreement.⁷¹ The Full Bench reasoned that although there has been no history of compulsory redundancies as a result of hiring contractors and no plans for this to occur in the near future, the extensive use of contractors did raise legitimate concerns about the impact of

⁶³ *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012) [82].

⁶⁴ *Ibid* [80].

⁶⁵ *Ibid* [81].

⁶⁶ *Ibid* [82].

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* [74].

⁷⁰ *Ibid* [76].

⁷¹ *Ibid* [77].

these changes on job security.⁷² The difference between this clause and the two rejected clauses listed above seems to be the fact there would be no immediate increase in labour cost for Qantas in order to obey this clause. In addition, Qantas had already agreed to the clause anyway in a side letter.

D: Consultation and Paid Time Off for Representatives

The union also succeeded in obtaining a clause which required Qantas to weigh up all alternative options before making arrangements to contract out, as well as a comprehensive consultation process and a reasonable time frame for consideration with all Qantas employees affected by such an option.⁷³ It also required Qantas to provide reasonable resources and paid time off for union nominees and union members to attend meetings to respond to the business case for contracting out and prepare specific in-house bids.⁷⁴

Once again, this clause did not lead to an immediate increase in costs for the employer, because Qantas had provided resources and paid time off in the past. There would be no change to existing practice.

E: FWC's Consideration of 'Interests of Employers and Employees' in Qantas

The Full Bench of FWC rejected the site rates clause and the 20 per cent cap clause, but accepted the no forced redundancies clause and the consultation and time off clause. The key difference between them was the fact that the site rates clause and the 20 per cent cap clause led to a *direct and immediate* increase in the cost of labour for Qantas and departed from existing practice. By giving such weighty consideration to the cost of labour and existing practice, the Full Bench effectively ignored the employees' interests in ensuring job security. The site rates clause and 20 per cent cap clause would have increased the employees' job security. As discussed in Part VI above, FWC had broad discretion to interpret the merit grounds section.⁷⁵ It chose to interpret the section in a way which did not give any weight to the employees' interests in ensuring job security.

It is unclear how much later decisions will rely on the *Qantas* Workplace Determination, because the Full Bench did emphasise the specific difficulties faced by the aviation industry.⁷⁶ This might mean that if a future dispute arose in an industry which was more robust and less affected by the economic downturn than the aviation industry, the outcome could be more favourable for job security.⁷⁷

⁷² Ibid.

⁷³ Ibid [72].

⁷⁴ Ibid.

⁷⁵ The broad discretion given to FWA was not unique to the merit grounds section. See Creighton and Stewart, above n 11, 48.

⁷⁶ Ibid 95.

⁷⁷ Other commentators have also commented on the Qantas dispute and the status of the aviation industry. See Anthony Forsyth and Andrew Stewart, 'Of Kamikazes and Mad Men: the Fallout from the Qantas Industrial Dispute' (2013) 36 *Melbourne University Law Review* 785, 808; Joellen Riley, 'A Safe Touch-Down for Qantas?' (2012) 25 *Australian Journal of Labour Law* 76; Sue Bussell and John Farrow, 'Continuity and Change: The Fair Work Act in Aviation' (2011) 53 *Journal of Industrial Relations* 392.

VIII: CONCLUSION

This article has argued that ‘permitted matters’ law is unclear and inconsistently interpreted. Cases which concern almost identical job security clauses have received different treatments. This article has also argued that the ‘interests of employers and employees’ is not clearly defined, thus granting FWC very wide discretion when arbitrating job security clauses in workplace determinations. Certainly, granting FWC a very wide discretion was a conscious decision by Parliament, but the lack of clarity in the legislation, coupled with the abolition of ‘prohibited content’ has resulted in unpredictable legal outcomes for Australian employers and employees. Historically the tribunal has been reluctant to arbitrate outcomes that interfere with managerial prerogatives. By their very nature, *all* job security clauses *could* be construed as interfering with managerial prerogatives, so why not prohibit job security clauses altogether in workplace determinations? This would be a much clearer approach. The previous law of ‘prohibited content’ did exactly that. It would save a lot of time and resources for employees and trade unions who are attempting to argue for job security clauses to be included into a workplace determination and lead to a more efficient legal process. It is time for Parliament to follow the advice given by legal philosopher Wesley Hohfeld and take action to clarify this area of law.⁷⁸

⁷⁸ Hohfeld, above n 2, 28.

