FEDERAL COURT OF AUSTRALIA

Corporate Air Charter Pty Ltd v Australian Federation of Air Pilots [2024] FCA 1225

Appeal from:	*Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd* [2023] SAET 63 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 2)* [2024] SAET 23 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 3)* [2024] SAET 36
File number:	SAD 89 of 2024
Judgment of:	**LOGAN J**
Date of judgment:	18 October 2024
Catchwords:	**PRACTICE AND PROCEDURE** – where Qantas Airways Ltd (Qantas) applied pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) to intervene in an industrial appeal from the South Australian Employment Court (the appeal) – where the appeal concerned, in part, the construction of the *Air Pilots Award 2020* (and its 2010 predecessor) (collectively, the Awards) and whether stand-by duty performed by pilots constituted regular work – where Qantas (and its subsidiaries) is the largest employer of pilots in Australia and that employment is regulated by enterprise agreements (rather than the Awards directly) – whether Qantas' intervention would provide "useful and different" submissions to those made by the parties – whether Qantas a direct or indirect legal interest in the proceedings and to what extent that interest would be affected by the appeal determination – intervention application dismissed **INDUSTRIAL LAW** – where Qantas Airways Ltd (Qantas) applied pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) to intervene in an industrial appeal from the South Australian Employment Court (the appeal) – where the appeal concerned, in part, the construction of the *Air Pilots Award 2020* (and its 2010 predecessor) (collectively, the Awards) and whether stand-by duty performed by pilots constituted regular work – where Qantas (and its subsidiaries) is the largest employer of pilots in Australia and that employment is regulated by enterprise agreements (rather than the Awards directly) –

	whether Qantas' intervention would provide "useful and different" submissions to those made by the parties – whether Qantas a direct or indirect legal interest in the proceedings and to what extent that interest would be affected by the appeal determination – intervention application dismissed
Legislation:	*Fair Work Act 2009* (Cth) s 62 *Federal Court of Australia Act 1976* (Cth) s 25 *Defamation Act 2005* (Vic) s 35 *Federal Court Rules 2011* (Cth) r 9.12
Cases cited:	*Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd* [2023] SAET 63 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 2)* [2024] SAET 23 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 3)* [2024] SAET 36 *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68 *Bechtel Australia Pty Ltd v Commissioner of Taxation* (2023) 116 ATR 392 *John Holland Group Pty Ltd v Commissioner of Taxation* (2015) 232 FCR 59 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2024] FCA 1104 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37
Division:	Fair Work Division
Registry:	South Australia
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	23
Date of hearing:	18 October 2024
Counsel for the Appellants:	Mr J Phillips SC
Solicitor for the Appellants:	Irwell Law
Counsel for the Respondent:	Mr J Hartley
Solicitor for the Respondent:	Australian Federation of Air Pilots
Counsel for the Intervener:	Mr M Follett SC with Mr M Garozzo

Solicitor for the Intervener: Ashurst Australia

ORDERS

SAD 89 of 2024

BETWEEN:	**CORPORATE AIR CHARTER PTY LTD** First Appellant
	CHRISTIAN ANGLBERGER Second Appellant
AND:	**AUSTRALIAN FEDERATION OF AIR PILOTS** Respondent
	QANTAS AIRWAYS LIMITED ACN 009 661 901 Intervener

ORDER MADE BY:	**LOGAN J**
DATE OF ORDER:	**18 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The interlocutory application filed on 15 October 2024 by Qantas Airways Limited be dismissed.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1 Pending in the Court's South Australian District Registry is an appeal by Corporate Air Charter Pty Ltd and Mr Christian Anglberger (collectively, CAC) against three related decisions of the South Australian Employment Court. The *Fair Work Act 2009* (Cth) (Fair Work Act) makes provision for appeals from eligible state or territory courts. The South Australian Employment Court is, for reasons which need not be the subject of present elaboration, such a court. The decisions of the South Australian Employment Court entail, amongst other things, conclusions reached concerning the construction of provisions in the *Air Pilots Award 2020* and its 2010 predecessor (collectively, the Awards) in relation to pilots on standby: *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd* [2023] SAET 63; *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 2)* [2024] SAET 23; *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 3)* [2024] SAET 36.

2 There is a controversy as between CAC and the respondent to the appeal, the Australian Federation of Air Pilots (the Federation), an industrial organisation representing pilots, as to whether hours spent by pilots on standby for duty should be classified under the Awards as regular working hours. The appeal is presently listed for hearing in Adelaide on 19 and 20 November before the Full Court.

3 Qantas Airways Limited (Qantas) has made an application pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) for leave to intervene in the appeal. That rule provides:

> **Interveners**
>
> (1) A person may apply to the Court for leave to intervene in a proceeding with such rights, privileges and liabilities (including liabilities for costs) as may be determined by the Court.
>
> (2) The Court may have regard to:
>
> (a) whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding; and
>
> (b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish; and
>
> (c) any other matter that the Court considers relevant.
>
> (3) When giving leave, the Court may specify the form of assistance to be given

by the intervener and the manner of participation of the intervener, including:

(a) the matters that the intervener may raise; and

(b) whether the intervener's submissions are to be oral, in writing, or both.

Note 1: The Court may give leave subject to conditions – see rule 1.33.

Note 2: The Court may appoint an amicus curiae.

4 The application for intervention is one which might, but in my view not must, be dealt with by the Full Court as constituted to hear the appeal. The terms of s 25(2B) of the *Federal Court of Australia Act 1976* (Cth) are such that, in my view, a single judge may hear and determine the intervention application.

5 The members of the Full Court, as constituted for the purposes of hearing the appeal, have considered the application for intervention, and regard it as one which is apt for disposition by a single judge.

6 The question therefore becomes whether to grant such leave?

7 Rule 9.12(2) is ultimately open-ended, in terms of considerations which should inform the Court in deciding whether or not to grant leave. Expressly relevant is whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding, and whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish.

8 It is desirable to make an observation about the meaning of "useful and different", lest it be thought that a refusal of an intervention application carries with it any pejorative quality, in terms of proposed representation by an intervener. It in no way carries such a quality. Qantas proposes to be represented on the hearing of the appeal, if leave to intervene be granted, by senior and junior counsel. I have no reservations, whatsoever, as to the competency of counsel, in terms of expertise in industrial relations law and related statutory construction issues.

9 "Useful and different", as it appears in the rule, is a composite. The meaning to give is, in my view, to be informed by an observation made by the High Court in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 (*Roadshow Films*), at [3], where it was stated:

> Where a person having the necessary legal interest can show that the parties to the particular proceedings *may not present fully* the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

[emphasis added]

10 Intervention applications are inevitably fact-specific and, with that, issue-specific to particular proceedings. Recognising that, it is nonetheless, in terms of earlier cases, a feature with respect to the determination of such applications to characterise whether or not the interests of the intervener would be directly or indirectly affected by a judgment in the proceeding concerned. A party whose interest will be directly affected is entitled to intervene, to protect that interest.

11 A non-party whose interests are likely to be substantially affected, but not directly affected, can be regarded as a person who would satisfy a pre-condition for leave to intervene. However, leave to intervene would not ordinarily be granted to such a person, unless that person could show that the parties to the proceeding may not present fully the submissions on a particular issue. So much flows, in my view, from *Roadshow Films*.

12 A helpful collection of factors which emerge from the authorities concerning intervention applications is to be found, in my view, in the joint judgment of Tate and Beach JJA, in the Victorian Court of Appeal in *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68 (*Bauer*), at [7]:

> [7] The principles upon which a court may grant leave to intervene are not in dispute. The governing principles may be briefly summarised as follows:
>
> (1) A non-party whose interests would be affected directly by a decision in a proceeding is entitled to intervene to protect the interest liable to be affected.
>
> (2) Where the legal interests of a person may be affected by the operation of precedent or by the doctrine of stare decisis, a court may grant leave to intervene if the interest is sufficiently substantial.
>
> (3) Where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene.
>
> (4) A grant of leave may be limited, and subject to such conditions as to costs or otherwise as will do justice as between the parties.
>
> (5) A non-party must satisfy the Court that its contribution, as an intervener, will be useful and different from the contribution of the parties, and that the intervention will not unreasonably interfere with the conduct of the proceeding.
>
> [footnotes omitted]

13 In *Bauer*, a number of media companies applied to intervene in proceedings concerning the construction of s 35 of the *Defamation Act 2005* (Vic). The applications for intervention were

not successful, because of a view formed by the Court in that case that the submissions of the proposed intervenors would not be materially different from those of the appellant: see [12] - [13].

14 Truly, though, as I have already observed, intervention applications are inherently case-specific, in terms of circumstances which inform the exercise of discretion, as to whether to permit intervention. It is certainly possible to find examples in the Court's industrial jurisdiction of cases where leave to intervene has been granted: see, recently, *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2024] FCA 1104 (Snaden J). In that case, his Honour granted leave for another mining company, Dyno Nobel Asia Pacific Pty Ltd, to intervene in support of Orica's appeal concerning whether particular workers fell within the remit of an industry long service leave scheme regulated by statute.

15 Qantas' presence in the airline industry is, insofar as it is not, at least in a general sense, a matter for judicial notice, the subject of detailed exposition in the affidavit of its Head of Industrial Relations, Mr James Morton. Put shortly, either directly or via subsidiaries, Qantas is the largest employer in Australia of pilots. Those pilots are governed both by the Fair Work Act, and as well by enterprise agreements, specific either to long haul or short haul duties. In that sense, the circumstances of Qantas are different to those of CAC, whose pilots are governed by the Fair Work Act, and directly by the Awards. Even so, the impact of s 62 of the Fair Work Act can be seen to be just as real for Qantas as it is for CAC, in terms of work beyond the hours for which s 62 provides.

16 Further, although the "Air Operator's Certificate" under which CAC conducts its operations contains an exemption, which that of Qantas does not, it seems, from the submissions of the parties in terms of likely issues with respect to construction of the Awards, that that is a distinction without a difference.

17 When all is said and done though, Qantas' interests are not direct, in the sense used in earlier intervention authorities. Qantas would not be directly bound by any order made on the appeal. It is, however, clear to the point of demonstration that Qantas has a singular interest, indeed, in terms of precedent, in whatever result there may be as to construction of the Awards, as a result of the determination of the appeal.

18 That said, and to take up a point made on behalf of the Federation, Qantas is, in that regard, in no different position than, for example, an employer whose interests might be affected, and

significantly affected, by the disposition of a tax case, which concerned fringe benefits tax liability, if any, arising in respect of fly-in fly-out workers: see, in that regard, *Bechtel Australia Pty Ltd v Commissioner of Taxation* (2023) 116 ATR 392; *John Holland Group Pty Ltd v Commissioner of Taxation* (2015) 232 FCR 59.

19 Having regard to the issues raised by the Notice of Appeal, there is, in my view, no reason to apprehend that the submissions made by the parties to the appeal would not be comprehensive, in respect of those issues. In other words, I am not persuaded, in terms of the express consideration in r 9.12(2), that the submissions of Qantas would be "useful and different".

20 Given the length of time allocated for the hearing of the appeal, it does seem to me unlikely that intervention would visit on the Court, in terms of allocation of judicial resources, and on the parties to the appeal, in terms of costs associated with appearance on the hearing of the appeal, additional costs. Any additional costs visited on the parties by virtue of the intervention could be the subject of particular conditions on any order granting leave to intervene. It is a feature, though, of the intervention application that Qantas did not, in advance, identify the potentiality for such additional costs, and seek, by informal agreement with the parties, to reach some accommodation in respect of the costs which would be entailed by intervention. Even so, these considerations are not, in my view, determinative.

21 I have also taken into account what one might apprehend are relative resources as between a relatively minor, relative to Qantas, operator in the airline industry, an industrial organisation, the Federation, and Qantas. But again, those relativities are not determinative.

22 Rather, what is determinative is that it is unlikely that the parties to the appeal would not present, fully, the submissions on the Awards' construction issues, which arise between the parties in their particular circumstances, on the hearing of the appeal.

23 For the reasons given, leave to intervene is refused and the application is dismissed.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate:

Dated: 22 October 2024