

Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Level 11, 275 Grey Street		
Suburb	South Brisbane		
State or territory	Queensland	Postcode	4101
Phone number		Fax number	
Email address	Jo.Glynn@virginaustralia.com		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Virgin Australia Regional Airlines Pty Ltd
Trading name of business	Virgin Australia Regional Airlines
ABN/CAN	76 008 997 662
Contact person	Jo Glynn

How would you prefer us to communicate with you?

Email (you will need to make sure you check your email account regularly)

Post

Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative’s details below

No

Applicant’s representative



These are the details of the person or business who is representing the Applicant.

Name of person	Ben Dudley		
Firm, union or company	Seyfarth Shaw Australia		
Postal address	Level 40, Governor Phillip Tower, 1 Farrer St		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	02 8256 0400	Fax number	
Email address	bdudley@seyfarth.com ; pnoakes@seyfarth.com ;		

Is the Applicant’s representative a lawyer or paid agent?

Yes

No

The Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:
First name(s)	
Surname	

Postal address	25 Stoney Creek Road		
Suburb	Bexley		
State or territory	NSW	Postcode	2207
Phone number	02 9554 9399	Fax number	
Email address	fedsec@alaea.asn.au ; alaea@alaea.asn.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	Australian Licensed Aircraft Engineers' Association
Trading name of business	
ABN/CAN	84 234 747 620
Contact person	Steve Purvinas

1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

Section 234 – application for an intractable bargaining declaration.

2. Order or relief sought

2.1 Please set out the order or relief sought.



Using numbered paragraphs, set out what you are asking the Commission to do.

1. The Applicant requests that the Commission make an intractable bargaining declaration pursuant to section 235 of the *Fair Work Act 2009* in relation to the proposed *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2022*.

2.2 Please set out grounds for the order or relief sought.

Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

Background

2. VARA is the operator of a regional airline based in Perth, Western Australia servicing routes between Perth and approximately 21 intra-state destinations in Western Australia (WA) (12 being dedicated mine sites), as well as 3 inter-state destinations across the country. VARA has been operating regional services in Western Australia for nearly 60 years, previously operating as "Skywest" before its acquisition by the Virgin Australia Group in May 2013.
3. VARA employs approximately 453 employees, including:
 - a. Flight crew;
 - b. Cabin crew;
 - c. Aircraft engineers; and
 - d. Head office employees engaged in functions such as sales and business development, safety, operations performance, finance and human resources.
4. VARA operates a range of aviation services, including:
 - a. regular public transport (**RPT**); and
 - b. charter services.
5. RPT services operated by VARA on VA's behalf include services to Broome, Port Hedland, Karratha, Kalgoorlie, Kununnurra, Darwin, Adelaide, Hobart, Newman, Onslow, Christmas Island, and Cocos Island. A number of these services provide the only aviation access to a number of regional communities throughout WA. VARA's RPT services are, amongst other purposes, used by persons living in remote regional communities to travel to Perth for specialist medical treatment.
6. VARA has an exclusive contract with the Commonwealth Government to provide aviation services to the Indian Ocean Territories (namely, Christmas Island and the Cocos Island). That contract requires VARA to provide:
 - a. two passenger flights each week to the Christmas Islands to the Cocos Islands; and
 - b. one additional freight service each fortnight (which is presently discharged through VARA subcontracting to Toll an additional fortnightly flight using a plane that is not compatible with passenger transport but is capable of delivering 11.5 tonnes of freight).
7. These services are responsible not only for the movement of passengers to and from those islands, but are critical to the supply of medicine, post and fresh food to the islands. Whilst there are intermittent shipping services to the islands, those shipping services are irregular, take around two weeks to reach the islands from the mainland, and indeed are sometimes unable to actually dock at Christmas Island due swell conditions.
8. VARA's charter services are focused on charter flights for Fly-In Fly-Out (FIFO) workers supporting the resources industry in WA, including from and to Barimunya, Condewanna,

Argyle, Gruyere, Boolgeeda, Gudai-darri, West Angela's, Woodie-Woodie, Geraldton, Albany, Ravensthorpe and Busselton. For many of the sites in VARA's charter network, VARA is the exclusive provider of services, or otherwise provides the majority of route capacity, such that its commercial clients are dependent on VARA to get workers to, but just as importantly out of, the various locations in which they operate. Many of these sites are long distances on unpaved roads from the nearest major airport, and typically have several hundred workers (if not more) flying in and out each week.

9. Many of the airstrips operated at remote locations have been designed and built to cater for the aircraft used by VARA. For example, it is not possible for the mainstay of both the Qantas and Virgin domestic fleets, the Boeing B737-800 aircraft, to service some of these remote locations as the runways in these locations are too short or the available airport infrastructure cannot support larger aircraft operations. In order to accommodate different aircraft, these airstrips would need to make changes to their built environment and procure specialist equipment (such as stairs/ramps) that would allow the different aircraft types to be boarded and exited safely. This equipment is not bought 'off the shelf' but rather takes months to secure.
10. If VARA is not able to provide aviation services to these remote locations/communities, there is the real possibility these remote locations/communities could become, at least in a practical sense, "cut off" from the supply of essential supplies and personnel.
11. VARA operates separately from Virgin Australia's other businesses and has its own maintenance division. VARA operates a fleet of Fokker F100s and Airbus A320s, which is different to the fleet operated by Virgin Australia's other businesses.
12. VARA employs approximately 60 aircraft engineers (**Engineers**) who are employed to perform aircraft maintenance work in VARA's Aircraft Maintenance Organisation (AMO), comprising of
 - a. 17 Aircraft Maintenance Engineers (**AMEs**); and
 - b. 43 Licensed Aircraft Maintenance Engineers (**LAMEs**).

Bargaining

13. Aircraft engineers employed by VARA are currently covered by the Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2017 (the **Current Agreement**).
14. The nominal expiry date for the Current Agreement was 7 February 2021.
15. Many of the LAMEs to be covered by the Proposed Agreement are members of the Australian Licensed Aircraft Engineers Association (**ALAEA**).
16. In about August 2020 (i.e. almost three (3) years ago), VARA engaged in discussions with the ALAEA to gauge their willingness to negotiate a new enterprise agreement, together with the Australian Manufacturing Workers Union in the two week period before the second creditor's meeting Post Voluntary Administration.
17. In February 2021, VARA issued a notice of representational rights relating to bargaining with Engineers for a replacement enterprise agreement for the Current Agreement (**Proposed Agreement**). The ALAEA is a default bargaining representative for its members for the Proposed Agreement.
18. Bargaining with the ALAEA has been taking place in earnest since April 2021 (that is, more than two years ago), but without the parties being able to reach agreement. The bargaining process has included:

- a. numerous bargaining meetings and correspondence regarding the negotiation of a replacement enterprise agreement over more than two years;
- b. VARA filing an application under section 240 of the *Fair Work Act 2009* (Cth) (**FW Act**) and participating in seven conciliation conferences chaired by Commissioner Schneider of the Fair Work Commission; and
- c. two different versions of a Proposed Agreement being put to a vote by Engineers. Both votes were opposed by the ALAEA and both were unsuccessful in securing a valid majority.

Protected industrial action

19. During the course of bargaining, the ALAEA has organised, and various LAMEs have taken, protected industrial action. The Commission issued a protected action ballot order (**PABO**) on 3 August 2022 and since that time, the ALAEA has issued eight notices of protected industrial action:
 - a. on 20 September 2022, the ALAEA notified VARA that members of the ALAEA would engage in a one minute work stoppage on 5 October 2022 (Notice V1) and that action was taken by a number of LAMEs;
 - b. on 23 January 2023, the ALAEA notified VARA that members of the ALAEA would engage in full shift work stoppages commencing on Wednesday, 8 February 2023 (and continuing each Wednesday thereafter) (Notice V2) and that action was taken by a number of LAMEs. On 4 April 2023, the ALAEA notified VARA that from 5 April 2023, such action would no longer be taken;
 - c. on 15 February 2023, the ALAEA notified VARA that members of the ALAEA would engage in bans on all overtime commencing on Wednesday 1 March 2023 (Notice V3) and that action was taken by a number of LAMEs. The ALAEA notified VARA on 17 March 2023 that it would no longer take that action;
 - d. on 1 March 2023, the ALAEA notified VARA that members of the ALAEA would engage in work stoppages from 9:30 pm to the end of shift, commencing on Wednesday 15 March 2023 (Notice V4). This action has been taken by a number of LAMEs and is ongoing;
 - e. on 18 April 2023, the ALAEA notified VARA that members of the ALAEA would engage in work stoppages for early day shift and day shifts between certain times on 1 May 2023, 3 May 2023, 8 May 2023 and 10 May 2023 (Notice V5). That action was taken by a number of LAMEs;
 - f. on 3 May 2023, the ALAEA notified VARA that members of the ALAEA would engage in work stoppages commencing on 15 May 2023, and continuing on 16 May 2023, 17 May 2023, 22 May 2023, 23 May 2023 and 24 May 2023 (Notice V6). That action was taken by a number of LAMEs;
 - g. on 17 May 2023, the ALAEA notified VARA that members of the ALAEA would engage in work stoppages commencing on 29 May 2023, and continuing on 30 May 2023, 31 May 2023, 5 June 2023, 7 June 2023 and 10 June 2023 (Notice V7). That action was taken by a number of LAMEs on each of 30 and 31 May and 5 June 2023;
 - h. on 31 May 2023, the ALAEA notified VARA that members of the ALAEA would engage in full shift stoppages for all night shifts from midday on 12 June 2023 (Notice V8).

20. The industrial action that has been taken, continues to be taken and has been notified for the immediate future, puts at risk the ongoing provision of VARA's services, and therefore places at risk transportation services for remote communities and Western Australia.

Section 235 – intractable bargaining declaration

21. Section 235 (as in force from 6 June 2023) provides:

(1) The FWC may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:

- (a) an application for the declaration has been made; and*
- (b) the FWC is satisfied of the matters set out in subsection (2); and*
- (c) it is after the end of the minimum bargaining period (see subsection (5)).*

(2) The FWC must be satisfied that:

- (a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and*
- (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and*
- (c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.*

(3) The declaration must specify:

- (a) the date it is made; and*
- (b) the proposed enterprise agreement to which it relates; and*
- (c) any other matter prescribed by the procedural rules.*

(4) The declaration:

- (a) comes into operation on the day it is made; and*
- (b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.*

(5) The end of the minimum bargaining period in relation to a proposed enterprise agreement is:

(a) if one or more enterprise agreements (the existing agreements) apply to any of the employees that will be covered by the proposed agreement—the later of the following:

(i) the day that is 9 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;

(ii) the day that is 9 months after the day bargaining starts, as worked out under subsection (6); or

(b) the day that is 9 months after the day bargaining starts, as worked out under subsection (6).

22. The Commission can be satisfied that each of the sub-paragraphs in section 235(1) are met and that – for the reasons set out further below – it can be satisfied of each of the matters referred to in section 235(2).

Section 235(2) matters

23. The Commission can be satisfied of each of the matters referred to in section 235(2):

- a. the Commission has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute – Commissioner Schneider has attempted to assist the parties (see matter B2023/241J);
- b. for the reasons set out above (and as will be demonstrated in the evidence) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration:
 - the parties have been bargaining for more than two (2) years;
 - the parties have attended numerous bargaining meetings totalling approximately 21 meetings (exclusive of FWC conferences) and engaged in a regular dialogue through telephone calls and emails about the negotiations outside of the meeting schedule;
 - the ALAEA has engaged in protracted protected industrial action;
 - the proposed agreement has been put to a vote twice and been voted down;
 - the parties have reached an impasse in the bargaining, and their positions are each resolute – there is no prospect of the parties reaching agreement;

- c. for the reasons articulated above, it is also reasonable in all the circumstances to make the declaration.
- 24. VARA submits that in the circumstances, the Commission ought be satisfied that it is appropriate to make an intractable bargaining declaration.
- 25. VARA relies on the grounds set out above and any further or alternative grounds that are advanced on the hearing of this application.

3. The employer

3.1 What is the industry of the employer?

Aviation

4. Industrial instrument(s)

4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2017

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Ben Dudley, Partner, Seyfarth Shaw Australia
Date	8 June 2023



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS