

FAIR WORK COMMISSION

**AM2016/3 – Proposed Helicopter Aircrew Award
Four yearly review of modern awards**

Additional Submission on behalf of Babcock Mission Critical Services Australasia Pty Ltd

17 August 2018

1. This submission is made on behalf of Babcock Mission Critical Services Australasia Pty Ltd (**BMCSA**), in accordance with the directions issued by the Fair Work Commission (**FWC**) on 24 July 2018.
2. This submission concerns the amended draft proposed *Helicopter Aircrew Award 2010* and refers to the draft Helicopter Aircrew Award dated 19 July 2018 (**July 2018 Draft Award**) tabled by the Australian Manufacturing Workers' Union (**AMWU**) at the hearing on 20 July 2018.
3. This submission is additional to the submissions lodged on behalf of BMCSA on 6 December 2017 and on 20 April 2018. It is a supplementary submission addressing the questions raised by the Full Bench during the hearing on 20 July 2018, which were taken on notice.
4. In this submission BMCSA addresses:
 - (a) other enterprise agreements known to cover helicopter aircrew in organisations other than BMCSA or CHC;
 - (b) the lack of precedent for the AMWU proposed clause for an additional skills allowance;
 - (c) the lack of precedent for the AMWU proposed fitness allowance;
 - (d) the prevalence or otherwise of helicopter aircrew in the tourism and transport industries;

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- (e) the permissibility or otherwise under section 139 of the *Fair Work Act (Cth) 2009* (**FW ACT**) of the indemnity and insurance clauses;
- (f) whether it is necessary to specify roster types in the proposed award;
- (g) interaction of the proposed hours of work, annual leave, public holidays and the NES;
- (h) the appropriateness of varying the Air Pilots Award 2010 to cover helicopter aircrew;
- (i) the precedent for additional URTI leave in modern awards; and
- (j) whether the clause 30.8 of the proposed Draft Award or the Air Pilots Award clause 31.1 are inconsistent with the NES.

Other Enterprise Agreements Applying to Helicopter Aircrew

- 5. The FWC asked the AMWU how many employers in the industry have enterprise agreements and requested that AMWU provide a list.¹
- 6. BMCSA was not asked to provide a list, however to assist the FWC, Annexure A is a list of enterprise agreements that BMCSA is aware of that cover helicopter aircrew.

Proposed clause for an additional skills allowance

Clause 19.6 of the July 2018 Draft Award

- 7. The AMWU took on notice to provide the FWC with any examples of a precedent clause in the award system that provide the kind of rights and entitlements of employees to make claims for additional skills that are proposed by the AMWU in Clause 19.6.²
- 8. BMCSA's submissions of 6 December 2017 [paragraphs 46 & 47] and of 20 April 2018 [paragraph 17] explain its view that such a clause is inconsistent with wage fixing principles and is a matter more appropriately dealt with through enterprise bargaining.
- 9. BMCSA is unaware of any similar clause within the award system.

Lack of precedent for the proposed fitness allowance

Clause 19.7 of the July 2018 Draft Award

- 10. The AMWU took on notice to provide the FWC with any examples of a precedent clause in the award system that provides an allowance to maintain fitness.
- 11. BMCSA is unaware of any award that contains such a clause.

¹ Transcript of 20 July 2018, PN 358-360

² Transcript of 20 July 2018, PN 440-452

12. In our submissions of 6 December 2017³, and on transcript at the hearing on 20 July 2018⁴, BMCSA identified several awards for employees who are required to maintain superior levels of fitness in their jobs that do not contain such an allowance.

Application of the proposed Award to tourism or passenger transport

13. During the hearing on 20 July 2018, the FWC inquired about the engagement of helicopter aircrew in the tourism or passenger transport industries.
14. BMCSA does not employ helicopter aircrew in those industries and to the best of its knowledge there is no use of helicopter aircrew in those sectors, or if there are, it is limited.

Permissibility of indemnity and insurance clauses

Clause 19.22(b) of the July 2018 Draft Award

15. The AMWU took on notice to make submissions about section 139 of the FW Act in relation to indemnity and insurance clauses.
16. BMCSA restates its previously-submitted objections to the proposed clause 19.22(b) in relation to the payment of fines and proposed clause 19.24 income protection insurance. These are not permitted by section 139 and cannot be properly characterised as allowances within the ambit of section 139(1)(g).
17. BMCSA prefers not to make submissions about whether clause 19.22(a) and clause 19.23 are permitted by section 139. It agreed with AMWU about their inclusion solely to reduce the areas of dispute and because they do appear in substantially the same form in the Air Pilots Award.

Permanent Touring Rosters

Clause 26.2 of the July 2018 Draft Award

18. At the hearing, the FWC asked why it was necessary to include the proposed clause 26.2.
19. BMCSA repeats one of the options it proposed at the hearing on 20 July 2018, which was to remove clause 26.2 of the proposed Draft Award, as it is not necessary.⁵ This would necessitate the deletion of the sub-heading in clause 26.1.

³ Paragraph 53 of BMCSA's Submissions of 6 December 2017

⁴ Transcript of 20 July 2018, PN 799

⁵ Transcript of 20 July 2018, PN 840

Interaction of hours of work, annual leave, public holidays and the NES⁶

20. We restate BMCSA's previously-submitted proposition that if helicopter aircrew are to have the same annual leave as pilots and the proposed award for helicopter aircrew is to expressly include the same option of a 15 day on 13 days off roster as the pilots, then their proposed award should reflect the totality of that arrangement by including the reciprocal clauses from Schedule E being Clauses E.6.5(d) and (e) of the Air Pilots Award.
21. AMWU and BMCSA have each submitted extensive written submissions on these points, however the Full Bench raised several questions in the hearing that warrant reconsideration.
22. BMCSA submits that the purported problems concerning interaction of the NES with the hours, annual leave and public holiday clauses could be simply resolved by:
 - (a) removing clause 26.2 and its reference to "15 on 13 off" rosters and instead relying on the NES and clause 23.2 for averaging the maximum ordinary working hours; and
 - (b) relying on the annual leave provisions of the NES, which would be four weeks per year of service (five weeks for seven-day shift workers); and
 - (c) removing the counting of public holidays as part of annual leave and the purported "buy out" of public holidays under clause 30.8(b) of the July 2018 Draft Award.

Varying the Air Pilots Award 2010⁷

23. BMCSA is not the Applicant for the making of a helicopter aircrew award. It is participating in these proceedings at significant cost because the outcome will substantially affect it and its operations.
24. BMCSA does not speak on behalf of the industry or any other employer and has made no detailed assessment of whether it would be appropriate to vary the Air Pilots Award.
25. BMCSA foresees some difficulties if an application were to be made to vary the Air Pilots Award, because:
 - (a) many more parties would be involved as significantly more employees and organisations are covered by that award;
 - (b) there are likely to be objections and intercession from other registered organisations;
 - (c) several potentially problematic clauses in the Air Pilots Award might be reagitated.

⁶ Transcript of 20 July 2018, PN 656-682

⁷ Transcript of 20 July 2018, PN 692 -700 and 776-777

26. This would have the effect of delaying proceedings, increasing complexity and substantially increasing the cost burden on BMCSA.
27. In its negotiations with the AMWU and in its submissions to the FWC, BMCSA has consistently maintained that where there is similarity of operations, the provisions of the Air Pilots Award are the most appropriate comparators for the proposed terms and conditions for aircrew, who work alongside the pilots on helicopter missions contemplated by this proposed award.

Upper Respiratory Tract Infection Leave ⁸

Clause 31.1 of the July 2018 Draft Award

28. We assist the FWC by confirming that a similar provision exists in the awards for other flight crew, namely Clause 28.3 of the Air Pilots Award and Clause 26.5 of the Aircraft Cabin Crew Award.

Public holidays clauses and the NES

Clause 30.8 of the July 2018 Draft Award

29. The FWC asked BMCSA to provide its view on whether the clause 30.8 of the proposed Draft Award is inconsistent with the NES.
30. On its face, clause 30.8(b) could be viewed as inconsistent with the NES in that it purports to exclude public holidays altogether by exchanging the NES public holiday entitlements for additional leave.
31. That goes further than clause 31.1 of the Air Pilots Award, which does not exclude public holidays but rather provides that the rate of pay and the amount of annual leave in that award ***take into account*** an employee's entitlement to public holidays in the NES and ***include compensation for*** all public holidays provided for in the NES (emphasis added).
32. If the proposed clause 30.8 is inconsistent with the NES and therefore challengeable, then it strengthens BMCSA's submissions above that annual leave should not be 42 days (since the 42 days would not be provided for any discernible reason). Employers could be expected to provide six weeks of annual leave as well as all public holidays.
33. This issue with clause 30.8 of the proposed Draft Award could be resolved by using the same wording as clause 31.1 of the Air Pilots Award.
34. We note that the AMWU in its earlier submissions argued that the 42 days annual leave was because of the loss of public holidays and that therefore using the days off from the preceding tour of a permanent tourer was "double counting". In fact, the Air Pilots Award expressly contains such a formula by including in the 42-day entitlement to annual leave

⁸ Transcript of 20 July 2018, PN 706-712

both those clauses setting off public holidays and days off (31.1 and Clauses E.6.5(d) and (e) of Schedule E).

35. When viewed in totality, BMCSA submits that an appropriate and simple solution would be as outlined at paragraph 22 in these submissions.



Ashurst Australia

Solicitors for Babcock Mission Critical Services Australasia Pty Ltd

17 August 2018

Annexure A

Current Enterprise Agreements Applying to Helicopter Aircrew

Company/Trading Name	Agreement Number	Agreement Name	Nominal Expiry Date
Babcock	AG2016/5658	<i>Babcock Mission Critical Services Australasia Aircrew Enterprise Agreement 2016</i>	31 March 2019
CHC Helicopters (Australia)	AG2017/4987	<i>CHC Helicopters (Australia) Crewperson Enterprise Agreement 2017 – 2019</i>	30 June 2019
CareFlight Ltd	AG2017/1038	<i>CareFlight Rotary Wing Aircrew Enterprise Agreement 2016 – 2020</i>	30 June 2020
CareFlight Group QLD	AG2013/11576	<i>CareFlight (Qld) Limited Rotary Wing Aircrewman Certified Agreement 2013 – 2015</i>	12 December 2015
Toll Helicopters	AG2016/5732	<i>Toll Helicopter Crewperson Enterprise Agreement 2016</i>	4 November 2020
Northern Region SLSA Helicopter Rescue Service Pty Ltd	AG2013/9556	<i>Northern Region Life Saver Rescue Helicopter Enterprise Agreement No 5</i>	1 October 2017
Westpac Rescue Helicopter Service	AG2016/1282	<i>Hunter Region Rescue Helicopter Pilots and Crewpersons Enterprise Agreement No 5</i>	31 December 2018
LifeFlight	AG2017/4954	<i>LifeFlight Australia Limited and Rotary Wing Aircrew Officer Certified Agreement</i>	30 June 2020