Federal Court of Australia

Transport Workers’ Union of Australia v Qantas Airways Limited [2021] FCA 873

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| File number: | NSD 1309 of 2020 |
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| Judgment of: | **LEE J** |
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| Date of judgment: | 30 July 2021 |
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| Catchwords: | **EMPLOYMENT LAW** – adverse action – decision of Qantas to outsource ground handling operations at ten Australian airports in the midst of the COVID-19 pandemic – whether substantial and operative reason for outsourcing was for a prohibited reason – ss 340 and 346 of the *Fair Work Act 2009* (Cth) – consideration of the “reverse onus” – consideration of the legal principles applicable to corporate decision making – failure of Qantas to discharge onus in relation to one prohibited reason – balance of relief either not pressed or dismissed – exact form of declaration to be determined**EVIDENCE** – consideration of the principle in *Browne v Dunn* (1893) 6 R. 67 – witnesses on notice of a challenge to their evidence as to identity of the relevant decision maker and reasons – necessity not to confuse matters of style with substance  |
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| Legislation: | *Evidence Act 1995* (Cth) s 36, 136, 140*Fair Work Act 2009* (Cth) ss 340, 341, 346, 360, 361, 793 *Federal Court of Australia Act 1976* (Cth) s 37P*Federal Court Rules 2011* (Cth) r 30.01 |
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| Cases cited: | *Amcor Ltd v Barnes* [2012] VSC 434*Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* [2003] FCA 910; (2003) 126 IR 165 *Australian Red Cross Society v Queensland Nurses’ Union of Employees* [2019] FCAFC 215; (2019) 273 FCR 332*Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 *Australian Workers’ Union v John Holland* [2001] FCA 93; (2001) 103 IR 205*Axon v Axon* (1937) 59 CLR 395 *Ballard v Multiplex*[2012] NSWSC 426*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500*Briginshaw v Briginshaw* (1938) 60 CLR 336*Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; (2012) 10 ASTLR 164*Browne v Dunn* (1893) 6 R. 67*CCL Secure Pty Ltd v Berry* [2019] FCAFC 81*Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222; (2017) 256 FCR 306*Chen v State of New South Wales (No 2)* [2016] NSWCA 292*CKC16 v Minister for Immigration and Border Protection* [2018] FCA 1260*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157; (2015) 238 FCR 273*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243*Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)* [2017] FCA 1046*Edgington v Fitzmaurice* [1885] 29 Ch D 459*Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; (2001) 129 IR 251*Ethicon Sàrl v Gill* [2021] FCAFC 29; (2021) 387 ALR 494*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118*General Motors-Holden’s Pty Ltd v Bowling* (1976) 51 ALJR 235*Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)*Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2001] FCA 349; (2001) 112 FCR 232*Jones v  Dunkel* (1959) 101 CLR 298*Katragadda v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 143*Leahey v CSG Business Solutions (Aus) Pty Ltd* [2017] FCA 1098*Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126*Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; (2019) 377 ALR 234*Mealey v Power* [2015] NSWSC 1678*Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; (2010) 274 ALR 205*National Tertiary Education Union v Royal Melbourne Institute of Technology*[2013] FCA 451; (2013) 234 IR 139*Nguyen v Cosmopolitan Homes* [2008] NSWCA 246*NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618*Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362*Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537*Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3)* [2020] FCA 1428; (2020) 299 IR 100*Qantas Airways Ltd v Transport Workers’ Union of Australia* [2011] FCA 470; (2011) 211 IR 1*Queensland v Masson* [2020] HCA 28; (2020) 94 ALJR 785 *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262*Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123*Tattsbet v Morrow* [2015] FCAFC 62; (2015) 233 FCR 46*White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169*Wong v National Australia Bank Limited* [2021] FCA 671 |
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|  | Australian Law Reform Commission Report, *Evidence (Interim)* (Report No. 26, 1985)Emmett A, ‘Practical Litigation in the Federal Court of Australia: Affidavits’ (2000) 20 *Australian Bar Review* 28*Employment and Industrial Relations Practice Note (E&IR*-*1)*Odgers S, *Uniform Evidence Law* (14th ed, Thomson Reuters, 2016) Woolf H, *Access to Justice Report*, Final Report (London, HMSO, 1996) |
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| Date of hearing: | 12 – 16, 19 – 22 April and 11 – 13 May 2021  |
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| Counsel for the Applicant: | Mr M Gibian SC with Mr P Boncardo |
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| Solicitor for the Applicant: | Maurice Blackburn Lawyers |
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| Counsel for the Respondent: | Mr N Young QC with Mr R Dalton QC and Mr M Follett |
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| Solicitor for the Respondent: | Herbert Smith Freehills |

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| **Table of Corrections** |  |
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| [310] | The reference to “ASOC [40.3A]” be amended to read “ASOC [44A]” |

ORDERS

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|  | NSD 1309 of 2020 |
|   |
| BETWEEN: | TRANSPORT WORKERS' UNION OF AUSTRALIAApplicant |
| AND: | QANTAS AIRWAYS LTD (ACN 009 661 901)Respondent |

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| order made by: | LEE J |
| DATE OF ORDER: | 30 July 2021 |

THE COURT ORDERS THAT:

1. The claims for relief in terms of prayers 1.5, 1.6, 1.7, and 1.8 of the amended originating application filed 31 December 2020 be dismissed.
2. The proceeding be adjourned to a case management hearing at 9:30am on 4 August 2021.
3. By 4pm on 3 August 2021, the parties provide to the Associate to Justice Lee agreed (or failing agreement, competing) short of minutes of order proposing a form a declaration to reflect these reasons and detailing the interlocutory steps necessary to ready the claims for relief identified in prayers 2A, 3 and 4 to be determined (to the extent all that relief continues to be sought).

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

REASONS FOR JUDGMENT

|  |  |
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| a THE CASE IN GENERAL AND A PLEADING ISSUE | [1] |
| B FACT-FINDING CHALLANGES | [16] |
| B.1 The Documentary Record | [16] |
| B.2 The Affidavit Evidence | [24] |
| B.3 The Oral Evidence | [30] |
| B.4 Relevance of Challenges to Fact Finding | [31] |
| C FACTUAL FINDINGS AND THE PRINCIPLED APPROACH | [32] |
| C.1 The Background and Non-Contentious Facts | [32] |
| C.2 Further Unchallenged Background Evidence | [37] |
| C.3 Peripheral Disputed Facts | [40] |
| C.4 A Summary of the Nature of the Key Disputed Facts | [42] |
| C.5 Principles of fact finding | [43] |
| The “Reverse Onus” | [44] |
| The Scope of the Rule in Browne v Dunn and its Present Application | [49] |
| C.6 Qantas’ Witnesses, their Role and their Credit Generally | [57] |
| Mr Jones | [59] |
| Colin Hughes | [70] |
| Paul Nicholas | [77] |
| Andrew Finch | [80] |
| Andrew David | [87] |
| C.7 Findings in Narrative Form | [93] |
| Early 2020 | [94] |
| April to May 2020 | [96] |
| June to Early August 2020 | [113] |
| Late August to Mid-November 2020 | [148] |
| The Outsourcing Decision – Late November 2020 | [161] |
| C.8 Findings on Outsourcing Decision | [190] |
| D the CLAIM AND THE law: adverse action | [203] |
| D.1 The Nature of the Claim | [203] |
| D.2 The Relevant Law | [206] |
| “Substantial and operative factor” and more on the “reverse onus” | [218] |
| E ASSESSMENT | [240] |
| E.1 The s 346(a) case | [241] |
| Conclusion on the s 346(a) case | [253] |
| E.2 The s 340 case | [259] |
| The Primary Case | [260] |
| Conclusion on the Primary s 340 Case | [282] |
| The Balance of the s 340 Case | [306] |
| F conclusion and orders | [311] |

LEE J:

# a THE CASE IN GENERAL AND A PLEADING ISSUE

1. Despite some public statements to the contrary, this is not a test case about the industrial phenomenon of “outsourcing”; nor indeed is it a test case about anything at all.
2. Rather, this case resolves a fact specific controversy arising from a decision made late last year by Qantas Airways Limited (**Qantas Airways**) to outsource ground handling operations work at ten Australian airports to a number of third party ground handling companies (**outsourcing decision**). The outsourcing decision is the subject of challenge by the Transport Workers’ Union (**Union**), on behalf of a number of its members who are employed by Qantas Airways and Qantas Ground Services Pty Limited (**QGS** and together **Qantas**), being employees who previously provided those ground handling operations.
3. By the time of final submissions, the contention of the Union, in broad terms, was that Qantas embraced the approach of “never letting a good crisis go to waste”. The Union alleges that at the beginning of 2020, Qantas was antipathetic to the industrial influence of the Union. The COVID-19 pandemic, which struck at a time when the Union was unable to take protected industrial action, provided a vanishing window of opportunity for Qantas to rid itself of the influence of the Union and the exercise of workplace rights by its members by outsourcing a large number of jobs performed by its members. In this sense, the dark clouds that gathered in 2020 presented a glimmer of opportunity. The perceived financial benefits of outsourcing (which until the pandemic had not been pursued because of the risk of operational disruption), became for the first time feasible and Qantas, at the level of its group management committee (**GMC**), seized its perceived opportunity while it lasted. Alternatively, it is contended that if the GMC did not make or contribute to the relevant decision to outsource, various executives of Qantas perceived the benefits of outsourcing and either made, or materially contributed to, the decision for a prohibited reason.
4. The contention of Qantas is, as one might expect, quite different. By the beginning of 2020, there was no suggestion Qantas would transform its ground handling operations at the relevant ten ports (as reflected in the fact it had resolved to make the necessary and significant capital expenditure to allow that work to continue to be undertaken by employees). The pandemic had a devastating and wholly unprecedented impact upon Qantas’ operations and revenues. A recovery plan was fastened upon by Qantas, which was relevantly directed to the imperatives of reducing operating costs; increasing variability in its cost base, and minimising capital expenditure. Out of a range of remedial steps implemented to achieve these ends, the option of outsourcing of all remaining ground operations was assessed, was recommended, and was then adopted following a long process, because it fulfilled the imperatives of the recovery plan. Risks (including industrial risks) were necessarily considered in assessing this proposed course, along with other considerations, but no prohibited reason informed the outsourcing decision in whole or part.
5. It is inaccurate to say that this case is essentially about which of these narratives is made out on the evidence, but these characterisations represent, at a very high level, the “case theories” advanced by each party.
6. At first glance, it appears the case is a straightforward one. Given the pleaded controversy relates to one decision made by one man, it might be thought to turn simply upon whether the evidence given as to the outsourcing decision on 30 November 2020 by Mr Andrew David, the Chief Executive Officer, Qantas Domestic and International, should be accepted. I do find below that Mr David was the relevant decision maker and, for reasons that will become evident, my failure to reach a level of satisfaction in relation to one aspect of his evidence has turned out to be determinative. But notwithstanding this, the fact-finding task does have some degree of complexity. Mr David’s evidence is necessarily to be assessed contextually and, importantly, his actions were not made in a vacuum. His evidence as to the outsourcing decision cannot be assessed as though the final step in decision making can be divorced from what preceded it. The circumstances leading up to the impugned decision are contextually important, and are examined in considerable detail below.
7. Qantas, sensibly, did not suggest the outsourcing decision on 30 November 2020 could be placed in some sort of hermetically sealed box, but a controversy did emerge as to the reliance by the Union on dealings between the GMC and Mr David and those with whom he primarily worked in the Australian Airports business of Qantas. The dealings with the GMC in particular assumed an importance in the Union’s case, which would not have been evident from a review of the pleadings, and this has created a dispute as to the permissible scope of the Union’s case. Before going further, it is necessary to explain and resolve this dispute which, like most pleading disputes, is about procedural fairness.
8. In its final submissions of 30 April 2021 (**UFS1**), the Union asked the Court to find that on 5 August 2020 (see USF1 [7(b)], [88] and [117]), the GMC made “the practical decision” to proceed with a proposal for outsourcing being a proposal which “effectively resulted” in the outsourcing decision or, put another way, that “the reality of events” was that the outsourcing decision was made when the proposal to outsource was fastened upon by the GMC: UFS1 [7(a)], [56] and [59].
9. Qantas contends that this case is not open to be advanced. This submission should be accepted.
10. The case pleaded in the amended statement of claim filed on 31 December 2020 (**ASOC**) contends that there were two relevant decisions: the *first* was a decision to proceed with an outsourcing *proposal*, announced on 25 August 2020 (ASOC [15]–[18]); this decision was “for the purpose of *initiating a process* that *would*lead to the termination of the employment of the Affected Employees” (ASOC [18A]) (**outsourcing proposal decision**); the *second* was what was described as a “*definite decision*to outsource” (ASOC [29]–[30]) made on 30 November 2020, being what I have defined above (at [2]), as the “outsourcing decision”.
11. In its final submissions of 5 May 2020 (**QFS1**), Qantas accepted that during the course of the trial and up until final submissions, the Union’s case was that the outsourcing decision “was the culmination of a two-stage decision making process that went for some months”: QFS1 [26]. It further accepted the Union’s case to be that because the outsourcing proposal decision was a “precursor decision in that process”, the reasons for the earlier decision were relevant to understanding the real reasons for the subsequent “definite decision” (being the outsourcing decision made on 30 November 2020).
12. There is also no contest that the Union ran a case that Mr David was not the sole decision maker having regard to the involvement of other persons (most notably, the GMC) at earlier stages in the process. The nature and extent of the involvement of the other persons, particularly in the outsourcing proposal, was such as to have a “material effect” on the *ultimate* outsourcing decision. Such a case is consistent with the Union’s opening submissions of 8 April 2021 (**UOS**) (see [42.1]).
13. This summary by Qantas in QFS1 accords with my understanding of the way the case was conducted. In the absence of a successful application for amendment either prior to trial (when directly relevant documents were inspected), or during the course of the trial (when evidence of greater clarity might be alleged to have emerged), it would, or at least could, occasion an unfairness to Qantas to allow a case to be run by the Union which moves the focus away from the impugned outsourcing decision as pleaded, to an alleged earlier “practical decision” made by the GMC in August 2020. As I have already noted, the context and steps leading up to the outsourcing proposal decision are highly relevant, but only to the extent that they impact upon the subjective reasons for making the outsourcing decision in late November 2020. Qantas did not come to meet any other case, and considerations of fairness are particularly important in a civil penalty case.
14. This does not mean, of course, that the case that the GMC was “materially involved in the decision making process to outsource” is unable to be advanced. Although (for reasons I will explain), I do not accept the Union’s submissions as to the involvement of the GMC in the making of the outsourcing decision, it was accepted (at QFS1 [4(c)], [27]) that a case as to material involvement of the GMC in the outsourcing decision of 30 November 2020 was run.
15. Before coming to the principled approach to fact-finding and making relevant findings, it is noteworthy that the process of fact-finding in this case has several challenges, which are significant and should be identified at the outset.

# B FACT-FINDING CHALLANGES

## B.1 The Documentary Record

1. Although this is an industrial case, as those experienced in commercial litigation are aware, in determining contested factual issues, what matters most is usually “the proper construction of such contemporaneous notes and documents as may exist, and the probabilities that can be derived from those notes and any other objective facts”: *Mealey v Power* [2015] NSWSC 1678 (at [[4]](https://jade.io/article/417654/section/140342) per Pembroke J). As Leggatt J (as his Lordship then was) said in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (at [[22]](https://jade.io/citation/11736405/section/140724)):

… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

1. Whether, as Full Court recently observed (in *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 (at [239] per Allsop CJ, Besanko and Middleton JJ), this approach is best seen as a helpful working hypothesis rather than a form of rule or general practice of placing little reliance on recollections is not something that matters for present purposes. What presently matters is that, at least in part, such an approach has an unstated assumption: that is, that the contemporaneous notes and documents that do exist emerged as the extemporaneous and unvarnished product of the conduct of internal dealings or communications between the contesting parties. The confidence that can be placed in the narrative that emerges from the contemporaneous record is increased when the relevant documents can be seen as the unfiltered and sufficiently complete record of what people were thinking and doing in “real time”. In the present case, it is evident that Qantas always believed that any decision it made to outsource would be the subject of intense scrutiny by way of legal challenge. Unsurprisingly in these circumstances, it sought external industrial relations and legal advice. The process of obtaining specialist legal advice on matters directly relevant to the issues in this proceeding commenced at least by May 2020 (Ex P, item 80; T459.20–35) – almost six months before the outsourcing decision was made. To the extent that this advice was provided by lawyers, Qantas (as it is entitled to do), has claimed legal professional privilege over the content of the extensive communications in the period leading up to, and contemporaneous with, the outsourcing decision. This legal advice came from highly experienced industrial relations solicitors (and indeed, late in the process, by junior counsel subsequently briefed to appear in this proceeding).
2. By way of an example as to the extent of the very early involvement of lawyers, in June 2020 (immediately prior to the GMC discussing the risks associated with a full exit from in-house ground operations), a claim for legal professional privilege by Qantas is maintained over four copies of a draft of industrial relations advice proposed to be given by a long-standing external industrial relations consultant retained by Qantas (Ex P, Part 2, items 19, 20, 75–6, 81–4 and 88–9; Ex Q); at around the same time, a meeting, lasting a day, was apparently held between Mr Colin Hughes (the executive responsible for delivery of airport operations at Australia’s ten largest airports) and Herbert Smith Freehills (**Freehills**): Ex 1, 1812.
3. In these circumstances, unlike some other cases where decisions are impugned, it is unrealistic to assume uncritically that the decision making process adopted, and the documents relating to or recording the decision, materialised spontaneously through some sort of organic process or represent a sufficiently complete record of relevant communications. Even early on, there was an awareness that any business record created may end up being subject to subsequent critical scrutiny. This is not to say it is open on the evidence to find that documents were deliberately created or drafted so as to dissemble the true position, but it would be jejune to proceed on the basis that the documents can be assumed as representing a spontaneous and complete picture. Two examples illustrate this point. *First*, as will be detailed below, it emerged that negative advice, highlighting the industrial risks of a proposal for outsourcing, was given by Qantas’ external industrial relations adviser orally and this apparently valued adviser attended a number of relevant meetings of which there is no contemporaneous record of any of his oral representations. It might be thought a reflection of Qantas’ careful and circumspect approach, that even an early draft prepared by a long-standing industrial consultant as to risk, would be passed by external solicitors. *Secondly*, the final process of making the outsourcing decision occurred after at least some of the contemporaneous documents were apparently settled by lawyers. I hasten to stress that there is nothing wrong with any of this and no inference adverse to Qantas is open to drawn because it has claimed legal professional privilege over a large number of communications during the period with which this dispute is concerned. Nor, as I explain below, is it at all surprising that legal or industrial advice of the nature sought was obtained. But it does rather highlight the importance of a representation apparently intended to be made by “voice-over” (and hence not intended to be recorded in writing) (see, for example, below at [63]) or, to the extent they exist, any representation made in a document thought mistakenly to be protected from disclosure as being privileged. Without impugning the integrity of the authors of documents, it is naïve to ignore the reality that people often write or speak with greater candour if they consider their comment is going to be kept confidential.
4. Further, despite the vast array of material included in the court book (most of which was not received into evidence), it is noteworthy that some documents one might intuitively expect to exist, were not created.
5. Although category based discovery was initially proposed by the parties, an order was made for standard discovery: FCMH, 22 December 2020, T10.40–11.2; T13.19–14.39. A List of Documents and then an Amended List of Documents was filed, both verified by the Head of Industrial Relations at Qantas. Those lists do not contain any documents in Part 3 (which is to include discoverable documents that have been, but are no longer in the control of Qantas); hence it is possible to proceed on the basis that *all* directly relevant discoverable documents that were created are extant and have been listed (the non-privileged in Part 1 of the List, and the privileged in Part 2). With one important exception (which arose because handwritten notes of one employee on a typed document were scanned and sent by another employee by email), there are no documents recording oral communications, by way of file notes or handwritten notes.
6. It is also worth giving an example of some classes of documents, which do not exist. Mention has already been made of the GMC. The GMC is comprised of the leading executives within the business. It is described in two policy documents of Qantas and its website as an “executive decision making forum” (Ex D, E and J), and is said to set “the broad strategic goals and parameters for the entire Qantas Group” including, relevantly, developing the three year integrated recovery plan, and was the “forum for the most senior management of Qantas to meet and exchange information, and to consider and provide feedback on risks and opportunities arising from proposals currently being considered for implementation by any one of [the] senior managers”: see the affidavit of Mr David (at [8]–[9]). Although it was contended by Qantas, consistently with the affidavit evidence, that the responsibility and authority to develop, decide upon, and implement strategies and options relating to individual business units did not rest with the GMC, it is obvious that the GMC met very regularly during what was perceived to be a crisis for the company, and played a critical role in discussing the recovery of Qantas from the pandemic. Findings will be made about the role of the GMC below, but the preliminary point to be made is that during the period with which we are concerned, no minutes or notes were discovered as to any of its discussions. Nor are there any minutes or notes discovered of a GMC Sub-Committee or the Project Restart Steering Committee (**Steering Committee**) formed by the GMC which dealt with the implementation of the proposed outsourcing plan: see Ex 1, p 2674–9. It is unnecessary to make any findings as to why such documents were not created, indeed to do so would to be engage impermissibly in speculation. Closely prepared presentations and papers prepared in advance of meetings are available, but to the extent it is relevant to work out what actually happened at the GMC meetings, or GMC Sub-Committee or Steering Committee meetings (or indeed during almost all meetings between the witnesses discussing the outsourcing proposal), this task is not assisted by any contemporaneous record or note handwritten or typed in “real time” by a participant at those meetings.
7. Finally, as to the documentary record, there is also a class of documents which exist (or are likely to exist) recording contemporaneous communications which, somewhat surprisingly, have not been sought to be produced. Mr David gave evidence, in response to a question I asked following reference being made to texts, that he had not been asked by anyone “to look for your texts which might be relevant to these issues”: T751.31. Although it was clear that at critical times Mr David had been in SMS communication with in-house legal counsel (and possibly other persons called as witnesses), no attempt was made by the Union to procure any text material by way of subpoena or a call under s 36 of the *Evidence Act 1995* (Cth) (**EA**) (and any such text documents as did exist were presumably not asked for by Qantas in compliance with its discovery obligations because they were not within its custody or control). Whatever the reasoning behind this forensic choice by the Union, it meant the Court did not have access to a class of informal communication produced at critical times, which apparently did exist (although how many of such communications did exist, between whom – other than between Mr David and in-house counsel – and how relevant these communications may have been, is entirely speculative).

## B.2 The Affidavit Evidence

1. This was a case where evidence in chief was given by affidavit. Consistently with the terms of the *Employment and Industrial Relations Practice Note (E&IR*-*1)* (at [9.1]), at the first case management hearing (**FCMH**), I raised with the parties my preference that evidence in chief in relation to controversial facts be led orally. In doing so, I had in mind both the terms of the Practice Note and the sort of considerations thoughtfully discussed by the Hon Justice A Emmett writing extra-judicially in his article, ‘Practical Litigation in the Federal Court of Australia: Affidavits’ (2000) 20 *Australian Bar Review* 28, where that very highly experienced judge observed (at 28):

Where an assessment of credit is required, a judge will have a much better prospect of assessing a witness who gives evidence in chief orally rather than being exposed to cross-examination immediately upon entering the witness box.

1. Qantas expressed a “strong preference” for affidavits (FCMH, T21.16) and senior counsel of the Union perceived some advantages in written evidence in chief, despite my indication (FCMH, T19.41–20.2) that:

I’m always conscious of what Lord Buckmaster said – and this is no [reflection on] any party, but it’s a famous quote that used to be repeated constantly by the Honourable T.E.F. Hughes AO QC, and that is that the truth comes out of affidavits like water from a leaky well, whereas people come along and tell their story in the witness box, there might be a better chance of the account being given in a more spontaneous way, and it may save a lot of money and cost and time.

1. This aphorism was one I had mentioned in *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; (2019) 377 ALR 234 (at [269](https://jade.io/article/706438/section/23952) [110]–[113]), where I also repeated the comment made by Lord Woolf MR contained in the *Access to Justice Report, Final Report* (HMSO), 1996 (at [55]) that:

Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting.

1. In citing my observations in *Lloyd v Belconnen*with apparent approval in *Queensland v Masson* [2020] HCA 28; (2020) 94 ALJR 785, Nettle and Gordon JJ observed (at 810 [112]):

The oft unspoken reality that lay witness statements are liable to be workshopped, amended and settled by lawyers, the risk that lay and, therefore, understandably deferential witnesses do not quibble with many of the changes made by lawyers in the process – because the changes do not appear to many lay witnesses necessarily to alter the meaning of what they intended to convey – and the danger that, when such changes are later subjected to a curial analysis of the kind undertaken in this matter, they are found to be productive of a different meaning from that which the witness intended, means that the approach of basing decisions on the *ipsissima verba* of civil litigation lay witness statements is highly problematic. It is the oral evidence of the witness, and usually, therefore, the trial judge’s assessment of it, that is of paramount importance.

(Footnotes omitted).

1. These comments of their Honours have real resonance in this case.
2. It will be necessary to return to this topic below, but for the purposes of this introduction and explaining my approach to fact-finding, while having appropriate regard to the affidavits, in relation to matters of controversy, it is worth noting I have placed “paramount importance” on the contemporaneous documentary case (such as it is and subject to the important qualifications identified above) and my assessment of the oral evidence adduced during cross-examination and re-examination.

## B.3 The Oral Evidence

1. When it comes to assessing the oral evidence, speaking generally, it is noteworthy that at times it was obvious how chary some Qantas witnesses were of making any concession, however obvious that concession might be and how, sometimes non-responsively, they re-enforced what the witness perceived to be important points that: (a) no decision was made by anyone but Mr David on 30 November 2020; and (b) any recommendation or later decision to outsource was for reasons wholly unconnected to any proscribed reason. The witnesses, to my observation, were very well prepared and had obviously been taken carefully through all the materials (including, apparently, sometimes material that they had no involvement in preparing). I am not being critical of those preparing the witnesses in making this remark, who no doubt acted within appropriate professional constraints, but for whatever reason, there was a general wariness and lack of spontaneity of the oral evidence and this (like the other aspects of the evidence I have mentioned) has made fact-finding a somewhat more challenging exercise than in many cases when the oral evidence (assessed together with the documentary record) allows a tribunal of fact to feel a real sense of confidence that a complete and candid picture has emerged of what went on in “real time”.

## B.4 Relevance of Challenges to Fact Finding

1. I have spent time focussing on these challenges to fact-finding by way of introduction because, as I remarked to the parties at the time of opening, this is, after all, a facts case. Who made the outsourcing decision and who materially contributed to it, are questions of fact. Whether the outsourcing decision was made or affected by a person holding a prohibited reason, although a subjective enquiry, is also a question of fact (remembering, as Bowen LJ famously said: “the state of a man’s mind is as much a fact as the state of his digestion”: [*Edgington v Fitzmaurice*](https://jade.io/citation/1319850) [1885] 29 Ch D 459 (at 483)).

# C FACTUAL FINDINGS AND THE PRINCIPLED APPROACH

## C.1 The Background and Non-Contentious Facts

1. There are several matters not in dispute, as is evident from a Statement of Agreed Facts, which became Exhibit A. There was also a large volume of affidavit evidence led by the Union (most of it irrelevant) that was not the subject of any challenge by Qantas. That evidence set out the long history of the relationship between the Union and Qantas.
2. To set the scene, it is useful to set out some background facts from Exhibit A, which I find for the purposes of the proceeding:

**D.1. Impact of COVID-19 on Qantas’ operations**

12. From January 2020, when the virus responsible for the COVID-19 pandemic first entered Australia, and ongoing, the Commonwealth Government, the governments of various Australian States and Territories and various international governments (including the governments of those countries which comprise Qantas’ international passenger network), have implemented various measures in response to the COVID-19 pandemic, the precise details of which have varied from time to time, many of which have dramatically curtailed the ability to engage in, or the demand for, passenger air travel, both domestic and international.

13. As a result of the COVID-19 pandemic and the progressive impact of the matters described in paragraph 12 above, during the period from January 2020 and ongoing:

(a) 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), and thereby passenger flights, on their respective international networks; and

(b) 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), and thereby passenger flights, on their respective domestic networks (including for regional, intrastate flights).

1. Exhibit A then outlined “Qantas’ immediate response to COVID-19” – detailing reductions in flight capacity and suspensions, the standing down of its employees and the “JobKeeper Scheme” – and continued:

20. On 5 May 2020, Qantas announced to the market that if current conditions persisted, the Qantas Group had sufficient liquidity until at least December 2021, on an average net cash outflow rate of $40 million per week on and from 30 June 2020.

**D.3. Qantas’ recovery planning from COVID-19**

21. On 25 June 2020, the Qantas Group announced a three-year recovery plan (**Plan**). The Plan involved three immediate priorities:

(a) ‘Rightsize’ the Group’s workforce, fleet and other costs according to demand projections, with the ability to scale up as flying returns;

(b) ‘Restructure’ to deliver ongoing cost savings and efficiencies across the Group’s operations in a changed market; and

(c) ‘Recapitalise’ through equity raising to strengthen the Group’s financial resilience for recovery and the opportunities it presents.

22. On 1 July 2020, Qantas and TWU representatives met in relation to voluntary redundancies.

23. On 27 July 2020, Qantas provided the TWU with information in relation to expressions of interest outcomes in anticipation of consultation meetings to occur the following day.

24. On 20 August 2020, the Qantas Group released its full year results for FY2020. Those results indicated, amongst other things:

(a) a $124 million underlying before tax profit for FY2020, which represented a 91% reduction compared to the prior financial year;

(b) a $2.7 billion statutory before tax loss;

(c) a $4 billion drop in revenue in the second half of FY2020, due to COVID-19 and associated border restrictions;

(d) the revenue of the Group fell by 82% in the fourth quarter of FY2020; and

(e) looking forward, the Group was anticipating a significant underlying loss in FY2021.

1. Exhibit A went on to outline a series of anodyne facts leading up to the outsourcing decision. But those uncontested facts form a component of a broader, disputed narrative, and I will recount them chronologically below.
2. While dealing with context, it must be stressed that the effect on commercial airlines of COVID-19 cannot be overstated, but need not be restated in any detail: see, for example, *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3)* [2020] FCA 1428; (2020) 299 IR 100 (at 118 [27]–[28] per Flick J). In Australia, there has been a drastic reduction in demand for air travel due to the closure of international and domestic borders, the requirement for international arrivals to undergo hotel quarantine and a reduction in the number of international arrivals permitted by the Federal, State and Territory Governments in response to new strains of the virus. Unsurprisingly, the extraordinary impact of Government measures taken in response to the pandemic on Qantas’ commercial viability is not disputed by the Union.

## C.2 Further Unchallenged Background Evidence

1. As noted above, the Union’s evidence as to the relationship between the Union and Qantas, was not the subject of challenge by Qantas. For clarity, to the extent that the Union led evidence in relation to the in-house bid (**IHB**) process and the mechanics of its interactions with Qantas, although this evidence was again unchallenged, I address it in Section C.7 below (as, to the extent it has relevance, it conveniently fits within the narrative set out in that section).
2. To the extent that any of the pre-2020 evidence matters (and it is does not matter very much), the Union’s evidence in chief establishes that:
3. in the late 1990s, Qantas began to use labour hire companies for, among other things, ground handling operations at some Australian airports, but the Union negotiated to maintain its members performing ground handling operations by submitting successful tenders on their behalf for their own jobs;
4. in 2002, the Union received information indicating that Qantas intended to tender for work in entire areas, such as the baggage room at Melbourne Airport and the Union engaged in discussions with Qantas to attempt to minimise the use of labour hire companies;
5. in 2003, Qantas agreed to the Union’s proposal that labour hire workers working side by side with Qantas employees would receive the same amount as the employees under the relevant enterprise agreement – this would act as a disincentive to Qantas to reduce employee numbers;
6. in 2007, Qantas made decisions to outsource work at a number of Australian ports, including Hobart, Launceston and Coolangatta, the Union tendered unsuccessfully on behalf of its members for their jobs and negotiated redundancy packages for some members;
7. in late 2007, Qantas announced its intention to put work out to tender by Union members at Adelaide Airport, and Union members took protected industrial action to protest that proposal – the matter was resolved through discussions between Qantas and the Union;
8. prior to around 2008 to 2009, the Union and Qantas had a good working relationship;
9. since that time, the relationship became more strained, as the Union conducted campaigns on issues relating to security of employment in Qantas and sought to limit the extent to which Qantas could contract out services provided by Qantas employees who are members of the Union;
10. in 2008, Qantas announced it was forming a new company, QGS, to provide ground handling services as an internal labour hire provider. The Union opposed the introduction of QGS on the grounds that it threatened job security and was inconsistent with Qantas’ commitments made to the Union in bargaining for security of employment and contracting out functions; and
11. in 2009, the Union campaigned against the establishment of QGS and undertook what was found by Moore J to be unprotected industrial action (*Qantas Airways Ltd v Transport Workers’ Union of Australia* [2011] FCA 470; (2011) 211 IR 1).
12. More relevantly, in recent times, both the Union and Qantas have been critical of each other and have taken opposing positions in law reform and regulatory matters. Further, by the beginning of 2020, after a number of instances of industrial action taken by Union members employed by Jetstar (a subsidiary of Qantas) in late 2019 and early 2020 (in relation to bargaining for a replacement enterprise agreement), the relationship had soured to the point where Mr Alan Joyce, Qantas’ Chief Executive Officer, considered the Union to be “militant”, and said so publicly in the media. Consistent with this description and the evidence generally, it is fair to describe the relationship between Qantas and the Union, by the time we get to the events the subject of these reasons, as being one which was not characterised by a high of degree of trust or mutual regard. Although the witnesses called by Qantas may not have been aware of the details of the points of difference between the Union and Qantas, I am satisfied that the members of the Australian Airports management team understood that the general relationship between Qantas and the Union by 2020 was antagonistic.

## C.3 Peripheral Disputed Facts

1. Before turning to the substance of the dispute, a few peripheral factual issues remain on the pleadings, which can be disposed of in a summary fashion given the lack of challenge to the Union’s evidence in chief.
2. *First,* it was disputed whether the employees affected by the outsourcing decision were in large part members of the Union. *Secondly,* it was disputed whether the employees affected by the outsourcing decision constituted the bulk of the Union’s members in Qantas’ airline business. Both of these matters were established beyond peradventure by the Union’s evidence in chief (and, for that matter, in numerous business records of Qantas). *Thirdly,* there was a dispute as to the impact of the outsourcing decision on the Union and its members. It is not in dispute that given the first and second disputed facts above, the effect of the outsourcing decision would be to remove the vast majority of Union members from Qantas’ business. For reasons that are unclear, it was disputed whether the Union’s industrial influence would be reduced in Qantas’ business. That disputed fact was the subject of evidence from the National Assistant Secretary of the Union (although this evidence was limited to evidence of the belief of the witness pursuant to s 136 of the EA). But despite this limitation on the use of this evidence, that opinion is consistent with the inherent likelihood of the diminished role of the Union following any outsourcing and the common ground that the only members likely to remain in Qantas’ business will be in the freight part of the business.

## C.4 A Summary of the Nature of the Key Disputed Facts

1. In turning to the more substantive factual matters that were in dispute, as may already be evident, the factual dispute as to the outsourcing decision at trial had a number of components: *first*, a dispute as to the identity of the operative decision maker; *secondly*, if the decision maker was Mr David, the parties disagreed as to what persons may have had a “material effect” on the decision; and *thirdly*, what, in truth, was on the mind of all of those alleged to be materially involved in the decision and whether there were any proscribed reasons, in particular given Qantas’ then relationship with the Union and the unique state of affairs occasioned by the pandemic in 2020.

## C.5 Principles of fact finding

1. Two matters of principle relating to fact-finding deserve attention because of the focus they received during final submissions: *first*, the operation of s 361 of the *Fair Work Act 2009* (Cth) (**FWA**); and *secondly*, the proper scope of the so-called “rule” in *Browne v Dunn* (1893) 6 R. 67.

#### The “Reverse Onus”

1. During the course of its opening and submissions, the Union repeatedly stressed the central importance of what it called the “reverse onus”. At times, and particularly in parts of the UFS1, this submission seemed to be put in such a way as to suggest that Qantas bore the evidentiary and persuasive onus in relation to the proof of every fact in the case. No doubt inadvertently, this submission did not reflect the true operation of s 361 of the FWA.
2. There is no need in this case to spill more ink on the principled approach to determining the question of whether a person took certain action for a prohibited reason. With respect, the relevant principles were summarised usefully by Wigney J in *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)* [2017] FCA 1046 (at [297]–[303]).
3. It is well established that the question of fact as to the reason or reasons for which adverse action was taken, must be answered in the light of all relevant facts and circumstances found and the inferences available from them. As the trier of fact, it is first necessary that I find the facts from the evidence admitted and from any inferences properly arising from that evidence (and inferences available to be drawn from the absence of any material). Findings as to the relevant facts and circumstances need to be made first, before then embarking upon the logically subsequent task of assessing those facts and determining the legal consequences of having found them.
4. As noted above, the reason or reasons for the outsourcing decision are to be determined on the balance of probabilities. To discharge its legal onus on the ultimate question to be determined, Qantas has adduced evidence as to the substantial and operative reasons for the outsourcing decision, directed at proving that those reasons were not the proscribed reasons alleged. Given the nature of that evidence in chief, if the evidence as to the reasons is accepted, Qantas’ onus is discharged and the case of the Union must fail. Importantly, however, and at the risk of repetition, Qantas is correct to stress that the determinative issue in respect of which Qantas bears the onus is to be assessed *after* the receipt and consideration of the evidence capable of bearing upon it.
5. The approach to making findings as to the intermediate or adjectival facts must not be misunderstood. With respect, the submissions of the Union and its focus on the “reverse onus”, tended to obscure the necessity for me to find facts in the orthodox way, as Qantas emphasises. Qantas also notes that part of this process of fact-finding is recognising that the graver the consequences of a particular finding, the stronger the evidence needs to be in order to conclude that any fact is established on the balance of probabilities. Although this is reflected in s 140(2) of the EA, and is undoubtedly correct, I would only add, given that Qantas placed emphasis on this being a civil penalty proceeding, that in considering the “gravity of the matters alleged”, the focus is upon the particular factual allegations in the case, not an examination of the cause of action or issues at a level of abstraction. This makes sense when one considers the focus on the gravity of the finding is linked to the notion that the Court takes into account the inherent unlikelihood of alleged conduct, and common law principles concerning weighing evidence: see *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 (at 576 [137]–[138] per Branson J); *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 361–2 per Dixon J).

#### The Scope of the Rule in Browne v Dunn and its Present Application

1. It might be thought trite to set out the true ambit of the rule deriving from such a famous case, but given its prominence in the final submissions of Qantas and the competing position of the parties, it is necessary that I do so. This can be done by gratefully adopting what Goldberg J said in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169 (at 216­­–8) and by setting out the summary of the relevant principles by Vickery J in *Amcor Ltd v Barnes* [2012] VSC 434 (at [107]), where the following appears:

(a) The rule in *Browne v Dunn* is a rule of fairness which requires a party or a witness to be put on notice that a statement made by the witness may be used against the party or witness or to be put on notice that an adverse inference may be drawn against the witness or an adverse comment made about the witness in order that the witness may respond to that issue and give an explanation: *Browne v Dunn* [1894] 6 R 67 Lord Herschell LC (at 70), Lord Halsbury (at 76-7); *Bulstrode v Trimble*  [1970] VR 840 at 849; *Karidis v General Motors Holdens Pty Ltd* [1971] SASR 422 at 425-6; *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 44 ALR 607 at 623; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* [1998] FCA 806; (1988) 156 ALR 169 at 216.

(b) The significance of the rule is that it requires notice to be given of a proposed attack on a witness or on the witness’ evidence where that attack is not otherwise apparent to the witness. The rule does not require that there be put to the witness every point upon which his or her evidence might be used against him or her or against the party who calls the witness: *Browne v Dunn*, Lord Herschell LC (at 70); *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169 at 217.

(c) Where, it is manifestly clear that the party or witness has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling, such as where notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so obvious, that it is not necessary to waste time in putting questions to him upon it, the rule may be dispensed with, where no unfairness will arise: *Browne v Dunn*, Lord Herschell LC (at 71); *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*(1988) 156 ALR 169 at 217.

(d) Notice of the relevant attack need not necessarily occur in cross-examination so long as it is otherwise clear that it will be made: *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 44 ALR 607 per Hunt J (at 623); *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169 at 217-218.

(e) The necessary notice may be effected in pleadings, in an opening or in the manner in which the case is conducted: *Seymour v Australian Broadcasting Commission*[1977] 19 NSWLR 219 at 224-5, 236; *Jagelman v FCT* (1995) 31 ATR 467 at 472 -3; *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 145 ALR 1 at 15; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169 at 218. To this list I would add notice given through witness statements or affidavits exchanged in advance of the trial.

(f) The rule has its foundation in the fair administration of justice: *Browne v Dunn*, Lord Halsbury (at 76-7).

1. At least at first glance, the *Browne v Dunn* criticisms of Qantas might have an understandable genesis. The cross-examination of each witness called by Qantas did follow a common pattern. In large part, the cross-examination involved a type of “page turning” exercise whereby the witness was asked to read a particular part of a business record (on occasions not prepared by the witness) and then the cross-examiner put propositions to the witness based upon a representation contained in the document: on occasions simply by asking the witness to confirm the existence of the representation. On more than one occasion, I indicated to the cross-examiner that such an approach may not be of optimal assistance (given I could read the documents myself) and, if propositions were to be put to a witness, they should be put directly: see, for example, T133.20–30.
2. Of course, as noted above, Mr David gave his reasons for the outsourcing decision, and Messrs Paul Jones, Colin Hughes and Paul Nicholas gave evidence as to their actual reasons for any involvement in the decision and each specifically denied that any part of their reasons included any of the proscribed reasons. Qantas contends that their “evidence as to those reasons was not directly the subject of cross-examination or any challenge in the course of their oral evidence”: QFS1 [3(e)–(f)]. It followed, Qantas submitted, that the evidence of the witnesses in this regard ought to be accepted.
3. The cross-examination was thorough and senior counsel for the Union displayed a mastery of the detail of the documents but, with no intended disrespect to the cross-examiner, although not milquetoast, it was not particularly direct nor forceful. Qantas asserts there was no suggestion put to any of these witnesses that their evidence given orally and in their affidavits as to their reasons was concocted, mistaken or unreliable: see, for example, QFS1 [46]. But it is important not to confuse different (and legitimate) styles of cross-examination with substance.
4. It must be accepted that as a general proposition unchallenged evidence which is not inherently incredible, ought to be accepted by the tribunal of fact (although such evidence can be rejected if it is contradicted by facts otherwise established by the evidence or particular circumstances point to its rejection): *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 (at 370–1 per Gibbs J, with whom Stephen J agreed, and Murphy J generally agreed); *Ashby v Slipper* [2014] FCAFC 15; (2014) 219 FCR 322 (at 347 [[77]](https://jade.io/article/315324/section/141) per Mansfield and Gilmour JJ).
5. But this does not mean that the evidence given as to the absence of prohibited reasons is bound to be accepted in this case for two reasons: *first*, I still have to be satisfied the evidence is sufficiently cogent for it to be accepted on the balance of probabilities (a topic to which I will return in detail in Section E.2 below); and s*econdly*, because, in any event, a fair review of the transcript does reveal that each of Mr David and Messrs Jones, Hughes and Nicholas, were sufficiently confronted with the proposition that despite the evidence as to their reasons or motivations they had given in chief, they were, in fact, motivated by the pleaded prohibited reasons. It suffices to set out in the below table some non-exhaustive examples of Mr David and Mr Jones being confronted with the prohibited reasons during their cross-examination:

|  |  |  |
| --- | --- | --- |
| **Witness** | **Reference** | **Transcript Extract** |
| Mr David | T764.16–765.4 | MR GIBIAN: And to the extent that you made a decision about this, your reasons for doing so included the same reasons that you had in August for embarking upon the outsourcing proposal? --- Which were three commercial reasons, yes.Well, they included, didn’t they, that you knew that there were a large number of TWU members within the workforce of ground handling? ---That wasn’t what the decision was based on.And they included that you didn’t – you wished to avoid Qantas being in a position where it needed to bargain with and negotiate with the TWU in the future? --- That’s not the reason that we made the decision.That you wanted to avoid the legacy conditions within the QAL agreement and conditions within the QGS agreement? --- That’s not the reason we made the decision.You wished to access flexible EBAs that were available to third party providers? --- That’s not the reason we made the decision.That you wished to avoid the TWU and employees being in a position to exercise industrial power by taking protected industrial action in the future? --- That’s not the reason we made the decision.You wanted the employees to prevent – or you wanted to prevent employees disrupting services in the future by taking protected industrial action? --- That’s not the reason we made the decision.In answering all of those questions, you indicated that that was not the reason “we made the decision”. Who was that you were referring to as having made the decision? --- I made the decision.Well, why did you refer to “the reasons why we made the decision”, in answering each of those questions? --- Because it has been a long day and I would have used the word “we” instead of “I”. I don’t often use the word “I”.And could I just suggest to you that all of those answers were not truthful answers? --- Well, I can tell you they were truthful answers. Suggest that. I refute that. |
| Mr Jones | T600.6–23 | MR GIBIAN: And the reasons that you had for endorsing the final outsourcing included the same reasons as you had as proposing that path in August and before, namely, that you knew – or you didn’t wish to have to negotiate with the TWU in the future? --- No.That you knew that there was a large number of members of the TWU within the ground handling workforce who would be influenced by recommendations or the positions adopted by the TWU? --- No.That you wished to – want the business to avoid the conditions under the QAL and QGS enterprise agreements? --- No. That you wished to avoid the TWU having – being able to exercise industrial power by its employees taking protected industrial action and bargaining in 2021? --- No.That you wanted to prevent the employees from disrupting services and interrupting services by bargaining and taking protected industrial action after the expiry of the enterprise agreement? --- No. They were not the reasons. |
| T594.22–39 | MR GIBIAN: Now, in your involvement in recommending, as you had been doing for some months, that Qantas outsource the ground handling operations that it undertook in-house, at least part of the reasons for you making that recommendation is that you didn’t wish to have to negotiate or bargain with the TWU in the future? --- No. That you knew there was a high level of TWU membership and the TWUs position would be persuasive within the workforce? --- No.That you didn’t want employees to be in a – or the TWU to be in a position where it could have significant bargaining power in 2021 because the employees could take protected industrial action? --- No.And that you didn’t want Qantas to continue to have to pay their rates and afford the conditions of employment in the QAL and the QGS enterprise agreements? --- No. And that you knew if the outsourcing was pursued, Qantas would not need to bargain with ground handling employees or be subject to protected industrial action taken by those employees? --- No. |

1. The confrontation of each witness in this way was dismissed as “mere puttage” (to repeat a queer but pithy description used by Qantas). But the reality is that given the way the case was pleaded and opened, whatever else is unclear, one thing is pellucid: each witness called by Qantas had notice beforehand there was an intention on behalf of the Union to contend the outsourcing decision was not made by Mr David alone and that the decision was motivated by a prohibited reason or reasons. The content of the affidavits filed Qantas’ witnesses and the exchange of submissions before trial demonstrates this beyond sensible argument. Given the way this litigation was fought from the outset, it is artificial to contend that the witnesses did not understand the reasons they had given in chief for doing what they did in relation to the outsourcing decision were squarely in issue. Although, again without intended criticism of senior counsel for the Union, it is fair to remark that other cross-examiners may have impeached the testimony of the witnesses in a less unpresuming manner, I am satisfied that save in one respect, no relevant unfairness could be said to arise.
2. The qualification to this conclusion does not really matter (given what I have already said about the ambit of the case allowed to be advanced by the Union) but should be noted for completeness: I do not consider that any suggestion that the GMC, on around 5 August 2020, actually *made* the practical decision to proceed with the outsourcing proposal which “effectively resulted” in the outsourcing decision was sufficiently put to the witnesses who attended such a meeting or became aware of the meeting’s deliberations. Indeed, the cross-examination largely proceeded on the express basis no decision had been made until November, as had been pleaded.

## C.6 Qantas’ Witnesses, their Role and their Credit Generally

1. An organisational chart was helpfully prepared by Qantas, which set out the hierarchy within Qantas and the position in that hierarchy of its witnesses. That chart, which I accept is accurate, is set out below. Qantas’ witnesses called were (in order) Mr Hughes, Mr Finch, Mr Nicholas, Mr Jones and Mr David. I will deal with the witnesses in a somewhat different order, but what follows is a general description of their roles and how the witnesses related with one another.
2. I will also in this section make general observations as to the credit of these witnesses. In doing so, I am conscious that both parties have made very extensive submissions as to credit. I have considered these submissions, but it would add further to an already lengthy judgment to set them out in full, except where I consider them to be of especial importance. Further findings as to the individual conduct of the witnesses and, to the extent relevant, their state of mind, will be made when setting out the chronological narrative of what occurred in Section C.7 below



#### Mr Jones

1. Mr Jones is no longer employed by Qantas, but is the former Chief Operating Officer of Qantas Airlines, and before taking on that position (in mid-2020), he was Executive Manager of Freight & Australian Airports. Mr Jones reported to Mr David, and Mr Hughes reported to him. Mr Jones was a member of the Qantas Airways Leadership Team (**QALT**), which comprised senior leaders across Qantas’ business and included Mr David. In April 2020, he instructed Mr Hughes to commence work to identify potential options to achieve financial targets in response to the pandemic. Mr Jones also attended a number of GMC meetings and made presentations at those meetings, which included options and recommendations for the business.
2. It is apparent that Mr Jones and Mr David worked closely together in their roles and there is no reason to doubt that they exchanged their views with one another in relation to matters they perceived to be important to the business of Qantas’ Australian Airports – it is more likely than not that they would have been candid with one another in relation to their views as to the options and recommendations for the business of Australian Airports discussed at GMC meetings.
3. Given that Mr Jones has now taken up a position with a competitor, one might have thought he may have been a witness who approached the giving of evidence without any of the conscious or subconscious inhibitions that sometimes exist when a witness considers that some aspect of their evidence may be adverse to the interests of their employer. Despite this, I regret to say that Mr Jones was an unimpressive witness. Although this was a view informed by several matters, it is appropriate to give a specific and important example of the unsatisfactory nature of his evidence. This concerned his handwritten annotations on a document prepared by Mr Nicholas: Ex 1, p 1178.
4. Mr Jones did not make any reference to this document in his evidence in chief and later gave evidence (at T602.26–603.2) that “I don’t have this document” and he assumed that Mr Hughes (who scanned it and sent the scanned document to Mr Nicholas) took the original of the document with him. The original of the annotated document was not tendered and it is unclear whether it exists, but a copy of the handwritten notes was discovered pursuant to the standard discovery order made (apparently because Mr Hughes happened to scan the handwritten notes made by Mr Jones and send the scanned annotated document to Mr Nicholas). Mr Hughes, who gave evidence before Mr Jones, had been cross-examined closely on the document (T118.31–119.45) and Mr Jones saw a copy of the document again for the first time when he had what he described as a “pre-discussion” shortly before he gave evidence and was being prepared for his cross-examination: T.602.38. Of course, I imply no criticism of the preparation of Mr Jones for cross-examination in the document being provided to him (notwithstanding he had not seen it since its creation nor given evidence in chief about it). But I mention the fact the document was drawn to his attention during the “pre-discussion”, because when it came to Mr Jones being cross-examined shortly thereafter, he would have thought about the document and its contents, presumably with an awareness that it was likely he would be cross-examined on his handwritten representations.
5. It suffices for present purposes to note that Mr Jones agreed that at around the time this document was created, discussions were taking place with Mr Nicholas and Mr Hughes and, from those discussions, he had understood that the combined view of Mr Hughes and Mr Nicholas was that the “above the wing” part of the workforce ought be retained (subject to a resizing exercise) and that the “below the wing” part of the workforce ought be tendered out: T.515–30. The annotated document was prepared during the course of the discussion leading up to the meeting of the GMC on 29 May 2020 where a presentation occurred entitled “People Recovery Plan: GMC Update” (being a meeting which Mr David and Mr Jones attended). Next to the handwritten notations was a reference to why options were different for “Customer vs Ground Ops”. Mr Jones accepted that notation read as follows:

Voice-over

> labour [sic] Gov lock in benefits

+ open EBA’s 2020 DEC?

1. Although regrettably lengthy, some extracts from the evidence (T516.14–526.15) as to this document illustrate the nature of the evidence he gave:

MR GIBIAN: You then made a hand notation in a box or two hand notations in boxes next to that typewritten text. The top box seems to me to read “voiceover”, and then there’s an arrow – underlined, and then there’s an arrow: “Labor government, lock in benefits”? --- Yes. I would agree that’s what that says.

Have I misread that or not? --- No. I think that is what that says.

What does “voiceover” mean? --- So I don’t recall, but it probably meant not for the presentation purposes being prepared. So I don’t recall the exact discussion at that time.

That is, you’re referring to information that you proposed to convey orally together with the – accompanying a presentation rather than including the written text of the presentation? --- So it’s speculative, because I don’t recall, but yes.

Right.

HIS HONOUR: Well, can you think of anything else that it could be a reference to – “voiceover” – than what you’ve assisted us with? --- I – I can’t.

Yes.

MR GIBIAN: Yes. And what you propose to deal with by way of an oral presentation reads, “Labor government, lock in benefits”. That’s what – you can read your writing, can you, and that’s what it says? --- Yes.

Is that a reference to a – the possibility that there would be a future Labor government, and you wished to lock in whatever cost-saving benefits you were able to obtain before that might happen?---It’s speculation as to what that means, because I don’t recall.

Well, you refer to the Labor government; do you see that? --- I do.

There was not at that time a Labor government – federally, at least; is that right? --- No. Just at the state level.

Only some states, obviously? --- Some, not all.

Would you understand that to be a reference to the federal government? --- Speculatively, yes, but I don’t recall.

And did you think – well - - -

HIS HONOUR: Sorry. You - - -? --- Yes. Yes, your Honour.

- - - keep on saying “speculative”. I don’t want you to speculate? --- Yes.

What I want you to do is to give your best truthful response to what is being put to you. If you’re not sure, say you’re not sure, by all means, but you’re the author of those words? --- Yes.

And I think what the cross-examiner is asking you to do is doing the best that you can to assist us with what you would have meant, given you’ve got the document in front of you, given you’ve got the words that you wrote less than a year ago – yes. Go on.

MR GIBIAN: Thank you, your Honour.

Would you accept that “Labor government” is a reference to a government at a federal level, and you would have differentiated if you were talking about particular state or territory governments? --- So I – I don’t – I genuinely don’t recall what this was – the discussion or context that I wrote those notes.

Well, the question I asked you is you accept that it’s – that can only be sensibly read as a reference to government at a federal level rather than government at a particular state or territory? --- I don’t recall the discussion at the time.

Qantas’ customer service and ground operations operate in each state or territory, do they not? --- They do.

… And what you were discussing here was the options for the customer service, above the wing and ground operations below the wing business of Qantas Airports generally, that is, the whole of those business units; correct? --- Correct.

That operate across all state and territories in Australia; correct? --- They do.

And it is the government at a federal level that would be relevant to all – the whole of that business; correct? --- Federal would be relevant to the whole of that business, yes.

And you would infer – you would accept that the natural inference from that is you were talking about government at a federal level; correct? --- Again, I – I don’t recall the conversation that occur.

…

MR GIBIAN: … And what you were referring to was locking in benefits, that is, obtaining whatever benefits you were referring to in a manner which was sustainable for Qantas in the event that Labor became elected at the federal level? --- So it – it may have meant that. It may have meant a number of things. It may have meant that – the concern that the benefits would not endure over time in an outsourced sense. So it has multiple possible meanings, the way I understand it.

All right. Firstly, I’ve apprehended correctly you say you cannot recall what you meant by writing, “voiceover – Labor government – lock in benefits”; is that right? --- Yes.

At all, that is, you have no recollection at all about what you meant by that? --- I don’t recall.

**And the words alone, “Labor government – lock in benefits”, I suggest to you indicate what you were contemplating was that there would be a – in assessing the options, which option was superior, the need to lock in benefits in advance of a potential future Labor government was something that you were taking into account and wished to convey in the oral presentation to accompany the slides that you were preparing? --- So when I read that, sat here today, I think of two things: that’s one possible meaning, but another possible meaning is the concern that the benefits would not endure, post a Labor government.**

Well, firstly, what you’ve written is “lock in benefits” – that is, not words that indicate the benefits would not persist, but expressing a desire to lock in those benefits? --- I don’t recall the conversation, nor the meaning of what’s written here.

Whichever way it is, you’ve expressed two – well, you say you’ve expressed two possible permutations or possible meanings.

HIS HONOUR: Sorry. Can I just understand what the second one is? I didn’t quite catch that. So one is locking in benefits now, on the basis of if there’s a future Labor government, they’re locked in. They can’t be changed. The second one, I didn’t quite understand. If you could just explain that one to me again? --- Yes, your Honour. So – and reading this, if a Labor government were to get in, understanding that there was a conversation around site rates, it might mean that the benefits of outsourcing would not endure - - -

…

MR GIBIAN: … In relation to the second construction that you proffered of these words, namely, that you may have been referring to a concern that the benefits of outsourcing would not persist, you raise that that may relate to a future Labor government enacting site rates provisions. Is that what you said? --- That’s one of the possibilities, reading this here today. Yes.

That is, your recollection is that – well, did you have a concern at that time that in the future, if a Labor government were elected then, at a federal level, they may enact laws requiring site rates to be afforded to labour hire and outsource staff? --- So I was aware of that as a possibility.

…

**MR GIBIAN: … I’m just suggesting to you that you had a concern at that time that if in future Labor was elected at a federal level, they would enact laws that would constrain Qantas’ capacity to outsource staff or parts of its operations? --- No. I don’t believe that is what that was referring to.**

Well, you refer to a – at least one of the permutations that you were raising as to these words to site rates provisions, and an apprehension that site rates provisions would or might be enacted in the future by a Labor government. Correct? --- Yes. You asked me what possibly this could mean. I gave you two examples of what it might possibly mean, but that doesn’t – I don’t recall the conversation.

…

MR GIBIAN: … In writing the words, “voiceover, Labor government lock in benefits”, what you… were communicating that you would convey to the group management committee, together with a presentation, was that it was desirable for Qantas to lock in benefits in advance of Labor being elected in the future? --- No.

**And that the reason why it was desirable to lock in benefits in advance of Labor being elected at a federal level in the future was because you knew or you had a view it was possible Labor would enact constraints upon outsourcing of operations by employers, such as site rates provisions? --- No, that’s not what I understood at that time. I don’t recall the specific conversation around this, and I’ve provided multiple possible meanings as part of the questioning.**

Well, you did say that you knew it was a possibility that Labor would enact site rates provisions if elected in the future? --- I’m aware of that possibility at this point in time, yes.

Yes. All right, and what I’m suggesting to you is your awareness of that possibility was what you were intending to convey to the group management committee as to one of the reasons as to why it was desirable to lock in benefits now? --- And I’m saying no, because one of the possible conversations from that is that the benefits would not endure in an outsource sense.

**So one of the possibilities is – what I’m suggesting to you is one of the possibilities that you were raising was that you could lock in benefits now in advance of a law change that you apprehended may occur if Labor was elected. Correct? --- Well, I don’t recall the conversation.**

**Yes, but that’s one of the possibilities, correct? --- I understand that, yes.**

**Yes? --- Yes.**

And another possibility that you have raised is you’re saying that if Labor is elected in the future, they may enact laws which would mean that the benefits of outsourcing would not persist. Is that what you’re saying the other possibility is? --- Well, there may be other possibilities beyond those two as well, because I don’t recall the conversation.

Well, you haven’t raised - - -

HIS HONOUR: What other possibilities could there be, other than those two possibilities that you’ve identified? --- It could have been around discussions at a state level. I don’t recall. So yes, on the balance of probability, which was, your Honour, your question to me, I thought it related to federal but there could have been other meanings in terms of the Labor government. That’s – they’re the three.

Anyway, your evidence - - -? --- Yes.

- - - on your affirmation is you have got no idea, at this stage – at this remove – from May last year, after being reminded of this document and reminded of your handwritten notes, what those handwritten notes mean. Is that what you say to me? --- I don’t recall.

…

MR GIBIAN: … In the box underneath those words, you’ve written, “plus open EBAs 2020, December”. I’ve read that correctly? --- Yes.

…

Open EBA is a reference, you understand, to a circumstance in which an enterprise agreement has passed its nominal expiry date? --- Yes.

And you understand the effect of an enterprise agreement passing – or one effect of an enterprise agreement passing its nominal expiry date is that the employees are able to bargain for a new enterprise agreement to replace it? --- Yes.

And as part of that bargaining process, are able to take protected industrial action in connection with that bargaining process? --- That’s one of the opportunities through an open EBA, yes.

And you were aware of that at that time? --- I would have been aware of that at that time, yes.

And the EBAs that were open at the end of – in December of 2020 – that is, past their nominal expiry date at the end of 2020 – included at least the Qantas Airways ground handling – TWU ground handling EBA. Correct? --- Yes.

And you were aware of that at that point in time? --- I would have been aware of that at that point in time. Yes.

So what you’re suggesting there would also be part of the voiceover that you would – oral presentation that you would make to the group management committee, together with the slide presentation – is that you would convey that a consideration in assessing the options for the above the wing and the below the wing was that the QAL EBA was open in December of – past its nominal expiry in December 2020? --- So I would have been aware that the EBAs were open then. I’m – again, because I don’t recall this conversation – I don’t know whether that was related to a voiceover or not. It’s a separate box. But yes, it was a part of the – in terms of awareness that I had in May that there were open EBAs at the end of December for this workforce. Yes.

And you made that notation because – leaving the voiceover to one side – that was a relevant matter in assisting which options were superior for the above the wing and the below the wing workforces? --- Well, it was a matter of fact at that time that the EBAs would be open. I’m not saying that that was – because I don’t recall the conversation, so I don’t recall the specifics of what in relation to the open EBAs was discussed.

What I’m suggesting to – well, you made this note. Correct? --- Yes, I made the note.

On a document which was discussing the key activities going forward in evaluating how the options are superior for resolving the current state, and why different outcomes for customer service and ground ops. Correct? --- As part of this document, yes.

Including – the discussions at that time with Mr Hughes and Mr Nicholas were to the effect that tendering out the below the wing was the preferred option, as opposed to rightsizing for the above the wing workforce. Correct? --- During this period of time, yes.

Yes, and I’m just suggesting to you that the only reason you would have written down “open EBAs, December 2020” is because the fact that the Qantas Airways ground handling EBA was past its nominal expiry date at the end of December 2020 was relevant in assessing the options, or which option was superior? --- No, it wasn’t in terms of “relevant to the options”, but it was very relevant to any future plans around transitioning business, operational risk, etcetera, which comes out in future documents.

That is, it was relevant in assessing the options in that once the EBA has passed its nominal expiry date, there was operational risk because the employees could take protected industrial action. Correct? --- There is a number of reasons why it was a much higher operational risk in 2021. That’s one aspect of why.

So one aspect that was relevant and that you noted to be considered, among two notes that you made, was that once the Qantas Airways EBA in particular was open after December 2020, there was operational risk because the employees could take protected industrial action? --- I can’t draw that conclusion that that was the conversation at this time, because I don’t recall it.

Yes, but you agree that that was a consideration that existed at the time, and was in your mind at that time in terms of assessing operational risk? --- So as documented as we go through timeline, operational risk was a factor in the implementation of the option that was needed for addressing the financial targets. Yes.

HIS HONOUR: Does that mean the answer to counsel’s question is yes? --- Do you mind asking the question again? Sorry.

Ask it again.

MR GIBIAN: Moving aside from the note, which you say you can’t remember why you wrote it, at that time, you knew that the Qantas Airways EBA was open at the end of 2020, and that as a result there was operational risk in 2021 because the employees could take protected industrial action. Correct? --- No, that’s not what I believe was in my mind at this period of time.

…

The next entry is to mark – in the notation of “Voiceover”, I think you’ve agreed that you wrote that because – and you can’t provide any other explanation, other than that you intended that to be part of the oral presentation to accompany a slide show, rather than as part of the written document itself? --- No, I don’t know whether that relates to a voiceover or not.

I’m sorry. Leaving aside whether the EBAs reference appears under “Voiceover”, you agreed that the reference to “voiceover, before the Labor government lock in benefits” was intended to convey – you couldn’t pick any other explanation for it other than that it conveyed you intended to make that comment orally, rather than included in a written presentation. Correct? --- I think that makes sense, yes.

And the reason why you would make that notation is because you didn’t want that content written down, it was something that you wished to communicate only in oral form? --- No, that doesn’t mean that I didn’t want it written down. It may be that it was not relevant to the core conversation that was occurring, and I certainly don’t recall a conversation on this topic at the time, or in the subsequent GMC meeting.

The only reason why you would make a note about the voiceover was that you intended that that matter not be recorded in the written presentation and only be dealt with in the oral presentation; correct? --- Yes.

Because you did not want that matter written down and recorded; correct? --- I don’t agree with the “because”. I don’t recall what the conversation was on the voiceover.

1. As the emphasised part of the extract makes clear, there was somewhat of a tension in the evidence given. The witness affirmed that he could not recall the discussion or what the notes meant. Despite this, Mr Jones accepted that it was a logical possibility that his notes recorded his view that benefits should be locked in “now in advance of a law change that [he] apprehended may occur if Labor was elected”. But despite that possibility existing, and notwithstanding his professed lack of recollection, he was intent in rejecting the notion that he held the view it was “possible Labor would enact constraints upon outsourcing of operations by employers, such as site rates provisions” and he was also able to give affirmative evidence that he did not believe at the time that he was concerned “that if in future Labor was elected at a federal level, they would enact laws that would constrain Qantas’ capacity to outsource staff or parts of its operations”.
2. What the transcript does not convey was that Mr Jones was clearly uncomfortable in giving this part of his evidence, and his manner of giving it was unpersuasive. In making a general finding as to credit which relies, to a significant extent, on demeanour, I have borne in mind what the High Court recognised in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 (at 129 [31] per Gleeson CJ, Gummow and Kirby JJ), that is, that a body of research exists that casts doubt on the ability of judges to make accurate credibility findings based on demeanour. But this was a witness where I considered not only the content, but also the manner of giving evidence, to be unusually telling.
3. Qantas made extensive submissions as to why the evidence of Mr Jones was not evasive and characterised the credit submissions made by the Union as unfair. Despite the evidence of Mr Jones and the submissions of Qantas to the contrary, I have come to the conclusion that Mr Jones was feigning a lack of recollection as to what was in his mind when he made the handwritten annotations and was also pretending a lack of recollection as to what was discussed in the meeting when the words were affixed and whether he later conveyed to the GMC (by way of “voice over”) comments consistent with his annotations. He perceived he had a shelter in not confronting what the annotations may be thought to reveal about his contemporaneous mental processes, by not “speculating”. This evidence revealing a lack of memory about far from distant and unimportant events was in marked contrast to the detailed evidence he gave in chief as to his clear memory of other matters, all of which were consistent with the case of Qantas, such as, for example: (a) meetings of the QALT during which he recalled “Mr David and Mr La Spina made clear during this period that each Qantas business unit … would be required to achieve certain financial objectives”, which he went on the specify in detail; (b) various discussions with Mr Hughes and Mr Nicholas (following his instructions to Mr Hughes to commence work on identifying potential options “that could achieve specified objectives”) and as to their progress, and as to providing them with feedback and input as appropriate, and the fact that Mr Hughes and Mr Nicholas had synthesised the various objectives communicated to them into three key strategic imperatives, which he could specify in detail; (c) his recollections of the details of relevant matters that occurred at some GMC meetings he attended; and (d) as to the details of his reasoning processes at various times.
4. Parts of the evidence given were particularly troublesome, such as the last answer given in the extract above which I do not accept, and the initial unwillingness to accept the notion that he may have been talking about the possible election of a Federal Labor Government and indicating, without any rational basis I could understand, that he could have been making a reference to a State Labor Government. Qantas submitted that in circumstances where Mr Jones did not recall what the notation related to, all he could do was seek to assist the Court by explaining that the reference “could have been around discussions at a state level” (T522.45–47), but nevertheless accepting that the reference most likely related to the Federal Government: T522.45–523.2. That submission should be rejected. His professed lack of recollection was disingenuous and I find the notion that the discussion would be about State government matters was said in an attempt to obscure what he meant by the notation.
5. The evidence canvassed above is not the only part of the evidence of Mr Jones that I found unsatisfactory (as my ultimate findings make clear). Although I have hesitated in making general adverse credit findings and closely considered whether I may be making too much of witness demeanour, I am satisfied that Mr Jones was willing to fashion his evidence to suit what he perceived to be the forensic advantage of his erstwhile employer. After observing him closely in the witness box and reflecting upon his evidence generally, I am satisfied I should reject the submission of Qantas that Mr Jones made “concessions where appropriate” and “sought to assist the Court to the best of his ability”. Unless it accords with the inherent probabilities (or other evidence I accept), I do not consider it is safe to place any significant reliance upon his evidence.

#### Colin Hughes

1. Mr Hughes was the Executive Manager, Qantas Airports from September 2019 to February 2021. In that role, as noted above, he was responsible for the delivery of airport operations at Australia’s ten largest airports. Mr Hughes reported to Mr Jones and Mr Nicholas reported to Mr Hughes. From late April 2020, Mr Hughes had discussions with Mr Jones about changes Qantas would need to make in response to the pandemic. Having been stood down, Mr Hughes was “stood-up” on a full-time basis for the purposes of developing a plan “as to how the Australian Airports Business could deliver operational changes to support Qantas’ recovery from the COVID-19 pandemic.” From May 2020 onwards and with Mr Nicholas, Mr Hughes developed several options for the Australian Airports Business for the GMC based on financial targets and principles set by Qantas’ senior management.
2. Mr Hughes did not attend all of, nor actively participate in, the GMC meetings, but Mr Jones – to whom he directly reported – did attend a number of relevant meetings and actively participated, and Mr Hughes assisted in preparing slide decks for Mr Jones’ presentations. Doing the best I can, there did not appear to be any material difference between the views held by Mr Hughes and the views of Mr Jones at relevant times as to options for the business of Australian Airports.
3. In June and July, Mr Hughes was involved in a “market testing” commercial exercise to identify potential third party ground handling suppliers, and in August 2020 commenced undertaking a review into the outsourcing proposal. Mr Hughes was primarily responsible for running the IHB process with the assistance of Mr Nicholas. He received and, at least to some extent, reviewed the responses to the IHB process and the requests for proposals issued to third party providers. Together with Mr Nicholas, Mr Hughes prepared a request for approval document with his recommendation and stated reasons for that recommendation which he provided to Mr Jones. Mr Jones, in turn, provided that recommendation to Mr David.
4. Mr Hughes was cross-examined at length. Although he was a somewhat more impressive witness than Mr Jones, to the extent he was pressed on what he perceived to be critical aspects of this evidence, his desire to not depart from his affidavit evidence led him to give evidence that was, in some respects, less than compelling. It is sufficient at present to mention two examples, which were reflective of a general tendency of Mr Hughes to be wary to making concessions he perceived would be contrary to the interests of Qantas.
5. *First,* was his inexplicable hesitancy in accepting the proposition that the Union had a strong industrial presence in the ground handling workforce. When questioned about a “People Recovery Plan” (Ex 1, p 1289) prepared for the meeting of the GMC on 29 May (and which noted “Pathway to cost base requires TWU agreement and appears difficult”),he did not initially concede the obvious reality that the Union had a strong industrial presence in the ground handling workforce, stating that he was aware it had an “industrial presence” but that he did not particularlyagree that that presence was a strong one (T131.40–45) (but later, in response to a question I asked, he essentially agreed with the proposition (T132.19–20)). I do not accept that this was a result of any confusion but reflected a wariness to concede an awareness of the significance of the membership of the Union in the ground handling workforce. To similar effect, Mr Hughes also demonstrated an unwillingness or hesitation to concede the obvious point that the perceived difficulty in negotiating with the Union was a consideration against retaining a reduced ground handling workforce: T133.16–9 and 29–39.
6. *Secondly*, Mr Hughes gave evidence (at T180.38–44 and T181.1–11), which I cannot accept, that as late as early November he had no expectation one way or another as to whether the IHB would be successful. I find below that no one within Mr David’s team believed it was realistic to expect that the IHB was likely to generate sufficient savings for it to be accepted and indeed, by late November, all preferred outsourcing contractors had been identified, and contracts were in the process of being negotiated and drafted. Outsourcing was manifestly the preferred option as being the option that best facilitated the pressing commercial aims of Qantas. Any notion that Mr Hughes thought that by early November, when the options presented to Qantas were binary, that it was as likely as not that the IHB would be successful, is fanciful.
7. These examples could be supplemented, and may not be particularly significant in isolation, but they have resulted in me having some difficulty in accepting that Mr Hughes was always doing his best to give candid answers, irrespective as to whether he perceived the answer helped or hindered the case of Qantas.

#### Paul Nicholas

1. Mr Nicholas is Head of Strategic Business Planning, and his role includes the design of initiatives and methods to improve cost efficiencies in the Australian Airports business. He reported to Mr Hughes and along with Mr Hughes developed the various options for the business in response to the pandemic, including outsourcing ground operations. Mr Nicholas assisted Mr Hughes with various presentations that set out proposals and recommendations, several of which were presented at meetings of the GMC by Mr Jones.
2. Mr Nicholas worked to develop materials required for a request for proposal process for third party providers to submit a formal bid and the IHB process. Although Mr Hughes was primarily responsible for the Union portion of the IHB process, Mr Nicholas assisted Mr Hughes. Mr Nicholas was also primarily responsible for the management of the request for proposal process with third party providers when it was implemented in around September 2020, and assessment and review of the responses. He met with Mr Hughes and Mr Jones in late November 2020 and, of course, agreed with Mr Hughes’ recommendation to outsource ground handling operations.
3. The Union submits that Mr Nicholas had the same difficulty as Mr Hughes in making concessions which might appear to have been obvious, and points to the evidence (T399.35–400.10) regarding him having “no knowledge or otherwise as to the extent of the TWU membership” and his failure to comment on whether he would be surprised if “membership was virtually 100 per cent”. On balance, I think this criticism is overstated. Although a very careful witness, in contrast to Mr Jones and Mr Hughes, Mr Nicholas was not as intent in avoiding any concession he considered adverse to the case of Qantas, and I consider that he was generally attempting to assist and be faithful to his oath. Mr Nicholas gave evidence (T428.20–429.11) that in preparing his evidence, his affidavit was drafted for him after “a series of discussions and [a] page turn of documents”, this apparently included a review of documents in respect of which he had no contemporaneous involvement. Given this, it is perhaps unsurprising Mr Nicholas might have had some difficulty in remembering his contemporaneous thoughts with any precision and separating them from reconstructions inadvertently moulded by discussions and a documentary review conducted for the purpose of him giving evidence.

#### Andrew Finch

1. Mr Finch is a solicitor and employed as the General Counsel & Group Executive, Office of the CEO and Company Secretary, and gave evidence, including as to financial delegation limits in Qantas. Mr Finch also gave evidence as to Mr David’s role and the nature and function of the GMC (of which he is a member). His evidence was that the GMC is not a “decision-making forum” but according to its risk management policy is “responsible for identifying and understanding risks, reviewing and endorsing the group risk report for submission to the audit committee, and otherwise endorsing the group risk management framework”. Mr Finch sent the power of attorney for Mr David’s execution, and also executed it in his capacity as Company Secretary.
2. Mr Finch’s credit was the subject of specific, very lengthy and detailed submissions, the extent of which was out of proportion to the importance of his evidence. The key point can be summarised shortly and starkly: the Union accused him of giving false and knowingly misleading evidence, while Qantas submitted he was a careful witness of the truth.
3. There was considerable controversy over the content of the affidavit of Mr Finch (at [5] and [12]–[22]), where the following evidence was adduced (although the italicised parts of [5] were admitted subject to a limitation pursuant to s 136 of the EA, this does not matter for present purposes):

5. On or around 18 November 2020, I was approached by Sonia Millen, Executive Manager, Industrial Relations for Qantas, in relation to a potential proposal to outsource Qantas’ ground operations at the 10 Australian ports where those operations were then being provided by Qantas Australian Airports. I had a general understanding and awareness of the outsourcing proposal from my attendance at GMC and Board meetings throughout 2020. *The proposal was being considered for implementation by, and was the responsibility of, Mr Andrew David, the Chief Executive Officer of Qantas Domestic and International.* Ms Millen said to me that she was concerned that*, if Qantas accepted bids and entered into contracts with third party ground handlers who had made bids (****Outsourcing Contracts****), the value of those contracts, either individually (in some cases) or collectively might exceed the financial authority of Mr David, who would ordinarily sign such contracts of an operational nature.*

…

12. In each case (unless I am unavailable or on leave), I have assisted the business unit which is proposing to enter into the transaction to obtain approval as required. Because this process is used regularly within Qantas, I usually prepare the request for approval using a ‘template’, or use a previous request for approval as the base for the request for approval. Where necessary for entry into a transaction (usually where the transaction requires entry into various contractual documents), I also prepare a power of attorney to accompany the request for approval. In some cases, such as with Treasury, because they have sought approval on multiple occasions, they will prepare a draft request for approval for my review based on a previous approved form.

13. Once the request for approval has been prepared, the relevant decision maker sends the request for approval to the Group CEO (or the relevant person from whom financial approval is being sought) and copies me into the email in the event that there are any questions. Given how frequently this process occurs, it is unusual for there to be any questions and I do not generally call or speak to the Group CEO (or the relevant authority holder) about any particular request.

14. Furthermore, in my capacity as a director of 62 Qantas group subsidiary companies, I regularly receive and process Requests for Approval, accompanied by a power of attorney authorising a relevant executive to sign applicable agreements and documents, authorising under my delegated authority transactions which the applicable management of those subsidiaries and the business units in which they sit do not have requisite delegated contractual authority to execute.

15. For example, in the past month, I have received two requests from marketing personnel in a wholly-owned subsidiary, Jetstar Airways Pty Ltd (**Jetstar**), to approve the execution by nominated managers within Jetstar of certain State tourism sponsorship contracts, the execution of which is not within the contractual delegated authority of those managers.

16. On this particular occasion involving the Outsourcing Contracts, following the request I received from Ms Millen referred to in paragraph 5 above, and working with Mr David and members of his team to ensure the accuracy and completeness of included information, on the afternoon of 18 November 2020, I prepared a request for approval to Alan Joyce (**RFA**)and accompanying power of attorney. The power of attorney is dated 19 November 2020, as Mr David and I intended that Mr Joyce would sign the RFA and power of attorney on the morning of that date.

17. At 8.11pm on 18 November 2020, I sent the RFA and power of attorney to Mr David...

18. In my email of 8.11pm on 18 November 2020, I indicated that I would attempt to speak with Mr David. My recollection is that I had a short conversation with him later that evening during which I said words to the effect of:

“Are you in a position at home, Andrew, to be able to sign the request and pass on to Alan?”

Mr David then said words to the effect of:

“I will ask Lynette to apply my electronic signature to it and then send it to Alan”.

I understood Mr David’s reference to “Lynette” to be a reference to Mr David’s Executive Assistant, and that Mr David’s reference to “Alan” was a reference to the same person that I had referenced, namely Mr Joyce.

19. Shortly afterwards at 9.05pm on 18 November 2020, Mr David sent an email to Mr Joyce (copying me) attaching the RFA and power of attorney “*for your approval*”...

20. The next morning, on 19 November 2020 at around 7am, I met briefly with Mr Joyce (for less than five minutes), for the purpose of executing the RFA. During that meeting, Mr Joyce signed the RFA. At the same time, Mr Joyce in his capacity as Director, and I in my capacity as Company Secretary, executed the power of attorney on behalf of Qantas...

21. As was typically the case with requests for approval, I did not discuss the substance of the RFA or power of attorney with Mr Joyce before or at the time of signing, nor did Mr Joyce ask me any questions about the RFA or power of attorney. Nor did I consider in any detail the reasons set out in the RFA when executing the power of attorney. I was generally aware of the progress and development of the proposal the subject of the RFA from my participation in GMC meetings and that the proposal was being managed by Mr David, and that was a sufficient basis for me to execute the power of attorney.

22. Following the execution of the RFA and power of attorney, I arranged for it to be provided to Mr David. I did not have any discussions with Mr David about the RFA or power of attorney after the RFA was signed.

1. As it will be explained below, the affidavit of Mr Finch omitted reference to events which had occurred that day in relation to the creation of the RFA and power of attorney and the involvement of a raft of other persons including solicitors from Freehills; it was also incorrect insofar as it represented that Mr Finch had a single conversation with Ms Millen, Qantas’ Executive Manager of Industrial Relations, worked with Mr David and his team to ensure the accuracy of the documents and that the preparation of those documents was a routine, unremarkable and everyday exercise.
2. This evidence in chief dovetailed with that of Mr David and was consistent with the submission made by Qantas by way of opening (QFS1 [154]), that what are defined below as the David Approval Documents and a later request for approval were inconsequential and “rudimentary administrative matters”.
3. Given the findings I make below, I consider that the evidence in chief had the effect of presenting a less than complete impression as to the preparation of the documents, which had the effect of bolstering the notion advanced by Qantas that the preparation of the David Approval Documents and a later request for approval were routine. Despite the submissions of the Union, however, I am not satisfied that this was the result of any conscious attempt of Mr Finch to give false evidence.
4. Given a submission made by Qantas, however, it is necessary to make a further point. Qantas contended that nothing should flow from the incomplete evidence in chief on this topic because any inadvertently misleading picture was the result of Qantas’ legal representatives seeking to ensure, as directed by the Court, that any affidavits filed not include any extraneous material and “[d]iscerning judgments … had to be made about what evidence was unnecessary, irrelevant or extraneous” (QFS1 [86]) and that at the time of the preparing of the affidavits it was not known to those solicitors that “the exact circumstances of the drafting and preparation of the 24 August RFA, the 19 November RFA (and [power of attorney]) or the 27 November RFA, including whether any of those documents (or any other documents) had been the subject of legal advice, was in issue, or contentious”: QFS1 [90(h)]. I should note that I specifically reject this submission, which I regard as devoid of merit. The true picture relating to the preparation of the documents was not an extraneous topic (given the impression Qantas itself sought to advance as to the preparation of the documents). Further, I reject the suggestion that the drafting was the result of seeking to confine the ambit of the evidence in chief consistently with case management imperatives. Rather, the affidavit was drafted to detail a narrative subjectively thought by the draftsman to be defensible as being literally correct (although, upon examination, it did not reveal the whole truth). As I remarked at the time, Mr Finch was placed in an uncomfortable position and that is to be regretted. The nature of the evidence adduced in chief has caused me disquiet, but it is open to think the draftsman may have mistakenly but genuinely thought he was preparing an affidavit that was appropriate. It is unnecessary to go further into why the affidavit of Mr Finch was drafted and settled in the form it was filed, but this episode was one illustration as to why I consider it is unsafe to proceed on the assumption that the affidavit evidence of Qantas (like the contemporaneous business records) can be thought to present a relevantly complete and comprehensive picture of what relevantly went on.

#### Andrew David

1. Mr David is the Chief Executive Officer of Qantas Domestic and International. He had responsibility and accountability for Qantas’ domestic and international airline businesses, including, as Qantas would have it, responsibility for the outsourcing decision. He bears responsibility for the execution of initiatives to meet the distributed goals and targets of Qantas Domestic and International. He reports to Mr Joyce and, as would already be evident, Messrs Jones, Hughes and Nicholas report to him. He is also a member of the GMC, and is the member responsible for the Australian Airports operations and functions. Mr David and the other members of the GMC were meeting on an almost daily basis during 2020 to discuss developments in the pandemic and Qantas’ response. Mr David signed the RFA to commence a review of Qantas’ ground operations in Australian Airports, which was recommended by Mr Hughes and endorsed by Mr Jones. He was not directly involved in the review and the IHB process but was kept informed as to their progress by Messrs Jones and Hughes. Mr David was emailed the results of the review and received the formal RFA for the outsourcing decision and supporting documents – recommended by Mr Hughes and endorsed by Mr Jones – which he signed.
2. Like with Mr Finch, I reject the submission of the Union that Mr David attempted to mislead the Court deliberately in his evidence in all material respects. Indeed, aspects of his evidence had the crystal-clear ring of clarity, which was absent from the evidence by other witnesses as to the IHB process and the likelihood that outsourcing would occur.
3. Mr David accepted that to meet the commercial objectives of Qantas, there were only two realistic options: (a) to either outsource; or (b) to accept the IHB (T730.5); and further, by the time of the outsourcing proposal, a “decision” to outsource ground handling had been made, but this view (which I consider should be characterised as preliminary) was subject to a formal Request for Proposal (**RFP**) process with third party ground handlers and the IHB process: T729.15–7. He also agreed (candidly it seemed to me), that given the commercial benefits perceived to be obtained by Qantas from putting in place outsourcing of ground operations, there was very little prospect of any IHB process coming close to delivering commensurate commercial benefits: T731.20–733.21.
4. Mr David was more realistic than others in these aspects of his evidence, but this does not mean that in all respects his evidence was entirely satisfactory. A minor but illustrative example was the following evidence (T623.10–41):

MR GIBIAN: … you understood and had the belief as at June 2020 that there was high – a strong membership of the TWU, particularly among the Qantas Airways workforce? --- I think I’ve already answered that. My answer was I didn’t know how many were members of the TWU, in neither the QAL nor the QGS.

And you had no perception one way or the other as to whether it was one percent or 99 per cent? --- As I said - - -

Is that your evidence? --- I did not know what the percentage was, no.

I asked whether – what your belief was. Did you have any perception - - -? I didn’t- - - - - at all – any understanding as to whether it was closer to one per cent or closer to 99 per cent? I didn’t hold a belief or a view on that topic.

You had no belief or view at all? --- No. I understood the TWU represented that employee group, full stop.

Did you understand – was your understanding that it was influential among that employee group in the sense that the positions it took or the recommendations it made to the workforce were likely to be followed by that workforce? --- I understood it was the union that represented those employee groups in EBAs.

Can you attend to the question that I asked you? --- Yes, sure.

… was your belief and understanding that the TWU was influential among the workforce in the sense that the positions it took or the recommendations it made to its members would be influential and followed by those members? --- I’m sorry, I just don’t understand the context of what you mean by influential. Could you explain what you mean by influential so I can answer the question clearly?

1. Having had the benefit of seeing this evidence unfold, I have real difficulties in accepting that Mr David did not hold a belief or view as to whether the Union membership was closer to one or 99 percent or needed assistance in understanding what the word “influential” meant in the context of the question asked. Rather, although to a lesser extent than Mr Jones or Mr Hughes, this sort of evidence, although not important in itself, was again indicative of what I perceived to be a desire of Mr David not to make concessions from time to time. I will return to the credibility of Mr David when I come to make ultimate findings below.
2. With these general observations in mind, I now come to my findings as to the contested aspects of the relevant course of events.

## C.7 Findings in Narrative Form

1. It is convenient to set out a chronological narrative constituting my findings as to what occurred within Qantas in 2020 concerning the outsourcing decision; from the genesis of its contemplation as an “option” at the advent of the pandemic in early 2020 to its culmination with the public announcement of its planned implementation on 30 November. The following narrative reflects my conclusions as to the evidence of Qantas’ witnesses when either corroborated by, or contrasted with, the contemporaneous documents.

#### Early 2020

1. On 23 January 2020, a GMC meeting was held. A presentation was given entitled “GSE Capital Replacement – Top 8”, setting out the proposed strategy for Ground Services Equipment (GSE) expenditure. That presentation identified ground operations as bearing “significant risk … based on age and condition” of the assets. Despite apparently considering outsourcing for ground operations in the past, at the beginning of 2020, Qantas intended that there be no foreseeable change to its ground handling operations at ten ports which were being (and had historically been) performed by Qantas employees and that it would make the necessary capital expenditure for ground services equipment to allow that work to continue: Ex 1, p 692.
2. As noted above, from early February 2020, progressive restrictions on international travel, followed by restrictions on domestic travel, were put in place. Restrictions on domestic travel were imposed from in or about March 2020. To describe what Qantas was facing as an existential crisis may be an overstatement, but it certainly was an unprecedented challenge to its viability.

#### April to May 2020

1. In late April, Mr Hughes had discussions with Mr Jones, and Mr Jones informed him that Qantas management had begun to grapple with the potential impact of the pandemic, and that Qantas would need to make significant changes to ensure that it remained viable. On 24 April, a GMC meeting was held to discuss “Recovery Scenarios and Planning” for Qantas in response to the pandemic. Following that meeting, on 27 April, an email was sent summarising the next steps including the following dot point (Ex 1, p 1013):

**Transformation opportunities:** Discussions getting underway on broader TX opportunities that might be accelerated.

1. Mr Hughes was aware from this time that Qantas was starting to think about transformation opportunities in the context of the pandemic, but those opportunities could not be separated from its response to the pandemic more broadly: T88.25. The discussions on “transformation opportunities” emerged because of the operational disruption that had occurred, and Mr Nicholas and Mr Hughes had identified that the “[c]urrent operating environment” presented an opportunity to “accelerate transformation” by complete or partial outsourcing and understood that an outsourcing in “today’s environment overcomes operational and supplier risks”: Ex 1, p 1017–8.
2. On 28 April, Mr Nicholas sent Mr Hughes a slide desk on structural cost opportunities, the second slide of which appeared in relevant part as follows (Ex 1, p 1017):

Current operating environment presents an opportunity to accelerate transformation:

1. Complete or partial outsourcing of Ground Operations and/or Fleet Presentation

...

That option was stated to have “[l]ower operational and Supplier Risk”: Ex 1, p 1018.

1. On 1 May, a GMC meeting was held, and a presentation was apparently made that included a “Summary of GMC ideas and prioritisation criteria”: Ex 1, p 1051. On the slides for this meeting, under the heading “Operational Transformation”, was a dot point “Ground Handling model/outsourcing approach”. The “Prioritisation Criteria” listed included: “vanishing window of opportunity”; “value”; and “feasibility”. The evidence of Mr Hughes was that “vanishing window of opportunity” was a reference to the pandemic causing an almost complete reduction in flights and the consequently lower operational risk of outsourcing: T137.5–21. Hence prior to any financial targets being set by Qantas (which, as I noted below, occurred on 20 May), the potential to outsource had been identified (T123.15–21) and, as this document reflects, the prevailing operating environment presented the first opportunity to outsource ground handling: T91.33–5.
2. The GMC planned to implement four-week “Crisis Transformation Sprints” aimed at assessing the value and feasibility of each opportunity then presented and developing action plans for their execution: Ex 1, p 1052.
3. It was only on 20 May – after the outsourcing decision had been raised as an option – that financial targets were set. Mr Martin Zoller (Head of Finance, Qantas Airlines and Group Finance) sent an email to the Executive Manager of each business unit in Qantas Airlines setting out cost target allocations for the 2021-22 financial year: Ex 1, p 1216.
4. Importantly, on the morning of 20 May, Mr Hughes emailed himself notes from a conversation with Mr Jones: Ex 1, p 1175. A few minutes later, Mr Hughes then forwarded those notes onto Mr Nicholas: Ex 1, p 1177. The document forwarded by these emails was that to which I have already made reference above and included, among other things, the handwritten notation from Mr Jones: “Voice-over labour Gov Lockin benefits + open EBAs 2020 DEC”. Mr Jones gave evidence that the notation may have been referring to the fact that outsourcing may not be possible in future and that laws may be enacted requiring the payment of “site rates”, namely laws requiring that contract and labour hire staff receive the same pay and conditions as directly hired employees: T520.35. There was evidence adduced by Qantas that no one had a recollection of the “voice over” material as to “lock-in” being raised at the GMC.
5. I have already recorded that I reject the evidence of Mr Jones that he did not recollect what was in his mind when he made this handwritten annotation; I also do not accept that he cannot recall what was later discussed, relevant to the annotation, at the GMC. It is much more probable than not, given Mr Jones thought it worthwhile to make the annotation proposing a voice-over (and, in the absence of any other evidence by participants at the meeting denying it was conveyed), that a representation to the effect of the annotation was made by him to the GMC. I also have considerable scepticism about the evidence of a lack of recollection of Mr Hughes as to what relevantly passed between him and Mr Jones at the meeting at which the annotations were made, but I have not reached the state of satisfaction necessary for me to reject the evidence of Mr Hughes of an absence of recollection. In any event, irrespective as to what precisely was conveyed at the GMC, I find that when Mr Jones wrote “+ open EBAs 2020 DEC”,the notation was meant to relate to dot point (b) on the document, which read: “Evaluation of how the options are superior to solving the current state. Why they are different for Customer vs Ground Ops”.I accept the submission of the Union that this aspect of Mr Jones’ notations was a record of his view that the option of outsourcing was “superior” given that there would be “open EBA 2020 DEC”, namely, both the “Qantas Airways Limited and QCatering Limited – Transport Workers Agreement 2018” (**QAL Agreement**) and the “Qantas Ground Services Pty Limited Ground Handling Agreement 2015” (**QGS Agreement**) would be open from (the end of) December 2020.
6. Notwithstanding the evidence I extracted above (when making general credit findings) and the evidence of Mr Jones in chief, I am reasonably satisfied that Mr Jones at this time did have a concern that any opportunity to obtain the financial benefits of outsourcing was a limited one for more than one reason. Importantly, there was already operational disruption. But also, looking ahead, if Labor was elected at a federal level, there may be a risk Qantas’ capacity to outsource staff or parts of its operations at some time in the future would be constrained. To “lock-in” any benefits in the current climate made commercial sense. Further, despite his evidence to the contrary, at the time when Mr Jones wrote “+open EBAs 2020 DEC”,I am reasonably satisfied that Mr Jones believed that one reason for pursuing outsourcing in 2020 was to avoid Qantas being in a position where it had to bargain with the Union and its members from December 2020 and face the prospect of industrial action – just when he then considered (regrettably over-optimistically) that flights might just be getting back to some degree of normality in 2021.
7. Leaving aside the terms of the annotation (and where it appears on the document) and my concerns about the credibility of Mr Jones, I am fortified in these conclusions for at least three reasons.
8. *First*, by reason of the fact that Mr Hughes agreed that: (a) when Mr Jones made his annotation on Mr Nicholas’ document, the note wasa reference to the fact the QAL Agreement would be passed its nominal expiry date at the end of December 2020, with the consequence that employees and the Union would be able to bargain and take protected industrial action (T119.35–41); and (b) this matter was discussed with Mr Jones at their meeting (T119.38–45). Although I am aware that Mr Hughes denied that this was discussed with Mr Jones in a way which meant that it was a consideration in assessing options for ground operations (T119.44–5), I do not accept this evidence is correct.
9. *Secondly*, as subsequent events and the ‘AA restart summary’ document, presented to the GMC on 15 June demonstrated (see [127]–[129] below), Mr Jones was well aware the QAL Agreement opened at the beginning of 2021, and there was a risk this would “concentrate power back into the [Union] early in the new calendar year when [Qantas] are growing domestic demand back and Virgin is potentially up on its feet” and that the “longer a decision is deferred the greater the increase in operational continuity risk; [and Qantas] are also unlikely to make any significant change during 2021 with an open QAL EA”: Ex 1, p 1813. There is no reason to think he did not hold these views at the time he made the annotations.
10. *Thirdly*, it seems that Mr Jones considered it prudent to ensure that if his views reflected in these aspects of his annotations were conveyed to the GMC, it be by way of “voice over”, rather than recording them in a document. On balance, I consider it more likely than not that the use of the “voice over” expedient was an attempt to prevent his real views being recorded in a contemporaneous document likely to be preserved. Even if I was wrong about this finding, it is appropriate to proceed on the basis that any oral comments along these lines to the GMC were ones which would have likely represented his candid views.
11. In any event, I am comfortably satisfied that Mr Jones considered at the time that in the absence of prompt action on outsourcing, there was a real risk the Union would exploit the opportunity afforded by both the QAL and QGS Agreements being past their nominal expiry date in 2021, and would then be able to exert industrial power which could cause significant disruption when growing domestic demand for air travel may have returned to more normal levels.
12. Returning to the narrative, on 24 May, Reed Tanger (Executive Manager, Group Finance & Strategy) sent an email to Mr Jones, Mr Hughes and Mr Nicholas, attaching a presentation in advance of a QALT meeting scheduled for 26 May. That presentation identified under transformational opportunities “Exit ground handling business” (Ex 1, p 1230) and again referred, under a heading “Summary of GMC ideas and prioritisation criteria” to a “[v]anishing window of opportunity”: Ex 1, p 1232.
13. On 29 May, a GMC meeting was held, attended by Mr David and Mr Jones: Ex 1, p 1272. A presentation was delivered at the meeting entitled “People Recovery Plan: GMC Update”. Section 4 of that document which dealt with “Airports” was prepared by Mr Nicholas, was given to Mr Hughes, and was then seen by Mr Jones. I find it reflected the views of each of Messrs David, Jones, Hughes and Nicholas at this time. Under a slide titled “Assessment of options below the wing” (Ex 1, p 1289), the “[c]onsiderations” for the proposal to “[r]educe existing workforce” were as follows:

**Pathway to cost base requires TWU agreement and appears difficult**

**Variability remains low** and decreased with QAL concentration

Limited productivity opportunities through tech/product changes

The considerations for “Tender Ramp, Bag and Fleet” were as follows:

**Government, Media, Industrial risk**

**Lower operational and supplier risk** due to reduced demand

1. It will be recalled that this meeting was held at the end of the so-called “Crisis Transformation Sprints” and involved an “assessment of options below the wing”, being the two proposals identified at Ex 1, p 1289. Considerations for and against these options were recorded, as was whether the option achieved strategic outcomes that had been earlier identified. Although Mr David described these as “risks to be assessed” by the GMC (T654.41–4), the submission of the Union that the only inference reasonably available from the document is that the GMC was “to assess and consider the two options, that is, determine or at least endorse which option was to be pursued” is speculative, and puts the matter far too highly. What is clear is that the document records the views of those involved in its preparation and presentation at the time and, as it happens, the GMC directed further work be done on the risks attached to the two options which had been presented: T541.19–23, T547.28–31; T553.1–6; T144.1–11. Contrary to the submission of the Union, I am not satisfied that the GMC directing further work on the proposals for “transformation” was somehow indicative of its role as a decision making forum in the context of Qantas’ Australian Airports business.

#### June to Early August 2020

1. More work was done and on 2 June, a further GMC meeting was held. A presentation was delivered entitled “Project Restart – below the wing: Australian Airports”. Five options were now identified for “below the wing”: Ex 1, p 1357. As to the option of “rightsizing” the workforce, for this option to be feasible, it was recorded that one would need to believe that “[s]tructural change [was] not feasible”: Ex 1, p 1360.
2. In relation to the outsourcing options, the “[t]imeline risk with employee bid process” (Ex 1, p 1360) was identified as a “con”. A “protracted employee bid process” was identified on the next slide (in relation to “Industrial Response”) as a risk, and that risk was identified as being high: Ex 1, p 1361. Obviously enough, that reference to a “bid process” was a reference to the requirement under the QAL Agreement that Qantas undertake an IHB. Despite any evidence given as to a lack of recollection or otherwise, I am confident that in these respects this document reflected the contemporaneous views of Mr David, Mr Jones and Mr Hughes (who all attended the relevant part of this meeting, though Mr Hughes apparently observed remotely). Given that there was a vanishing window of opportunity to implement any outsourcing of ground operations, it is unsurprising that the need to undertake the IHB process as required by the QAL Agreement, if it was allowed to become protracted, was conceptualised by Messrs David, Jones and Hughes as a timing risk. All options remained open, but I also find that at this stage they all considered that an outsourcing option would meet the two-year costs target but that “rightsizing” the workforce would not. Further, partly as a result of this view, they believed (provided structural change was possible), that an outsourcing option was preferable than “rightsizing” the workforce. The only real issue was whether it was too risky.
3. These conclusions accord with the terms of the document and the inherent probabilities, despite any reluctance by any of the witnesses to concede that these were their considered views at this time.
4. On 11 June, Qantas received a detailed advice from Mrs Justine Oldmeadow, an industrial relations consultant, regarding the industrial risks of outsourcing ground handling operations. Mrs Oldmeadow apparently worked with her husband, Mr Ian Oldmeadow, in a company conducting a business known as “Oldmeadow Consulting” and had provided industrial relations advice to Qantas for some time: T426.31–9. It appears from the evidence of Mr Hughes (T146.17–24), that the purpose of procuring the Oldmeadow advice was to assist in assessing implementation risks of outsourcing options ahead of the 15 June GMC meeting (in circumstances in which one outcome of the 2 June GMC meeting was that further analysis of the extent of risk be undertaken).
5. Following the order made for standard discovery, this document was listed in Part 1 rather than Part 2 of Qantas’ verified list of documents. At the time of its creation, however, it was marked as a “DRAFT FOR THE PURPOSES OF LEGAL ADVICE V1”. In the absence of evidence to the contrary, I assume that the author mistakenly considered, at the time the document was created, that it was a privileged communication. The document was sent to Mr Jones who forwarded it on to Mr Hughes, who sent it to Mr Nicholas. It was in the following terms (Ex 1, 1524–7):

**[UNION] REACTION**

This paper identifies the likely reaction of the [Union] to an announcement to potentially outsource the entire QF below wing operation.

The number of employees affected is split across two companies and two Enterprise Agreements:

QAL—1078 employees, 95% full time and union membership close to 100%. EBA opens 31/12/2020

QGS—1632 employees, 99% part time and union membership around 50% (TBC). EBA opened 9/19/20

QF’s below wing workforce is an important membership base for the [Union]. Employees are at fixed locations and easier to organise than the [Union]’s historic membership base of Truck Drivers. However, the [Union] has not been able in recent years to organise within outsource providers as effectively, although it is slowly increasing membership in these companies.

**Should a decision be made to outsource all of the below wing operation this would represent the largest Compulsory Redundancy (CR) programme of a single blue collar work group and the largest outsourcing programme ever undertaken by Qantas.**

**The [Union] will campaign strongly on multiple fronts against any proposal to outsource the below wing work in Qantas. The fronts will be:**

* **Industrial**
* **Political**
* **Public**

For [Union] Legal reactions refer to separate legal advice.

**Industrial**

Separate advice is being prepared on legal issues associated with any proposed outsourcing. **The [Union] will likely seek to utilise every legal avenue to delay and/or prevent implementation of any outsourcing and/or embarrass QF**. In addition to any legal issues concerning the reasons for outsourcing (see legal advice), consultation with the [Union] is required on major decisions and there is a requirement to consult on CR’s. There is also a provision in clause 11 of the QF TWU EBA that requires application of a protocol for pre-decision consultation and in-house bids in circumstances where the Company is considering outsourcing. **The [Union] will undoubtedly use all these provisions to frustrate and attempt to delay the process.**

The QGS EBA is open. Technically the [Union] can seek a Protected Action Ballot. However, it is possible that the [Union] may instead opt for a covert industrial campaign, particularly with employees on Job Keeper. For example, employees Stood Up to work may call in sick at the last minute. This will be hard to manage during the Pandemic, because unlike Blue Flu (calling in sick as part of a campaign while the operation is normal), the attitude of the Fair Work Commission to identifying such action as unprotected industrial action during the Pandemic is not clear cut. The advantage for the [Union] and employees is that the operation is impacted but employees do not lose money. Evidence of this type of covert action was apparent in some Ports during the 2019 Christmas TWU industrial campaign in JQ.

…

**Conclusion**

The [Union] has nothing to lose in taking [Qantas] on over outsourcing and in the current environment may well win significant public sympathy. The Federal Government is trying to create an ongoing working arrangement with the ACTU and is facing a deep recession and high unemployment. ALP State Governments are very reactive to union concerns and may well weigh in on the side of the [Union].

**Ultimately if the legal and commercial reasons support outsourcing all the below wing in [Qantas], then it will succeed. However, the environment in which any outsourcing takes place needs to be carefully considered, both in terms of the impact on the timing of achieving the outsourcing, and current Government and Public attitudes.**

(Emphasis added).

1. It is not entirely clear to me whether Mr or Mrs Oldmeadow, or both, was the author or authors of this advice and the extent of their contemporaneous involvement with Qantas employees in the consideration of the pros and cons of the outsourcing proposal. There was no mention at all of their involvement in the affidavit evidence read by Qantas (nor of the involvement, as it happens, of Qantas’ Executive Manager of Industrial Relations, Ms Millen, who was likely involved in obtaining industrial relations advice from Oldmeadow Consulting). Qantas submitted (QFS1 [90(f)]) that this is understandable because when it came to Qantas preparing its affidavits, there was no suggestion that the Union would contend that the views of Oldmeadow Consulting or Ms Millen were of any relevance to the making of, or the reasons for, the outsourcing decision. This is correct so far as it goes, because the involvement of these people (like the extent of the contemporaneous involvement of specialist legal advisers) only became apparent upon receipt of a list of documents and inspection by the Union of non-privileged documents discovered because of the standard discovery order (and, as to legal advisers, upon later particularisation of the privilege claim), but that somewhat misses the point.
2. It emerged in cross-examination (T553.31–554.2) that Mr Jones received a draft of the Oldmeadow advice and, with regard to the draft, asked for some additional matters to be addressed. That communication was not in evidence, although it was inferentially referred to at Ex 1, p 1523. Curiously, as noted above, the document produced on discovery and provided on 11 June was marked as a “DRAFT FOR THE PURPOSES OF LEGAL ADVICE V1” – but it may not have been the first version. Qantas, in response to a query made through my Associate that was received into evidence as Exhibit Q, confirmed that a number of copies of a draft of this document had been discovered which had been sent the day before, but had been asserted to be “subject to a claim of legal professional privilege, and as such were withheld from production”: see Ex P, Part 2, items 19, 20, 75–6, 81–4 and 88–9; Ex Q. Notwithstanding that a later version of the document was produced, this claim for privilege was not challenged by the Union and it is unclear on the evidence how the version in evidence differed in material respects, if at all, from the draft originally sent to the solicitors. Again, it would be erroneous to speculate in this regard.
3. Mr Jones also apparently had one telephone discussion with Mrs Oldmeadow (T554.6–9) and a telephone conversation with Mr Oldmeadow whereby Mr Jones was taken through the paper: T554.11. What version of the paper was discussed is a little unclear. What is clear is that, at some stage, Mr Oldmeadow was apparently somewhat firmer in expressing his views than the views as recorded in the document sent by Mrs Oldmeadow. He told Mr Jones that the outsourcing proposal was “high risk”: T554.44. Indeed, according to Mr Jones, Mr Oldmeadow “was very concerned about the overall risks”, was a proponent of ways of reducing the risk, and this led to a conversation around adopting option 3 (T556.4) (which was outsourcing the fleet but “rightsizing” the “Ramp and bag” (Ex 1, p 1360)).
4. Mr Oldmeadow apparently had various meetings in relation to the outsourcing proposal throughout 2020 (T555.16) although his attendance, the nature of his contribution, or any detailed expression of any reservations he had, as Qantas’ industrial relations consultant, about adopting a strategy he was “very concerned about” and regarded as “high risk”, was not addressed in the affidavit evidence and, moreover, was not the subject of any contemporaneous business record (other than the somewhat less than definitive views sent by Mrs Oldmeadow, a first version of which had been sent, as a draft, to the solicitors).
5. It may be that Qantas thought that the views expressed by their industrial relations consultant and the extent and nature of his dealings with Mr Jones and others was not material when evidence in chief was filed (as being irrelevant to a fact in issue). It is unnecessary for me to say anything about such a view, if it was held. It may also have been usual practice or happenstance that the conversation or conversations in which Mr Oldmeadow expressed his concerns as to the outsourcing being high risk (and any reasons why) were not thought sufficiently important to record in writing. Again, it is unnecessary and inappropriate to speculate. However, with the evidence in the state it is, I have a sense of disquiet that I do not fully understand the true extent and nature of the dealings between Oldmeadow Consulting and Mr Jones or others during this period and, in particular, what precisely was said by Mr Oldmeadow and to whom about the risks and rewards of outsourcing (or alternate options) and when it was said.
6. The Oldmeadow advice is useful, however, as it does at least represent a snapshot of the types of issues then confronting Qantas in assessing whether to proceed with outsourcing (being the only option, in whatever form, that could deliver the two-year costs target). Despite any evidence adduced to the contrary, my strong impression from the terms of the documentation is that although clearly no final decision had been made (and all options were still open to be considered), an outsourcing option continued to be preferred at this time by Mr David, Mr Jones and Mr Hughes, subject to detailed consideration of the sort of industrial risks identified by Mrs Oldmeadow and the legal risks, in respect of which, advice was being sought from highly experienced industrial solicitors. And, irrespective of any conditional preferences of Mr David, Mr Jones and Mr Hughes, no final decision could be made, of course, before the IHB timeline risk was managed and Qantas ensured that the Union, as Mrs Oldmeadow had warned, did not use the provisions providing for the IHB “to frustrate and attempt to delay the process”.
7. Further, the Oldmeadow advice by Qantas’ industrial consultants, which made reference (Ex 1, p 1524) to the QGS Agreement being “open”, suggests that this was at that time a matter of some perceived importance. Of course, the risk of “open EBAs” and (at least inferentially, the capacity of employees to bargain and take protected action) was on the radar from at least 20 May as between Mr Jones, Mr Hughes and Mr Nicholas (Ex 1, p 1176), and was apparently referred to in the GMC meeting on 2 June: Ex 1, p 1361. The Oldmeadow advice was received a little over a week later.
8. The advice to the industrial and legal risks of the outsourcing proposal for ground operations was evidently a topic of intense interest. I have already detailed the dealings, such as they are revealed in the evidence, with Mr and Mrs Oldmeadow. It is a little unclear, and not particularly important, as to when precisely specialist industrial solicitors were retained, although there are emails and “PowerPoint presentations” over which a claim for legal professional privilege is maintained dating from late May: see, for example, Ex P, Part 2, items 226–8. As noted above, what is clear is that Mr Hughes spent a whole day with Freehills at around this time: Ex 1, p 1616. In any event, a flurry of relevant communications immediately followed the receipt of the Oldmeadow advice and, I infer, legal advice as to industrial matters.
9. The day after the Oldmeadow advice, on 12 June, Mr Hughes emailed Messrs David and Jones a copy of a presentation sent “ahead of discussion at 4pm” that day: Ex 1, p 1587. On the slide canvassing risks of a “full tender” there appeared as a third point “TWU Campaign” which would cause “damage to brand and reputation”: Ex 1, 1593. Consistently with the Oldmeadow advice, that risk was expressed as “high” and a “mitigation” was expressed to comprise “Corporate comms about the ‘Case for Change’; explanation of outplacement services and EAP support being provided in addition to EBA redundancy provisions.” Later there appeared a slide titled “TWU narrative likely to be: proposal creates insecure work and casualisation, a “race to the bottom” and is an attack on the TWU” and the “Legal/Industrial” Risks and Response were redacted for legal professional privilege: Ex 1, p 1595. Another redacted slide was titled “Key determinant of the timeline is the QAL in-house bid”, but the contents of that slide were also redacted for legal professional privilege (Ex 1, p 1597) (it appears a form of that presentation was later delivered on 15 June at the GMC meeting referred to below).
10. The next day, on 13 June, Mr Hughes emailed to Messrs David and Jones a document with a draft of Mr David’s talking points for the GMC ahead of his discussion with Mr Jones about that meeting: Ex 1, p 1616. That document appeared as follows:

**The reasons to consider full exit**

* This topic is really a trade-off between risk and reward at an aggregate level for the company
* Last GMC we outlined the benefits and risk areas and were asked to answer the threshold question regarding legal confidence
* Spent a day with Freehills 
* Operational risk is low as we have xx% domestic market and % of total by year end and medium timeline case supports doing it this year
* There is a significant financial prize of ~$100M per year vs. Option 1 (our base case). This consisted of $57M in Airports but also $42M+ (validated as at least that) in services across GSE, WFP etc. & it avoids the need for $8OM capital in next 5 years.
* Airlines globally are signalling they will be smaller, lower cost and more focused; it is not business as usual after a demand shock of this type with such a low revenue outlook
* There is also a strong argument we need to prepare for a resurgent domestic competitor
* VA entered administration ~20% lower unit cost than Qantas BTW (GO & Fleet)
* Post administration we should expect PE owners to pursue aggressive further cost reductions; particularly in non-core areas of their business
* To this end, post administration Virgin may have/or perceive to have greater societal 'permission' for more systematic change than Qantas
* Virgin start from a structurally better place with ground ops inhouse for DOM only in SYD, MEL, BNE & ADL. Virgin subcontracts all other DOM ports, all INT and cleaning
* The TWU will run a highly aggressive and public campaign but we think that is likely there will be significant campaigns regardless of the choices we make given Kaine’s campaigning position
* As an example, the TWU were the only TU to criticise our decision to offer 4 weeks negative leave for employees during stand down calling it ‘wage theft’

So what are the main reasons not to do this?

* It is inconsistent with the “retain as many jobs as we can” mantra and communications
* The size of the job losses (2700) sticker shock
* CR's opposed to VR’s for our people
* Government risks are a problem that need to be carefully weighed. Large scale job losses are inconsistent with Job Keeper and will create a very challenging Government dynamic.
* There are a few points that will support the case but this risk still remains High [sic].
* Aviation jobs we exit will remain in the industry and will not be offshored
* We will not have enough work for people for some time nor the same size business
* In our rightsizing base case we are assuming up to 1000 redundancies
* There is a further ~*1000 (seems too high ?)* who will have no meaningful work for up to two years - potentially without JK from October
* People affected are likely to face a stand down indefinitely with no pay and no JK. A redundancy is preferable in that they receive severance and can seek new employment immediately. Considering these jobs are low paid, unskilled lab our, this is a kinder approach.

**Option 1**

* Financial targets are not achieved in Y1 or Y2 and there is a further downside risk of $28M if we cannot manage our surplus (will be very difficult with TWU to agree reduced hours)
* We will be oversupplied until at least 2022 so limited options to bring in 3rd party
* QGS EBA is currently open and the TWU are unlikely to want to close it quickly. The QAL EBA opens 1 January 2021 and there is a risk the two agreements are open simultaneously
* It will concentrate power back into the TWU early in the new calendar year when we are growing domestic demand back and Virgin is potentially up on its feet
* TWU will run an aggressive campaign and will likely attack international stand downs which may have broader Group implications

**Option 3**

* Given the need to rethink our model we think there is a defendable argument to exit from Fleet Presentation in the 4 ports we operate
* It’s absolutely non-core, almost all Tier 1 airlines don't do it including Virgin
* It is a better performing financial and capital efficiency option than the base case and is a structural step forward in exiting Ground Operations
* Andrews and Ian see this as lower risk as it impacts xxx roles and the cleaning function is less central to the TWU agenda.
* As discussed with Andrew(s) McGinnes and Parker whilst risks clearly remain, the PR and Government risks are assessed to be lower than full exit

**Other options over time ……**

*Details of SIT here please .... (Not sure I want to give option on QGS by port) and QGS model options ........ 600 roles, when, how, trigger that its ok etc.?*

(Italicised text appeared on the original document in red).

1. Mr David responded on 14 June to that email from Mr Hughes, stating “Excellent job. Read it thoroughly. Nothing I would change or add”: Ex 1, p 1742. Everyone relevant, it seems, continued to be on the same page.
2. The same day, on 14 June, a further advanced draft of Mr Hughes’ 13 June document was sent by Mr Jones to Mr Finch. This time the author marked the covering email and the enclosed document “Privileged and Confidential”: Ex 1, p 1717. On 15 June, a GMC meeting was held, attended by Mr David, Mr Jones and Mr Hughes. The presentation was delivered at the meeting entitled “Project Restart – below the wing: Australian Airports”. Apart from the mistaken general marking as to privilege and confidentiality, the revised document was relevantly supplemented in the following terms (Ex 1, p 1813):

**The timing**

* Understandably there is a desire to find an opportunity to retime this decision and find a different window. We don’t think that’s as real an option as we’d like it to be
* The strongest argument for ‘why now’ is necessity driven by COVID, and the need to rethink our ways of working to survive in a new world. That argument will erode over time
* The longer a decision is deferred the greater the increase in operational continuity risk; we are also unlikely to make significant change during 2021 with an open QAL EA
* **If we do not make the decision to exit at this time and select Option 1, it is hard to see the conditions in which we would ever have the opportunity to execute full exit again**

…

(Emphasis added).

1. As to Option 1 or Option 3 (both of which did not involve outsourcing the ground operations), the document provided:

**Other options over time**

* If we select Option 1 or 3 there is an option to exit fully from SIT late next year
* This removes a further ~650 roles and would be defendable as SIT is the only standalone international port in the network with significantly reduced flying looking forward
* Operational transition risk would be low at SIT given limited flying but a higher risk across the network given an open QAL EA, so would need to wait for closure of the EA
1. The references to the “open QAL EA” were, of course, a reference to the QAL Agreement, which was due to reach its nominal expiry on 31 December: T572.35–7. Again, this document is consistent with no decision having been made and all options being still open for consideration. However, the terms of the document fortify me in my view that Mr David, Mr Jones and Mr Hughes, who were at the meeting, considered that a one-off and vanishing opportunity was being presented to adopt outsourcing of ground handling operations and that operational risk would increase in 2021 in circumstances of “open EBAs”: see also the evidence of Mr Jones at T572.35–573.25.
2. This document is consistent with what appears to me to be the views Mr Jones held at this time: (a) that the operational consequences of the pandemic presented a limited opportunity to outsource; (b) the so-described “necessity driven by COVID” provided a justification that could be deployed inside and outside Qantas, being a justification that would weaken over time; and (c) significant change in 2021 would not be likely to occur for reasons including that the QAL Agreement would have passed its nominal expiry date. In this regard, as to part of what was set out as to “[t]he timing” (see [129] above) as to option 5 (being the outsourcing option), Mr Jones’ evidence (at T571.11–572.41) was:

MR GIBIAN: … The third dot point under the heading Timing, you indicate that the longer the decision is deferred, the greater the increase in operational continuity risk. And then you indicate:

*We are also unlikely to make any significant change during 2021 with an open QAL EA.*

Do you see that? --- Yes.

The relevance of an open QAL EA was that the Qantas Airways ground handling employees could, from 2021 onwards, take protective industrial action? --- So that’s not the only relevance of an open QAL EA. Qantas doesn’t make major change with open EBAs due to operational risk.

Yes. The reason why there is an operational risk with an open EBA is that the employees would be able, in that circumstance, to take protective industrial action; correct? --- No, there’s a multitude of reasons for that.

Well, perhaps I will go back a step. By reference to – in operational risk, you’re referring to the potential for there to be interruption in the supply of ground handling services to Qantas’s flights? --- Yes.

In a manner that might disrupt customers and delay flights, etcetera; correct? --- Yes.

**And one reason why there is an operational risk is that employees may withdraw their labour by taking industrial action; correct? --- That’s one reason, yes.**

**Yes. And the capacity of the employees to do so, that is, their right to take protective industrial action would only arise after the QAL EBA had passed its nominal expiry date on 31 December 2020; correct? --- Yes.**

And so the reason that you were raising there as to why it was necessary to outsource now as that in 2021, the ground handling employees of Qantas Airways would be able to take protective industrial action and that would present an operational risk to the business? --- No, because it says there, “We also are unlikely to make significant change.” So it was in context that we don’t make significant change while we have open EBAs.

Yes. I’m asking about that second part of that dot point? --- Okay.

Do you recall – can you concentrate your mind on that. The reason why you’re unlikely to make any significant change during 2021 with an open EBA is because it would present an operational risk; correct? --- It’s more than operational risk why we don’t make major change during open EBAs.

**One reason why you don’t make operational change during EBAs is because there is operational risk because the employees are able, in that circumstance, to take protective industrial action, correct? --- That is one the reasons, yes.**

…

And then the fourth dot point under the heading Timing is that you indicated that, if you didn’t make the decision to exit at this time, that – and select option 1 – and instead selected option 1, your view was it was hard to see the conditions in which you would ever have the opportunity to execute a full exit again, do you see that? --- Yes.

And the reasons for that were two fold. One was that the circumstances of the pandemic would dissipate, and certainly it was hoped that the airline would be back to more usual operations, correct? --- That’s a reason, yes.

Yes. And the other reason was that the – with the QAL EA open from 2021, that would prevent this course of action, in a practical sense, being implemented in the following year, correct? --- So that’s another possible reason, yes.

Yes. But they’re the two reasons – well, they’re the only two reasons you identify under the heading Timing, correct? --- They are the only two reasons in that set of documents, yes.

(Emphasis added).

1. This evidence (and the failure thereafter to concede readily that his views as to the reasons why Qantas should outsource now was the message he was seeking to convey to the GMC) was a further example of an aspect of the evidence of Mr Jones that was troubling. It was reflective of his desire, running through his evidence, of not making any concessions he perceived were adverse to the case of Qantas; moreover, the evidence, while being given, was unimpressive. I accept the evidence of Mr Jones that operational risk is why Qantas does not make major changes affecting a relevant aspect of its workforce during open EBAs, but I also have no doubt that the most significant risk to operational disruption is *because* protected industrial action may be able to be taken by employees. I have little doubt that was one of the reasons in the mind of Mr Jones when he had formed the view, and communicated it to others, that if the outsourcing of ground operations was to be done, it be best done quickly.
2. On 19 June, a Qantas Board meeting was held. Discussion occurred as to the development of a three-year plan to guide Qantas through the COVID-19 crisis to recovery. In a slide deck presented at that meeting, a slide under the heading “Proposed Qantas Airports Transformation Initiatives”, relevantly included the following (Ex 1, p 2010):

**Industrial Risk Assessment**

* **Above the wing:** VR expected. Agreement on surplus possible with ASU. ASU EA open
* Overall rating: [Low]
* **Below the wing:** TWU response to strategic review. Expected legal challenge and public brand campaign. Delays to in-house bid process. QGS EA open. QAL EA to open 1 January 21. PIA possible
* Overall rating: [High]
1. The Board meeting minutes also appeared (relevantly) as follows (Ex 1, p 2038):

GMC and Paul Jones then led a detailed discussion on the manpower aspect of the proposed Recovery Plan, including:

* a 6,000 headcount reduction (5,000 redundancies and approximately 1,000 contractors not returning). The redundancies (both voluntary and compulsory depending on work group) would arise from restructuring / right-sizing Qantas Engineering, Mainline cabin / tech crew, Qantas Ground Operations and non-operations / corporate areas;
* an interim surplus of 15,000 employees to be managed, depending on workgroup, using stand down, leave without pay, part-time arrangements and leave burn. The interim surplus will diminish over two years as the availability of useful work increases;
* the potential restructuring opportunities for the "below the wing" Qantas Ground Operations; and
* the significant risks including potential industrial action, legal challenges, political consequences and brand/reputational damage. These risks are proposed to be managed by a sub-group of GMC, who would regularly report back to the Board.

The Board acknowledged the risks of the Plan and was supportive of the proposed approach. The Board also acknowledged the significant and challenging impact of the Plan on employees and emphasised that this should be taken into consideration in all employee communications.

It was **RESOLVED THAT** the “Qantas Group Three Year Financial Plan” is approved.

1. Mr Jones’ speaking notes for the Board meeting appeared relevantly as follows (Ex 1, p 2042–44, without alteration):

A significant opportunity exists beyond rightsizing to drive fundamental transformation BTW through outsourcing of the entire function (Additional 1573 roles as Compulsory Redundancy)

This is a non-core area of our business. There are many specialist Ground Handing and Cleaning companies. At Qantas 58 of our 68 ports are outsourced today (including all international locations). We are only one of 2 Tier 1 airlines Globally that clean our own aircraft at a turn for example.

…

**While there a lot of clear pros outlined there are a number of critical risks that need to weighed up carefully before making a decision.**

Government reaction to 2431 FTE redundancies (including VR) and outsourcing while Jobkeeper / retention of jobs has been such a strong mandate

The TWU campaign would be extensive and create challenges for the brand potentially leading to a British Airways level of negativity with Qantas perceived as the big bad corporate taking advantage of COVID situation and not being on Team Australia

…

Engage Government to determine likely response to outsourcing and how manageable that would be

Continue to evaluate the benefits and risks understanding how the Government, TWU, media and competitor landscape evolves - by end of July we will have a better insight to Virgin and how they will operate in the market as well as the level of voluntary redundancy demand that exists for our people.

Decision is currently planned prior to Aug 20th to align with year end results and the market announcements to be made at that time. If we proceed, it requires a formal RFP in market and an in-house bid process opportunity (in legacy EBA) enabling employees to bid for the work and therefore we would expect to transit on into early next year to enable these activities to be completed

…

The alternative is too take a phased approach, maybe by targeting a smaller footprint e.g. Exit Sydney international (only dedicated port) next year, and take advantage of the market opportunities as they become available eg Growth in certain locations. This would clearly be a much longer term strategy and process given the lack of growth potential in the foreseeable future and the legacy EBA with TWU opens early next year significantly increasing the operational risks with any transitions.

(Emphasis added).

1. References in the penultimate paragraph above were made to the requirement of the IHB process before any outsourcing decision was made, and the RFP process with third party ground handlers. The final paragraph referred to the increasing operational risk with any transition were Qantas not to pursue the outsourcing option while the bargaining for the QAL Agreement was closed.
2. It is worth pausing here to make two points. The *first* and more general point is that as Qantas rightly emphasises, it is important not to decontextualise what was occurring regarding any option as to ground handling operations. The affirmative case of Qantas (see the defence at [40(a)–(b)]) was that Mr David made the outsourcing decision for the reasons identified, being that the result of the decision best met what were said to be three (although they seem like five) key “imperatives” or “challenges” developed by Mr Hughes and Mr Nicholas for the Australian Airports business. These were summarised as being to: (a) achieve the two-year cost targets by reducing operating costs; (b) increase variability in the cost base; and (c) minimise capital expenditure, grow customer confidence and deliver ongoing business improvement. But the fulfilment of these perceived imperatives by this part of the business was only *part* of a much bigger picture being the broader three-year plan to guide Qantas through the COVID-19 crisis to recovery, the approval of which (the “Qantas Group Three Year Financial Plan”), was the subject of the resolution passed by the Board. When this is borne in mind, contrary to the submission of the Union, it does not strike me as somehow intuitively odd that the Board, and for this matter the GMC, would devolve to the head of individual business units the responsibility for not only implementing the changes perceived as optimising recovery, but also deciding upon them insofar as they related to their aspect of the business.
3. The *second* point is reflected in the emphasised part of Mr Jones’ speaking notes. Having considered the whole of the evidence, I do not think, at this time or thereafter, there was ever any doubt in the mind of Mr Jones (or Mr David and Mr Hughes for that matter), that there were “clear pros” of implementing “fundamental transformation” by outsourcing the entire ground handling function and that this option was to be preferred to option involving “rightsizing”. Despite the evidence adduced by Qantas which attempted to paint a picture that until after the assessment of the IHB in November, persons such as Mr Jones and Mr Hughes were essentially agnostic as between different options, such a narrative is entirely unpersuasive. It is no overstatement to remark that what these gentlemen were faced with was a business calamity. The option delivering the best overall financial outcome for their employer, and which was therefore perceived as best assisting the recovery of a business under extreme pressure, was the one that they wished to implement (provided, of course, it was feasible to do so). This involved the not unfamiliar exercise of weighing risk and reward. Understandably, they sought and obtained expert advice about those industrial and legal risks so those risks could eventually be properly weighed in the balance against the estimated rewards. Obviously enough this is consistent with the ultimate decision being the one which best facilitated the so-called three imperatives, but it can be put more simply: provided it was open to do so, Mr Jones, Mr David and Mr Hughes wanted to outsource ground operations because they believed it was best for the bottom-line. This is why Mr David’s evidence in cross-examination, that by the time of the outsourcing proposal, a “decision” to outsource ground handling had been made, but that this preliminary view was subject to a RFP and IHB process (T729.15–7) (being a timeline risk in making the outsourcing decision), was far more compelling than any notion that the relevant participants were in a state of aloof detachment being unable to predict which of two outcomes was more likely until the IHB had been poured over and analysed.
4. Returning again to the narrative, on 25 June, Qantas announced its post-pandemic recovery three-year plan and equity raising: Ex 1, p 2056. The announcement did not make mention of the proposal to outsource below the wing operations but did mention, in broad terms, “Job losses and extended stand downs to manage long period of reduced flying (especially internationally)”.
5. On 25 June, a Request for Approval regarding a redundancy programme of up to 1,211 full-time employees (a separate decision to the outsourcing decision) was executed as approved by Mr Jones, and financial approval “in accordance with the financial delegation framework” was provided by Mr Joyce. The request was also reviewed by Mr Robert De Bella (the Qantas Airlines Chief Financial Officer) and Ms Millen.
6. On 29 June, Qantas commenced a request for information process with potential third party suppliers of ground handling services. On 13 July, Swissport provided a response to that request for information, which included reference to its relevant collective bargaining agreement remaining “valid until at least January 2024” and Swissport having a “long history of highly flexible collective agreements”: Ex 1, p 2303. Later in that response, and appearing under the heading “Managing Cost”, was the statement that “Swissport was founded with the strategy of creating extraordinary value in ground handling … [w]ithout the burden of legacy work practices, labour agreements and demarcations”: Ex 1, p 2315.
7. Around this time, GMC meetings were held, as were meetings of the Steering Committee, which was established to guide project direction, with representation from key relevant business areas: Ex 1, p 2415. The Steering Committee was comprised of seven members including Mr Jones, Mr Hughes and Ms Millen. There was also a GMC Sub-Committee, which included Mr David and Mr Finch: Ex 1, p 2508. There is no need to go into these meetings in any detail, indeed it is difficult to do so on the evidence, but a snapshot of the position as at 22 July can be obtained from a review of part of the papers for the GMC entitled “Deep Dive Topic #1 Ground Handling Strategies”: Ex 1, 2455–60. Under the heading “Timeline and next steps” the following detailed table appears (Ex 1, 2457):

1. As can be seen, well prior to any formal decision being made on the proposal to outsource in August, a detailed timeline had been contemplated setting out the “key outstanding risks” to be assessed and contemplating an ultimate decision by the end of 2020 (subject to the timeline risk of the IHB process and consultation). I accept the force in Qantas contending that this is all consistent with simple good business planning, but it is also consistent with my view, that even at this stage outsourcing was highly likely to happen, provided the risks were perceived to be manageable.
2. On 5 August a GMC meeting was held. A presentation was made entitled “Integrated Recovery Program[me] Risk Review”. This presentation was prepared by Mr Jones and Mr Hughes and was approved by Mr David. Among other things, the document included (Ex 1, p 2586) “Critical milestones for program[me] delivery” foreshadowing that on or about 17 August it is provided that a “QF Airports BTW—announcement” marked as “pending” would be made and (Ex 1, p 2590–1), under the heading “Group Exposure Forecast Overview—Rep/Brand Impact and Potential Response”, the potential Union, Government and opposition responses were set out. I am confident that these aspects of the presentation accurately reflected the views of Messrs David, Jones and Hughes at this time. The papers on 5 August also explained that a workplace determination in 2012 “shaped Qantas’ obligations to the [IHB] process”, it set out the “approach to the IHB process” and the legal and industrial relations risks (the details set out for the GMC in this presentation as to the proposed approach and the relevant risks were all the subject of a claim for legal professional privilege: Ex 1, p 2675–6.
3. On 6 August, a draft “Australian Airports Reforecast” was prepared (Ex 1, p 2698), which in the comments section noted that the “FY21 Budget includes [below the wing] outsourced supplier costs [option 5]” and that the reforecast “reflects delay in [below the wing] option 5 to Dec-20”. On the same day, a Steering Committee meeting was held as a presentation entitled “Ground Operations – Project Restart: Proposed implementation plan” was provided: Ex 1, p 2683. This document is heavily redacted for legal professional privilege as to the “program[me] timeline”, the “strategic review timeline”, the “approach to the [IHB] process in 2020” and “legal and industrial relations risk”. As a consequence, although no inference should be drawn that the redacted parts of the document contain representations adverse to the interests of Qantas, it is, on the current state of the evidence, somewhat difficult to understand what was conveyed. A similar document prepared for another meeting a little over a week later (Ex 1, p 2708) sets out details for the IHB and RFP process.
4. At least by 11 August, I am satisfied that plans were well advanced for the announcement of the outsourcing proposal. It appears on this date a meeting was scheduled for ten days later with Mr Joyce apparently sending an electronic invitation to a “GMC: Ground Handling/ Project Restart” meeting proposed to last for two hours to members of the GMC as well as Messrs Jones and Hughes, and also the external industrial relations consultant Mr Oldmeadow and Executive Manager, Industrial Relations, Ms Millen: Ex 1, p 2782.

#### Late August to Mid-November 2020

1. On 19 August, a Qantas Board meeting was held. An announcement on 25 August of a strategic review of ground handling was noted as a next step and a presentation was given providing an update on Project Restart. Under the section titled “In-house bid and RFP process” and “Airports Restart: High-level timeline”, a delay was identified from December to February/March as “Delay to timeline (in-house bid the key driver)”: Ex 1, p 2731.
2. On 20 August, Qantas released its full year results for FY2019-20 and, on the following day, a Project Restart Steering Committee meeting was held, and a GMC meeting was also held. By now, it was time to put the outsourcing proposal in place.
3. On 24 or 25 August, Mr David executed a RFA for the commencement of a review of Australian Airports (ramp, baggage and fleet presentation) operations for Qantas (**24 August RFA**). The Union advanced several submissions about the 24 August RFA and the evidence given by the witnesses in relation to it. The principal thrust of the Union’s submissions was that the 24 August RFA was “designed to make it appear that Mr David was singularly responsible for the decision to propose outsourcing” and to “disguise the role of the GMC”. Qantas complains that such an allegation, which it characterised as an “alleged conspiracy to disguise”, was not directly put to any relevant Qantas witness, including Messrs Nicholas and Hughes who drafted the 24 August RFA: see T174.1–175.5; T438.46.
4. There is some merit in the submission of Qantas that the focus of the Union on the 24 August RFA and the evidence given about, is distracting and places disproportionate emphasis on a largely peripheral matter. It is clear from the evidence that RFAs are regularly prepared at Qantas to access funds and record decisions and are a standard but important exercise: T592.21–5; T384.25; T173.43–174.7; T437.29–438.34. It was part of the formal process by which the decision making occurred and I do not think there is anything in the notion it was some form of concoction.
5. It is also true, however, that this RFA came after the long process which I have outlined above, and was the final step in putting in place a decision that was inevitable given the evaluation of the likely risks and rewards by Mr David and those reporting to him of proceeding with outsourcing and, to the extent it can be ascertained, the apparently favourable (or at least non-hostile) feedback of the GMC.
6. The only relevance (and it is marginal) seems to me to be the eagerness of Qantas in its material in chief to present a picture that there was nothing at all out of the ordinary in the preparation of the 24 August RFA and giving the impression, albeit implicitly, that a practical decision to review was made on that date and not earlier.
7. The true position is that the preparation of an RFA might have been a standard procedure, but this one was of importance and was prepared following the receipt of extensive industrial relations and legal advice including, it seems to me likely, legal advice concerning the decision making process. In any event, what was happening was broadly consistent with the evidence that Mr David gave orally. He was happy to proceed, and he had reached this *final* view sometime after the 5 August GMC meeting and before 24 August (T725.44–726.23; T726.39–40) – although, as I have explained, I find Mr David’s settled position for some time was that he was highly likely to proceed with the outsourcing proposal. The RFA is best seen as a formal process (T726.11–5) reflecting the procedural step needed to implement the decision to proceed with the review.
8. On 25 August, Qantas notified affected employees of its proposal to undertake the review, including details of the IHB process and an external RFP process with third party ground handlers. On the same day, Qantas made a public announcement in relation to the review. A couple of days later, the first briefing session between Qantas and the Union occurred in relation to the review and the IHB process. At this point, it is convenient to make some findings as to the IHB process generally.
9. By the time of the instigation of the review, I am comfortably satisfied that after having received (either directly or through report) detailed expert advice about industrial and legal risks, and weighed those risks in their minds, the view of each of Messrs David, Jones and Hughes was that, all things being equal, a final decision to outsource ground handling would be made. But this was necessarily subject to Qantas being required to go through the RFP and IHB process. Although they may not have been aware of the extent of the likely savings of outsourcing, at the very least, the manifest rewards and benefits of outsourcing from the perspective of Qantas were by now all well-known to them. These perceived benefits were very significant, in that outsourcing would: (a) deliver cost savings for the ground operations of around $100 million per year when things returned to normal; (b) provide the ground operations on a fully variabilised “cost per turn” basis (hence Qantas would only pay when an aeroplane needed to be “turned” at an Airport); and (c) importantly, obviate the need for capex of $80 million over the next five years in updated equipment to perform the services in-house. In their minds, I am satisfied that the benefits were so significant as to outweigh the likely legal and industrial risks as they had been explained to them. Indeed, the perceived benefits were so significant that they were all willing to move towards a probable outsourcing, even though Qantas’ experienced external industrial relations consultant, Mr Oldmeadow was, at least initially, “very concerned about the overall risks”.
10. Although any savings in the counterfactual could not be identified until the IHB process had ended, given the significance of the benefits of outsourcing from the perspective of Qantas, I do not think any of Messrs David, Jones and Hughes considered any future comparative analysis of benefits between the two realistic options was likely to be anything like a close-run thing. At this time an eventual outsourcing was a racing certainty, or close to it. I make this finding notwithstanding Mr Jones and Mr Hughes were prepared to maintain a posture in their evidence that they were very much open to the prospect and likelihood of comparable benefits emerging from the IHB process. This aspect of the evidence was a good example of its artificiality. Mr David, to his credit, was somewhat more frank and realistic.
11. A vast bulk of evidence, both expert and lay, was directed to the IHB process. Despite its volume, it can be dealt with briefly and it is unnecessary to refer to almost all of it. The Union contended that Qantas initially imposed arbitrary and unrealistic timeframes for the submission of an IHB and it was only after the Union commenced proceedings in the Fair Work Commission that a longer timeframe was allowed. It was said Qantas’ general approach to the IHB was reflected by Qantas’ representatives expressing concern about the IHB process potentially being a protracted one and that the “IHB process was, in effect, a box-ticking exercise Qantas had to go through the motions of before announcing its preferred outsourcing decision after rejecting any IHB submitted”: Union opening submissions of 2 April 2021 (**UOS**) (at [25]).
12. What is clear is that Qantas disavowed any requirement for the IHB to be a bid to the same level, or of the same formality, as it required from third parties responding to any RFP and said that it would be sufficient for any IHB to respond to the general concepts involved. On 3 September, Qantas had commenced the RFP process with third party ground handlers, by releasing materials to third party providers as part of the RFP process, including a draft “Standard Ground Handling Agreement”.
13. In any event, the Union took the process seriously, and on the advice of its advisors Ernst & Young (**EY**), provided a comprehensive request for information designed to enable the Union to identify Qantas’ historical cost structure in order to be able to isolate costs that could be removed. Mr Hughes sent a letter to the Union on 24 September, noting that Qantas was not requiring an IHB to be documented or presented in a formal fashion and that Qantas was not setting any hard savings target for an IHB. There was much toing and froing including at the instigation of a partner of EY, Mr Campbell Jackson, who was engaged to provide assistance to the Union in formulating the IHB.

#### The Outsourcing Decision – Late November 2020

1. By early November, Qantas had, in effect, negotiated terms with external providers and, by 19 November, was in a position to engage those providers to perform ground handling work (with the possible exception of Swissport).
2. We then come to the steps leading up to, and the making of, the outsourcing decision.
3. By 18 November Mr Finch had prepared a “Request for Approval – Awarding of contracts for ground operations across 10 ports” document to be sent by Mr David to Mr Joyce (**18 November RFA**) and a draft power of attorney (together, the **David Approval Documents**).
4. The 18 November RFA stated that its purpose was as follows (Ex 1, p 4249):

To seek the Chief Executive Officer’s approval to negotiate and finalise a contract or contracts for the provision of ground handling services at 10 ports across Australia, which are currently provided by Qantas Australian Airports, if that becomes required, and to incur any consequential redundancy pay liabilities.

1. It went on to note that:

At this stage, Australian Airports has received several external proposals from interested parties bidding for the Relevant Ground Operations, and may shortly receive one or more “in house bids” from Qantas employees. If Qantas accepts one or more bids from external bidders, it will need to enter contracts with those bidders and would likely be exposed to large redundancy payments for many employees who presently provide the Relevant Ground Operations.

1. A power of attorney was required, it was said, because the value of the contract will, on a net present value, exceed Mr David’s delegated authority and Mr David went on to note (Ex 1, p 4250) that:

I intend to:

1. assess the various proposals from external suppliers and any in-house bid(s), and decide which if any bids/proposals for the Relevant Ground Operations best meet the objectives sought to be met by the review (as set out above), and decide whether to accept the in-house bid(s), or accept bids from one or more external bidders. Subject to the time required to analyse and assess any competing bids (including any competing in-house bid(s)), I would intend to make that decision within the next week; and

2. if I decide to do so, negotiate and finalise the contract or contracts for the provision of the Relevant Ground Operations from one or more of the several external proposals from interested parties.

1. It is unnecessary to set out the terms of the power of attorney, save to note that it gave power to Mr David to, among other things, “negotiate” documents in connexion with the approved transaction, being the awarding of contracts for the provision of ground operations: Ex 1, p 4251.
2. As I have already touched upon when dealing with the submissions made as to the credit of Mr Finch, the circumstances in which the David Approval Documents were created and their purpose was a matter that generated much heat and light at the hearing.
3. To recap, the evidence in chief of Mr Finch conveyed the impression that the David Approval Documents emerged as a run of the mill exercise engaged in by Mr Finch on 18 November following a call with Ms Millen. So much is apparent from paragraph [12]–[15] of Mr Finch’s affidavit, which sets the scene for paragraphs [16]–[19], where Mr Finch detailed how the David Approval Documents were compiled and ultimately sent to Mr David and then to Mr Joyce. Certainty, the impression I took from reading this affidavit and that of Mr David prior to the cross-examination, was that Mr Finch had only one phone call with Ms Millen about the routine David Approval Documents, which he then drafted, and that Mr David and members of Mr David’s team assisted.
4. What actually happened was different.
5. Mr Finch initially gave evidence orally, consistently with his evidence in chief, that Ms Millen had unexpectedly approached him on 18 November by telephoning him while he was in the office: T321.34–5. As noted above, Ms Millen was the Executive Manager of Industrial Relations, and apparently a person with no general financial accounting or management responsibilities in Qantas’ business: T321.7–26. She did not explain to Mr Finch why she, as the industrial relations executive manager, was raising an issue of financial management and compliance with him: T322.29–31.
6. Later it emerged that Mr Finch had not only spoken with Ms Millen more than once (T331.35–44), but that his conversation with Ms Millen was to seek her advice to clarify whether he had correctly represented matters in the 18 November RFA: T333.5–8, 14–7 and 32–6; T335.1–7. Following further cross-examination, it became apparent that Ms Millen had in fact told Mr Finch that she was going to contact Freehills and someone from Freehills would call him (T341.35–8) and that he was going to receive a call from Mr Rohan Doyle, an industrial relations partner, and the solicitor for Qantas in this proceeding: T339.25–8 and 36–40. Mr Finch was asked whether he had had any other form of communication with Mr Doyle on 18 November and said, to the best of his recollection, he had a single telephone conversation and did not exchange emails with him: T343.39–44.
7. It is unnecessary to set out in all its detail the circumstances in which an accurate account of what occurred emerged in relation to the creation, execution and distribution of the David Approval Documents. Doing the best one can, it appears: (a) Ms Light, who was a solicitor from Freehills seconded to work in Qantas’ industrial relations team had emailed Mr Doyle, Mr Popple (another solicitor) and Mr Follett, Qantas’s junior counsel who appeared in this proceeding on the morning of 18 November, copying in Ms Millen and others; (b) Mr Doyle then emailed Mr Finch, Mr Follett, Ms Millen and Ms Light, copying in Mr Popple; (c) a Word document was emailed as between these email recipients between 6:42 pm and 7:11pm; (d) a Word document was emailed from Mr Doyle to Mr Finch, Mr Follett, Ms Millen and Ms Light, and copied to Mr Popple at 7:41pm (after a copy of the Word document, being a draft of the 18 November RFA, was last saved by Freehills); (e) at 8:11pm Mr Finch provided the unsigned David Approval Documents to Mr David and said he would contact him later that evening by text foreshadowing a “chat” (Ex 1, p 4243); (f) shortly thereafter, by 9:05pm, the David Approval Documents had been signed by Mr David and sent through to Mr Joyce (copied to Mr Finch) (Ex 1, p 4248); and (g) the following day, an executed power of attorney and request for approval (signed by Mr Joyce and witnessed by Mr Finch) was provided (Ex 1, p 4273–6).
8. All this detail as to the preparation of the David Approval Documents is said to be relevant by the Union because, it is submitted, that it is passing strange that an industrial relations partner from Freehills would need to be involved in drafting routine commercial documents (which did not concern industrial relations matters but matters of financial authority and the capacity to enter into commercial contracts for service) and this, it is said, “begs the question as to what was, in truth, the purpose and motivation for the preparation of the RFA and power of attorney”: UFS1 (at [135]). Although I should note immediately the evidence did not establish that the solicitors *drafted* the documents, only going so far as proving that they were run past, or settled, by them.
9. A further point is made by the Union that the 19 November RFA and power of attorney were “hopelessly in conflict” with Qantas’ Contract Execution Policy (Ex J), in that the authority proposed to be given to Mr David to “negotiate” contracts, was said to be inconsistent with the Contract Execution Policy. Qantas disputes any such inconsistency, in my view incorrectly, but it does not really matter. As I will explain below, I do not believe I can or should make the jump to conclude that because: (a) the David Approval Documents were settled by solicitors; or (b) Qantas read incomplete and misleading evidence in chief about their preparation; or (c) the power of attorney was prepared inconsistently with the Contract Execution Policy, that efforts were being made to hide the identity of the true decision maker.
10. On 19 November, the IHB was presented by the Union and EY made clear that the bid was “fluid” and they were “happy to engage with Qantas” as to its content. The IHB response had two aspects: *first*, it was said that, if accepted, the Union’s proposal would achieve savings of over $100 million over five years (but further work was needed to develop optimised rosters and align the utilisation assumptions underpinning the bid); and *secondly*, an aspect of the IHB was submitted by the Union’s delegates from various ports and was said to provide for additional costs savings which could be achieved.
11. The RFP process had run in September and by this time, consistently with what they had thought would be the case, Messrs Hughes and Nicholas thought the responses to that process had demonstrated that the complete outsourcing of the ground operations could and would achieve each of the three imperatives, in that it would: (a) deliver cost savings of around $103 million; (b) provide the ground operations on a fully variabilised “cost per turn” basis; and (c) eliminate the need for capex of $80 million.
12. Notwithstanding the submissions of the Union, it is unnecessary to go so far as finding that: (a) the Union and its members were not provided with proper or adequate materials to formulate an IHB; or (b) Qantas adopted an inconsistent approach to the IHB and moved the goal posts. Although the stated reasons for rejecting the IHB were somewhat curious, particularly its reference to the IHB not being sufficiently detailed when it had told the Union that an IHB need not be particularly detailed, all of this is somewhat by the by. As I have explained, there was never any real chance that the IHB would deliver the perceived commercial benefits that were thought likely to be obtained by the proposed outsourcing (and had been confirmed following the RFP process). The IHB process occurred because Qantas was properly advised that it was necessary, and although I do not find the process was simply an artifice or conducted otherwise than in good faith, if it was ever really any contest, one of the two participants could have been thought of as being at shorter than Winx-like odds, while the other was a long shot roughie. Put simply, it was done because it had to be done, but there was never a realistic prospect of it being successful.
13. The carefully drafted evidence in chief of Messrs Hughes and Nicholas stressed that the various IHBs, including the national Union IHB, failed to achieve any of the so-called three imperatives: Hughes (at [109] and [117]–[122]); Nicholas (at [72]–[73]). It was said that it was on this basis that Mr Hughes recommended to Mr David that he decide to outsource the ground operations: Hughes (at [131]–[132] and [134]). And for those same reasons, Mr Jones agreed with and endorsed that recommendation: Jones (at [66]–[75]). It will already be evident I consider that this narrative is tortured and overcomplicates what actually happened. Ever since the outsourcing proposal was first considered, each of these men thought outsourcing was in the commercial interests of Qantas (which was consistent with the three imperatives) and that it should be pursued, provided the risks were not too great.
14. But now came decision time. To execute the decision, it was necessary for a further request for approval to be prepared. The document which later became the request for approval document of 26 November (**26 November RFA**) had been prepared by both Mr Nicholas and Mr Hughes from the time of receipt of the IHB: T196.27–46; T197.1–4. Mr Nicholas, although not mentioning the fact in his affidavit, indicated that a number of persons were involved in preparing the 26 November RFA (T487.35–41), including Ms Light who was the industrial relations solicitor on secondment from Freehills: T489.2–46; T490.1–15. Mr Nicholas agreed that he had discussed the document with Ms Light: T489.26–7. It is also apparent from Ex P that a number of emails were sent attaching a Word document and Powerpoint presentation between 24 and 26 November. The inference is available and should be drawn in the light of all the evidence, that these were copies of drafts of the 26 November RFA and an accompanying Powerpoint.
15. The Union asks the Court to conclude that the process of preparing the 26 November RFA (like the process of preparing the David Approval Documents) was nothing like that as represented in Qantas’ evidence in chief. It was again said that what had been constructed was part of an artifice by which these documents gave verisimilitude to the notion that Mr David was the sole decision maker and which disguised the role of the GMC.
16. I accept that the RFAs and power of attorney did make it appear that Mr David was the sole decision maker and that Qantas was very intent in painting a picture that the outsourcing decision was the commercial decision of one man which, although made in singular circumstances, was made in a manner and by a process that was commonplace and demonstrated the ordinary business practices of the organisation. I am also conscious of the fact that although the non-privileged business records of Qantas that were created generally reflect the Qantas narrative in this respect, the documents that do exist were created when it was known they would be subject to later scrutiny and were created (and some other business records which might be expected to exist were not created), when Qantas was obtaining specialist legal advice and industrial advice. Further, I accept the witnesses called by Qantas were, as I have said, very careful in ensuring that they did not depart from evidence they considered supported the case of Qantas. But having noted all this, what I am not entitled to do is then proceed, by an illegitimate form of inferential reasoning, to some of the conclusions for which the Union contends relating to the involvement of the GMC.
17. The Union asserts that the Court should find that “the inference one draws from the whole of the evidence is that endorsement or approval was given by the GMC in a manner which rendered it having a material effect”: T884.4–6. With respect, however, I have not reached a level of reasonable satisfaction that the inference for which the Union contends should be drawn. It is simply too speculative. I have already rejected the submission of the Union that the GMC directing further work on the proposals for “transformation” is indicative of its role as a decision making forum in the context of Qantas’ business, but it is useful at this point to deal with the Union’s contention concerning the GMC making the outsourcing decision more fully.
18. The Union places some emphasis on passing references made in some documents. A representative example is that at the GMC meeting on 5 August a presentation entitled “Ground Integrated Recovery Program[me]— GMC Session #2” was made, and, under the heading: “Today’s objectives”, reference is made to “[d]ecsions for today” (relevant to the cash positon), and it is further identified that one of these objectives was to “[d]irectionally endorse next steps on priority topics”, which included the “[g]round handling strategy”: Ex 1, p 2604. These passing references to “decisions” or “endorsement”, which appear here, and from time to time in other documents were fastened upon by the Union as confirming representations made in two policy documents of Qantas and its website that the GMC, in fact, was a “executive decision making forum” or a “key decision making forum”: Ex D, E and J. It follows, according to the Union, I should reject the evidence adduced by Qantas that the responsibility and authority to develop, decide upon, and implement strategies and options relating to individual business units did not rest with the GMC. This was a stepping stone for the ultimate submission that the outsourcing decision was made at the level of the GMC collectively, and not Mr David.
19. On the evidence as it stands I am not satisfied that the Union’s contention as to the role of the GMC in making the outsourcing decision should be accepted. Too much can be made of the references relied upon by the Union. It is plain that the GMC set broad strategic goals and parameters for the entire Qantas Group including, relevantly, developing the three-year integrated recovery plan, and that it was a senior forum to exchange information, and to consider and provide feedback on risks and opportunities. But, speaking generally, it seems to me that the GMC fulfilled this role, and the primary responsibility for specific significant proposals being identified, considered and then implemented was one of the senior managers (but only after proper consultation with the GMC as to the risks and opportunities). As I noted above, this makes intuitive sense given the size of the business, the way it was structured, and the apparent ambit of responsibility of the senior managers. I dare say a senior manager would not last long if they ignored the feedback of the GMC and ploughed on to make a major decision contrary to the feedback and risk assessment emerging from a GMC meeting, but this does not mean that the members of GMC (or any member of it) acted as the decision maker.
20. In any event, the 26 November RFA and presentation in relation to the outsourcing decision were sent to Mr David and the following day, Mr David signed the request for approval in relation to the outsourcing decision. I am satisfied that although, from at least August, the outsourcing decision was very highly likely to be made, it was Mr David who ultimately was responsible for making it.
21. On 29 November, the Qantas Board was provided with a memorandum about the outsourcing decision and on 30 November 2020, Qantas announced that it had rejected the IHB and determined to outsource its operations to external third party providers. It is worth setting out the communication from Mr David to employees (Ex 1, 4754–6) in some detail:

Hi all,

It’s been three months since we announced a proposal to outsource ground operations across 10 Australian Airports.

I know this process has been extremely tough for everyone, but the reasons why we needed to undertake the review unfortunately remain.

We project significant losses will continue this financial year, with revenue falling by more than $10 billion. While some domestic flying is coming back, international markets are expected to take years to recover. We’ve had to take on over $1.5 billion of additional debt. And we know our competitors are aggressively cutting costs to emerge as leaner businesses into a market that will have been through a recession.

We face a huge task to recover from this crisis and we need to make fundamental changes across the Group.

For ground operations, we need to solve for three challenges – lower our overall cost of ground handling operations (by outsourcing we anticipated saving around $100 million annually based on pre-COVID flying), avoid large spending on equipment (calculated at $80 million over 5 years) and match our ground handling services with fluctuating levels of demand.

**OUTCOME OF THE REVIEW**

We’ve completed a review of the TWU-led national in-house bid including local proposals from employees at individual airports, as well as bids from external specialist providers. We’ve assessed the information against how they address the three challenges set out in the review.

**After careful consideration of the proposals, and subject to consultation, we’ve decided to proceed with outsourcing all baggage, ramp and fleet presentation functions in all 10 remaining ports where we still do this work in-house.**

While this is the best outcome from a business perspective, we are very conscious of what it means for our people. Regrettably, around 2,000 roles will likely become redundant once we transition these services to the third-party suppliers, subject to consultation.

This was an extremely tough decision and I appreciate this news will be upsetting for our Australian Airports team and their families.

…

**THE BIDS**

The TWU national in-house bid was unsuccessful because it didn’t outline a plan or any real detail for how costs savings would be practically achieved. The bid was also unable to solve the challenge to avoid large spending on equipment and matching our ground handling services with fluctuating levels of demand.

In contrast, teams at some airports presented a number of ideas to deliver our ground handling services more efficiently. Unfortunately, they were only able to identify $18 million in savings compared to external suppliers who can solve all three challenges, including an overall reduction in annual ground handling costs of approximately $103 million.

Specialist third-party ground handlers provide services to many airlines as their core business. This means they have much lower overheads and equipment costs, better access to technology and resources they can scale up and down more easily between airlines.

…

**NEXT STEPS**

While you come to terms with this news, can I ask you to please look out for yourself and each other. For those currently working, please continue to keep your eye on safety.

Over the coming days we’ll consult with our affected employees and the TWU to discuss the proposed timing for transitioning ground handling services to the external suppliers.

Subject to this consultation and the finalisation of contracts, our intention is for this to take place in the first quarter of 2021. It’s expected that, over time, there will be a range of opportunities for some impacted team members with suppliers in the sector, as travel demand gradually recovers.

I want to thank our ramp, baggage and fleet presentation teams for their professionalism and contribution to supporting our customers and our operations over many years.

1. Qantas’s reasons for refusing the IHB are criticised by the Union as being disingenuous in circumstances where Qantas had said, repeatedly, that the IHB was not required to be detailed or that the IHB did not need to be presented in a manner as formal or sophisticated as those presented by external providers, but this is not really to the point. As I have noted, there was never any realistic prospect the Union’s bid would be as commercially attractive as the outsourcing proposal – if, as Mr David said, this was, in truth, an “extremely tough decision”, it was not because Messrs David, Jones or Hughes were in any way vexed in working out what they considered to be best in furthering the commercial interests of Qantas.
2. In late January 2021, Qantas entered into ground handling agreements with third party providers and on or before 31 March 2021, all relevant affected Qantas employees ceased employment.

## C.8 Findings on Outsourcing Decision

1. Needless to say, the findings identified above are relevant to the extent that they assist in forming a conclusion as to the reason or reasons for making the outsourcing decision by Mr David and, to the extent it is relevant, the reason or reasons of those who materially contributed to the making of the decision by Mr David.
2. The submissions of Qantas were that the Union’s case is an artificial construct. It complains (QFS1 [33]) that the Union seeks to “throw a blanket” over the entirety of events from late April onwards, then conduct a roving search for what facts or circumstances may have been exercising the minds of various Qantas managers at various times, about various issues and in various contexts, so as to assert, for the first time in final address, that any and all of those things should be regarded as substantial and operative reasons for the outsourcing decision.
3. In summary, Qantas contends that while Mr David kept a close eye on implementation risks, his immediate and operative reasons for the outsourcing decision were, quite simply, which of the two parallel processes achieved the so-called three imperatives and those matters were the only subject matter of the comparative assessments of Mr Nicholas and Mr Hughes, the recommendation of Mr Jones and the only subject matter of the 27 November RFA and the detailed “RFA Support Pack”: Ex 1, p 4597–614.
4. This submission is said to be made good by the evidence given by the relevant witnesses and the fact that there is no mention of any of the earlier considerations that had been analysed and assessed, including in the GMC presentations, in the contemporaneous documents (including the 30 November announcement and associated employee communications, and Mr David’s memorandum to the Board dated 29 November). I have dealt with the cogency of the evidence in chief, and it suffices to note that given the critical documents had been poured over by a team of industrial relations lawyers with eyes attuned to protecting the imminent decision to later potential attack, reference to anything other than the three imperatives in the contemporaneous documents would have been remarkable.
5. Mr David’s evidence was that his reasons for making the decision were the same reasons he had in August for embarking upon the outsourcing proposal, which he said were the three objectives: T764.28–35. I am satisfied that evidence is substantially correct although I am not satisfied that these three objectives, expressed as they are at a level of generality, meant that Mr David was not subjectively conscious of other considerations which were not inconsistent with the three imperatives. Although Mr David rejected the proposition that his reason for the decision to outsource was that he “wished to avoid Qantas being in a position where it needed to bargain with and negotiate with the Union in the future” (T764.41–3); and was to “prevent employees disrupting services in the future by taking protected industrial action” (T765.8–10), whether those denials reflect his subjective views at the time is something I have reservations about.
6. Part of this uncertainty as to the evidence of Mr David is because I specifically reject the similar but unconvincing evidence of Mr Jones that no part of his reasons for recommendation to make the outsourcing decision was to prevent employees disrupting services in 2021 by taking protected industrial action when, it was hoped, services might be getting back to usual.
7. In this regard, it is worth mentioning that both Mr Jones and Mr Hughes clearly thought differently about the likely amenability of the Australian Services Union (**ASU**) and the Union. The ASU had coverage and practical membership of so-called “above the wing” customer service staff: T120.28–9. In the 20 May note (Ex 1, p 1178), upon which Mr Jones made handwritten annotations, an option to deal with the “challenge” presented was to approach the ASU and negotiate changes to ASU enterprise agreement(s): T120.35–47 and T121.1–3. In June 2020, Mr Jones noted in relation to the ASU (Ex 1, p 2042) that Qantas was “taking a right size approach of the workforce … Believe path with ASU will exist to deliver close to $ targets even with an open EBA”. In this regard, Mr Jones accepted that he believed that even with an open enterprise agreement, negotiations with the ASU could produce the cost savings sought by Qantas and that he was, in his notes, drawing an unfavourable comparison between the ASU and the Union in relation to the achievement of cost targets: T581.6–10 and 25–9.
8. In Mr Jones’ notes in a ‘Q&A’ section, which he said were intended to assist him in dealing with questions he contemplated he might get from Board members (Ex 1, p 2043) he noted, obviously contrasting the more compliant ASU that “right sizing” was preferable because, among other reasons, “ASU/Linda willing to work with us on transformation” (Linda being the ASU’s then National Secretary, Ms Linda White (T583.23–4)).
9. It is plain that Mr Jones (and, for that matter, Mr Hughes) believed that the ASU members were persons with whom one could do business, but the more militant Union and its members fell into a different category. Put more specifically, notwithstanding that the ASU EPA was “open” and protected industrial action was a possibility, what Mr Jones was concerned about was the Union being able to exert industrial power by organising protected industrial action following the QAL Agreement reaching its nominal expiry date of 1 January 2021. Not only did Qantas perceive that it could not work with the Union and its members in ground handling without some difficulty, it feared the Union and its members having both the QGS Agreement and QAL Agreement “open” concurrently.
10. The Union submits that the differing manner in which Mr Jones (and Mr Hughes) considered that Qantas should deal with the above the wing and below the wing workforces points to the Union and its membership being some factor motivating their involvement in promoting Qantas proceeding to outsource. I deal with this submission below.
11. There was no suggestion anywhere in the evidence that Mr David and Mr Jones (and Mr Hughes for that matter) had any different views as to the risks and rewards of outsourcing and the apparent consensus between them, although not definitive, weighs in favour of a conclusion that Mr David had similar views as Mr Jones (and Mr Hughes) as to when and why outsourcing should occur.
12. I have formed these views notwithstanding that I accept the submission of Qantas that logic suggests that avoiding unnecessary capital expenditure, improving flexibility and reducing costs (in the midst of a financial crisis when large-scale cost savings and restructuring was happening across the whole Qantas Group) are all objectively cogent commercial reasons for the outsourcing decision – but making the outsourcing decision to further these imperatives, is not inconsistent with another, complementary reason. The key concern of making the outsourcing decision at the time that it was made was because of the vanishing window of opportunity. The operational disruptions caused by the pandemic were, viewed as at November 2020, likely to continue for some time but not, mercifully, indefinitely. The operational disruption occasioned by the pandemic meant that the risk/reward analysis that had previously prevented outsourcing being considered a viable option became, for a limited period, viable. The existence of the open EBAs were clearly, at least in the mind of Mr Jones, a further factor. Mr Jones perceived a need for the outsourcing decision to be made prior to Qantas being presented with the prospect that the inevitable industrial backlash caused could have, as part of its response, protected industrial action.
13. In summary, although I am satisfied for reasons that I have explained that this factor was part of Mr Jones’ reasoning processes in making his assessment of the two remaining options and his endorsement of the recommendation to Mr David, I am less certain of the subjective decision making processes of the decision maker, Mr David. I will expand upon these findings, and consider their legal consequences, below.

# D the CLAIM AND THE law: adverse action

## D.1 The Nature of the Claim

1. The Union relevantly alleges that one of Qantas’ substantial and operative reasons for making the outsourcing decision was because (ASOC at [40]) the affected employees were members of the Union (**affected employees**) (contrary to s 346(a) of the FWA) or because they either had various workplace rights, or to prevent them exercising various workplace rights (contrary to s 340 of the FWA).
2. A number of matters are not in contention: *first*, it is accepted that the outsourcing decision amounted to a form of adverse action against all affected employees (Defence at [34(a)–(b)]); *secondly*, all of the affected employees were entitled to the benefit of a workplace instrument (s 341(1)(a)), being an enterprise agreement made under the FWA (the QAL Agreement and the QGS Agreement) (Ex A, [8]–[9]); and *thirdly*, that a number of the affected employees were members of the Union.
3. Hence although there is some peripheral debate about whether the affected employees had (and the extent to which they had) other alleged workplace rights, as explained by way of introduction to these reasons, as Qantas submitted (Qantas opening submissions dated 2 April 2021 (**QOS**) [5])), this case is to be decided by answering the following question: did any prohibited reason “form a substantial and operative part of Qantas’ reasons for making the Outsourcing Decision”?

## D.2 The Relevant Law

1. In this section I will make some general observations as to the applicable law to be applied, but it will be necessary to return to some issues as to the proper construction of the provisions relied upon by the Union in Section E below.
2. The “adverse action” provisions are found within Pt 3-1 of the FWA, that Part being directed to “General Protections”. Section 340, falling under “Division 3 – Workplace rights”, appears in relevant part as follows:

**340 Protection**

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person’s benefit, or for the benefit of a class of persons to which the second person belongs.

1. As can be seen, the elements to the cause of action under s 340 are that: (a) the employer must have taken “adverse action” against the relevant employees; (b) those employees had the “workplace rights” that they allege; and (c) the employer took the adverse action against the relevant employees because they held those workplace rights or to prevent the exercise of those workplace rights.
2. The “workplace rights” relied upon by the Union were identified as being:
3. the benefit of entitlements conferred by the Enterprise Agreements (s 341(1)(a) FWA);
4. the ability to participate in a process under the FWA by initiating or participating in bargaining for the making of an enterprise agreement (s 341(1)(b) FWA); and
5. following the nominal expiry of the Enterprise Agreement covering the relevant employee, the ability to participate in a process, being a protected action ballot and organising and/or engaging in protected industrial action for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement.
6. Qantas contends that, having regard to the statutory language, a person only has a workplace right if they are, at the point in time when adverse action is taken against them, presently able to initiate or participate in a process under a workplace law: QOS [56]. Qantas also contends that as at the time of the outsourcing decision the affected employees did not have the ability to: initiate or participate in the process of bargaining for enterprise agreements; participate in a protected action ballot; or engage in protected industrial action: QOS [53].
7. The facts of relevance to that contention is that, as explained above, at the time of the outsourcing decision: (a) the QAL Agreement had not yet reached its nominal expiry date of 31 December 2020 and no process of bargaining for a replacement had been initiated; and (b) the QGS Agreement had reached its nominal expiry date and the process of bargaining had commenced, but no process for protected action ballot or protected industrial action had yet been initiated.
8. The Union contends that if a workplace law or instrument gives a person an ability to do something and adverse action is taken because of that reason, the person engaging in the adverse action will take that action because the person has that ability. The ability to engage in the particular process or proceeding need not presently exist. Justice Jessup in *Tattsbet v Morrow* [2015] FCAFC 62; (2015) 233 FCR 46 (at 73 [107]) interpreted s 341(1)(b) widely in that s 341(1)(b) “is not dependent on the existence of an entitlement” and rather it depends “upon the person’s proposal to initiate a process or proceedings under a workplace law.” Though those comments were specifically made in relation to a claim under s 340(1)(a)(iii) for a proposal to exercise a workplace right.
9. It is unnecessary to resolve these issues given that the Union also relies on s 340(1)(b), that is, the prevention of the exercise of a workplace right; and because it also relies on s 341(1)(a), in respect of which the relevant workplace right is conceded by Qantas. It is not suggested it would add anything in terms of relief were the Union to be successful on the basis of a number of workplace rights, rather than successful on the basis of the most relevant workplace right.
10. Section 346 appears in “Division 4 – Industrial activities”, and provides as follows:

**346 Protection**

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

1. The elements to the cause of action under s 346 are also as follows: (a) that the employer must have taken “adverse action” against the relevant employees; (b) that each relevant employee is a member of the Union, it not being in dispute that the Union is “an industrial association” for the purposes of the FWA; and (c) that the employer took the adverse action against each relevant employee because they were each members of the Union.
2. The applicant must “establish as an objective fact the circumstance said to be the reason for the taking of the adverse action”, that is, the Union must establish each of the first two elements of ss 340 and 346 on the balance of probabilities: *Australian Red Cross Society v Queensland Nurses’ Union of Employees* [2019] FCAFC 215; (2019) 273 FCR 332 (at 343 [66] per Greenwood, Besanko and Rangiah JJ); *Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222; (2017) 256 FCR 306 (at 340–2 [154]–[157] per Bromberg J).
3. The meaning of “adverse action” is addressed in s 342, and the Union alleges that the provisions of most relevance (noting that Qantas conceded the outsourcing decision amounted to “adverse action”) are:
4. in the case of Qantas’ own employees, Item 1(c) of s 342(1), that Item directed to an employer against its employee, and “[altering] the position of the employee to the employee’s prejudice”; and
5. in the case of Qantas’ contract for services with QGS, Item 3(c), that Item concerning a principal against a contractor, and similarly “[altering] the position of the independent contractor to the independent contractor’s prejudice”.

#### “Substantial and operative factor” and more on the “reverse onus”

1. As to the third element of each cause of action, the word “because” as used in ss 340 and 346 (and other provisions of the Act) requires an examination of the reasons of the employer for the “adverse action”. The sections are contravened if it can be said that a prohibited reason (the exercise of the workplace right or membership of the Union) “comprised ‘a substantial and operative’ reason, or reasons including the reason, for the employer’s action”: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 (at 535 [104] per Gummow and Hayne JJ); *General Motors-Holden’s Pty Ltd v Bowling* (1976) 51 ALJR 235 (at 242 per Mason J (as his Honour then was), with whom Stephen and Jacobs JJ agreed).
2. Sections 360 and 361 of the Act further address those circumstances where it is necessary to determine the “reason” why particular action was taken, such as is required by ss 340 and 346.
3. Section 360 provides as follows:

**Multiple reasons for action**

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

1. And, as noted above, s 361 of the FWA means that in the circumstances of this case, to the extent it is relevant, Qantas bears the onus of proof on the issue (identified at [44]–[48] above), being: did any prohibited reason form a substantial and operative part of Qantas’ reasons for making the outsourcing decision?
2. Although it is not in issue here, it is worth recording that before any presumption under s 361 is engaged, the pre-condition or “requirement [is] that the evidence [be] consistent with the hypothesis that the respondent was actuated by a proscribed purpose”: *Red Cross Society* (at 345 [74] per Greenwood, Besanko and Rangiah JJ).
3. Having now found the relevant facts based upon consideration of the entirety of the evidence adduced and determined that Mr David was the decision maker, my role as the tribunal of fact is now to determine relevantly whether Qantas has established, on the balance of probabilities that the action taken was not taken for reasons which included a prohibited reason. That question is to be answered by reference to my findings on all the evidence relevant to the question, but given the repeated reference by the Union in submissions to evidence that *might* have been called, it is necessary to recall that s 361 does not impose upon Qantas the onus of calling any and every piece of evidence that might arguably influence the answer to the question of reasons or intent: see *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157; (2015) 238 FCR 273 (at 279 [27] per Jessup J).
4. Sections 340 and 346 (among other provisions in the Act) are directed to the state of mind of “a person”. As was explained by Heydon J in *Barclay* (at [140] 544), that case concerning a s 346 adverse action claim and the state of mind of the Chief Executive Officer, “[e]xamining whether a particular reason was an operative or immediate reason for an action calls for an inquiry into the mental processes of the person responsible for that action.” This can be a straightforward exercise, but in other cases, even where there is one decision maker, complexity can arise.
5. I considered the principled approach when a number of individuals are in some way involved in the decision making process in *Leahey v CSG Business Solutions (Aus) Pty Ltd* [2017] FCA 1098 and noted (at [103]–[104]):

103. … In *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; (2001) 129 IR 251, the Full Court considered a situation where two supervisors assessed an employee for redundancy by reference to identified criteria. A third person, a general manager, then made the ultimate decision to terminate the employment of the employee. It was explained that if either of the supervisors’ assessments was influenced by a prohibited reason, that would have impugned the decision of the general manger, even though the prohibited reason had not been disclosed to him. In doing so, at 260 [37] the Court explained that one supervisor made “*an indispensable contribution to the rankings*” and both supervisors “*co-operated in a joint assessment, with each giving an account of what influenced them individually*”. If one supervisor “*was influenced in giving a low mark by a prohibited reason, it can be assumed that if the ranking were done without having regard to that prohibited reason*” then this would, inevitably, have, affected the ranking process, whatever the views of the other supervisor. Furthermore, whatever debate there might be about the extent of the general manager’s power or involvement in the decision, the manager’s evidence was that he took the supervisors’ assessment and worked from there. It followed that if the supervisors’ assessment was affected (or infected) by either supervisor holding an undisclosed prohibited reason, then the general manger “*would have, in effect, inadvertently adopted it so that its force continued regardless of the lack of any express prohibited reason in the mind of*” the general manager (at 260 [37]).

104. In dealing with the Full Court’s decision in *Kodak*, in *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Ltd* [2015] FCA 1014; (2015) 253 IR 166, Reeves J observed (at 198 [121]) that:

… where the reasoning process is dispersed through an assessment process involving a number of persons…the judgment in *Kodak* requires me to examine the reasoning process employed by each person whose involvement had a material effect on the ultimate decision. This inquiry…focuses on the conscious reasoning processes of those who had a material effect on the ultimate outcome to determine whether their reasoning processes were free of the alleged prohibited reason or reasons. If one or more of the reasons employed by one or more of them was a prohibited reason, that will impugn the ultimate decision. This is what I consider the Full Court meant by “inadvertently” adopting an “undisclosed prohibited reason” in *Kodak* …

(References omitted).

1. Very recently, in *Wong v National Australia Bank Limited* [2021] FCA 671, Snaden J (at [84]–[98]) referred to the process of corporate decision making and the circumstance decisions made on behalf of a body corporate by an officer, but with input from others. His Honour noted (at [85]) that the authorities provide that “a body corporate’s reasons for conducting itself in a given way might reside or partly reside in the mind or minds of individuals other than those who decided to effect that conduct”. Reference was made to *National Tertiary Education Union v Royal Melbourne Institute of Technology*[2013] FCA 451; (2013) 234 IR 139, where Gray J determined that a University’s reasons for dismissing an academic employee resided not merely in the minds of those who made the decision to dismiss, but also in the minds of those who authored a memorandum that recommended that course. The memorandum was said to be “an essential part of the process” and, thus, the reasons of its authors were held also to be the University’s reasons for dismissing the employee.
2. At [86], Snaden J noted that *RMIT* was consistent with the earlier reasoning in *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; (2001) 129 IR 251 (discussed above) and that of Greenwood, Besanko and Rangiah JJ in *Red Cross Society*, where the Full Court noted, after referring to *Kodak*and *Clermont Coal* (at 348 [91]), that:

… a person who is involved in the process leading to the decision may be a decision-maker for the purpose of a prescribed [sic] purpose, but we do not need to formulate a precise test for the purpose of this case and consider it prudent to refrain from doing so.

1. Snaden J perceived difficulty in reconciling *Kodak* (and *Australian Red Cross*)with two decisions of the High Court: *Barclay* and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243, both being cases which “did not concern the anatomy of corporate decision-making” but were instructive because:

… they illustrate the distinction to be drawn between a person’s reasons for doing something and the contextual influences that might bear in some way upon those reasons. In a case such as the present, although the latter might inform the court’s assessment of the former, it is the former that remains the central issue to be determined.

1. His Honour then made reference to *Australian Workers’ Union v John Holland* [2001] FCA 93; (2001) 103 IR 205 (Goldberg J), where the fact of the employee’s membership of the applicant union, although significant in a contextual sense, did not factor in the mind of his employer as a reason for his dismissal. This, and another similar case, were said to illustrate that:

… the reasons of those who significantly or indispensably influence (or, as Reeves J put it in *Clermont Coal*, 198 [121]: have “a material effect on”) such decisions ought not to qualify, merely by reason of that influence, as reasons that animate resultant corporate conduct.

1. His Honour regarded this approach as being consistent with the language employed by s 793(2) of the FWA which serves to deem (in defined circumstances) the existence of a corporate state of mind “in relation to particular conduct”. It does so by paying regard to the state or states of mind of the human agents by whom “the conduct was engaged in”. Insofar as it concerns a course or instance of conduct engaged in by or on behalf of a body corporate:

… the question that arises under s 793(2) is not “Who influenced (or indispensably or significantly influenced), contributed to or had a material effect on the decision to embark upon that conduct?”; it is, rather and more simply, “Who decided that that conduct should be embarked upon?” It is in the mind or minds of the latter that the state of mind of the body corporate on behalf of which they act is to be found.

1. His Honour concluded that he was unable to see how “an individual officer might qualify as a maker of any given corporate decision unless he or she can be thought to have exercised some authority or executive power to effect it, be that actual or ostensible, formal or otherwise”. Having noted this, his Honour recognised he was required to apply *Kodak*and the other cases that have applied equivalent reasoning.
2. If there is a case at Full Court level where the issue of whether a person who is involved in the process leading to the decision was a decision maker for the purpose of a proscribed purpose was decisive, and it was argued that the relevant reasoning in *Kodak* was plainly wrong, then it will no doubt be necessary for a Full Court to evaluate the points usefully raised by Snaden J. A formal submission was not made in this case that *Kodak* was wrongly decided (although it was sought to be distinguished) and, although I will make relevant findings, for reasons I will explain, the case does not ultimately fall to be decided only by whether a person other than Mr David, materially involved in the process leading to the outsourcing decision, was motivated by a proscribed purpose.
3. It suffices to note, for my part, the point is not without difficulty but at least in some cases, it may be artificial to maintain any bright-line distinction between a person’s reasons for doing something and contextual influences that might bear upon the reasoning process and its result. This is not to suggest an objective test be adopted, nor the taking into account of any unconscious reasons (and hence detract from the principles explained in *Barclay*). But some decisions (like in *Leahey*) are the culmination of a long process involving the input of others. It is easy to conceive of cases where influences which may be characterised as “contextual” may matter, and subjectively bear upon a reasoning process. It all depends. Every decision is made in a context and is the work of a human actor; and decisions can be complex things involving the application of rational thought, but can also involve confusion and illogicality that are part of the human experience. In the end it is all a fact dependent analysis. In any event, it is unnecessary to explore these issues further.
4. The Union did, however, place some emphasis on *Kodak* and *Clermont Coal*. It will be recalled that part of the Union’s case was that either the GMC made the decision or materially contributed to Mr David making the decision (propositions I have rejected). Relevant to both assertions were submissions made about the absence of evidence from most members of the GMC. The Union went so far as to submit that to discharge the onus, an employer in the position of Qantas is *required* to lead evidence of the reasons and purposes of all persons who “were involved and contributed to the ultimate decision”. This submission should be rejected for two reasons.
5. The *first* is that it is important not to misunderstand *Kodak* and *Clermont Coal.* In each case, as noted above, the senior manager selected the employee for retrenchment by reference to a ranking carried out by subordinates which “led inexorably” to the selection of the employee for retrenchment. This is why, on the facts of those cases, the involvement of others had “a material effect on the ultimate outcome” (*Clermont* (at 198 [121] per Reeves J)) or had an “indispensable contribution to the rankings” (*Kodak* (at 260 [37] per Lee, Madgwick and Gyles JJ)).
6. *Secondly*, the proposition as contended for by the Union not only puts the matter too highly, but would also be contrary to principle and unworkable. At this level of generality, it seems to me to depart from the foundational requirement that if a party’s case is otherwise proved on the material in evidence, the inference that the absent witness would not assist the party’s case does not detract from the proof, nor lead to a discounting of the evidence actually called: see [*Morley v Australian Securities and Investments Commission*](https://jade.io/article/204396) [2010] NSWCA 331; (2010) 274 ALR 205 (at 322 [634] per Spigelman CJ, Beazley and Giles JJA); *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (at 413–4 per [[169]–[170]](https://jade.io/article/264257/section/14349) French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, and at 442 [[253]](https://jade.io/article/264257/section/4482) per Heydon J). Of course, like in any other civil case, there will be circumstances where demonstration that other evidence could have been, but was not, called may properly be taken into account in determining whether a party has proved its case to the requisite standard. But, as was stressed in *Hellicar* (at 412–3 [165]–[167] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), disputed questions must be decided according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led.
7. Before leaving this topic, it is worth noting that Qantas expressly accepted (QFS1 [208]) that the principles in:

*Kodak* and *Clermont* are applicable to the extent that Mr David adopted the evaluative assessments of his management team in Australian Airports (Messrs Jones, Hughes and possibly Nicholas) as to the RFP responses meeting the Three Imperatives and the IHBs not meeting those imperatives.

1. Further, senior counsel for Qantas explained as follows (T220.30):

So the way in which this case is brought is that there’s a decision in late November that follows the receipt of the third party tenders and the in-house bid and involves an evaluation of those matters, and it’s the reasoning process of that point of time by those who participate either as the decision-maker or as the recommenders of the decision which is necessarily to be the only focus of the inquiry, ultimately.

1. Qantas’ main point was to stress, correctly in my view, that the analysis required by ss 340 and 346 is a causal inquiry into the reasons of the decision maker at the time the adverse action was taken: *Barclay* (at 542 [127] per Gummow and Hayne JJ).

# E ASSESSMENT

1. In this section I will deal separately with the two pleaded (ASOC at [40]) cases, being that the outsourcing decision was taken because the affected employees: (a) were members of the Union (**s 346(a) case**); and (b) either had various workplace rights, or to prevent them exercising various workplace rights (**s 340 case**).

## E.1 The s 346(a) case

1. The Union contends for the finding that the Court cannot be satisfied that Qantas has established that it was not a substantial and operative reason for deciding to outsource ground handling that the TWU had almost 100% membership among Qantas employees and significant membership among QGS employees.
2. In summary, leaving aside disputes as to credit and procedural fairness issues (both of which I have dealt with above), Qantas contends that this contention should be rejected for four reasons.
3. *First*, because it is inconsistent with the basal fact that the outsourcing decision applied to all affected employees and did not discriminate between them on the basis of Union membership and Qantas still employs workforces represented by the Union, including in its freight business. In particular, whatever the true positon as to the proportion of affected employees who were members of the Union, in the presentation pack for the GMC meeting on 2 June, the Australian Airports management team understood that the breakdown of the workforce was approximately 1,000 Qantas direct employees and approximately 1,700 QGS employees: Ex 1, p 1358. And according to the Oldmeadow advice, the QAL workforce was 1,078 employees with Union membership close to 100% and the QGS workforce was 1,632 employees with Union membership around 50%: Ex 1, p 1524. Mr Jones received this information by email and he forwarded it to Mr Hughes, and had no reason to doubt its accuracy and accordingly, it is said, considered that over 800 of the affected employees were not Union members. Despite this, neither the outsourcing proposal nor outsourcing decision drew distinctions based upon Union membership or even between Qantas employees and QGS employees (save for the IHB process, which was an entitlement of Qantas employees).
4. *Secondly*, Qantas contends that the Union seeks to draw too much from documents, by opportunistically fastening upon an extract from a document (such as the GMC meeting presentation packs for the 29 May and 2 June GMC meetings), contending that the extract carries an objective meaning that aligns with the alleged characteristics of the proscribed reason (here, Union membership); and then asserting that this meaning is consistent with the Union’s hypothesis. This is connected with the submissions of Qantas on credit, in that it is submitted that such an approach does not serve to contradict the evidence of the Qantas witnesses as to their reasoning (as distinct from being a factor or risk pertaining to one or more options under consideration at an earlier point in time).
5. *Thirdly*, much time was spent by Qantas in pointing out that a “reason” for a decision will only be proscribed if it amounts to a *substantial* and *operative* reason (*Barclay* (at 535 [104] and 542 [127]–[128] per Gummow and Hayne); *BHP Coal* (at 267 [85] per Gageler)) and, relatedly, drawing a distinction between *reasons*, as that concept is properly understood, and *factors* or *considerations* which may have entered into the decision making process. Relying on the reasons of Merkel J and Finkelstein J in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2001] FCA 349; (2001) 112 FCR 232 (at 276 [164] and 289 [209]), the differences between a *reason* for acting, and the underlying *cause or causes* of that reason was stressed. Correctly, Qantas pointed to the fact that some factor or another may enter into the reasoning process of a decision maker, but not amount to a substantial and operative reason for the taking of adverse action.
6. *Fourthly,* Qantas unsurprisingly stressed that a reason is only proscribed under the FWA, if Mr David’s own internal reasoning or mental process was to take the adverse action because, relevantly, the affected employees were members of the Union *per se*.
7. It is convenient to deal with each of these four matters in turn.
8. *First*, the submissions made by Qantas that all affected employees were not Union members is not persuasive as an answer to the notion the outsourcing decision was taken *because* the bulk of affected employees were members of the Union. As I found at [40]–[41], the affected employees were: (a) in large part members of the Union; (b) constituted the bulk of the Union’s members in Qantas’ airline business; and (c) the effect of the outsourcing decision would be to remove the vast majority of Union members from Qantas’ business (and hence the Union’s industrial influence would be reduced in Qantas’ business). Although I do not think that the intent of the outsourcing decision was to hobble the industrial influence of a perceived “militant” industrial organisation, given the nature of the Union’s membership and its members’ roles, outsourcing ground operations to third party contractors would be an effective way of going about the fulfilment of such an aim.
9. *Secondly*, as I have found (and as Qantas accepts (QFS1 [299]–[301])), the Australian Airports management team (Mr David included) held the view in mid-June that to achieve the cost reductions relevant to Option 1 (rightsizing ground operations), that is, the “surplus management savings in terms of stand downs, leave burn and other flexibilities (estimated in the range of at least $28 million), would require the agreement of the [Union] and this appeared difficult”. This is, of course, reflected in the presentation packs for the 29 May and 2 June GMC meetings, as well as Mr Jones’ “AA Summary” document presented at the 15 June GMC meeting: Ex 1, 1812–3. It was, in this way, a clear factor militating against Option 1 and, as a matter of logic, seems to me a factor to be considered in favour of Option 5 (outsourcing). But curiously this corollary was resisted by Qantas. Indeed, Mr Nicholas gave evidence (T465.5–7), which when being given was particularly unpersuasive, denying that the difficulty with securing agreement with the Union on surplus management savings was a reason why he recommended outsourcing. This strikes me as both artificial and unconvincing, and Mr David was again more frank. When Mr David was specially taken to the comment: “[w]ill be very difficult with the [Union] to agree to reduced hours”, in Mr Jones’ “AA Summary” presented to the GMC on 15 June, he gave the following, more convincing, evidence (T694.42–6):

So that was a consideration against pursuing option 1, and in favour of pursuing the decision which you refer to as option 5; correct? --- Yes. Because of the commercial objectives, yes.

1. I accept, as a matter of pure logic, that a negative consideration attaching to Option 1 does not automatically make the consideration a reason for preferring Option 5, but I am satisfied that this was the case here. As I have explained, the “commercial objectives” and commercial view of the whole of the Australian Airports management team did not change from June until the making of the ultimate outsourcing decision: the outsourcing was always going to be the option which best promoted the commercial interests of the company as the team perceived them. Although it is correct to say a conclusion was reached that only the outsourcing option would achieve the so-called three imperatives, an aspect of this evaluative assessment was that each man thought that no realistic or foreseeable agreement with the Union was ever going to deliver commensurate commercial benefits as outsourcing.
2. *Thirdly*, it is clearly correct, as Qantas submits, that a decision maker can take into account a range of factors, positives and negatives and risks in assessing a decision, without those factors becoming a substantial or operative reason for the decision. Leaving aside authority recognising such a distinction, this is commonsense drawn from ordinary human experience. But too close a focus on abstractions and categorisations is apt to be distracting. After some factor or consideration has been identified, as North J explained in *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* [2003] FCA 910; (2003) 126 IR 165 (at 194 [98]), the inquiry involves “questions of judgment and characterisation”. Any analytical tool which distinguishes between a “cause” or a “factor” and a substantial and operative reason is part of a process of characterisation and assessment of degree in making a finding as to the subjective processes of reasoning of the decision maker.
3. *Fourthly,* Qantas’ more telling point seems to me to focus on the commercial reality of the situation in which the Australian Airports team found themselves. Although the outsourcing did have the consequence of diminishing substantially the industrial influence of what the Australian Airports team considered to be a non-compliant and obdurate Union, my focus must be on whether, in truth, a substantial and operative reason for what happened was *because* the affected employees were members of the Union: see ASOC [40].

#### Conclusion on the s 346(a) case

1. Great effort was spent in this case by the Union pointing to a history of industrial antipathy and then identifying references to the Union being difficult, to the impracticality of reaching agreement with the Union, and by pointing to contrasts between the way in which Qantas perceived the Union, as compared to the apparently more benign ASU. The documents are replete with reference to industrial risks and the likely industrial backlash if outsourcing ground operations was pursued (which was no doubt the reason why experienced industrial lawyers were so heavily involved and Mr Oldmeadow had an involvement – albeit one the extent of which one is far from pellucid). Much time in cross-examination was spent taking witnesses to these various references.
2. There is, however, a distinction between factoring something into consideration of an issue, and making a decision about the issue presented (however the distinction, although important, may, in some cases, be an elusive one). As I have explained, I am amply satisfied that the outsourcing decision by Mr David in November became inevitable because an assessment was made that the perceived manifest commercial benefits outweighed the risks. Financial crisis and the operational disruption, both caused by the pandemic, meant that the industrial and reputational risks were far less significant than would otherwise have been the case. It is hardly surprising that the pure financial interests of the corporation, at a time of financial crisis, were at the forefront of consideration. Qantas’ evidence went to great lengths to paint a picture of internal agonising and studious assessment of the alternatives and detachment up until the eleventh hour, but I am unconvinced that this was the case.
3. After the evidence had closed (T797.46–798.10), I attempted to summarise the primary thrust of Union’s case as I perceived it. In that summary I focused on the contention that a reason for the outsourcing decision was that Qantas was presented with a unique opportunity to outsource, because of low operational continuity risk. Apart from the pandemic interrupting flights, this was because the Qantas Agreement had not yet reached its nominal expiry date and no process of bargaining for a replacement enterprise agreement had yet commenced.
4. Senior counsel for the Union pointed out (T798.30–799.4), correctly, that there was more to the Union’s case, and contended that one:

… infers from the documentary evidence and the oral evidence that’s given; including, for example, that… unlike the approach that was taken with respect to the customer service staff, represented by the ASU – one of the reasons why [Qantas] didn’t think or didn’t wish attempts to pursue cost savings by retaining the workforce was because they thought they couldn’t reach agreement with the [Union] and the [Union] and its members were difficult or recalcitrant or… problematic… [T]hat [there] is always a general attitude contrary to the [Union] and its members that caused them not to go down the path of keeping the workforce and trying to retain cost savings by negotiating workplace changes or whatever it might be but rather by just getting rid of that workforce. And that was the union motivation in addition to the elements of preventing direct action, as your Honour has referred. And the history … and general relationship has some relevance in that respect …

1. Although there is force in what is submitted about the tension between Qantas and the Union and the Australian Airports business team’s perception of whether it could strike a suitable bargain with the Union, the conclusion from the evidence is that absent the unusual concatenation of events which presented a vanishing window of opportunity to secure the financial benefits of outsourcing in 2020, it would not have happened in the foreseeable future, at least absent some form of *deus ex machina* – Qantas would have made the capital expenditure it had resolved to make in January and the risks of outsourcing would continue to outweigh the considerable financial rewards (as they had pre-2020).
2. When one stands back and has regard to all the evidence, and has particular regard to what I found in truth motivated Mr David and his team in recommending and making the outsourcing decision, I am reasonably satisfied on the balance of probabilities, that the fact affected employees were members of the Union was not, in itself, a substantial and operative reason for deciding to make the impugned outsourcing decision. That aspect of the Union’s case fails as a consequence.

## E.2 The s 340 case

1. The position in relation to s 340 is different.

#### The Primary Case

1. The thrust of what became the Union’s primary case is that one of the reasons for the outsourcing decision was that 2020 presented a unique opportunity because of: (a) low flying levels associated with the pandemic; and (b) the affected employees then had no ability to initiate or participate in the process of a protected action ballot (s 341(2)(d)) and the process of organising and engaging in protected industrial action (s 341(2)(c)).
2. As this case is put in final submissions (UFS1 [162]–[188]):
3. those that comprised the Australian Airports business team were aware that the Qantas Agreement was open (in the sense that it would pass its nominal expiry date) at the end of 2020 (UFS1 [165]) and were aware that this meant that Qantas was exposed to the possibility of protected industrial action in 2021 (UFS1 [164]–[165]);
4. Qantas’ documentary records demonstrate that there was an awareness of, and sensitivity to, this state of affairs and that the Australian Airports business team brought this into account in assessing the positives and negatives (or pros and cons) of various options;
5. to identify and have regard to these possibilities and their various weightings with respect to various options, necessarily means that they became part of the reasoning process for evaluating those options, in that they record reasons either to proceed with a particular option or to not proceed with a particular option (UFS1 [166], [171], [181], [184] and [187]); and
6. not only does the consideration of these matters make them reasons with respect to the various options, but it also makes them substantial and operative reason for the outsourcing decision (UFS1 [187]–[188]).
7. Qantas identifies what it says are a number of difficulties with this contention of the Union.
8. *First*, it submits that the evidence establishes that an open Qantas Agreement and the possibility of protected industrial action was always viewed as an implementation risk of outsourcing (T691.36–9, T696.23–32; T524.23–9, T571.20–3; T158.6–44), but it is wrong to then elevate an assessment of implementation risk attending a decision to proceed to outsource in 2020, compared to the greater implementation risk that would likely apply in 2021, into a reason for such a decision, when the two are distinct.
9. *Secondly*, it wrongly assumes Qantas was not exposed to protected industrial action until at least some time in 2021 (because QGS employees could, after following the necessary protected action ballot procedure, organise and take protected industrial action at any relevant time in 2020). By reason of this, Qantas was exposed to protected industrial action by about 63% of the relevant cohort of ground operations employees, at all relevant times in 2020 and beyond.
10. *Thirdly*, there is no documentary consideration of any timing risk of open EBAs or protected industrial action in 2021, until Mr Jones’ 15 June GMC notes (Ex 1, p 1813) and this document does not, it is submitted, indicate apprehension about the Union realising an industrial opportunity and Mr Jones’ handwritten notations from on or around 20 May (Ex 1, 1176) (UFS1 [166]–[167]) have been contorted, and there is no evidence that Mr Jones presented on these notes to any other meeting (T526.4–8), nor any evidence that Mr David ever saw these notes. After this, exposure to protected industrial action received very limited specific attention (see Board pack (Ex 1, p 2010) and Board Notes (Ex 1, p 2042)) and although the relevant Qantas witnesses were aware of these matters and conscious of the increased implementation risks in 2021 (and their causes), the relevance of these matters related solely to operational continuity risk.
11. *Fourthly,* apart from the Union not fairly characterising the business records, it is said aspects of the timeline are telling against the Union’s proposition, including that a target date was set for the end of any “Review” process (RFP and IHB) as the end of 2020, while noting that there could be a delay to that timeline into the early months of 2021 (and hence Qantas would not be implementing any outsourcing proposal until 2021, at a time when both enterprise agreements would be open and both entities would be vulnerable to protected industrial action).
12. *Fifthly*, it is submitted that the Union’s argument has a more fundamental difficulty.The factor or consideration which was relevant, at the time of both the outsourcing proposal decision and the outsourcing decision, was that operational risk was low because of limited flying and stand-downs and because the Qantas employees *did not* have any entitlement to bargain or take protected industrial action. It is said to stretch beyond recognition the word “prevent” and the legislative purpose of the “prevent” limb of s 340 of the FWA, to suggest that any aspect of Qantas’ reasoning was to *prevent* a possible future exercise of rights to bargain and take protected industrial action, which might only arise if the actual decision were to be made at some later point in time and if there were greater flying activity at that point. In this way, the outsourcing decision “did not prevent anything” and the Union cannot point to any direct or immediate “prevention” occasioned by the outsourcing decision. It is said the weakness of the Union’s position explains why it tried in submissions to stretch the concept of prevention so that it extends to any action which is taken with a “view” to a certain outcome: UFS1 [10], [11], [13], [15] and [18].
13. *Sixthly*, as a particular illustration of the more general *Browne v Dunn* complaint, it is said it was never put to Mr David, squarely, in terms or at all, that when he came to make either the outsourcing proposal decision or the outsourcing decision that:

… particular considerations or risks attending the other options considered in June 2020, were present to his mind, or that they were amongst his substantial and operative reasons for making the decisions he did, in August and then in November 2020. Nor were matters of this kind ever put by the [Union] to the other relevant witnesses (contrast to the Court’s question to Mr Hughes (T177.1–6)).

1. It was said much of the cross-examination on this topic was entirely hypothetical and framed as questions of basic logic (cause and effect), rather than descending into the actual reasoning process employed by the witnesses themselves.
2. *Seventhly*, it is said that even if the Court were to conclude that there was “a desire to avoid the consequences for operational continuity of enterprise bargaining and protected industrial action”, a multitude of factors are likely to come into the mind of a decision maker when assessing various options and their attendant risks, before going on to make one or more large or significant decisions at later points in time. It is said it is far from unusual that the evidence (oral and documentary) shows an extensive and detailed consideration of various “risks” associated with the evaluation of various options and, at a later point, the implementation risks associated with one of those options, namely the outsourcing of ground operations.
3. *Eighthly*, it is said each of Messrs David, Jones, Hughes and Nicholas only ever considered “open EBAs” and protected industrial action, as “something relevant to an assessment of “operational continuity” risk at a different future point in time” and there is no foundation in the evidence for a finding that any part of their reasoning process was directed towards enterprise bargaining or protected industrial action *per se*. This argument was then developed as follows:

Enterprise bargaining and the frequent availability of protected industrial action are a feature of life at Qantas, having over 55 enterprise agreements across more than 15 unions (Finch T263.13-17; David T609.29-32). But so far as the Outsourcing Decision is concerned, the possibility of protected industrial action with no impact on operations never arose as a consideration, because it did not give rise to an operational continuity risk. In June 2020, the impact of industrial action on operational continuity was considered as an implementation risk affecting various options depending on their timing, in June 2020. It was also considered as an implementation risk affecting the Outsourcing Proposal in September to November 2020, *whether that action was protected* *or covert* [Ex 1, 1594, 1820, 2421, 2510 and 2678]. As this demonstrates, it was the "risk" that these two rights (principally the protected industrial action) might pose to "operational continuity" in particular scenarios (including in particular if a decision were to be deferred to a future date) that was considered, not the mere fact of the protected action itself.

1. It will already be evident that aspects of Qantas’ arguments are inconsistent with the findings I have already made in Section C.8 above, in particular that:
2. Mr David’s reasons for making the outsourcing decision were the same reasons he had in August for embarking upon the outsourcing proposal, which were substantially the so-called three imperatives but that this did not mean that Mr David was not subjectively conscious of other considerations, not inconsistent with the three imperatives;
3. I am affirmatively satisfied that part of Mr Jones’ reasons for recommendation to Mr David to make the outsourcing decision was to prevent affected employees disrupting services in 2021 by taking protected industrial action when, it was hoped, services might be getting back to usual; the key concern of all within the Australian Airports business in making the outsourcing decision at the time that it was made was because of the vanishing window of opportunity caused by the operational disruption. Further, in relation to Mr Jones, I am satisfied that the existence of the open Enterprise Agreements was a consideration; and
4. I am not satisfied there was any difference between Mr David and Messrs Jones and Hughes in the way they thought about the proposed differences in approach between above the wing and below the wing workforces or any different views as to the risks and rewards of outsourcing.
5. Notwithstanding this, it is appropriate to say something about each of the points made by Qantas summarised above.
6. *First*, as I have explained, the relative risk assessment of implementation of outsourcing in 2020 compared to any future opportunity was central to the view collectively held by the Australian Airports business team as to why there was a vanishing window of opportunity to outsource – further, I am affirmatively satisfied that Mr Jones factored into his risk assessment, as an important component, that the outsourcing decision should be taken at that particular time to prevent affected employees disrupting services in 2021 by taking protected industrial action.
7. *Secondly*, it may be accepted that Qantas was exposed to protected industrial action by about 63% of the relevant cohort of ground operations employees in 2020, but this is not to the point. Apart from the obvious fact that no industrial action would have been a particularly effective step when aeroplanes were not flying, the real concern was to avoid the “risk of the two agreements being open simultaneously” (Ex 1, p 1813) when any protected action could involve both workforces and may occur when the aeroplanes were able to fly again normally.
8. *Thirdly*, I have already found there was consideration of a timing risk of open Enterprise Agreements as early as May and I am satisfied Mr Jones believed, at all material times, that operational risk would increase in 2021 in circumstances of open Enterprise Agreements and power being concentrated back in the Union: see, for example, T573.25–42.
9. *Fourthly,* the point that the decision could conceivably be delayed, on a worst-case scenario, is of no moment. It is manifest that if a decision was to be made, the collective view within the Australian Airports team was that it should be made with celerity. The window was perceived to be finite. This involved management of the so-called IHB timeline. No doubt timelines for the process of decision making contemplated delay if, as Mrs Oldmeadow had warned, the Union opportunistically used the provisions providing for the IHB “to frustrate and attempt to delay the process”, but there can be no doubt the aim was to make the decision as soon as it could be made, subject to proper assessment of the risks and effective management of the IHB process.
10. *Fifthly*, the submission that the outsourcing decision “did not prevent anything” and that the Union cannot point to any direct or immediate “prevention” is misconceived. The Union makes the point, correctly, that the insertion of a requirement that the prevention of the exercise of the workplace right be “direct or immediate” involves a gloss on the words of s 340(1)(b). The section directs attention to whether adverse action has been taken “to prevent” the exercise of a workplace right. There is no basis for adding a requirement that the right be of a particular nature such that it can be characterised, by some sort of evaluative assessment, to be sufficiently immediate. In any event, the outsourcing decision prevented the members of the Union who were affected employees exercising their workplace right to do something that Qantas did not want to occur and wished to prevent, that is, participation in protected industrial action. Section 340(1)(b) contemplates acts to prevent employees exercising workplace rights by preventing circumstances arising whereby those rights could be exercised.
11. *Sixthly*, the *Browne v Dunn* complaint goes nowhere. Irrespective of whatever criticisms Qantas makes of the cross-examination, the three centrally important witnesses were cross-examined (often at very considerable length) by reference to documents they had prepared or approved that outsourcing occur in 2020 because of the risk of employees being in a position to bargain and take protected industrial action in 2021: see, for example, Mr Hughes (at T158.16–162.36), Mr Jones (at T523.13–525.21 and T575.39–576.28) and Mr David (at T622.27–39, T690.45–691.30 and T695.45–697.16). I accept the Union’s submission that the proposition that Qantas, and those managers who gave evidence, wanted to prevent its ground handling employees being in a position to bargain and to take protected industrial action, was squarely put.
12. *Seventhly*, Qantas is correct to stress that it is to be expected that the evidence would show extensive and detailed consideration of various “risks” associated with the evaluation of various options and, at a later point, the implementation risks associated with one of those options. In this case, like some others, it can be relevant that a decision maker was aware of a risk and gave consideration to it, but this does not mean that the identification of risk means an action was taken for a particular reason. This is why the Union’s submission that the Court can make something significant of the fact that specialist industrial relations legal advice was obtained is misconceived. It would have been contrary to commonsense if industrial relations advice was not obtained. The fact of that advice might be relevant to understand or give weight to representations in documents settled or passed by lawyers (as I have explained above), but to draw some adverse inference simply because advice on a certain topic was received would be contrary to principle.
13. *Eighthly*, connected to the last point, I accept that it is unsurprising that the risk protected industrial action might pose to “operational continuity” would be considered. I also accept that the identification of such a risk does not mean that the prevention of the risk occurring in the future somehow becomes a reason for a decision which would necessarily mean the risk would not eventuate. The focus is always on the mind of the relevant decision maker. However, the relevance of the fact that the relevant risk was identified and discussed is rationally relevant as part of the assessment as to whether Qantas has established that the prevention of the risk eventuating (that is, the workplace right being exercised in the future) was a reason why the outsourcing decision was made in November 2020.

#### Conclusion on the Primary s 340 Case

1. Having found, as Qantas urged, that Mr David was the decision maker, in the light of my findings after assessing all the relevant evidence and my explanation of the law, I come the determinative issue of this aspect of the Union’s case: did Mr David decide to outsource the ground operations for one of the prohibited reasons alleged, being preventing the exercise by the affected employees of their workplace right to organise and engage in protected industrial action and participate in bargaining in 2021 (**Relevant Prohibited Reason**).
2. By way of recapitulation, as I have explained, by reason of s 361 of the FWA, it is to be presumed that Mr David took the adverse action for the Relevant Prohibited Reason unless Qantas proves otherwise. The focus of my inquiry is the reason or reasons of Mr David and, more particularly, whether the Relevant Prohibited Reason was a “substantial and operative” reason (*Barclay* (at 522–3 [56]–[59] per French CJ and Crennan J, and at 535 [104] and 542 [127] per Gummow and Hayne JJ)); or an operative or immediate reason (*Barclay* (at 544 [140] per Heydon J)). It is not necessary, of course, for Qantas to establish that the Relevant Prohibited Reason was entirely disassociated from the workplace right identified: see *Barclay* (at 523 [62] per French CJ and Crennan J).
3. As we are dealing with the proof of a fact, it is well to revisit some even more basic principles. As Sir Owen Dixon emphasised, when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found (*Briginshaw v Briginshaw* (at 361)). He also explained that a party bearing the onus will not succeed unless the whole of the evidence establishes a “reasonable satisfaction” on the preponderance of probabilities such as to sustain the relevant issue (*Axon v Axon* (1937) 59 CLR 395 (at 403)); and the “facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied”: *Jones v  Dunkel* [(1959) 101 CLR 298](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281959%29%20101%20CLR%20298) (at 305).
4. In this way, a “[m]ere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact”: *NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618 (at 655 [124] per Redlich and Harper JJA and Curtain AJA); see also *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; (2012) 10 ASTLR 164 (at 176 [51] per Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing).
5. This approach has not been without its critics. Mr Stephen Odgers SC, notes that in enacting s 140 of the EA the intention of the Australian Law Reform Commission was “that a belief that the facts in issue were as alleged is not and should not be required”: see Odgers, *Uniform Evidence Law* (14th ed, Thomson Reuters, 2016) (at 1319 [EA.140.60]), citing the Australian Law Reform Commission Report, *Evidence (Interim)* (Report No. 26, 1985) (at [998]). But the notion that the standard of proof on the balance of probabilities requires the fact finder to reach a state of *actual persuasion* of the occurrence or existence of the fact in issue before it can be found is very well entrenched and unquestionably represents the current state of the law: see also *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262 (at [136] 284 per Spigelman CJ); *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (at [44] per McDougall J, with whom McColl and Bell JJA agreed); *Ballard v Multiplex*[2012] NSWSC 426 (at [123]–[127] per McDougall J); *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 (at [33]–[34] per Leeming JA, with whom McColl JA and Emmett AJA agreed); *Katragadda v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 143 (at [77] per Lee J); *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123 (at 157 [156] per Lee J); *Ethicon Sàrl v Gill* [2021] FCAFC 29; (2021) 387 ALR 494 (at 511 [52] per Jagot, Murphy and Lee JJ).
6. If the question posed was whether I have reached a state of actual persuasion or reasonable satisfaction that a substantial and operative reason for Mr David outsourcing the ground operations was the Relevant Prohibited Reason, I would answer that question in the negative. If the same question was posed in relation to the reasons for the relevant endorsement of outsourcing by Mr Jones, I would answer in the positive. But neither of these questions is the issue I am presently addressing.
7. I am not satisfied that Qantas has proved on the balance of probabilities that Mr David did not decide to outsource the ground operations for reasons which included the Relevant Prohibited Reason. As will already be obvious, this conclusion reflects my unease as to the state of the evidence on this fact in issue and, in particular, Mr David’s evidence when viewed in the light of all the other evidence to which I have made reference.
8. I emphasise that my lack of confidence in accepting the affidavit sworn by Mr David uncritically is not the result of some *a priori* view about the worth of affidavits in litigation generally, or in industrial cases in particular. Having said this, I adhere to the view expressed at the FCMH that I consider I would have been best assisted by the account of Mr David being given orally, consistently with the Practice Note. Hesitancies about accepting the affidavit evidence as reliable emerged when, during cross-examination, a more authentic account emerged of certain aspects of Mr David’s evidence.
9. I have already dealt with some important examples. In his oral evidence, Mr David accepted (see [89] above) that by the time of the outsourcing proposal, a “decision” to outsource ground handling had been made, but this was subject to a formal RFP process and the IHB process (T729.15–17) and that there was very little prospect of any IHB process coming close to delivering commensurate commercial benefits as outsourcing: T731.20–733.21. One will search in vain for this far from peripheral, but truthful evidence, being disclosed in the affidavit.
10. It is worth noting a further example, which requires a little background. During the opening, the following exchange occurred with senior counsel for Qantas (T20.1–10):

MR YOUNG: … The decision to outsource that was made on 27 November and 30 November was, as your Honour has seen, a decision made by Mr Andrew David in his capacity as chief executive officer of Qantas domestic and international. In that role he is the executive head of Qantas Airports.

HIS HONOUR: Is that right? I mean, wasn’t it made pursuant to a power conferred pursuant to a power of attorney, strictly speaking? It wasn’t necessarily made in his capacity as having a particular role. It seems to me, strictly speaking, the decision was made pursuant to an authority conferred on him by the donor company pursuant to a power of attorney.

MR YOUNG: No. The power of attorney was concerned with the subsequent decision to enter into contracts. The actual decision was made by Mr David, who had sole accountability and responsibility for the business unit consisting of Qantas Airports. **That is the way it appears in Mr David’s affidavit, your Honour.**

(Emphasis added).

1. Mr Young was, with respect, correct in his characterisation of the affidavit. However, despite the impression given in the affidavit that the granting of a power of attorney was a commonplace, Mr David explained that he could not recall that there had been any occasion prior to November 2020, when he had requested or had been provided with and executed a power of attorney (T744.9). The following exchange then occurred (T744.32–46):

HIS HONOUR: You said in your affidavit that you understood this to be a common practice within Qantas. I’m just wondering, given that you can’t recall any other occasion when you were given a power of attorney of the type that occurred in relation to this - - -? --- Yes.

- - - what was the basis upon which you formed the view that this was common practice within Qantas, when it had never happened to you before? --- I have been made aware that it happens in, for example, treasury. It happens there quite a lot because there’s multiple contracts, and that - - -

So someone has told you that, have they? --- Yes, they have. Yes.

There are other types of authorities from Mr Joyce that were delegated to others, pursuant to the terms of a power of attorney in respect of the entry into – in respect of financing transactions, and the like? --- That’s my understanding. That’s what I have been told. Yes.

1. Mr David gave some evidence upon being taken to the power of attorney by senior counsel for the Union as follows (T755.5–23):

MR GIBIAN: And I think the effect of the power of attorney is really in 1(a), which appears under – about halfway down that page. You will see that that indicates that Qantas appoints the attorney during the period, and (a) says:

*In respect of only the approved transaction, to negotiate, finalise, amend, execute by hand and deliver the transaction documents or replacements or documents to give effect to those transactions.*

You see that? --- Yes.

All right. And having read that, that’s what you understood to be the effect of this document that you were arranging to be executed? --- In terms of the approved transaction, which was the outsourcing across the 10 ports, yes.

But you were being authorised to negotiate, finalise, amend and execute documents relating to that transaction? --- Yes.

Which really meant the contracts with the third-party providers; is that right? --- Yes.

1. As it turned out, Mr David did not in fact negotiate, finalise, amend and execute documents with the third parties and, as a consequence, senior counsel for the union asked him (T761.1–21):

So at least at the end of the day, you didn’t actually do anything that you were authorised to do by the power of attorney that was entered into in November? Is that right? --- **Well, I made the decision to outsource.**

Yes. Does it say that in the power of attorney? --- Well – okay. **I thought I had explained.** **My understanding was that gave me, then, the authority to make that decision** confident, then I could execute on contracts. So my understanding that I was going to make a decision on the 26th as to whether we accepted the in-house bid or outsource, I made that decision. **My assumption was that this allowed me – was a convenient way to do it.**

Having taken you to it, what it actually authorised you to do, you didn’t do any of those things. Is that right? --- Well, I need to go back to the document you’re referring me to, but the only bits I – I think you’re referring to - - -

HIS HONOUR: Don’t worry about going back? --- Okay.

**Your subjective understanding when you made the decision, as I understand what you’ve just said to me, was that in doing it, you were exercising a power granted to you under that power of attorney. Is that right? --- Correct, yes. That’s correct, your Honour.**

(Emphasis added).

1. Mr David’s affidavit (which contained 109 paragraphs of narrative), at [91]–[96], attempted to make it clear he had: (a) turned his mind to issues of corporate authority; (b) formed the apparently considered view that the proposal to outsource would not be affected by any limit on his authority to approve the award of contracts (or incur any resultant redundancy liabilities), because the entry into the contracts would result in a net saving; (c) had a communication with Mr Finch in which he was told that if the outcome of the outsourcing decision would be to approve the entry into contracts with the external suppliers, the monetary value of those contracts in aggregate over their initial term, could be regarded as exceeding the limit of his financial authority; (d) agreed with Mr Finch’s proposal that to be safe he would arrange for Mr Joyce to delegate financial authority, which Mr David understood “to be common practice within Qantas”; (e) was aware that “Mr Finch prepared a power of attorney and accompanying explanatory [RFA]” for him to send to Mr Joyce; (f) reviewed the documents sent by Mr Finch; (g) sent them signed to Mr Joyce by email shortly thereafter; (h) copied them to Mr Finch; and (i) was aware Mr Joyce signed the request for approval early on 19 November. He was also careful to give evidence he did not speak to or meet with Mr Joyce about the RFA and power of attorney, did not seek or obtain any input or advice from Mr Joyce on the outsourcing decision (beyond any contributions which he may have made in earlier GMC meetings, which he could not recall) and noted that at no time did “Mr Joyce seek to involve himself at any stage in the process leading to the decision, or in the decision itself”.
2. Together with Mr Finch’s evidence (extracted above) an overall picture was created of Mr David’s understanding, with clarity, of the reasons why the power of attorney was arguably required, and the fact that it was a routine event. As it turned out, there was an artificiality as to the picture painted by this aspect of these witnesses’ evidence. Although this evidence was not decisive as to the reasoning behind making the outsourcing decision, it was evidence of routine or of business practice, which supported the picture Qantas wished to present. There was no suggestion in the affidavit that in truth Mr David *subjectively believed* he needed the power of attorney to make the outsourcing decision, or it was at least convenient for him to have authority conferred in this way in order to make the outsourcing decision on behalf of the company. If the affidavit accurately recounted his contemporaneous subjective views, then one would expect it would have reflected his understanding (however objectively mistaken that understanding may have been) that in making the decision at the heart of this case, he thought he was exercising a power granted to him under that power of attorney (see [294] above). It should go without saying, but I do not accept that such matters could have been left out of the affidavit because Qantas was conscious not to deal with peripheral matters. These differences between authentic aspects of the evidence given by Mr David orally, and the account given in chief, are sufficient for me to harbour doubts about whether I can be satisfied as to the persuasiveness of the written evidence.
3. Finally, although not decisive and of minor importance in itself, as a general impression, after hearing and observing Mr David, the affidavit evidence does not, at least in parts, read as if it is his authentic “voice”. To take one example, at [104], Mr David affirms as follows:

Having been shown paragraph 40 of the Amended Statement of Claim which has been filed in this proceeding, I reject and deny that any part of my reasons for deciding to outsource the Ground Services, included any of the reasons alleged in that paragraph. Employees in freight, engineering, and cabin crew who I assume to be affiliated to or with the TWU and who have enterprise agreements with Qantas, still play roles at Qantas, and will continue to do so after the outsourcing of the Ground Services.

1. It is a suboptimal approach to the taking of a genuine account of a lay witness as to the facts-in-issue to show them a complex legal document and then recount their reaction as though they were pleading to it. Relatively recently, the practice of reading affidavits aloud in Equity has fallen into desuetude, but this long-standing practice, at least in New South Wales, did have a real benefits: it reminded those settling affidavits that the written account was supposed to be in the real words of the witness, not an example of legal drafting; it also meant that they were succinct and to the point.
2. But even leaving aside any deficiencies in the affidavit evidence, an independentreason for my hesitation about reaching the necessary state of satisfaction with regard to the evidence of Mr David is that the case was expressly run by Qantas on the basis that there was no difference between Mr Jones’ reasons for his involvement and that of Mr David. The affidavit evidence provided, for example, that Mr Hughes recommended to Mr David that he decided to outsource the ground operations (Hughes at [131]–[132] and [134]) and *for those same reasons*, Mr Jones agreed with and endorsed that recommendation (Jones at [66]–[75]); and *for essentially the same reasons*, Mr David made the outsourcing decision: David at [97] –[103]. Qantas’ submissions did not suggest that there was a cigarette paper of difference between the motivations of each these men to the extent that they had an involvement. In particular, there is no evidence there was any difference between them in: (a) the way they thought about the differences in approach between above the wing and below the wing workforces; or (b) the risks and rewards of outsourcing. As I have recorded above, I am affirmatively satisfied that Mr Jones was motivated by the Relevant Prohibited Reason. The closeness of the working relationship between the two men gives me some pause in accepting that Mr David was differently motivated than Mr Jones.
3. A further and independent reason for my scepticism, such as it is, relates to the oral evidence. I have already given my general impressions of Mr David as a witness in Section C.6. I will not repeat them but note that it was evident Mr David was aware how some concessions would be unwary and appeared keen, at times, to highlight, non-responsively, aspects of his account which he considered supported the conclusion that he was not motivated by a Relevant Prohibited Reason. I hesitate in rejecting his evidence, however, because as I have explained, aspects of his evidence were evidently candid. But it would be as wrong to approach the assessment of Mr David’s evidence on the basis that it must all be right, or be right in a particular respect, just because he was candid in respect of some important things; just like, as the Full Court (McKerracher, Robertson and Lee JJ) explained in *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 (at [94]):

It has been a long time since the maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) was part of the common law, its broad applicability having been rejected long ago (including by no less a judge than Lord Ellenborough CJ in [*R v Teal*](https://jade.io/citation/15315426)(1809) 11 East 307; 103 ER 1022). It is trite that the tribunal of fact (be it a judge or jury), having seen and heard the witness, is to decide whether the evidence of the witness is worthy of acceptance and this may involve accepting or rejecting the whole of the evidence, or accepting some of the evidence and rejecting the rest: *Cubillo v Commonwealth*[2000] FCA 1084; (2000) 103 FCR 1 at [45-47](https://jade.io/article/102201/section/151829) [118]-[123]; *Flint v Lowe* (1995) 22 MVR 1; and [S v M](https://jade.io/citation/1353881) (1984) 36 SASR 316. It is for this reason a jury is directed that they may accept some parts of a witness’s evidence, but not other parts: *Dublin, Wicklow & Wexford Railway Co v Slattery* (1878) 3 App Cas 1155. This reflects the accumulated wisdom and experience of the common law that witnesses may lie about some things and yet tell the truth about others, and the tribunal hearing the evidence is best placed to fix upon the truth. …

1. The same applies to the intermediate position where the tribunal of fact is not satisfied either way as to whether it should accept or reject an aspect of the evidence of a witness. Credibility assessments can often be non-linear: see *CKC16 v Minister for Immigration and Border Protection* [2018] FCA 1260 (at [33]–[35] per Lee J).
2. In the end, adapting what was said in *Jones v Dunkel* (at 305), my conclusion after considering all the evidence is that the facts proved on the balance of probabilities fall short of a reasonable basis for a definite conclusion, affirmatively drawn, that Mr David did not decide to outsource the ground operations partly to prevent the exercise by the affected employees of their workplace right to organise and engage in protected industrial action and participate in bargaining in 2021. Or, to put it another way, it *may* be that a substantial and operative reason for Mr David making the outsourcing decision was not the Relevant Prohibited Reason, but by reference to all the evidence, I am not reasonably satisfied on the preponderance of probabilities that this fact has been proved by Qantas. In these circumstances, and in this respect, Qantas has not discharged its onus. In reaching this conclusion I have been conscious of the nature of this finding of contravening conduct and of its consequences.
3. Implicit in my reasoning is a rejection of the broader contention of the Union that Mr David cannot have been the sole operative decision maker and its allied proposition “that [Qantas’ submission that] only three individuals’ views and advice had a material effect on any decision by Mr David is not supported by the totality of the evidentiary picture”: UOS [50A].
4. As noted above (see [237]–[239]) Qantas did not contest that it was not only Mr David, but also “the recommenders of the decision”, who are the focus of the inquiry. The evidence supports the conclusion that Mr Jones endorsed the recommendation of Mr Hughes and a substantial reason for him doing so was the Relevant Prohibited Reason.Despiteit being uncontroversial that Mr David relied upon the recommendation which had been endorsed by Mr Jones, it is unnecessary for me to base my ultimate determination on the notion that Mr Jones, as a person who was involved in the process leading to the decision, can be regarded as a decision maker for the purpose of a proscribed purpose: cf *Red Cross Society* (at 348 [91]). By reason of the matters explained above (at [226]–[233]), this raises issues of some complexity and it is unnecessary to form a view as to the precise metes and bounds of the concept of material involvement relied upon by the Union to resolve this controversy. It is well in this case to focus on a causal inquiry into *the reasons of Mr David* at the time the adverse action was taken, and whether Qantas has proved what it needs to prove in relation *to Mr David’s reasons* (taking into account the whole of the evidence including the relevance of the motivations to Mr David’s decision making of Mr Jones, who worked so closely with him).
5. For completeness, it is worth noting that it seems to me more likely than not that Mr Hughes was motivated by the Relevant Prohibited Reason in the same way as Mr Jones given the nature of their working relationship, the communications between them, and the fact that there was no suggestion that there was any difference between their views as to the risks, rewards and proposed reasons for outsourcing. Having said this, I have not considered myself quite so convinced as to the subjective motivation of Mr Hughes as that of Mr Jones.

#### The Balance of the s 340 Case

1. To the extent it is not duplicative to the above, there is a further pleading of s 340 case. It can be dealt with relatively briefly.
2. The Union asks the Court to find that Qantas has not disproved that a substantial and operative reason for the outsourcing decision was that the affected employees were entitled to the benefits of the Qantas and QGS Agreements: ASOC [40.2]; UFS1 [7(g)], [204].
3. It may be accepted on the authorities that the relevant workplace right here includes not just the mere fact of the application of the industrial instrument but also its contents: see UFS1 [189]–[192]. It is said that having regard to the fact that the enterprise agreements entitled the affected employees to hourly rates of pay (regardless of whether there was productive work for them to do) and entitled them to minimum periods of engagement, Qantas could only achieve the required variability and reductions in cost base by varying the enterprise agreements or outsourcing the work. Of course, one of the factors why Qantas regarded it as in its commercial interests to outsource was that costs were only incurred when aeroplanes were turned, but the commercial reason for the outsourcing is as I have explained. The difficulty with this argument is that unlike the Union’s primary case (where I am not satisfied that the Relevant Prohibited Reason was not, in and of itself, a substantial *reason* for taking the decision), this aspect of the Union’s case elides the distinction between a substantial and operative reason and one of a number of underlying causes.
4. In relation to the balance of the other workplace rights pleaded at ASOC [40], I am satisfied that Qantas has proved that a substantial and operative reason for the outsourcing decision was not: (a) that the affected employees, or least a significant number, were members of the Union *per se* (ASOC [40.1]); or (b) that the affected employees had, *at the time of the outsourcing decision*, the ability to participate in a process under the FWA by initiating and/or participating bargaining for the making of an enterprise agreement (ASOC [40.3]).
5. The only proscribed purpose which I consider consistent with the evidence and has not been disproved is that pleaded (in substantially the same form as I have found) at ASOC [44A].

# F conclusion and orders

1. On 22 December 2020, I made an order that pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) and s 37P(2) of the *Federal Court of Australia Act 1976* (Cth), the question of whether the Union is entitled to any declaratory relief be determined separately and prior to any other claim for relief in the proceeding.
2. The Union’s claim for declaratory relief in terms of prayers 1.1, 1.2, 1.3 and 1.4 was abandoned by the filing of the amended originating application. The Union is not entitled to declaratory relief in terms of prayers 1.5, 1.6, 1.7, 1.8 and that aspect of the claim should be dismissed. The declarations set out in prayers 1.9 and 1.10 are defective in form in that they do not identify sufficiently the gist of the relevant conduct and its relationship to the contravention: *Rural Press Ltd v Australian Competition & Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 (at 91 [89]–[90] per Gummow, Hayne and Heydon JJ). They do, however, seek to capture the contravening conduct which I have found did occur. Qantas did not suggest that there was any reason as to why discretionary relief in the nature of a declaration should not be made if any contravening conduct was found. I will hear from the parties on the precise form of declaratory relief that should be granted in favour of the Union.
3. The claim for an injunction has also been abandoned, which leaves the relief sought by prayers 2A, 3 and 4 to be determined (to the extent all that relief continues to be sought).
4. This complex matter as to liability has been able to be resolved eight months to the day from the making of the impugned decision. This has only occurred because of the skill and the co-operation of the practitioners involved for both parties, for which the Court is grateful.
5. I will fix a date for a case management hearing at 9:30am on 4 August 2021 and direct the parties bring in either agreed or competing short minutes of order proposing a form a declaration specifying the contravening conduct I have found, and detailing the interlocutory steps necessary to ready the balance of the case ready for final determination.

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| I certify that the preceding three hundred and fifteen (315) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 30 July 2021