IN THE FAIR WORK COMMISSION

Matter No.: AM2018/14

Re Application by: Australian Federation of Air Pilots

OUTLINE OF SUBMISSIONS IN RESPONSE OF THE AUSTRALIAN FEDERATION OF AIR PILOTS

1. This Outline of Submissions in Response is filed pursuant to Direction 3 of the Directions made by Vice President Cantazariti on 18 December 2018 in matter AM2018/14. It responds to the submissions and evidence filed by Alliance Airlines Pty Ltd ("**Alliance**") on 13 February 2019 and the Regional Aviation Association of Australia ("**RAAA**") on 13, 20 and 21 February 2019.

2. As the AFAP understands it, Alliance and the RAAA propose variations to clause 13 of the *Exposure Draft of the Air Pilots Award* ("**Air Pilots Award**")[1] to the following effect:

   (a) the training contemplated by clause clauses 13.2 and 13.5 does not include training required by the Civil Aviation Safety Authority (or another regulatory body);

   (b) the training contemplated by clause 13.2 of the Air Pilots Award does not include a pilot's initial training or training on the aircraft type for which they were employed; and

   (c) to provide an ability for an employer and pilot to agree to vary the content of clauses 13.2 and 13.5 of the Air Pilots Award by the imposition of an individual return of service or training bond.

3. The RAAA and Alliance argue that these variations reflect the current operation of clause 16 of the current Air Pilots Award 2010 ("**Air Pilots Award 2010**"), and do not affect the status quo.[2] For the following reasons, that argument is incorrect.

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[1] Clause 13 of the Air Pilots Award currently replicates in exact terms clause 16 of the *Air Pilots Award 2010*.
[2] Noting that the RAAA and the Alliance applications are expressly made under section 160 of the *Fair Work Act 2009* (Cth) and not under the 4 yearly review.

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The training contemplated by clauses 13.2 and 13.5 does not include training required by the Civil Aviation Safety Authority (or another regulatory body)

4. For a pilot to perform the duties required by an employer, they must have undertaken certain training, and achieved certain regulatory approvals from a body such as the Civil Aviation Safety Authority. Accordingly, where the training is of a type that is imposed by a regulatory body such as the Civil Aviation Safety Authority, it is training required by the employer so that the pilot can perform the duties required by the employer.

5. Notably, neither Alliance nor the RAAA point to any type of training to which their proposed variation clause 13.2 and 13.5 would apply. It is difficult to conceive of training related to reaching and maintaining minimum qualifications for a particular aircraft type that would not be required by the Civil Aviation Safety Authority.

6. Alliance's reliance on *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33 at paragraph [48] is misconceived. Paragraph [48] must be read considering the preceding paragraphs [44] – [47]. Those paragraphs set out what was pleaded and what pleadings were denied for the purposes of the Court determining a penalty. Paragraphs [44] – [47] do not refer to agreed facts. When read in context, paragraph [48] refers to who required the training, and which entity might be liable under clause 16.5 of the Air Pilots Award for the costs of that training. Buchanan J was not referring to what training was required, rather which respondent required the training. Paragraph [48] examines who the prospective employer might have been for the purposes of clause 16.5.

7. The AFAP otherwise refers to and repeats the AFAP Outline of Submission filed on 13 February 2019 at paragraphs [15] – [28].

The training contemplated by clause 13.2 of the Air Pilots Award does not include a pilot's initial training or training on the aircraft type for which they were employed

8. The AFAP agrees that clause 13.2 only applies to a pilot whose employment has commenced. However, nothing in clause 13.2 supports that it does not apply to a pilot's initial training, or training on the aircraft type for which they were employed.

9. Any training of a pilot once employed, initial or subsequent, is caught by clause 13.2. If the training is performed prior to the commencement of employment, then one looks to clause 13.5 (as were the circumstances in *Jetgo Australia Holdings Pty Ltd v Goodsall* [2015] FCCA 1378 ("**Jetgo Decision**")) to ascertain whether that clause applies.

10. Alliance incorrectly relies on paragraph [162] the of Jetgo Decision. Paragraph [162] states that clause 16.2 of the Air Pilots Award 2010 only applies to persons who are already in the employ of the employer, and that the training must occur during the employment. That is uncontroversial. The initial training of pilots often occurs once employment has commenced. In any event, paragraph [162] is obiter dicta. The Jetgo Decision rested on the application of clause 16.5 of the Air Pilots Award 2010.

11. There is no textual foundation in clause 13.2 of the Air Pilots Award that would exclude initial training that is undertaken once a pilot is employed. Nor does it provide any foundation for excluding any other training required on the aircraft type for which a pilot is initially employed.

12. Further, there is no textual foundation that would explain the absurdity that would result from the proposed variation, being that a pilot's initial training would be caught by clause 13.5, but not by clause 13.2.

To provide an ability for an employer and pilot to agree to vary the content of clauses 13.2 and 13.5 of the Air Pilots Award by the imposition of an individual return of service or training bond

13. The AFAP agrees that variations to the obligations imposed by clause 13 are possible, and that these have been utilised for some time.[3] However, they must only do so through the mechanism of a statutory instrument which is subject to legislative protections (for example, previously the no disadvantage test or currently the better off overall test).[4] A bond that is not included in such a statutory instrument is unenforceable.[5]

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[3] *China Southern West Australian Flying College* [2012] FWA 8272 at paragraph [11].
[4] Ibid.
[5] *McLennan v Surveillance Australia Pty Ltd* [2005] FCAFC 46 at paragraph 48; *Regional Express Holdings Ltd v Clarke* [2007] FCA 957 at paragraphs 47 and 51.

14. In so far as Alliance rely on paragraph [156] of the Jetgo Decision, the AFAP agrees that the training required was covered by clause 16.5 of the Air Pilots Award 2010 and must, as Vasta J states, be reimbursed to the pilot. Whether it was permissible to contain a delayed repayment regime is open to question, however that is not the issue in this application. The ultimate basis on which the employer in the Jetgo Decision was found not to be liable under clause 16.5 was a combination of factual circumstances unique to that case. Further, paragraph [156] of the Jetgo Decision does not concern clause 13.2 of the Air Pilots Award.

15. In response to paragraph 21 of the Alliance Submissions, there is no relevant distinction that can be drawn between the interaction between bonds and the Air Pilots Award, and bonds with other types of statutory instruments. The general principle remains that it is not possible to contract out of a statutory instrument to the employee's detriment.[6]

16. In response to the examples contained at paragraph 29 of the Alliance Submissions:

    (a) Example 1 – Alliance is correct in saying that, should the bond not be a statutory bond, then no amount could be recovered. If ABC Aviation wished to be able to recover its costs, then it is open to bargain at the enterprise level. If it was a statutory bond, then that would be a matter for enterprise bargaining between ABC Aviation and its employees.

    (b) Example 2 – This was the subject of enterprise bargaining. The effect of the terms of the enterprise agreement were a matter for Virgin and its employees during negotiations.

    It is unclear what these examples are intended to demonstrate in relation to the Air Pilots Award as they are the result of the enterprise bargaining provisions of the *Fair Work Act 2009* (Cth).

17. The contention, at paragraphs 23 – 25 of the Alliance Submissions, that a return of service or a training bond is a separate and distinct obligation to the obligations set out in clause 13 is misconceived. A training bond is essentially the obligation to pay some or all of the training costs in the event the bond period is not served. It is the payment part that offends clause 13.2 and 13.5 because it means that the employer is not responsible for those costs.

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[6] *Regional Express Holdings Ltd v Clarke* [2007] FCA 957 at paragraph 44.

18. In response to section E of the Alliance Submissions, the AFAP agrees that employers have a right to seek return of service by way of a training bond, but only through a statutory agreement with the appropriate trade-offs. The AFAP considers bonds imposed pursuant to provisions contained in the list of statutory instruments at paragraph 37 of the Alliance submissions are prima facie enforceable, because they have been scrutinised during the application of the better off overall test.

19. In response to paragraph 8 and 12 of the RAAA Submissions, these do not inform the question of whether non-statutory bond agreements are enforceable. As the evidence filed by the RAAA demonstrates, the AFAP has been consistent in its view that non-statutory bonds are unenforceable. What employers may or may not do does not inform whether non-statutory bonds may co-exist with clause 13 of the Air Pilots Award.

20. There also seems to be a multitude of approaches to bonding contained in the witness statements filed by the RAAA, such that it can hardly be said that those witnesses agree about whether non-statutory bonds are enforceable or that their enforceability represents the status quo.

21. In response to paragraph 24 of the RAAA Submissions, there is no valid distinction to be drawn between the proposed clause 13.6 and the variation sought by the Applicant in *China Southern West Australian Flying College* [2012] FWA 8272. Both proposed clauses seek to allow alterations to clause 13.2 without being scrutinised under the better off overall test. The basis on which the distinction is said to be drawn is not articulated in either paragraph 24 of the RAAA, nor in paragraph 33 of the Alliance Submissions.

Australian Federation of Air Pilots

28 March 2019