IN THE FAIR WORK COMMISSION

Matter No.: AM2016/3 Proposed Helicopter Aircrew Award
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following further submission to the Fair Work Commission in accordance with directions issued by Deputy President Hamilton on 10 April 2018.[1] This submission responds to matters raised in the submission of Babcock Mission Critical Services Australasia Pty Ltd (Babcock) 20 April 2018.[2]

2. In relation to the witness statement of Mr Andrew Cridland lodged by Babcock, the AMWU is not lodging any witness evidence in reply because we do not oppose listing Sunsuper as a default fund and have included Sunsuper in the list of default Superannuation funds in the draft Award lodged by the AMWU dated 13 April 2018.[3]

3. This submission will address the following matters Babcock has identified as still in dispute between the Babcock and the AMWU:

    (a) Clauses 19.4 (Other Required Additional Skill Certification Allowance);

    (b) Clause 19.5 (Fitness Allowance);

    (c) Clause 19.9 (Overseas Allowance);

    (d) Clause 19.21 (Telephone);

    (e) Clause 19.24 (Indemnity);

    (f) Clauses 19.26 (Income Protection Insurance);

    (g) Clauses 25 (Hours of duty and days free of duty) and 26 (Multiple day tours);

    (h) Clauses 27 (Overtime days worked) and 28 (Overtime hours worked);

    (i) Clause 30 (Annual leave);

    (j) Clause 32 (Jury Service Leave); and

    (k) Clause 33 (Public holidays).

4. The submission will also address the following matters which Babcock indicated they no longer oppose in principle or which have been resolved:

    (a) Former clause 16.6 of the 2017 September Draft Award (Transmission of business), which has been deleted from the 2018 April Draft Award;

    (b) Clause 17 (Classifications);

[1] Direction in AM2016/3 issued by Hamilton DP 10 April 2018
[2] Babcock Mission Critical Services Australasia Pty Ltd submission 20 April 2018
[3] AMWU Draft Helicopter Aircrew Award 2018 (13 April 2018)

(c) Former clause 18.3 of the 2017 September Draft Award (Annual Increment), which has been deleted and replaced with new drafting for clause 18.1 of the 2018 April Draft Award (Minimum wages);

(d) Clause 19.1 (Tools of trade), replacing the "Safety equipment allowance" provided for in the 2017 September Draft Award;

(e) Former clause 19.3 of the 2017 September Draft Award (Mobile Intensive Care Ambulance allowance), which is now clause 19.5 of the 2018 April Draft Award;

(f) Former clause 19.23 of the 2017 September Draft Award (Insurance), which has been replaced with clause 19.25 of the 2018 April Draft Award (Life Insurance and Total and Permanent Disability Insurance);

(g) Clause 20 (Accident pay); and

(h) Clause 31 (Personal/carer's leave and compassionate leave).

5. The matters which are still in dispute will be addressed first, while the matters which are in-principle agreed or no longer in dispute will be addressed subsequently.

6. Finally, in the direction issued by Deputy President Hamilton, the Commission has given leave for the AMWU to file a further submission and evidentiary material "relevant to issues it raised in its letter to the Fair Work Commission dated 4 April 2018." The AMWU will also address this leave in this submission.

Clauses 19.4 (Other Required Additional Skill Certification Allowance)

7. Babcock indicate that this is incompatible with modern award making principles to introduce a term requiring consultation and an "attempt to reach agreement" between an employer and employees for a proposed new allowance. Babcock also indicate that this is more appropriately a matter for enterprise bargaining.

8. In the current context, the AMWU's currently proposed clause is designed to respond to an incident where an employer wishes to train and require employees to utilise a new skill. The previous CHC Enterprise Award contained clause which simply specified a monetary amount, which is why the original draft award lodged by the AMWU also contained a fixed monetary amount. Following discussions with Babcock, the AMWU has amended the clause in its 13 April 2018 Draft to allow the employer and a majority of employees at a workplace to reach agreement about what the entitlement should be.

9. It is necessary to include such a term in a modern award to respond to situations where an employer wishes to train employees and require them to exercise a new skill. Without such a clause the modern award would not be able to adapt to changing circumstances and provide a fair and relevant safety net.

Not a matter that can be delegated to bargaining

10. While the Modern Awards Objectives requires that the commission take into account "the need to encourage collective bargaining," that does not go as far as allowing the Commission to delegate matters to bargaining or make an assumption that a matter not in an Award would be bargained for. Not allowing for a capacity to introduce new skills into a workplace would leave the Award lacking in flexibility to respond to changing needs. The Award must have an ability to stand on its own, and be applicable, where there is no enterprise agreement or bargaining taking place between parties.

The clause allows for the Commission to intervene in a dispute

11. The clause proposed by the AMWU allows for the matter to be resolved through the Award dispute resolution clause if necessary. While the dispute resolution clause in awards does not allow for resolution of the dispute by arbitration without consent, unlike disputes involving individuals such as a casual conversion clause, in this type of matter, once the matter has been raised with the Commission, the Commission may of its own motion exercise powers under Part 2-3 of the *Fair Work Act* 2009 to achieve the Modern Awards Objective by creating at that point the monetary entitlement necessary the increased productivity that is achieved through the implementation of new skills in a workplace.

The requirement to "attempt to reach agreement" already exists in awards

12. There is nothing which indicates that a clause requiring an employer and an employee to "attempt to reach agreement" is incompatible with modern award making principles.

13. There are many modern award clauses which require an employer and an employee to attempt to reach agreement about a matter before it can be implemented and also placing obligations on an employer to not unreasonably refuse or be limited in their capacity to disagree. There are numerous examples of clauses which the Commission or its predecessors have endorsed.

14. The first example is the Casual Conversion clause which arose out of the Metals Casuals 2000 decision[4] which contains the following sub-clause:

> "(d) Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but **must not unreasonably so refuse**.
>
> (e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.
>
> (f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause

[4] (2000) 110 IR 247; Print T4991

14.4(d), **the employer and employee must, subject to clause 14.4(d), discuss and agree on:**

(i) which form of employment the employee will convert to, being full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment." **(emphasis added)**

15. This clause requires the parties to discuss and agree on a range of matters, with a criteria on the employer not to "unreasonably refuse."

16. The Casuals and Part-time employment Full Bench in this present review has proposed a model clause[5] for casual conversion which contains the following clause:

"(f) Where a regular casual employee seeks to convert to full-time or part-time employment, **the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee**." **(emphasis added)**

17. These clauses include a requirement that an employer must not "unreasonably refuse" or may only refuse on "reasonable grounds."

18. Another example of a clause requiring parties to attempt to reach agreement and requiring an employer to not unreasonably refuse is the NES entitlement to Annual Leave. The criteria in s.88 clearly indicates that an employer "*must not unreasonably ruse to agree to a request by the employee to take paid annual leave*."

19. An example of a clause requiring agreement is the Award Flexibility term, which is present in every award and allows for agreement between an employer and an employee to apply award terms in a particular way.

20. Similarly, many awards contain facilitative provisions provide for an employer and a majority of employees or individuals employees to reach agreement on a whole range of matters including time off instead of payment for overtime, annual close down, meal breaks, public holidays, rest break after overtime and minimum engagements.

"the employer must not withhold agreement unreasonably"

21. The AMWU's clause not only requires agreement for implementation, but also provides a framework for resolving the dispute. The criteria that the employer "must not withhold agreement unreasonably," although not specifying employees does by inference require that employees have put forward a reasonable suggestion in order that the employer's response can be identified. What is or is not unreasonable in the context of a particular skill will turn on the specific facts of

[5] (2017) FWCFB 3541 at [381]

each case. The real opportunity for the Commission to arbitrate an outcome using its powers under Part 2-3 is likely to result in parties reaching agreement.

Clause 19.5 (Fitness Allowance)

22. The AMWU continues to rely upon its previous submissions and witness evidence in relation to this entitlement. However, of note is that the AMWU has varied the fitness allowance clause since its previous submissions to exclude "Surveillance Aircrew." While there is a level of fitness required of Surveillance Aircrew as evidenced by both Babcock and AMWU witnesses, it is of a lower level of fitness than the Aircrewperson and Rescue Aircrewpersons. Both Babcock and AMWU witnesses indicate the minimum level of fitness is a CASA Medical for surveillance aircrew. Both Babcock and AMWU witnesses provide statements that evidence that Rescue Crewpersons definitely have a level of fitness which warrants a more stringent fitness test. In light of the lower level of fitness required by Surveillance Aircrewpersons, the AMWU had put forward a clause which excludes Surveillance Aircrewpersons.

23. However, the requirement for a CASA medical assessment even for Surveillance Aircrewpersons leads to the conclusion that a fair and relevant safety net should provide adequate financial support for employees required to maintain that level of fitness.

24. It is also relevant to note that a fitness allowance exists in the CHC Enterprise Agreement (attached to Mr William Smits' Statement) at clause 22.3 and for Rescue Crewpersons in the Babcock Enterprise Agreements (attached to Mr Steven Robert Guyett's Statement) at clause 33.6.

25. The following witness statements provide further evidence in support of a fitness allowance:

    a. Mr William Smits at paragraph 60;

    b. Mr Charles McGregor-Shaw 12 September 2017 at paragraph 24;

    c. Mr Charles McGregor-Shaw 24 January 2018 at paragraph 14 – 15;

    d. Mr Brett Arthur Hoy at paragraph 26;

    e. Mr Steven Robert Guyett at paragraph 32;

    f. Mr Stephen Ford undated at paragraph 59;

    g. Mr Stephen Ford 19 January 2018 at paragraph 11;

    h. Mr Joel Young at paragraph 18;

    i. Mr Brandon Rogers at paragraph 43; and

    j. Mr Andrew Barry Gaskin at paragraph 23.

Clause 19.9 (Overseas Allowance)

26. The overseas allowance was included in the original draft as it was drawn directly from the CHC Enterprise Award. The parties did not have an opportunity to discuss this clause in detail prior to this submission. Babcock's proposal of utilising the ATO's taxation determination TD 2017/19 for overseas travel[6] based on which country would be acceptable to the AMWU. The AMWU would propose to copy the determination's paragraph 38 Table 6 and Table 9 into a schedule of the Award.

27. This would accord with the AMWU's understanding that for transport expenses such as vehicle expenses Babcock would be using the ATO's method of calculating the vehicle expense reimbursement per kilometre.[7]

Clause 19.21 (Telephone)

28. The AMWU's intention is that the minimum dollar figure is only applicable where the employer requires the employee to have a telephone. Work related calls above this figure would be reimbursed. It is only envisaged that itemised calls above the figure would be recorded where they are international calls, where there are no international calls included in the mobile plan. Many plans now include mobile international "minutes" as part of the plan, which range from 100 to 150 minutes to unlimited for some large plans.

29. The current market for mobile phone plans only include unlimited plans which include unlimited national calls and texts with a small amount of data. Vodafone has a "sim only" plan which does not include a mobile phone is starting at $30 for either a 12 month plan or month to month.[8] Optus has a sim only plan which does not include a mobile phone starting at $30 for a 12 month plan or $35 for month to month.[9] Telstra has a "sim only" plan which does not include a mobile phone, starting at $39 for a twelve month plan or $49 for a casual month to month plan.[10]

30. It is no longer common for mobile phone companies to itemise calls and messages sent from a mobile phone. The major item which is itemised and charged is data. None of the three carriers offered sim only plans which were not "unlimited" for national calls and sms.

31. In light of the current market for mobile phone plans and the way in which calls are charged, the minimum figure proposed by the AMWU is a reasonable figure and the way in which the clause is drafted allows for circumstances where international calls which may be individually charged above the "unlimited plan" fee.

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[6] ATO's taxation determination TD 2017/19 for overseas travel at paragraph 38 onwards
[7] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Vehicle-and-travel-expenses/Car-expenses/
[8] https://www.vodafone.com.au/plans/sim-only accessed 27 April 2018
[9] https://www.optus.com.au/shop/mobile/phones/sim-only accessed 27 April 2018
[10] https://www.telstra.com.au/mobile-phones/plans-and-rates#byo-plans-tab accessed 27 April 2018

Clause 19.24(b) (Indemnity)

32. The AMWU understands that Babcock agrees to clause 19.24(a). However Babcock disagrees with clause 19.24(b).

33. The AMWU's proposed clause 19.24(b) was drawn from the CHC Enterprise Award. It makes clear that negligence or poor performance exclude the operation of the clause. This is to make clear that it is only where the employee is performing their duties as instructed by the employer that the employer should pay the fines.

34. The AMWU would be happy to add the words, "where the employer has directed an employee to perform work in a way that attracts any fines from CASA," after the words, "Except in the case of negligence or poor performance."

Clauses 19.26 (Income Protection Insurance)

35. The AMWU continues to rely upon its earlier submission 24 January 2018 on this issue. Mr Stephen Ford's Statement 19 January 2018 at paragraph 14 to 16 provides evidence about the difficulty of Helicopter Aircrew in attempting to obtain this insurance because of their line of work. Mr Charles McGregor-Shaw's statement provides evidence that he was able to obtain private insurance. However, it attests that the cost was quite high.

36. It is relevant to note that Babcock does provide income protection insurance at clause 16 of its Enterprise Agreement. CHC provided for income protection in their Enterprise Award and also provide it in their Enterprise Agreement at clause 26. The AMWU's proposed clause is taken from the CHC Enterprise Award and is the same entitlement which exists in the CHC Enterprise Agreement.

37. It makes sense for the employer to obtain he income protection insurance because of the difficulties are experienced by employees in obtaining the insurance.

38. While Babcock's income protection entitlement in its Enterprise Agreement is only for 52 weeks, it is paid at 100% of the ordinary rate of pay, up to a maximum of $2000 per week.

39. The standard which exists as part of superannuation funds is 85% of income (which includes 75% paid to the worker and 10% paid into their superannuation) for up to 2 years or up to 5 years.[11]

40. For Helicopter Aircrew where they are both at higher risk of injury, as well as requiring a certain level of medical and/or physical fitness, income protection for a period of 5 years would be necessary to ensure that they had sufficient time to adjust and rehabilitate and retrain into a new occupation at the same level of either a Certificate III or Certificate IV.

[11] Australian Super Income Protection https://www.australiansuper.com/insurance/income-protection-cover accessed 27 April 2018

41. Retraining is particularly important where the injury results in a changed physical capacity that requires the Helicopter Aircrewperson to change careers. Both Babcock and AMWU witnesses indicate the minimum level of fitness is a CASA Medical for surveillance aircrew. Both Babcock and AMWU witnesses provide statements that evidence that Rescue Crewpersons definitely have a level of fitness which warrants a more stringent fitness test. AMWU witnesses evidence that Aircrewpersons are also required to pass a fitness test at Babcock and maintain a level of fitness necessary to operate a winch, carry objects and manoeuvre around in a tight cramped space.

42. A one year limit such as exists in the Babcock Agreement would be insufficient time for a person who is not totally and permanently disabled to adjust and complete a course or retraining for a new occupation.

43. The two years, which is a standard for a superannuation fund provided income protection would be insufficient to complete adjustment and rehabilitation as well as retraining to the same skill level.

44. Five years provides a sufficient amount of time for adjustment and rehabilitation from the injury along with a period for retraining to a Certificate III or IV level in a different occupation.

Clauses 25 (Hours of duty and days free of duty) and 26 (Multiple day tours)

45. The AMWU continues to rely upon its earlier submission 24 January 2018 on this issue. It is relevant to note that the AMWU has drafted a new clause 23 and clause 26.2, which addresses the concerns raised by Babcock in their earlier submission in relation to the current working patters.

46. Clause 23 has been redrafted to allow for an averaging of hours over the necessary periods which are currently performed in the industry for non-touring and touring employees. In particular the averaging of hours over 28 days or 56 consecutive days.

47. Clause 26.2 has been included to make it clear that the averaging over a 28 day roster for permanent tourers may include 15 days on and 13 days off. This clause is read in conjunction with clause 23.

48. In relation to Babcock's proposed annual leave provision for permanent tourers, that clause excludes the NES and cannot be included in a modern Award.

Annual Leave for permanent tourers

49. For permanent tourers, Babcock propose that 6 weeks of annual leave should be taken as one 28 day cycle, along with the 13 days off from an earlier cycle. The clause proposed by Babcock is as follows:

> *"(d) A pilot on tour of duty will be employed on the basis of twelve 28 day cycles of duty per annum, consisting of 15 days on duty and 13 days off. Such days off to be taken at the pilot's home base. In addition the pilot will be*

entitled to 42 days annual leave per annum (inclusive of Saturdays, Sundays and public holidays), which will consist of one period of 13 days off associated with a duty cycle plus 29 days.

(e) Any accrued days off under the above clause will not be included as part of annual leave except as provided in clause E.6.5(d). Methods of achieving correct ratios between periods of duty away from home base and days off may be agreed between the majority of affected employees and individual employers provided the principles set out in this clause are adhered to."

50. This involves a double counting of both Public Holidays and of an averaging of hours system. Therefore, the double counting involves an exclusion of both the Public Holidays NES entitlement and the Maximum Hours NES entitlement.

51. A decision of Commissioner Hunt looked at similar issues involving hours of work.[12] However, that decision did not consider this specific issue in relation to the exclusion of the NES, as it was not canvassed before the Commissioner.

52. Subsection 55(1) of the Fair Work Act 2009 stipulates that:

> "A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards."

53. The NES entitlement to "Maximum weekly hours" allows provides for a maximum of 38 hours.

54. In assessing whether an employee's refusal to work additional hours are reasonable or unreasonable, s.62(3)(i) provides that averaging of hours arrangements are to be taken into account. The proposed award contains averaging of hours, which may be over 28 days and result in 15 days on and 13 days off. The 13 days off are part of the averaging of hours in connection with the 15 days on.

55. The NES entitlement to Public Holidays is very clear that the employees are entitled to be absent on Public Holidays. However, the employee may only refuse a request to work if that request is unreasonable. In assessing whether the request is unreasonable, s.114(4) outlines factors to be taken into account which include the nature of the work performed, whether the employee could reasonably expect that the employer might request work on the public holiday, and the amount of notice.

56. In the present circumstances where the pattern of work for permanent tourers includes public holidays and shift work, it would be reasonable to assume that a roster with the 28 day pattern is a reasonable request to work on all public holiday in return for an additional 2 weeks annual leave, which also compensates for the additional week of leave for shift work that involves Sundays. There are no penalties for work on Public Holidays.

[12] [2017] FWC 315

57. In the AMWU's proposed Draft Helicopter Aircrew Award 13 April 2018, the AMWU has included a clause at clause 30.8, which stipulates that:

> "An employee entitled to 42 days of annual leave under this award will not be entitled to public holidays."

58. This clause is to address Babcock's concern that employees who receive the 42 days annual leave were also entitled to Public Holidays.

59. There is a question about whether this clause satisfies the requirement under s.115(3) that the clause substituting public holidays must include agreement. The AMWU is content to include a majority agreement requirement to ensure compliance with the clause. The AMWU understands from a Statement issued by the President that this issue is under consideration by the Plain Language Full Bench.[13]

60. Babcock's proposed clause would see the 13 days off from an adjacent cycle be counted as part of the "42 days of annual leave." Babcock propose that an employee would take 28 days off, along with an adjacent 13 days off from an earlier or subsequent cycle and 1 additional day. This would mean a double counting of the 2 weeks additional leave as both:

    1) days substituted for public holidays and compensation for working Sundays; and

    2) days off as part of an averaging arrangement.

61. The 13 days off cannot be both days off as part of an averaging arrangement and also the days substituted for Public Holidays and compensation for regularly working sundays.

62. The NES entitlement for annual leave is taken to be one cycle of 28 days, which would amount to the 4 weeks of annual leave under the NES.

Clauses 27 (Overtime days worked) and 28 (Overtime hours worked)

63. The AMWU's intention was only for double time for overtime days worked not triple time. Clause 27 stipulates as follows:

> "*Where an employer requires a full-time or part-time employee to work extra days in addition to the employee's ordinary rostered days and the employee agrees to do so, the employee shall be paid at the rate equivalent to their ordinary daily rate (clause 18.6(a)) multiplied by 2. The amount of the ordinary daily rate is to include all allowances that are paid to the employee for their ordinary rostered days*."

64. The reference to "in accordance" in clause 18.6(b) makes it clear that the rate for overtime is the ordinary daily rate multiplied by 2.

[13] Statement [2018] FWC 1501

65. The rate of double time for overtime days is necessary, because of the disutility of an additional day of overtime.

66. It is relevant to note that the AMWU has changed the rate of overtime hour to be time and half for the first two hours and double time thereafter from double time for all hours. However, for overtime days there is a different consideration in relation to the attached non-working hours which is not compensated for by ordinary overtime penalties.

67. An employee required to work an additional day is likely to be away from home for the full 24 hours, even though they are only paid for the working part of that day. They would be required to cease work, take the appropriate rest period, and resume work the next day. There would be an entire 24 hour period where they are away from family and home, and which also disrupts the averaging of hours arrangements significantly as the number of days off is reduced.

68. In relation to overtime hours, the calculation of overtime over the work cycle is to ensure that employees are paid an appropriate overtime penalty. The averaging of hours arrangement for a 28 day cycle of 15 days on and 13 days off would result in approximately 10 hours per day during the 15 days on. The scope for overtime is limited, taking into account the rest periods and occupational health and safety.

Clause 30 (Annual leave)

69. The AMWU has addressed the issue of public holidays and annual leave in the draft. However, the AMWU remains opposed to Babcock's proposed annual leave clause for permanent tourers which excludes the NES and is addressed earlier in this submission.

Clause 32 (Jury Service Leave)

70. Awards can supplement the NES entitlement for Jury Service beyond the NES 10 days.

71. While it is true that the Award Modernisation Full Bench indicated that it would not supplement the NES entitlement to jury service. It also indicated that it was not aware that any Awards or NAPSAs contained a cap on the jury service entitlement. The decision contained the following paragraphs:

> "Community service leave
>
> [103] We have given further consideration to whether modern awards should supplement the NES in relation to the amount of jury service leave to which an employee is entitled. The NES provides that jury service leave should be limited to 10 days. So far as we know jury service leave provisions in awards and NAPSAs are not subject to any cap at all. If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.

> [104] A similar consideration arises in relation to the rate of pay while on jury service leave. For similar reasons we shall not make general provision for a rate of pay other than the base rate as defined in the NES. It follows that the standard community service leave clause will simply refer to the NES."[14]

72. In the same decision, the Full Bench did include a clause in a Modern Award which did not contain a cap. The Manufacturing and Associated Industries and Occupations Award 2010 which was made in the same decision does not include a clause without a cap on the wages which the employer should reimburse an employee.

73. The logic expressed in the Full Bench decision above was expressed at a time when the Full Bench considered that the National Employment Standards were the community standard to override pre-reform Award standards and the Full Bench did not at that time consider that supplementation was possible to achieve the modern awards objective in relation to an NES entitlement. Subsequent Minister's requests were varied to give clearer instruction to the Full Bench that supplementation was a possibility for Awards.

74. With respect to that Award Modernisation Full Bench, were the possibility of supplementation given consideration alongside a deference to the precedents set by earlier AIRC decisions a different outcome would have arisen. The fact that all the Awards did not contain any cap as noted by the Full Bench at the time, would have weighed in favour of supplementing the NES in all modern awards, if the Full Bench had considered it possible to supplement to the NES and create community standards above that found in the NES.

Clause 33 (Public holidays)

75. The AMWU agrees that clause 30.8 could be moved to a new clause 33.2.

Clause 16.6 Transmission of Business

76. The AMWU has agreed not to pursue this issue and has removed the clause from the proposed draft award.

Clause 17 Classifications

77. This is now an agreed clause. There is now a new definition for both Surveillance Aircrewperson and Surveillance Mission Coordinator. These are also included in the definition of "Helicopter Aircrew," which is used in the coverage clause.

Clause 18.2 and 18.3 Check and Training and Line Training

78. The AMWU agrees with Babcock's proposed variations.

[14] [2018] AIRCFB 1000 at paragraph 103 to 104

Former clause 18.3 annual increment now part of 18.1 minimum wages

79. The parties have reached agreement on a new clause 18.1 which provides for a minimum wages table that provides for each classification to advance in the pay scale based on years of service up to 9 years. The percentage increase for each year is based on the percentage increase in the pay scale for Helicopter Pilots deployed on similar missions as the helicopter aircrew covered by the proposed award and for the same size helicopters which they are deployed on.

80. On this basis, the AMWU withdraws its proposal for a separate "Annual Increment" clause.

Clause 19.1 Tools of Trade

81. This is now an agreed clause.

Clause 19.5 Mobile Intensive Care Ambulance Allowance

82. This is now an agreed clause.

Clause 19.25 Life Insurance and Total and Permanent Disability Insurance

83. This is now an agreed clause. This clause has been redrafted to be based on an amount equal to $248,808.35, which is 5.42 times the standard annual wage of a 1st year Aircrewperson.

Clause 20 Accident Pay

84. This is now an agreed clause.

Clause 22.4 Superannuation

85. This is now an agreed clause. The AMWU has added Sunsuper to the list of funds.

Clause 31 Personal / Carer's Leave and compassionate leave

86. This is now an agreed clause.

Whether there should be a separate new award or a variation to an existing award

87. The AMWU proposes that there should be a separate new award made by the Commission. A number of times, the Commission has asked questions of the parties about whether an existing award should be varied.

88. The AMWU wrote a letter to the Commission 4 April 2018 which stated the following:

> "1. The Australian Manufacturing Workers' Union (AMWU) writes to seek an opportunity to respond to any relevant facts or other

considerations which the Fair Work Commission may take into account in fulfilling its obligations under s.163(2).

2. At the mention on 4 April 2018, Deputy President Hamilton sought clarification about what the AMWU was proposing, in particular whether the AMWU sought a new Award or a variation to an existing Award. At the earlier mention on 16 February 2018, Deputy President Hamilton put a position that:

"One of the achievements of the process of restructuring awards over the last 10 or 15 years, has been reducing numbers of awards. The question is, and this has been raised with you before, repeatedly. Why would you make a separate award for such a small group of employees?"

3. In general terms, the Fair Work Act 2009 (the Act) places no restriction upon the creation by the Fair Work Commission of new Modern Awards. This is made clear by the existence of s.163(2), which infers that there is a possibility to create new Modern Awards, following the discharge of the obligation to consider an alternative. Further, support for this construction, is found in s.168C(1) of the Act, which places a definite restriction upon the creation of any new Modern Enterprise Awards under the Act. Modern Enterprise Awards may be made through the Enterprise Award Modernisation transitional process found in Schedule 6 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – which is an equivalent process to the "Part10A Award Modernisation" process which resulted in the current Modern Awards.

4. The AMWU in its submission 20 September 2017 indicated a preference for a separate new Award. However, we had also acknowledged that it was a requirement under s.163(2) for the Fair Work Commission to consider whether it was appropriate to vary an existing award. At the mention on 16 February 2018, the AMWU indicated in response to a question from Deputy President Hamilton that this option had been canvassed in our submissions. When asked by the Deputy President if the AMWU would "be possibly happy" with a variation to an existing Award we had indicated yes. However, at no point, did the AMWU drop its primary submission that there should be a separate Award.

5. Babcock, the only employer intervener in the proceedings, in their original submissions 6 December 2017 indicated agreement with the AMWU position that the Aircraft "Cabin Crew Award 2010 would not be an appropriate base instrument and that it would be preferable and consistent with the modern awards objective for a modern award to be created specifically for helicopter aircrew."

6. Following further questioning by Deputy President Hamilton at the mention on 16 February 2018 and again on 4 April 2018, Babcock

indicated at the mention on 4 April 2018 that they did not have a strong view about the issue.

7. This means that there are presently no strong objectors putting a clear position against the AMWU position, that there should be a new and separate award for Helicopter Aircrew.

8. Because there have been no active parties presenting an opposition view to what the AMWU has proposed as the primary position, it is not possible to understand on what basis a party might consider that it is more appropriate under the current legislative framework to vary an existing award, rather than make a new award.

9. The varying of an existing award such as the Aircraft Cabin Crew Award 2010 would necessarily involve industry groups and significant players with an interest in that Award. The variation of an existing Award with such significant organisations is resource intensive for a significant number of parties who must trawl through the contents of proposed variations to an Award to simply clarify their interest in the issue, which is not the kind of economic activity intended by the Modern Awards Objective. It does not add anything to the simplicity or ease of understanding for the Modern Awards System or any other objective of the Modern Awards Objective.

10. In light of the above the AMWU respectfully requests an opportunity to be informed if the Fair Work Commission intends to take into account any relevant facts or matters in discharging its obligations under s.163(2) and importantly, to be given an opportunity to respond to the detail of those relevant facts or matters. This opportunity to respond to relevant matters or facts which the Commission may take into account is relevant to the Commission's obligations under s.577.

89. The AMWU's position articulated in the letter remains.

90. The AMWU thanks the Commission for the leave given for the AMWU to lodge any submissions and further evidentiary material. However, the AMWU notes that it has not been given notice of what the case is against its primary submission that there should be new award made, which makes it impossible to make submissions in reply.

91. There are many parties involved in the *Air Cabin Crew Award* 2010, who have no interest at all in Helicopter Aircrew matters. Similarly, the AMWU has no interest in the *Air Cabin Crew Award* 2010. There does not appear to be any involvement or interest from Babcock or CHC in the current Award review of the *Air Cabin Crew Award* 2010.

92. Requiring all the disparate parties to review changes irrelevant to them would increase the work for paid agents, but not be an efficient use of time and resources for parties already involved in numerous matters in the 4 yearly review and likely to be involved in numerous test case and award variation matters in the future.

93. The facts about involvement in the current 4 yearly review demonstrate that there is not a community of interest between the parties representing each group of employees and employers between the Helicopter Aircrew and the Air Cabin Crew. It would be administratively more efficient for both parties and the Commission to keep Helicopter Aircrew separate and to deal with only the interests of Helicopter Aircrew in a proceeding, rather than having to manage the disparate industrial interests between the Air Cabin Crew and Helicopter Aircrew. Proceedings are likely to be quicker and less time consuming, as evidenced by the efficiency of the parties in reaching agreed consent positions on a number of matters in the Helicopter Aircrew proposed Award and clearly defining the narrow points of difference.

94. If there are other matters which the Commission wishes to take into account in its consideration of this issue, the AMWU would request at that time an opportunity to address those matters.

95. The AMWU respectfully submits that the Commission should deal with the question of what safety net of fair and relevant entitlements should exist for Helicopter Aircrew first. Following that, the Commission can then deal with its required consideration of whether or not its possible to vary an existing Award. Following that, if the Commission decides an existing Award should be varied, conferences can be convened engaging the parties which are currently engaged in the review of that existing Award to be varied. Or if the Commission decides to make a new Award, no further conferences or consultations would be necessary necessary.

End

27 April 2018