FEDERAL COURT OF AUSTRALIA

Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3) [2020] FCA 1428

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| File number: |  |
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| Judge: | **FLICK J** |
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| Date of judgment: | 6 October 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – employees stood down – the cause of the stoppage of work – whether employers reasonably responsible  **INDUSTRIAL LAW** –dispute – entitlement of employees to maintenance of the *status quo* – whether there was work to be performed |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) s 738 |
|  |  |
| Cases cited: | *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Qantas Airways Ltd* [2020] FCA 656, (2020) 295 IR 225  *Food Preservers Union of Australia and All States Ready Foods* (1976) 182 CAR 391  *Kucks v CSR Ltd* (1996) 66 IR 182  *Pickard v John Heine & Son Limited* (1924) 35 CLR 1  *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)* [2020] FCA 951  *Re Australian Workers’ Union v Electrolux Home Products Pty Ltd* [2003] AIRC 1453  *Re Distilleries Award 1976* (1976) 180 CAR 786  *Re Food Preservers Union of Australia and McCains Australia Pty Ltd* (1977) 188 CAR 36  *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328  *The Millers and Mill Employees Award 1937* (1946) 56 CAR 622  *Townsend v General Motors-Holden’s Ltd* (1983) 4 IR 358  *Vehicle Builders Employees’ Federation of Australia v Ford Motor Co. of Australia Pty Ltd* (1962) 3 FLR 198 |
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| Date of hearing: | 28 September 2020 |
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| Registry: | New South Wales |
|  |  |
| Division: | Fair Work Division |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 47 |
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| Counsel for the Applicants: | Ms R Orr QC with Mr M Follett and Mr M Hosking |
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| Solicitor for the Applicants: | Herbert Smith Freehills |
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| Counsel for the First Respondent: | Ms L Saunders |
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| Solicitor for the First Respondent: | Australian Licensed Aircraft Engineers Association |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 527 of 2020 |
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| BETWEEN: | QANTAS AIRWAYS LTD (ACN 009 661 901)  First Applicant  JETSTAR AIRWAYS PTY LTD (ACN 069 720 243)  Second Applicant | |
| AND: | AUSTRALIAN LICENSED AIRCRAFT ENGINEERS ASSOCIATION  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 6 OCTOBER 2020 |

THE COURT ORDERS THAT:

1. The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within seven days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FLICK J:

1. This proceeding concerns the jurisdiction of the Fair Work Commission (the “Commission”) to “*deal with*” applications made to it on 26 March 2020 by the Australian Licensed Aircraft Engineers Association. Those applications put in issue the standing down of licensed aircraft engineers by Qantas Airways Ltd and Jetstar Airways Pty Ltd. The stand downs took place against the backdrop of a global pandemic, caused by the virus known as COVID-19, which as at May 2020 had claimed over 83,000 lives in the United States of America, and over 32,000 lives in the United Kingdom: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Qantas Airways Ltd* [2020] FCA 656 at [1], (2020) 295 IR 225 at 227 (“*Qantas (No 1)*”). The death toll has continued to mount. As at present, the world death toll has exceeded 1,000,000 lives.
2. The first hearing in the present proceeding was held on 18 and 19 June 2020. Reasons for decision were published on 9 July 2020: *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)* [2020] FCA 951 (the “*Qantas (No 2)*” decision). It was then relevantly concluded that:

* the requirements imposed by cl 6 of the *Licensed Aircraft* Engineers (Qantas Airways Limited) Enterprise Agreement 10 (the “Qantas Agreement”) and cl 20 of the Jetstar Airways Engineering & Maintenance Enterprise Agreement 2018 (the “Jetstar Agreement”) which addressed the “procedure(s) for dealing with disputes” (cf. *Fair Work Act 2009* (Cth) (the “*Fair Work Act*”), s 738) had to be satisfied in order for the Commission to have power to “*deal with*” the dispute that had arisen,

and that, on the facts:

* there had been substantial compliance with each of these requirements such that the Commission had jurisdiction to “*deal with*” the dispute as to whether there was “*useful work*” for the licensed engineers to perform.

The parties were then ordered to bring in *Short Minutes of Orders* within seven days.

1. It was then envisaged that all of the issues sought to be resolved by the parties had in fact been resolved. It nevertheless emerged when the draft *Short Minutes of Orders* were provided that there remained two further issues to be resolved by the Court, so that the Commission could properly proceed in its task of resolving the dispute as it related to “*useful work*”, namely:

* whether there was a “*stoppage of work*”; and
* if there had, whether the stoppage of work was “*through any cause for which Qantas [could not] reasonably be held responsible*” or “*by any cause, which Jetstar [could not] reasonably prevent*”.

If the Court were to make the declarations sought by the airlines in relation to those two issues, the Commission could then determine:

* whether the licensed engineers could be usefully employed during the stand down period; and
* if the licensed engineers could not be usefully employed during that period, whether the lack of useful employment was “*because of*” the stoppage of work.

Whether any (or all) of the questions should have been resolved during the course of the June 2020 hearing can presently be left to one side. They were certainly not issues which formed any part of the competing submissions advanced during that hearing.

1. It is regrettable that such questions were not resolved as part of the earlier hearing or very soon thereafter. But, for whatever reason, those questions remain outstanding. A subsidiary question also arises as to whether licensed aircraft engineers employed by Jetstar were entitled to have the *status quo* maintained pending the resolution of the dispute which emerged.
2. It is concluded that:

* declaratory relief should be granted in the form sought by Qantas and Jetstar; and
* the Jetstar engineers were not entitled to have the *status quo* maintained pending the resolution of the dispute.

1. In reaching these conclusions, it is necessary to set forth:

* the terms of both the Qantas and Jetstar enterprise *Agreements* which assume relevance;
* the facts of relevance and the admissions made;
* the general principles to be applied in the interpretation of stand down provisions; and
* the manner in which those general principles have been applied to the facts as agreed.

It is also necessary to separately address:

* the subsidiary question as to the entitlement of the Jetstar licensed engineers to maintain the *status quo*.

### The stand down provisions of the enterprise agreements

1. Clause 14.6 of the *Qantas Agreement* provides as follows:

Stand down

Qantas shall have the right to deduct payment for any day an employee cannot be usefully employed because of a strike or stoppage of work through any cause for which Qantas cannot reasonably be held responsible. The right given in this clause is subject to the following conditions:

**14.6.1** When Qantas proposes to exercise the right given in this clause it shall notify the employee. During the period such notification remains in force the employee shall be deemed to be stood down for the purposes of this clause.

**14.6.2** An employee who is stood down shall be treated for all purposes (other than payment of wages) as having continuity of service and employment notwithstanding such standing down.

**14.6.3** An employee who is stood down may at any time during the period the employee is stood down terminate his/her employment without notice and the employee shall be entitled to receive from Qantas as soon as practicable any moneys due to the employee at the time of termination. The day on which the employee exercises the right of termination without notice shall be the day on which the employment is terminated.

**14.6.4** An employee whose employment is terminated under clause 14.6.3 shall for all purposes (other than payment in lieu of notice) be treated as if employment had been terminated by Qantas without default of the employee.

**14.6.5** An employee who is stood down as aforesaid shall be at liberty to take other employment.

**14.6.6** An employee stood down for a period of more than 5 working days who has exercised the right to take other employment shall be entitled to work out in such other employment notice of up to one week provided the employee notifies Qantas of the employee so doing.

**14.6.7** An employee whom Qantas proposes to stand down may elect to take, for the period of the stand down only and for such further time as is reasonably required for the employee to return to his normal place of abode, any annual leave to which the employee is entitled or which is accruing and upon such election being exercised the employee’s annual leave shall be reduced accordingly.

**14.6.8** Notwithstanding anything contained in clause 14.6 Qantas will not deduct payment for any day prescribed by the Agreement as a public holiday which occurs during the period of stand down of an employee except to the extent that such employee has become entitled to payment for the holiday in other employment. An employee claiming for a holiday shall, if required by Qantas, furnish a statutory declaration setting out details of any other employment during this period and the remuneration received therein.

1. Clause 30.5.1 of the *Jetstar Agreement* provides as follows:

***Stand down without pay***

30.5.1 The Company may deduct payment from an Employee for any day or part of a day in which they cannot be usefully employed because of a stoppage of work by any cause, which Jetstar cannot reasonably prevent. In these situations consideration will first be given to the following alternatives before deduction of pay occurs:

(i) redeployment into other productive duties; or

(ii) where the above cannot be achieved, deployment onto any paid leave owing.

1. Of relevance to the subsidiary issues concerning the entitlement of the licensed engineers to maintain the *status quo* pending the resolution of the dispute is cl 20.4 of the *Jetstar Agreement*. Clause 20 is that provision which addresses the resolving of workplace concerns or disputes. In its entirety, cl 20 provides as follows:

**20. RESOLVING WORKPLACE CONCERNS OR DISPUTES**

If there is a dispute relating to any matter arising under this Agreement or in relation to the NES, the following dispute resolution procedure will be followed:

20.1 A dispute will first be discussed between the Employee and their local Line Maintenance Manager or Duty Operations Manager (in ports where there is no LMM/DOM, the dispute will be discussed with their local Supervisor in the first instance). The local manager will make a decision on the potential resolution and advise the Employee verbally or in writing if requested within 72 hours of notification.

20.2 If the dispute is not resolved, the Employee may refer the matter to more senior levels of management for further consideration. A response will be provided where possible within five (5) working days, but no later than ten (10) working days.

20.3 If the dispute remains unresolved either party may notify the existence of a dispute to the FWC for conciliation and if conciliation is unsuccessful, arbitration.

20.4 Where the above procedures are being followed work will continue as per the status quo prior to the dispute arising provided the matter in dispute does not relate to an imminent risk to health or safety and the Employee cannot be reallocated to other appropriate duties.

20.5 No party will be prejudiced as to the final settlement by the continuation of work in accordance with this clause.

20.6 The Employee has the right to be represented by a representative of their choice (including a representative from a Union) during any step in this process.

### The agreed facts & admissions

1. The factual background to the present proceeding and the facts of immediate relevance to the stand down of the licensed engineers are set forth in:

* a *Statement of Agreed Facts and Admissions* (the *Agreed Statement*); and
* a *Supplementary Statement of Agreed Facts and Admissions* (the *Agreed Supplementary Statement*).

Those two *Statements* set forth the facts and admissions in considerable detail. Also in evidence was:

* an affidavit of Mr Peter Smith sworn on 12 May 2020.

1. Although unnecessary to set forth the entirety of the facts set forth in the *Agreed Statement*, it is prudent to at least record the following (albeit lengthy) passages, namely:

**B. Responses to COVID-19 pandemic**

5 During the period January 2020 to 2 May 2020, the Commonwealth Government and the governments of various Australian States and Territories implemented various measures in response to the COVID-19 pandemic. Those measures included the following:

(a) **Travel warnings:** The Commonwealth Government and various Australian State and Territory Governments issued travel warnings to Australian citizens and residents, advising them not to travel overseas. The level, extent and scope of those travel warnings increased from advice that Australian citizens and residents do not travel to particular countries to a more general warning on or about 18 March 2020 advising against all overseas travel and that Australian citizens and residents who are currently overseas should return home.

(b) **Border controls**: The Commonwealth Government implemented border controls, limiting who could enter or leave the country. The level, extent and scope of those controls increased from prohibiting foreign nationals from specified countries from entering Australia to a broad prohibition on travel to Australia by all non-citizens and non-residents (with limited exceptions). Similarly, the Commonwealth Government implemented a “do not travel” ban on Australians travelling overseas, meaning that Australian citizens and residents could not travel overseas unless granted an exemption by the Australian Border Force.

(c) **Self-isolation and quarantine measures – international:** The Commonwealth Government and various Australian State and Territory Governments implemented measures requiring the self-isolation or quarantine of individuals arriving in Australia from overseas. The level, extent and scope of those measures increased from an initial requirement that overseas travellers self-isolate for a period for 14 days (for example, in their own homes) to a requirement that overseas travellers be quarantined in approved facilities (for example, hotels).

(d) **Self-isolation and quarantine measures – domestic:** The Northern Territory and Tasmania implemented measures requiring the self-isolation of individuals arriving from interstate. Western Australia also prohibited most kinds of intrastate travel. The level, extent and scope of these measures also increased over time, culminating in decisions by the Queensland and Western Australian Governments to prevent most forms of interstate travel.

(e) **Restrictions on movement:** Australian State and Territory Governments each implemented restrictions on movement of their residents and requirements regarding social distancing. The level, extent and scope of those measures increased from initially prohibiting indoor and outdoor events over a certain threshold to directions that “non-essential” businesses temporarily close and people not leave their homes without a reason for doing so (for example, grocery shopping, medical and health needs and exercise).

6 During the period January 2020 to 2 May 2020, international governments also implemented various measures in response to the COVID-19 pandemic of the kind described in paragraph 5 above, including the governments of those countries comprising Qantas’ and Jetstar’s respective international passenger networks. The precise measures adopted varied from jurisdiction to jurisdiction, but in some cases included restrictions on or the outright prohibition of entry into particular countries by foreign nationals or attempts to transit through particular airports.

7 By reason of the matters described in paragraphs 5 and 6 above, and also by reason of the impact of the COVID-19 pandemic more generally, by 25 March 2020:

(a) as regards international air travel:

(i) Australian citizens and residents could not leave Australian territory as a passenger on an outgoing aircraft unless one of the following exemptions applied: the person was ordinarily resident in a country other than Australia; the person was member of the crew of an aircraft or vessel or was a worker associated with the safety or maintenance of an aircraft or vessel; the person was engaged in the day-to-day conduct of inbound and outbound freight; the person’s travel was associated with essential work at an offshore facility; or, the person was travelling on official government business (including a member of the Australian Defence Force);

(ii) Australian citizens and residents were restricted in their ability to travel to Australia due to the requirement that they self-isolate for 14 days on arrival;

(iii) non-Australian citizens and non-residents were prevented from travelling to Australia with the exception of the spouses, legal guardians and dependents of Australian citizens and permanent residents; New Zealand citizens living in Australia as Australian residents; and Pacific Islanders transiting to their home countries;

(iv) international air travel could no longer be conducted between Australia and certain international destinations (for example, in view of restrictions imposed on travellers from mainland China), whether directly or through other international destinations;

(v) international air travel could no longer be conducted by using particular airports (for example, Singapore Airport) for the purposes of transiting passengers; and

(b) as regards domestic air travel:

(i) all States and Territories enacted legislation restricting persons from travelling both intrastate and interstate within Australia except for very limited “essential” purposes; and

(ii) some States required travellers entering the State to quarantine for periods of up to 14 days upon entry.

8 The matters set out in paragraph 7 above continued to apply during the period 26 March to 2 May 2020, although there were changes in the precise measures in place from time to time during that period (for example, arrivals into Australia were subject to quarantine in hotels and other accommodation facilities for two weeks of mandatory self-isolation before returning home and some States implemented border restrictions preventing travellers from entering the States except in limited circumstances).

The *Agreed Statement* continues on to further provide as follows:

**C. Steps taken by Qantas and Jetstar in response to COVID-19 pandemic**

**C.1 Qantas and Jetstar networks prior to COVID-19 pandemic**

9 Each of Qantas and Jetstar operates passenger flights using its passenger aircraft domestically within Australia and between Australia and various international destinations.

10. In addition, the Group provides freight services, which involves the commercial transport of cargo (**Qantas Freight**).

11 Licenced Aircraft Maintenance Engineers (**LAMEs**) employed by Qantas perform maintenance work in respect of Qantas Freight’s freighter planes in Australian ports, except where these freighter planes are “wet leased” from third party entities, which independently contract for maintenance services.

12 During the period 29 March 2019 to 22 April 2019 (for Qantas) and 1 April 2019 to 2 May 2019 (for Jetstar):

(a) excluding non-regularly scheduled charter flights (see paragraph 27(a) below), Qantas’ domestic and international passenger networks averaged in the order of 4,565 domestic departures and 776 international departures per travel week. This equated to in the order of 433,000 passengers on domestic routes and 177,000 passengers on international routes per travel week; and

(b) Jetstar’s domestic and international passenger networks averaged in the order of 1,836 domestic departures and 845 international departures each travel week (noting that, for internal reporting purposes, Jetstar treats New Zealand domestic flights as part of its “international” network). This equated to in the order of 314,000 domestic passengers and 131,000 international passengers per travel week.

13 Further, during the period identified in paragraph 12 above:

(a) Qantas’ domestic passenger network was serviced by in the order of 140 aircraft (which, on average, were utilised (that is, conducting flights as part of the domestic passenger network) for around 7.9 hours per day), while its international passenger network was serviced by in the order of 53 aircraft (which, on average, were utilised (that is, conducting flights as part of the international passenger network) for around 15.1 hours per day); and

(b) Jetstar’s domestic passenger network was serviced by in the order of 46 aircraft (which, on average, were utilised for around 11.8 hours per day), while its international passenger network was serviced by in the order of 23 aircraft (which, on average, were utilised for around 14.2 hours per day).

…

**C.2 Impact of COVID-19 pandemic on Qantas and Jetstar networks**

16 As a result of the COVID-19 pandemic and the progressive impact of the matters described in paragraphs 5 to 7 above, during the period January 2020 to mid-March 2020:

(a) each of Qantas and Jetstar progressively experienced an almost total reduction in travelling passengers (reflected in a reduction in bookings for future flights, an increase in cancellations of existing bookings and/or an increase in passengers not showing up for flights) on their respective international networks;

(b) each of Qantas and Jetstar progressively experienced very significant reductions in travelling passengers (reflected in a reduction in bookings for future flights, an increase in cancellations of existing bookings and/or an increase in passengers not showing up for flights) on their respective domestic networks (including for regional, intrastate flights); and

(c) in view of the reductions identified in paragraphs 16(a) and 16(b) above, progressively the revenue generated from operating each passenger flight on international and domestic routes flown by Qantas and Jetstar (for example, revenue derived from passenger tickets and freight) was not capable of covering the variable costs (comprising fuel, airport landing fees and per passenger charges, and some pilot and cabin crew costs) incurred by operating that flight. That is, the flight was loss-making on a variable basis before even factoring in fixed costs such as aircraft depreciation and ownership costs, head office costs, IT, airport terminal leases and engineering facilities.

17 By reason of paragraph 16 above:

(a) from around late January 2020, from time to time Qantas and Jetstar cancelled or did not schedule certain flights on their respective domestic and international networks where the revenue generated from operating those flights was not capable of covering the variable costs of doing so. This continued to occur from time to time until 28 March 2020 (for Qantas) and 31 March 2020 (for Jetstar) as the progressive impact of the matters described in paragraphs 5 to 7 above continued to be experienced; and

(b) further and for the same reasons, from around early February 2020 to mid-March 2020, each of Qantas and Jetstar progressively announced their intention to make temporary capacity reductions (that is, a reduction in the number of available seats for commercial passengers – usually achieved by reducing the number of flights on particular routes) on their respective domestic and international routes to align with the lower level of travelling passengers as follows:

(i) on 1 February 2020, Qantas suspended its direct services to mainland China with effect from 9 February 2020 until at least 29 March 2020;

(ii) on 20 February 2020, Qantas and Jetstar announced their intention to reduce capacity on their flight routes to Asia by 16% and 14% respectively, and capacity reductions of 2.3% on their domestic routes to take effect from the second half of the financial year. Jetstar also announced its intention to reduce capacity on its flight routes to New Zealand by 5%; and

(iii) on 10 March 2020, Qantas announced its intention to reduce capacity on flight routes across its international network, with changes proposed to come into effect from 30 March 2020 and following. Jetstar also announced its intention to reduce capacity on flight routes across the Asian network, with changes proposed to come into effect from 1 May 2020 and following.

18 As addressed in paragraphs 22 and 27 below, to the extent that the measures described in paragraph 17(b) were expressed to take effect from a later date, they were superseded by further capacity reductions across Qantas’ and Jetstar’s respective domestic and international passenger networks.

19 By mid-March 2020, as a result of: (i) the collapse in passenger travel; (ii) measures implemented domestically and internationally to restrict movement; (iii) the increasing concern that the effects of the COVID-19 pandemic would be sustained; and (iv) uncertainty as to how long the effects of the COVID-19 pandemic would last, the Qantas Group (the **Group**) had determined that:

(a) most of Qantas and Jetstar’s scheduled flights were loss-making or likely to become loss-making imminently, with Qantas and Jetstar considering there to be a real risk that all of Qantas and Jetstar’s scheduled flights would be impacted in this way; and

(b) because many of the costs of operating the Group’s business were fixed and substantial costs, maintaining its usual passenger flying operations (in the absence of the revenue usually associated with those operations) during the period of the COVID-19 pandemic would be likely to cause the Group to incur net cash outflows in the vicinity of $200 million per week.

20 The existing cash reserves of the business as at 16 March 2020 were approximately $1.8 billion.

…

27 By late March 2020, and as a result of the matters set out in paragraphs 16 to 26 above, the only passenger flights which Qantas and Jetstar were operating were:

(a) limited regularly scheduled and chartered flights by Qantas within regional Western Australia and Queensland for ‘fly in fly out’ workers and very limited international charter flights; and

(b) some additional inter-city domestic and international flying (that is, other than regularly scheduled and chartered flights for ‘fly in fly out’ workers), which was typically conducted at a variable loss to Qantas and Jetstar.

28 During the period 29 March 2020 to 22 April 2020 (for Qantas) and 1 April 2020 to 2 May 2020 (for Jetstar):

(a) each of Qantas and Jetstar continued to experience an almost total reduction in travelling passengers on their respective international networks;

(b) each of Qantas and Jetstar continued to experience significant reductions in travelling passengers for flights on their respective domestic networks; and

(c) in view of the matters identified in paragraphs 28(a) and 28(b) above, Qantas and Jetstar conducted domestic and international passenger flying only to the extent that:

(i) paragraph 27(a) applied;

(ii) until around mid-April 2020, paragraph 27(b) applied; or

(iii) from around mid-April 2020, Qantas and/or Jetstar were required to conduct particular flights in order to meet the requirements of the Commonwealth Government pursuant to arrangements entered into between Qantas and Jetstar, on the one hand, and the Commonwealth Government, on the other.

…

36 Having regard to the Group’s current best assessment of the likely impact of the COVID-19 pandemic on the number of travelling passengers across Qantas’ and Jetstar’s domestic and international networks in the short to medium term and the resultant impact on the Group’s business, as at the date of this Statement of Agreed Facts and Admissions, the Group anticipates that:

(a) Qantas and Jetstar will continue to be loss-making for the duration of the 2020/2021 financial year.

(b) if the Group (including Qantas and Jetstar) is unable to continue to stand down a significant proportion of its workforce for the duration of the 2020/2021 financial year, this will require the Group to incur an additional $1 billion (approximate) of expenses for that financial year.

(c) accordingly, the Group considers that it will have no reasonable option but to maintain the cost-cutting measures it has undertaken, which include standing down a significant proportion of its workforce, until at least 30 June 2021 in order to maintain the Group's financial viability. In addition, the Group considers that it will be necessary for the Group to undertake further or extended cost-cutting measures including returning aircraft leases and delaying all aircraft deliveries.

…

**F. Broader impact of dispute**

62. The standing down of LAMEs employed by Qantas and Jetstar occurred at or around the same time as the standing down of approximately 20,000 other employees of Qantas and Jetstar (for example, pilots, cabin crew and ground handling staff etc).

…

66 The decision to stand down employees across the Group was financially significant, in circumstances where:

(a) as noted in paragraph 45(c) above, during the period of the stand down, the total wages in respect of LAMEs employed by Qantas was in the order of $3.8 million per week and the total annual wages in respect of LAMEs employed by Jetstar is in the order of half a million per week (although, in both cases, not all of those LAMEs were in fact stood down);

(b) the costs savings to the Group (taking into account receipt, and payment, of JobKeeper payments for stood down employees and employees’ base rates of pay, excluding activity based payments such as overtime and allowances) have been calculated by the Group to be approximately:

(i) $4.3million in respect of the Qantas and Jetstar LAMEs for the initial stand down period;

(ii) $31.1million in respect of the Qantas and Jetstar LAMEs for the entire duration of stand downs to 4 August 2020;

(iii) $103.6million in respect of the Group employees who were stood down for the initial stand down periods;

(iv) $428.8million in respect of the Group employees for the entire duration of stand downs to 4 August 2020; and

(c) during the period of the stand down, some employees the subject of the stand down (including, but not limited to, LAMEs employed by Qantas and Jetstar) accessed their annual leave and long service leave accruals.

The subsequent paragraphs detail (*inter alia*) further steps taken by Qantas to address to continuing drain upon its resources.

1. The *Agreed Supplementary Statement* provides in part as follows:

**Further facts about the impact of the COVID-19 pandemic on Qantas and Jetstar**

1. Given the cash reserves of the Group’s business as at March 2020 and the level of net cash outflow discussed at paragraph 19(b) of the SAFA, if Qantas had not made the decision to significantly cease flying activities and minimise costs and cash outflows as described in the SAFA (including by standing down employees), the rate of net cash outflow would have been such that, if continued indefinitely, it would have challenged the organisation’s viability and the Group would otherwise have had insufficient financial means to fund the eventual return to flying its pre-COVID-19 networks.

2. In the absence of significantly ceasing flying activities and standing down employees, this outcome could not have been avoided because:

(a) the Qantas Group had already explored and implemented every other cost saving measure, such as ceasing payments of rent, ceasing payments to suppliers, negotiating terms with other suppliers and deferring various payments; and

(b) those other cost saving measures were not, of themselves, sufficient.

Nor would the result have been different, though it might have been delayed, when after March 2020, Qantas was able to raise additional debt and equity capital. Further, had Qantas snot taken the steps it took to cut costs at the time it took those steps, its ability to obtain the debt and equity capital which it did, would likely have been constrained, or only been available on more onerous terms.

1. The liberty has been taken of simply reproducing these extracts from the two *Statements*. It serves little purpose, with respect, in simply attempting to rephrase in different language that which has been agreed between the parties.

### Reasonably be held responsible – the authorities

1. Provisions of industrial awards and agreements, including provisions such as cl 14.6 of the *Qantas Agreement* and cl 30.5.1 of the *Jetstar Agreement* (and also cl 20.4 of that *Agreement*), are to be construed in accordance with well-accepted principles which have been long settled in the industrial context: *Qantas (No 2)* [2020] FCA 951 at [14] to [17]. Those principles include the rejection of “*narrow or pedantic approaches*” and the recognition that provisions of an industrial award or agreement are to be approached recognising that those who draft such provisions are likely to have“*a practical bent of mind*”, and are “*more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*”: *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 per Madgwick J.
2. Within these well-accepted principles of construction, there have also emerged further generally expressed principles of relevance to the application of stand down provisions – albeit principles necessarily dependent on the actual terms employed in particular provisions. Although commonly referred to as “*stand down*” provisions, the provisions were at least initially expressed in terms of a right of employers to withhold payment of wages. A right to “*stand down*” employees, it would appear, likely emerged thereafter in about 1937: cf. *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328 at 332 per Spicer CJ, Joske and Eggleston JJ.
3. At a very general level, it should be noted at the outset that stand down provisions serve two purposes – one purpose being to provide “financial relief” to an employer from paying wages in circumstances where, through no fault of its own, the employer has no work that the employees can usefully perform; the other purpose is to protect the employees from what would otherwise flow from the termination of their services: *Qantas (No 1)* [2020] FCA 656 at [18], (2020) 295 IR 225 at 229.
4. Not surprisingly, the onus rests on the employer to establish that it brings itself within the power to invoke such provisions: *Townsend v General Motors-Holden’s Ltd* (1983) 4 IR 358 at 363-367 per Morling J (“*Townsend*”).
5. Stand down provisions, as with other provisions (for example) providing for the termination of employment, have a long history. Initially some provisions were drafted which confined the ability of an employer to stand down employees to specified circumstances. But one instance is provided by the early decision in *Pickard v John Heine & Son Limited* (1924) 35 CLR 1 (“*Pickard*”). The stand down provision in that case was drafted in terms which entitled “*management … to deduct payment for any day the employee cannot be usefully employed because of any strike by the union or any other Union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent…*”. The employer had there decided that there was no work for an employee on Anzac Day because employees working under State awards on that day would be entitled to double pay and “*that would have been unprofitable*”: (1924) 35 CLR at 5 per Isaacs ACJ. The phrase there employed in the stand down provision, “*any such cause*”, was construed by the Acting Chief Justice as referring to “*causes*” of the kind previously mentioned such that it referred to “*any cause similar to or of the same nature as the breakdown of machinery*”: (1924) 35 CLR at 9 per Isaacs ACJ. Starke J construed the clause differently to Isaacs ACJ. But nothing for present purposes turns upon the differences in construction. Of importance is the notion of construing a clause according to its terms. Although not a transition in drafting style which assumes any immediate relevance to the present proceeding, it may be noted that by the mid‑1940s awards were shifting from authority to deduct wages for “*assigned causes*” and extending to “*any stoppage of work by any cause for which the employer cannot reasonably be held responsible*”: *The Millers and Mill Employees Award 1937* (1946) 56 CAR 622.
6. And when identifying the “*cause*” of a stoppage of work, it is accepted that the search is not for the immediate “*cause*” of the stoppage but rather a more broadly based factual inquiry directed to the sequence of events which ultimately led to the stoppage of work: *Vehicle Builders Employees’ Federation of Australia v Ford Motor Co. of Australia Pty Ltd* (1962) 3 FLR 198 (“*Ford Motor Co*”). On the facts of that case, the Ford Company had not yielded to demands made by the Federated Clerks Union that the company should ensure that all of its clerical staff at Ford’s Geelong plant should join the Union. In response, the Union refused to permit delivery of parts to Ford with the result that the assembly of vehicles at its Broadmeadows plant could not proceed. The Commonwealth Industrial Court, constituted by Dunphy, Joske and Eggleston JJ, rejected the claimant’s contention “*that the cause of the stoppage of work at the Broadmeadows plant [could not] be said to be one ‘for which the employer [could not] reasonably be held responsible’*”: (1962) 3 FLR at 199. Their Honours there concluded (at 200):

As to the first contention we are of opinion that the company has shown, on the evidence and the agreed facts, that the cause of the stoppage of work is a shortage of materials and that the company cannot reasonably be held responsible for this shortage. The shortage is due solely to the action of the shipping clerks in refusing to permit delivery of vital material from the wharves at Melbourne and Sydney and there seems no doubt that this action was taken in an endeavour to force the company to comply with the demand of the Federated Clerks Union. An employer could only “reasonably be held responsible" under the relevant provisions of cl. 7 of the award if a stoppage of work were the natural and probable consequence of his acts and the hold up of vital material following upon a refusal by the employer to force or coerce unwilling employees to join the Federated Clerks Union is not such a natural and probable consequence.

On this approach, it is to be noted that the question of causation was not resolved by reference to the conduct of Ford in not yielding to the demands of the Federated Clerks Union. The “*natural and probable consequence*” of that conduct was not, according to the Commonwealth Industrial Court, the stoppage of work at the Broadmeadows plant. The “*cause*” of the stoppage of work was the “*shortage of materials*” and that shortage, it was held, was “*due solely to the action of the shipping clerks in refusing to permit delivery of vital material*”.

1. A more broadly based review of whether it was the “*natural and probable consequence*” of the employer’s conduct which caused the stoppage, rather than a confined inquiry directed to the immediate cause of the stoppage, is essentially a question of fact. There are thus cases in which it has been concluded that it was the conduct of the employer which occasioned the stoppage of work and the stand down of employees: e.g., *Re Food Preservers Union of Australia and McCains Australia Pty Ltd* (1977) 188 CAR 36. The employer in that case sought to install new liquid waste disposal equipment at the company’s potato-processing plant at Ballarat. After referring to the observations in *Ford Motor* *Co* as to the “*natural and probable consequence*” of acts, Commissioner Matthews concluded:

It therefore became a natural and probable consequence of the Company having installed the original plant that the factory had to be closed down for the reconstruction based on re-designed plant. A further natural and probable consequence of the approved design of the new treatment plant was the necessity for a close down of the factory for 5 weeks and the standing down without pay for 5 days of the 35 female employees with whom these proceedings are concerned.

The evidence brought out before the Commission leads it to conclude that the Company was reasonably responsible for the stoppage of work and the consequent inability to employ the 35 employees for the 5 ordinary working days in question. It is the Commission’s decision that such employees be paid the ordinary wages that were withheld from them by being stood down for such days.

See also: *Re Australian Workers’ Union v Electrolux Home Products Pty Ltd* [2003] AIRC 1453 at [72].

1. In *Ford Motor Co,* their Honours, it is considered, separately resolved the question of causation but, in doing so, employed the language found in the balance of (in that case) cl 7 of the award, namely whether the company could “*reasonably be held responsible*”. These two questions of causation and reasonableness of conduct, nevertheless remain separate components of many stand down provisions. Consistent with the Industrial Court’s conclusion in *Ford Motor Co*, if not explicit in its reasoning, the question as to whether the cause of a stoppage of work can be one for which an employer can “*reasonably*” be held responsible depends – again not surprisingly – upon an assessment as to the conduct of the reasonable employer: *Pickard* (1924) 35 CLR 1. If attention in *Pickard* is directed not to the phrase “*any such cause*” but focussed upon the balance of the provision which referred to “*any such cause which the employer [could not] reasonably prevent*”, Gavan Duffy J thus concluded at 10 to 11:

… If we apply to the words in dispute the meaning primarily attached to them in ordinary use and by the lexicographers, we may paraphrase the language thus: “Any stoppage of work arising from any cause *of the kind already mentioned* which the employer cannot prevent *by any means which a reasonable man might be expected to employ in the circumstances*.” When the language is thus paraphrased, two things become tolerably clear: — (1) That the stoppage contemplated by the sub-section must be the effect of a cause of the same or a like kind with something already mentioned in the same clause. Whether this “something” includes only a breakdown in machinery or extends also to a strike, it is not necessary for our purpose to determine. (2) That either the stoppage or the cause of the stoppage (it matters not which) could not have been prevented by the employer using any of the means which a reasonable man might be expected to employ in such circumstances. In order that the respondent might avail itself of the provisions of the clause it was necessary that it should bring its case within both these propositions; and, in my opinion, it has brought it within neither of them. It is admitted that the stoppage which occurred had no relation either to a strike or to a breakdown in machinery, and the respondent has not satisfied me that it would not have been a reasonable course to pay to those of its employees who are serving under the State award the wages prescribed by that award for holiday work, rather than close its works during the holiday.

Of present relevance is the reference by Gavan Duffy J to causes which an employer could not prevent by “*using any of the means which a reasonable man might be expected to employ in such circumstances*”. Starke J adopted a similar approach, albeit one more unequivocally directed to the commercial basis upon which the employer had based its decision. His Honour thus reasoned (in part) as follows (at 11 to 13):

… the defendant concluded that it would be uneconomic to employ, in their absence, Lees and other engineers on that day. The defendant therefore informed them that no work would be available. …

… in my opinion, the better interpretation of this obscure and ungrammatical provision is not to attach it to causes already provided for, but to read it thus: “any stoppage of work by any cause such as the employer cannot reasonably prevent.” … No one can say with any certainty what the clause means, and it might be redrafted with advantage to the parties to the award. Even on the interpretation I have adopted, I cannot think that the defendant has brought itself within its terms. The stoppage of work was brought about simply because the employer did not choose to pay holiday rates to other workmen. It could not work these men profitably if it had to pay them double-time rates. That is a misfortune, and no doubt hard upon the defendant. But the stoppage of work was brought about by its own action and was wholly within its own volition. The provision in the award for deducting pay has no application to such a case.

Isaacs ACJ, it may be noted, had left the outer boundaries of the phrase to one side when he observed (at 10):

On the question of when and how far economic considerations enter into the determination of whether, in an appropriate case, the employer could “reasonably prevent” the stoppage from the given cause, I express no opinion at present.

1. The relevant inquiry is thus one not directed solely to whether an employer caused or contributed to a stoppage of work but an inquiry more directed to whether the employer could “*reasonably*” have prevented the stoppage.
2. Although questions as to causation and the reasonableness of the conduct of an employer potentially remain separate components of many stand down provisions, the resolution and application of stand down provisions has frequently been approached on the basis of whether an employer can reasonably be held responsible for the stoppage of work that has occurred: e.g., *Townsend* (1983) 4 IR 358. There in question was (*inter alia*) the standing down of employees on an assembly plant at Elizabeth in South Australia. Motor vehicles were assembled on a moving assembly line with a predetermined sequence of construction or assembly. An “*integral part*” of the assembly was the installation of “*heater boxes*” which served to provide heated air and demisting of windscreens. Delivery of the heater boxes was halted by reason of a strike at the manufacturing factory of Nippondenso Limited, which was General Motors’ supplier. Steps were taken by General Motors to source heater boxes from alternative suppliers, including overseas suppliers. A limited number were obtained but a decision was taken to allocate the available heater boxes to a number of its manufacturing plants. It was concluded that the employer was able to stand down employees on the assembly line at the Elizabeth plant. In so concluding, Morling J reasoned in part (at 360) as follows:

… Eventually supplies of the boxes became available to GMH and it allocated these between the vehicle assembly plants at Elizabeth, Dandenong and Acacia Ridge. GMH spent some $43,000 in airfreight charges on the boxes.

I am satisfied that as soon as the strike at Nippondenso interrupted the supply of heater boxes GMH took every step reasonably open to it to obtain alternative supplies. I am further satisfied that although there were delays in obtaining alternative supplies, those delays were not the fault of the company and could not have been avoided by it. Indeed, I did not understand counsel for the applicants to assert the contrary. This being so, it is unnecessary to refer in any further detail to the considerable body of evidence led by GMH to establish that it acted prudently and expeditiously in finding an alternative supply of boxes. However … senior counsel for the applicants… submitted that even if GMH could not be criticized for its efforts in obtaining an alternative supply of heater boxes, it was at fault in sending some of them to Acacia Ridge. It was argued that the assembling of Commodore vehicles at Acacia Ridge could have temporarily stopped in March 1981 and that the heater boxes should have been sent to the Elizabeth plant, thus avoiding all, or some, of the stand-downs. I do not think this criticism of GMH's actions is justified on the evidence.

In respect to the Elizabeth assembly plant, his Honour concluded (at 371) as follows:

… From the start of the assembly line in the body shop until the end of the line there are over 700 vehicles on the line at the one time. In March of 1981 some 165 vehicles came off the line every day. Each of these vehicles was on the production line for about five days.

I have already found that the Nippondenso strike cut off GMH’s supply of heater boxes and that it took all reasonable steps to find an alternative source of supply. In view of these findings, and of the finding that the company acted reasonably in allocating to its Acacia Ridge plant some of the heater boxes that it was able to obtain overseas, I am satisfied that employees engaged on the assembly lines at the Elizabeth plant could not have been usefully employed on 10th and 11th March.

As I understand the evidence the assembly lines were in the vehicle assembly, trim assembly, paint shop and body assembly sections of plant 2 at Elizabeth. About 1100 employees were engaged in these sections and of these the majority were stood down on 10th March and nearly all on 11th March. It is plain that if those employees who were stood-down had attended at work there would not have been any work, let alone useful work, for them to perform.

Of present relevance is the fact that his Honour concluded that the employer was entitled to stand down workers at the Elizabeth plant, even though the employer had made a decision to allocate some of the heater boxes to other of its assembly plants and in doing so occasioned the halt of the assembly line at Elizabeth. In reaching that conclusion, his Honour found that the employer “*acted reasonably in allocating to its Acacia Ridge plant some of the heater boxes that it was able to obtain*…”: (1983) 4 IR at 361.

1. One consideration of relevance to a determination as to whether conduct is reasonable is whether the conduct of the employer has been pursued in order to promote its own financial well-being. Although an employer may have “*regard to its own economic interests*” (cf. *Townsend* (1983) 4 IR at 372 per Morling J), an employer cannot invoke stand down provisions because (for example) it is “*uneconomic*” to employ its workers and pay double time on a public holiday (e.g., *Pickard* (1924) 35 CLR at 13 per Starke J), or so as to promote financial gain. Thus, for example, in *Re Distilleries Award 1976* (1976) 180 CAR 786 (the “*Distilleries*”case) the Conciliation and Arbitration Commission constituted by Justice Sharp varied the *Distilleries Award* to “*includ[e] provision for summary dismissal*”, but not to include “*provision… for stand down*”, and in so doing observed (at 787):

This comes to what seems to me to be the essence of the argument, namely, the purpose of a stand down clause. I do not accept the contention which, in fairness, was not advanced by Mr Park, that standing down employees without pay should be an employer’s right if that were the most convenient way of avoiding economic loss. The concept that it was managements’ prerogative to use labour at will has had no place in western society for many decades. It has been replaced by the concept that the use of the labour of human beings is a privilege accorded to management on defined terms. One of those terms is that reasonable security of earnings be assured to the labourer. This is the purpose of the notice clause in awards and very substantial grounds must exist for this Commission to include any provision which would enable it to be abrogated, even temporarily, by unilateral action.

There may, however, be circumstances when both the employer and those employed would want to avoid the extreme measure of terminating employment. It is for this situation that stand down provisions should exist and should contain adequate safeguards. If that consensus is not present then, as I have already indicated, this Commission must be persuaded that there are exceptional and substantial reasons based on the facts of that occasion, for its intervention.

1. Stand down provisions, accordingly, “*ought no longer to be seen as an automatic, albeit partial, safeguard for the employer against economic loss*”: *Food Preservers Union of Australia and All States Ready Foods* (1976) 182 CAR 391 at 392 (the “*Food Preservers*” case) per Gaudron J. Although stand down provisions serve two generally expressed purposes, one purpose being to provide “*financial relief*” to employers (*Qantas (No 1)* [2020] FCA 656 at [18], (2020) 295 IR at 229), in the *Food Preservers* case Gaudron J voiced the following concerns (at 392):

The purpose of a stand down clause ought no longer to be seen as an automatic, albeit partial, safeguard for the employer against economic loss. Society now claims and expects reasonable economic security for the wage earner and recent decisions of this Commission illustrate a growing trend to grant stand down clauses only as a variation of an award to deal with specific situations and then as a last resort so as to preserve as many facets of the employment relationship as possible. Where such stand down clauses have been granted, there has also been a tendency to provide some relief to the employee by granting the right to take accrued annual leave and/or to terminate on short notice.

Her Honour nevertheless went on to necessarily recognise as follows that there remained circumstances in which an employer should have a right to stand down employees:

For the above reasons, I grant the union's claim with this qualification: there have been occasions in this industry on which some sections of the workforce being members of the Food Preservers Union have withdrawn their labour with the result that continued production has been impossible. In such circumstances, I consider it only fair that an employer should have an automatic right to stand down other employees who cannot be usefully employed.

### The responsibility of Qantas & Jetstar

1. Both cl 14.6 of the *Qantas Agreement* and cl 30.5.1 of the *Jetstar Agreement* refer to:

* a “*stoppage of work*”; and
* a stoppage “*through any cause for which Qantas cannot reasonably be held responsible*” (cl 14.6), or in the case of Jetstar, a stoppage by reason of “*any cause which Jetstar cannot reasonably prevent*” (cl 30.5).

Of relevance (*inter alia*) is the fact that neither clause invites an inquiry directed to an identification of a specific kind of clause such as a breakdown of machinery, such as was the case in *Pickard*. Both clauses can be invoked and employees stood down, subject to the balance of these provisions, for “*any cause*”.

1. On the facts of the present case, the “*stoppage of work*” was the substantial stoppage of domestic and international passenger flights during the period from 12.01am on 29 March 2020 through to 22 April 2020, other than the very restricted flights that did take place. As agreed between the parties, “*each of Qantas and Jetstar progressively experienced an almost total reduction in travelling passengers*”: *Agreed Statement* at para [16]. That, it may readily be accepted, is “*any cause*” for the purposes of cll 14.6 and 30.5.1 of the *Agreements*.
2. The cause of the “*almost total reduction in travelling passengers*” was:

* the global pandemic;
* the progressive steps being taken by the Australian government to restrict international air travel, at first restricting travel from certain countries such as China and later culminating in the closure of Australia’s international borders to non-citizens and non-residents (with limited exceptions);
* the steps being taken by the Australian Government and the governments of the States and Territories to restrict the movements of persons intrastate and interstate, other than for essential purposes; and
* the quarantine restrictions imposed upon those who did travel.

1. Rejected is the submission advanced on behalf of the Union that the cause of the stoppage of work were the decisions taken by Qantas and Jetstar to stand down the licensed aircraft engineers. As expressed in its written submissions, a central plank of the Union’s case was expressed as follows:

9. The Association contends that it was not: the *cause*, fundamentally, was a business decision in response to an actual and projected downturn in trade. As good and reasonable a business decision as it may have been, this is fundamentally an event within the Airlines’ control. It is a stoppage arising from a voluntary change in business operations, not a matter entirely out of the Airlines’ hands.

10. The stand-down provision of the agreements have a long history and a specific function. They do not operate to allow either employer to reduce its staffing levels in response to downturns in trade – no matter how dramatic the downturn.

Although those decisions may have been the immediate cause for the relevant licensed aircraft engineers to stop work, neither cl 14.6 of the *Qantas Agreement* nor cl 30.5.1 of the *Jetstar Agreement* impose any requirement to identify the immediate cause of stand downs. Both clauses are drafted in terms of permitting the stand down of employees “*through any cause*” or “*by any cause*”. Although on one view it could be said that the immediate cause of the stoppage of the work to be performed by the engineers was each decision to stand the relevant employees down, clauses such as 14.6 and 30.5.1 require a consideration of the sequence of events which led to those decisions being taken: cf. *Ford Motor Co*. So viewed, it is not open to conclude anything other than that the “*cause*” of the stoppage of work was (in summary form) the global pandemic and the measures taken by the governments of the Commonwealth and the States and Territories to drastically curtail both international and domestic air travel and the movement of people within Australia.

1. Once the “*cause*” of the stoppage of work is so identified, it inextricably follows that it was not a “*cause*” for which Qantas or Jetstar could “*reasonably*” be held responsible – it was not a “*cause for which Qantas [could reasonably] be held responsible*” (cl 14.6) or a cause which Jetstar could “*reasonably prevent*” (cl 30.5.1).
2. The reasonableness of the steps which both airlines took is to be gauged by reference to the steps which a “*reasonable man might be expected to employ in the circumstances*”: *Pickard* (1924) 35 CLR at 10-11 per Gavan Duffy J. The Qantas Group, it was agreed between the parties in the *Agreed Supplementary Statement*, “*had already explored and implemented every other costs saving measure, such as ceasing payments of rent, ceasing payments to suppliers, renegotiating terms with other suppliers and deferring various payments*”. The facts of the present case, it is respectfully concluded, come nowhere close to a situation where other steps could reasonably have been pursued by Qantas or Jetstar. The facts of the present case are even far more removed from the facts presented (for example) in the *Townsend* case, where even there it was held that the employer had acted reasonably, despite that employer having diverted an essential component for its car manufacturing facility to another assembly plant, and thereby occasioning the shutting down of its Elizabeth plant.
3. Also rejected is a further submission advanced on behalf of the Union that the facts of the present case are comparable to those in *Pickard*. The submission was sought to be bolstered by the observations of Starke J in that case to the “*stoppage of work [being] brought about by [the employer’s] own action and was wholly within its own volition*”: (1924) 35 CLR at 13. There the employer had sought to deduct wages by reason of its decision that it was “*uneconomic to employ*” the additional workers necessary to enable work to continue: (1924) 35 CLR at 11. The dramatic downturn in airline travel was not the result of any conduct on the part of Qantas or Jetstar; it was an economic reality forced upon the airlines by reason of the global pandemic and the conduct of the Commonwealth, State and Territory governments in restricting travel and movements. The action taken by the airlines in standing down the licensed aircraft engineers was a necessity forced upon them. It is, with respect, disingenuous to suggest that the action taken by the airlines was action within their “*own volition*”. Although the Union may well be correct in submitting that the circumstances in which stand down provisions can be invoked may well now be more confined than previously (cf. the *Food Preservers* case (1976) 180 CAR at 392 per Gaudron J), the circumstances in which Qantas has invoked cl 14.6 and Jetstar invoked cl 30.5.1 of their respective *Agreements*, are hopefully unique and never to be repeated.
4. The facts of the present case, moreover, do not require any real consideration to be given to whether Qantas and Jetstar were pursuing a course of protecting their own financial interests. Neither airline was (for example) seeking to maximise profits at the expense of the payment of wages to its employees. On the facts of the present case, both airlines were pursuing a course of ensuring their very economic survival. Neither airline was really presented with any real choice between:

* a course which may have maintained profitability, but at the expense of the wages payable to a particular category of employees (such as the licensed aircraft engineers); or
* not standing down one particular category of employees (being the licensed engineers), but maintaining profitability at the expense of potentially other categories of employees.

Even faced with such a choice, an employer is not required to disregard “*its own economic interests*”: *Townsend* (1983) 4 IR at 372 per Morling J (cf. the *Distilleries* case). The present case is far removed from Qantas and Jetstar being confronted with any genuine choice – each had to dramatically reduce its costs in order to ensure ultimate financial viability.

1. No conclusion should be reached that the airlines would be, if the Union’s position prevailed, forced to fly planes at substantial losses, carrying few (if any) passengers and thereby threatening their commercial viability. Rejected is the Union’s submission that, notwithstanding the global pandemic affecting not only Qantas and Jetstar, but other employers and employees worldwide, the licensed aircraft engineers are guaranteed “*security of income*”.
2. Both Qantas and Jetstar, it is thus concluded have discharged the onus (cf. *Townsend* (1983) 4 IR at 363-367) of bringing themselves within, respectively, cl 14.6 of the *Qantas Agreement* and cl 30.5.1 of the *Jetstar Agreement*.

### The status quo – the Jetstar Agreement & cl 20.4

1. The subsidiary issue which only arises in respect to Jetstar is whether cl 20.4 of the *Jetstar Agreement* precludes the standing down of the licensed aircraft engineers whilst the dispute provisions set forth in cl 20 of that *Agreement* were being pursued in relation to the validity of those stand downs.
2. It has previously been concluded that cl 20.1 was satisfied on 19 March 2020 and cl 20.2 was satisfied on 20 March 2020: *Qantas (No 2)* [2020] FCA 951 at [86] to [87].
3. Clause 20.4, it is respectfully concluded, does not preclude those employees being stood down pursuant to cl 30.5.1 of the *Jetstar Agreement,* even though the dispute provisions were still being pursued. Such a conclusion necessarily follows from:

* a construction of cl 20.4 which confines its operation to those circumstances in which there is available work which the employee can otherwise perform; and/or
* the fact that to construe cl 20.4 in the manner suggested by the Union would render nugatory the right conferred by cl 30.5.1.

1. As to the former reason, the object and purpose of provisions such as cl 20.4 contemplate that “*work will continue as per the status quo*”. The assumption is that whilst a dispute remains to be resolved, there is available work for the employee to perform and that the *status quo* will continue. Clause 20.4, accordingly, does not contemplate or extend to those circumstances in which there is no work which an employee can usefully perform whilst the dispute remains to be resolved.
2. As to the latter reason, provisions such as cl 30.5.1 are only enlivened when there is in fact no work which can be usefully performed. The object and purpose of stand down provisions, it has been previously concluded, is two-fold: one purpose being to provide “*financial relief*” to an employer “*from paying wages in circumstances where, through no fault of its own, the employer has no work that the employees can usefully perform*”: *Qantas (No 1)* [2020] FCA 656 at [18]. And, even though clauses such as cl 30.5.1 ought not to be construed as conferring an “*automatic, albeit partial, safeguard for the employer against economic loss*” (the *Foods Preservers* case at 392 per Gaudron J), a construction of cl 20.4 which would require an employer to retain the services of an employee to perform work which cannot be provided would, with respect, strip cl 30.5.1 of any utility. If the contention of an employer be ultimately found to be erroneous such that there was in fact work available to be performed, the employee would presumably be entitled to an order for the payment of monies wrongfully withheld.
3. So construed, cl 20.4 and cl 30.5.1 are directed to factually different scenarios: the former is directed to imposing an obligation on an employer to maintain the *status quo* whilst there is work available to be performed and whilst a dispute remains to be resolved; the latter provision is directed to those circumstances in which there is no available work to be performed.
4. These reasons proceed from the construction of cll 20.4 and 30.5.1. As a process of construction, it is concluded that both provisions serve two different purposes. There is, with respect to the contrary submission advanced on behalf of the Union, little circularity in reasoning. If, on the facts as they may ultimately be established in any given case, there is (for example) no right to stand down an employee pursuant to cl 30.5.1 such that there was on the facts as found other available work to be performed, there would be a contravention of both provisions. But the process of construing the terms of cll 20.4 and 30.5.1 solely by reference to the terms of the *Jetstar Agreement* leads to the construction of cl 20.4 advanced on behalf of Jetstar.
5. The subsidiary argument advanced on behalf of the Union in respect to cl 20.4 of the *Jetstar Agreement* is thus rejected.

## CONCLUSIONS

1. The stoppage of work for both Qantas and Jetstar, it is concluded, was one for which Qantas could not reasonably be held responsible and one which Jetstar could not reasonably prevent. Given the substantial downturn in passenger flights, there was no other option “*reasonably*” open for Qantas or Jetstar to pursue. Neither Qantas nor Jetstar could obviously be held responsible for the downturn in international and domestic air travel; and neither Qantas nor Jetstar could “*reasonably*” have prevented the stoppage of work which occurred. Both Qantas and Jetstar took those steps which a “*reasonable [employer] might be expected to employ in such circumstances*”: *Pickard* (1924) 35 CLR at 11 per Gavan-Duffy J.
2. Nor was Jetstar required to maintain the *status quo* pending the ultimate resolution of the dispute.
3. Without being exhaustive, it remains a matter for the Commission to resolve such questions as remain outstanding, including:

* whether the licensed engineers could have been usefully employed during the period when they were stood down; and
* whether, if they could not have been usefully employed, the lack of useful employment was “*because of*” the stoppage of work.

1. Declaratory relief should be granted in the form sought by Qantas and Jetstar. No injunctive relief should be granted. It may confidently be expected that the Commission will pursue a course consistent with the declaratory relief now to be granted.

## THE COURT ORDERS THAT:

1. The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within seven days.

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| I certify that the preceding forty seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 6 October 2020