IN THE FAIR WORK COMMISSION

Matter No: B2023/543

Applicant: Virgin Australia Regional Airlines Pty Ltd

Respondent: Australian Licensed Aircraft Engineers Association

APPLICANT'S OUTLINE OF SUBMISSIONS

Introduction

1. Pursuant to section 234 of the *Fair Work Act 2009* (**FW Act**), Virgin Australia Regional Airlines Pty Ltd (**VARA**) applies to the Fair Work Commission (**Commission**) for the making of an "intractable bargaining declaration" (under section 235 of the FW Act) (**IBD**) in relation to a proposed enterprise agreement.

2. The proposed enterprise agreement has been the subject of very extensive, yet failed, bargaining between VARA and the Australian Licensed Aircraft Engineers Association (**ALAEA**). The proposed enterprise agreement would replace the *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2017* (**2017 Agreement**) (the proposed enterprise agreement is referred to herein as the **VARA Engineers EA**).

3. The Regulation Impact Statement within the Senate Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**SJBP Bill**), variously described IBDs as "*improved bargaining tools*" which were said to increase or improve the capacity of the Commission to help workers and business reach agreement and to increase its "*capability to assist bargaining parties to progress bargaining to finality through independent third-party arbitration*". IBDs would also "*support the [Commission] to assist parties involved in bargaining … to resolve disputes arising in bargaining*".[1]

4. Despite almost 3 years of bargaining (albeit with some short breaks in between), a large number of bargaining meetings, an extended process of Commission-assisted bargaining conferences pursuant to section 240 of the FW Act, two failed

[1] Paragraph [821] of the Senate Revised Explanatory Memorandum to the SJBP Bill.

employee votes on the VARA Engineers EA (both of which returned a 90% or higher "no" vote) and a not insignificant period of protected industrial action (**PIA**) organised by the ALAEA and taken by its members which has negatively affected VARA's operations, disrupted its services and cost significant amounts of money, the principal industrial parties are intractably apart on an issue which is often difficult to resolve, being wage increases over a defined period. Indeed, given the ALAEA's proven propensity for "moving the goalposts" during bargaining, VARA is not even clear as to what it would take to have the ALAEA endorse the VARA Engineers EA to the workforce.[2] Whatever it is, it is clearly more than VARA is prepared to pay.

5. That summation of the facts presents as the quintessential bargaining scenario which the Parliament would have had in mind when enacting the IBD regime. The facts present as a "reasonable" scenario in which to make an IBD, especially having regard to the ineffective "serious breach declarations" which they were introduced to replace.[3]

6. VARA relies on the witness statement of Ms Joanna Glynn, General Manager Group Workplace Relations for the Virgin Australia Group (the parent holding group of VARA), dated 30 June 2023 (**Glynn Statement**) in support of its application.[4]

Background

7. VARA is the operator of a regional airline based in Perth, Western Australia, providing regular public transport (**RPT**) services between Perth and regional and remote communities in Western Australia (**WA**), as well as and fly-in-fly-out (**FIFO**) commercial charter flights to remote areas for the resources industry in WA.[5] VARA has been operating regional services in Western Australia for over 50 years, previously operating as "*Skywest*" before its acquisition by the Virgin

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2 Which given the high levels of union membership among the voting cohort and the level of control the ALAEA has over that cohort, would deliver agreement.

3 As far as VARA is aware, the Commission never made a serious breach declaration (which were designed to end deadlocked and intractable bargaining). See also paragraph [826] of the Senate Revised Explanatory Memorandum to the SJBP Bill.

4 VARA will also seek to tender aspects of evidence given by Stephen Purvinas (Federal Secretary of the ALAEA) in VARA's "cooling off" application.

5 Glynn Statement at [46]-[51].

Australia Group in May 2013.[6]

8. VARA employs approximately 453 employees, including:

   (a) Flight crew;

   (b) Cabin crew;

   (c) Aircraft engineers; and

   (d) Head office employees engaged in functions such as sales and business development, safety, operations performance, finance and human resources.[7]

9. VARA operates separately from Virgin Australia's other businesses and has its own maintenance division. VARA presently operates a fleet of Fokker F100s and Airbus A320s.[8]

10. VARA employs approximately 60 aircraft engineers (**Engineers**) who are employed to perform aircraft maintenance work in VARA's Aircraft Maintenance Organisation, comprising of:

    (a) 17 Aircraft Maintenance Engineers (**AMEs**); and

    (b) 43 Licensed Aircraft Maintenance Engineers (**LAMEs**).[9]

11. The ALAEA is entitled to represent the industrial interests of the 43 LAMEs. Approximately 41 of those LAMEs are members of the ALAEA.[10] Not unsurprisingly, the ALAEA exercises significant influence over the enterprise agreement voting behaviours of those LAMEs, such that an agreement with the ALAEA is effectively an agreement with the Engineers (and vice versa).

Bargaining

12. The Engineers employed by VARA are currently covered by the 2017 Agreement,

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6 Glynn Statement at [43].

7 Glynn Statement at [55].

8 Glynn Statement at [45] and [47].

9 Glynn Statement at [56].

10 Statement of Stephen Purvinas dated 12 June 2023 (**Purvinas CO Statement**) at [5].

which reached its nominal expiry date on 7 February 2021.

13. In about August 2020 (*i.e.* almost 3 years ago), VARA commenced bargaining with the Engineers for the VARA Engineers EA. Despite some initial involvement in early bargaining by the Australian Manufacturing Workers' Union (**AMWU**),[11] the entire bargaining process has been conducted between VARA and the ALAEA. There are no other bargaining representatives to VARA's knowledge.

14. Bargaining since August 2020 has included:

    (a) 30 bargaining meetings;[12]

    (b) VARA filing an application under section 240 of the FW Act and the parties participating in seven conciliation conferences chaired by Commissioner Schneider of the Commission;[13]

    (c) significant PIA taken by LAMEs; and

    (d) two different versions of a VARA Engineers EA being put to a vote by Engineers and voted down (overwhelmingly) on each occasion.[14]

15. During the course of bargaining, the ALAEA has organised, and various LAMEs have taken, PIA in support of their claims for the VARA Engineers EA. The Commission issued a protected action ballot order (**PABO**) on 3 August 2022 and since that time, the ALAEA has issued eight notices of PIA.[15]

IBDs under section 235 of the FW Act

16. Section 235(1) of the FW Act provides that the Commission *may* make an IBD in relation to a proposed enterprise agreement (here, the VARA Engineers EA), if:

    (a) an application has been made;

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11 Who is eligible to represent the industrial interests of at least some of the AMEs who would be covered by the VARA Engineers EA, and who may be a default bargaining representative. The AMWU has advised the Commission that it does not wish to be heard in relation to the application.

12 Glynn Statement at [18(a)]

13 Glynn Statement at [18(d)]

14 Glynn Statement at [119] and [246].

15 Glynn Statement at [18(e)].

(b) the Commission is satisfied of the matters set out in section 235(2); and

(c) it is after the "end of the minimum bargaining period".

17. The only subsection in issue[16] is (b) – that is, the Commission's satisfaction as to the matters in section 235(2) of the FW Act. Those matters are:

(a) the Commission has dealt with the dispute about the agreement under section 240 and VARA participated in the FWC's processes to deal with the dispute (section 235(2)(a));

(b) there is no reasonable prospect of agreement being reached if the Commission does not make the declaration (section 235(2)(b)); and

(c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement (section 235(2)(c)).

Section 235(2)(a): participation in section 240 processes

18. Section 235(2)(a) of the FW Act requires the Commission to be satisfied that it has dealt with the bargaining dispute under section 240 and that VARA participated in the Commission's processes in that regard. VARA does not understand this requirement to be in contest here.

19. VARA applied to the Commission under section 240 on 14 March 2023 and has fully participated in at least seven conferences with Commissioner Schneider since that time. The last of those was an unsuccessful "last ditch attempt" by the Commissioner to resolve the impasse whilst his decision on VARA's "cooling off" application was reserved.[17]

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16 As to (a), there can be no doubt that an application has been made and as to (c), section 235(5)(a) applies here. The later of the two dates identified therein is the day that is 9 months after the nominal expiry date for the 2017 Agreement (that is, 8 November 2021), because the notification time (section 235(6)(b)) for the VARA Engineers EA (section 173(2)(a)) was on or around 17 August 2020: Glynn Statement at [69]. An alternative view (which VARA contends is incorrect) is that the issue of a second NERR gave rise to a new, later notification time. On that view, the end of the minimum bargaining period would be around 24 November 2021: Glynn Statement at [61].

17 Glynn Statement at [258]-[259].

Section 235(2)(b): no reasonable prospect of agreement being reached

20. Section 235(2)(b) of the FW Act requires that the Commission be satisfied that there "*is no reasonable prospect of agreement being reached*" if the IBD is not made (*i.e.* in the *status quo*).

21. Whilst the phrase "*no reasonable prospect*" is well-known to the law (and to various provisions of the FW Act), it is invariably used in a significantly different context (no reasonable prospect of success). It is doubtful that much (if any) of the well-established law with respect to that phrase in that context (and the caution to be exercised in summarily dismissing a proceeding, or awarding costs in the Commission), is of any particular assistance to construing the phrase in the present statutory context.[18]

22. Whilst noting the dangers of resort to explanatory materials, especially those which merely paraphrase the actual statutory language,[19] those materials are not illuminating. They make the obvious points that the test does not mean "*agreement could never be reached*", and that reaching agreement "*could not be considered a reasonable chance*".[20]

23. Noting what is said in paragraph 3 above and the apparent statutory purpose in increasing the circumstances where the Commission can intervene to bring extended bargaining processes to an end, some contrast with former section 235(2)(d) of the FW Act may be of some assistance: "*agreement…will not be reached in the foreseeable future*". It is apparent that section 235(2)(b) is a more relaxed test than that which previously existed.

24. What can be said with some certainty is that the inclusion of the word "*reasonable*" is important. Almost anything is *possible* in a dynamic bargaining situation, just like almost anything is possible in contested litigation involving evidence and legal complexities.[21] The test is not "*no prospect*", but rather "*no*

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18 The Parliament adopted the same phrase in similar contexts to section 235(2)(b), in two further provisions introduced into the FW Act through the SJBP Bill: sections 65C(3) and 76C(4).

19 *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at [31]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41; (2015) 256 CLR 569 at [229]; *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [14].

20 Paragraph [846] of the Senate Revised Explanatory Memorandum to the SJBP Bill.

21 *Vans Inc v Offprice.Com.Au Pty Ltd* [2006] FCA 137 at [11]-[12].

reasonable prospect". The Commission need not consider whether agreement is possible (or probable):[22] but rather, whether that outcome is a *reasonable* prospect.[23]

25. The answer to that question here is "no": agreement between VARA and the ALAEA (and hence, agreement between VARA and the Engineers) is not a *reasonable* prospect.

26. The bargaining history shows that as VARA has over time moved closer to the ALAEA's stated positions on wage increases, the ALAEA has slowly moved away from those stated positions. What started as a dispute about wage increases during the life of the VARA Engineers EA of 2% per annum versus 3% per annum (with an agreed two year Wage Freeze Period),[24] then became a dispute about 3% per annum wage increases during the life of the VARA Engineers EA versus an additional 3% per annum for the two year Wage Freeze Period.[25]

27. For the reasons traversed by Ms Glynn in her statement and as the Commission would be no doubt familiar with, VARA's capacity to move any further on wage increases is prohibitively constrained by not only its operational and financial circumstances, but by what almost every other workgroup within the Virgin Australia Group has agreed to, based on representations as to a uniform "corporate" position. There is no prospect of VARA moving any further: indeed, as was made clear at the time of the second failed employee vote and as is made clear by Ms Glynn's evidence, VARA has dropped two "conditional" discretionary benefit components of the package then put to the Engineers.[26]

28. The ALAEA over the course of almost 3 years, has demonstrated no propensity to move closer to agreement with VARA, and significant propensity to move further away. There is no reasonable prospect of the ALAEA accepting the Wage

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22 Unlike the statutory predecessor, where the Commission had to be satisfied that agreement "*will not be reached*" within a particular timeframe.

23 Introducing statutory paraphrases such as "*real*" or "*not fanciful*", has the potential to lead into error: *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [14]; *Visy Paper Pty Ltd v ACCC* [2003] HCA 59; (2003) 216 CLR 1 at [24]; *NTEIU v Monash University* [2013] FWCFB 5982 at [19].

24 Glynn Statement at [94] and [99].

25 Glynn Statement at [16], [129], [159] and [214].

26 Glynn Statement at [274].

Freeze Period, and even if it did, there is no prospect at all that it would do so combined with 3% per annum wage increases (which is VARA's end point). Mr Purvinas has already, in effect, conceded as much.[27]

29. It is instructive that Commissioner Schneider, who has had significant involvement with the parties in the section 240 process, described the parties' chances of resolving the matters at issue as "*nearing hopeless*".[28] That is the language of *possibility*, not the language of *reasonable prospects*.

Section 235(2)(c): reasonable in all the circumstances

30. Section 235(2)(c) of the FW Act requires that the Commission be satisfied that it is reasonable in all the circumstances to make the IBD, taking into account the views of the bargaining representatives.

31. The latter aspect of this legislative criterion is neutral in this case. Even if the AMWU is technically a bargaining representative for the VARA Engineers EA, it does not wish to be heard on the application. This leaves two bargaining representatives: one who strongly supports the making of the IBD and one who (presumably) strongly opposes it. VARA at least has reasonable reasons for its position: the ALAEA's position is not so clear.

32. In any case, this leaves "*reasonable in all the circumstances*". This provides the Commission with a broad, evaluative discretion. However, the Commission does not have a discretion to consider and evaluate "*irrelevant considerations*".[29] What those irrelevant considerations might be is difficult to identify in the abstract.

33. VARA submits that this criterion does not present as a difficult one to satisfy in the context of the facts here. As noted in paragraph 5 above, this case presents as the quintessential scenario which the Parliament would have had in mind when "*improving*" the Commission's bargaining tools and its capacity to intervene in protracted bargaining.

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27 The ALAEA wants at least an additional 4% compounding amount, payable for all purposes: Purvinas CO Statement at [19]; Transcript of Proceedings of 13 June 2023 in B2023/542 at PN372-PN376.

28 *Virgin Australia Regional Airlines Pty Ltd v ALAEA* [2023] FWC 1510 at [85].

29 Leading to both *House v The King* error and also *Hetton Bellbird* error (in reaching the state of satisfaction).

34. In many cases, there may be a connection between subsections (a), (b) and (c) of section 235(2). The extent and duration of the section 240 process, whilst not explicitly relevant to subsection (a), would likely be relevant to subsection (c).[30] Likewise, whilst the assessment required by subsection (b) could in some cases be made at a very early stage in bargaining, the fact that bargaining is at an early stage is likely to be relevant (in a potentially negative sense) to subsection (c) also.

35. Here, insofar as there is a connection between these criteria, they all support reasonableness. The section 240 processes have been long and extensive. Further, the bargaining duration has, by any measure (and even taking account of small breaks from September 2020 to February 2021 and October 2021 to the end of January 2022), been lengthy, involved and protracted.

36. Further and to the extent relevant, the parties have attempted options and remedies available to them to resolve the impasse. The ALAEA and its members have notified and taken escalating PIA over the last six months, without success. In light of the ALAEA's stated position as to the purpose of the PIA[31] and the undertaking given to Commissioner Schneider in relation to it,[32] further PIA will not alter VARA's position.[33] On the other hand, VARA has on two occasions gone directly to employees, without the ALAEA's agreement, seeking for them to approve two different manifestations of the VARA Engineers EA (the latter of which was VARA's best available offer).[34] Both votes were resoundingly defeated.[35]

37. It is not clear what more is required before the satisfaction required in section 235(2)(c) would be established. Further contentions on reasonableness must

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30 It is potentially noteworthy in that context that the "minimum bargaining period" was originally drafted by Parliament as contemplating three months of section 240 processes (a time which has passed here).

31 Purvinas CO Statement at [30]-[33].

32 *Virgin Australia Regional Airlines Pty Ltd v ALAEA* [2023] FWC 1510 at [79]-[80]; Purvinas CO Statement at [53]-[54].

33 Glynn Statement at [276]. This is especially so when on the ALAEA's view of things, any disruption to VARA's operations caused by the PIA will be "*totally ameliorated*" by the undertaking: Transcript of Proceedings of 13 June 2023 in B2023/542 at PN704.

34 Glynn Statement at [274].

35 Glynn Statement at [119] and [246].

await the evidence in the proceeding and the ALAEA's contentions.

Residual discretion?

38. Having regard to the context and purpose of section 235 of the FW Act, the use of the word "may" in the chapeau to section 235(1) is used in an empowering sense, not in a discretionary sense. That is, if satisfied of the matters in subsections (a)-(c), the Commission (as a statutory body) is empowered to (and must) make an IBD – it does not retain a residual discretion as to whether or not to make an IBD.

39. It is difficult to conceive of any circumstance where, after reaching a state of satisfaction that it was "*reasonable in all the circumstances to make the [IBD]*", that the Commission would nevertheless refrain from making one on some broad, unfettered discretionary basis. The statutory provision is very similar in that sense, to that under consideration (section 46(3) of the then *Income Tax Assessment Act 1936-1968* (Cth)) in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*.[36]

Conclusion

40. For the reasons summarised herein and for the purposes of section 235(1)(b) of the FW Act, the Commission should be satisfied of each of the matters identified in section 235(2) of the FW Act. In light of what appears to be the relatively uncontentious nature of sections 235(1)(a) and (c) of the FW Act on the facts of this case and what is said in paragraphs 38-39 above, the Commission *must* make an IBD. Alternatively, it *should* make an IBD.

41. Section 235(3) of the FW Act deals with matters which the IBD must specify, being the date it is made, the proposed enterprise agreement to which it relates and any matters prescribed by the procedural rules.[37]

42. It is somewhat of an oddity of the statutory scheme that it provides for a post-

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[36] [1971] HCA 12; (1971) 127 CLR 106 at 133-135. This conclusion was said to be "obvious" in the case of satisfaction of an almost identical statutory criteria to section 235(2)(c). See also *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* [2008] FCAFC 60; (2008) 167 FCR 372 at [128]-[129].

[37] There are no such rules, or matters prescribed by such rules, at this time.

declaration negotiating period (section 235A). However, unlike industrial action related workplace determinations[38] (and indeed the statutory predecessor of IBDs, being bargaining related workplace determinations),[39] this period is not mandatory, nor is it time limited to a minimum of 21 days.

43. There is no need for a post-declaration negotiating period in this case: other than speculating in the realms of mere possibilities, it would be completely inutile. The Commission's satisfaction as to section 235(2)(b), effectively makes this so.[40]

Matthew Follett
Aickin Chambers

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4 July 2023

38 Sections 266(1)(b) and (3) of the FW Act.

39 Sections 269(1)(b) and (2) of the FW Act (before the SJBP Bill amendments).

40 Noting that technically on its language, it contemplates the bargaining parties having a "*change of heart*" once an IBD is made (the "no reasonable prospect" test relates only to the *status quo*).