



Australian Manufacturing Workers' Union
NATIONAL RESEARCH CENTRE

5th November 2019

Vice President Hatcher
Fair Work Commission
Level 10, Terrace Tower
80 William Street
East Sydney NSW 2011

By email: Chambers.Hatcher.VP@fwc.gov.au
CC: amod@fwc.gov.au

Dear Associate to Vice President Hatcher

AM2016/3 Proposed Helicopter Award

I refer to the above matter and the amended directions issued by the Vice President on 1st October 2019.

In accordance with those directions, the AMWU encloses:

- Its submissions in response to the materials filed by the Australian Federation of Air Pilots; and
- A witness statement of Mr Richard Wing

This material has been provided in the formats requested.

The AMWU seeks leave to file a further witness statement as soon as practicable, but outside the timetable programmed in the directions referred to above.

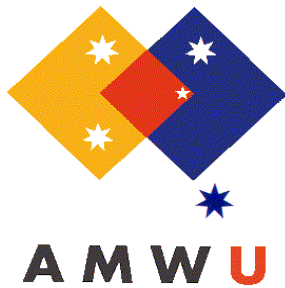
The further witness statement has been mostly prepared but has regrettably not been able to be formalised prior to the time for filing.

The AMWU thanks the Commission for consideration of this request.

Yours sincerely

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AM2016/3 Proposed Helicopter Aircrew Award

Introduction

1. This submission is made by the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (**AMWU**) and is made in accordance with the amended directions issued by Vice President Hatcher on 1 October 2019.¹
2. This submission will:
 - a. Outline the background to this proceeding;
 - b. Outline the relevant legislative provisions;
 - c. Expand on the AMWU’s position regarding the potential for Helicopter Aircrew to be covered under the Air Pilots Award 2010 (**Pilots Award**); and
 - d. Respond to the submissions of the Australian Federation of Air Pilots (**AFAP**).

Background

3. On 10 December 2014 the AMWU made application for a new modern award to cover the occupation of ‘helicopter aircrew’.
4. At all stages throughout the AMWU’s application, the AMWU maintained that a new award should be created to cover the occupation of helicopter aircrew.
5. As an alternate position, the AMWU submitted that the *Aircraft Cabin Crew Award 2010* (**Cabin Crew Award**) could be varied to include helicopter aircrew.²

¹ [Amended directions made on 1 October 2019.](#)

² [Submissions of the AMWU dated 20 September 2017](#) [72].

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6. On 7 July 2019 the Fair Work Commission (**Commission**) issued a decision *4 yearly review of modern awards – Proposed Helicopter Aircrew Award* [2019] FWCFB 4748 (**July 2019 Decision**).
7. In the July 2019 Decision, the Commission found that it was required to finalise its consideration regarding whether an existing award could be varied to include the relevant classifications, before it could determine whether to make a new modern award.³

Relevant Legislative Provisions

8. This proceeding is being conducted pursuant to s.156 of the FW Act. Relevantly, s.156 requires a 4-yearly review of modern awards to be conducted, and further provides that in a 4-yearly review, the Commission may make a determination varying a modern award, make a modern award or revoke a modern award.⁴
9. This section has been repealed, but clause 26 of Schedule 1 requires the Commission to continue to apply s.156 as if it had never been repealed.⁵
10. Section 134(1) sets out the modern awards objective. Section 134(2) provides that the modern awards objective applies to all the Commission's functions or powers relating to modern awards.⁶
11. Section 163 provides:

163 Special criteria relating to changing coverage of modern awards

Special rule about reducing coverage

- (1) *The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.*

Special rule about making a modern award

- (2) *The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.*

³ *4-yearly Review of Modern Awards – Proposed Helicopter Aircrew Award* [2019] FWCFB 4748 [71].

⁴ *Fair Work Act 2009* (Cth) (compilation date 20 September 2017) s.156.

⁵ *Fair Work Act 2009* (Cth) clause 26 of Schedule 1.

⁶ *Ibid* s.134.

Special rule about covering organisations

- (3) *The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.*

The miscellaneous modern award

- (4) *The **miscellaneous modern award** is the modern award that is expressed to cover employees who are not covered by any other modern award.⁷*

12. Relevantly, the Commission has made findings regarding the construction of s.163 in as follows:

“[57] These provisions apply to the AMWU’s application in the following way. First, we must be satisfied that the current coverage of helicopter aircrew under the Miscellaneous Award does not meet the modern awards objective such that an alteration to this position is necessary to meet the modern awards objective.

[58] Second, if we are satisfied that the current modern award coverage must be changed to meet the modern awards objective, s 163(2) prevents us from making the new award proposed by the AMWU until we have given consideration to whether an existing modern award should be varied to cover helicopter aircrew. This is problematic in terms of the way in which the AMWU advanced its case, in that the AMWU’s primary case was that its proposed new award should be made and only submitted in the alternative that an existing award should be varied to cover helicopter aircrew. The approach taken by the AMWU implies an order of consideration in reverse of that required by s 163(2).

[59] Third, in giving primary consideration as to whether an existing award should be varied to cover helicopter aircrew as required by s 163(2), it is necessary to consider for the purpose of s 163(1) whether any relevant award is appropriate for them. Again, because of the way in which the AMWU advanced its case, limited attention was given to this issue and it was initially addressed only in relation to the Aircraft Cabin Crew Award.”⁸

13. Further, the Commission has already made a finding that it is not consistent with the modern awards objective for Helicopter Aircrew to be covered by the Miscellaneous

⁷ Ibid s.163.

⁸ 4-yearly Review of Modern Awards – Proposed Helicopter Aircrew Award [2019] FWCFCB 4748.

Award⁹, meaning that an “alteration to this position”¹⁰ (the status quo) is necessary to meet the modern awards objective.

14. As noted by the Commission in the July 2019 Decision, this means that the next step is to consider whether an existing award can be varied to cover helicopter aircrew.¹¹ Moreover, as stated by s.134, the modern awards objective applies to all of the Commission’s powers and functions relating to modern awards.¹²
15. The corollary of this is that the modern awards objective applies to the Commission’s consideration of whether to vary the Pilots Award to cover Helicopter Aircrew. Relevantly, s.134(1) would also be applicable if the Commission were to decide not to vary an existing award and instead make a new award.
16. However, this is not to say that the exercise required by the Commission is to simultaneously consider whether to make a new award or to vary an existing one and determine which course of action would better achieve the modern awards objective.
17. This much is clear from s.163(2) which, as the Commission has noted, requires the Commission to *finalise* its consideration about whether an existing award (the Pilots Award for present purposes) could be varied.
18. Therefore, it is the AMWU’s submission that if the Commission applies the relevant considerations in s.134(1) and determines that the modern awards objective would be achieved by a variation to the Pilots Award in a form proposed, then that is the end of the inquiry, insofar as the Commission’s discharge of duty under s.163.

Position of the AMWU

19. The primary objective of the AMWU is, and has been throughout these proceedings, been to attain coverage for helicopter aircrew by a modern award other than the *Miscellaneous Award 2010 (Miscellaneous Award)*, although It is true that the AMWU has previously run its case by primarily submitting that a new award should be created.
20. At the hearing of the matter on 20 July 2018 the Commission raised with the AMWU a question as to why the Pilots Award couldn’t apply to Helicopter Aircrew. The following exchange is enlightening:

⁹ Ibid [66].

¹⁰ Ibid [57].

¹¹ Ibid [71].

¹² *Fair Work Act 2009* (Cth) s.134.

VICE PRESIDENT HATCHER: Why doesn't the Pilots Award then provide you with the formula as to how to do this? You see, the Pilots Award just talks about CASA regulations and a few other things. Why couldn't we put there people in as an adjunct to the Pilots Award, as they work alongside and if they are doing the same working rosters and travel patterns, pick up the conditions applicable to the pilot?

PN698

MR NGUYEN: We haven't considered that option. We had only considered the option of the Air Cabin Crew award.

PN699

VICE PRESIDENT HATCHER: It just seems to me odd that you have got two people working obviously very closely together and probably sitting within one metre of each other. The idea that they are covered by two different modern awards is a bit strange.

PN700

MR NGUYEN: We will undertake to come back to your Honour about that possible option as well. But in general terms, they are different occupations requiring different skills.

PN701

VICE PRESIDENT HATCHER: Well, obviously the skills are different and you need the classification, but in terms of things like travel patterns, hours of work and rostering arrangements, I would have thought they would be doing the same thing, wouldn't they?

PN702

MR NGUYEN: We hadn't considered - when you come back to your Honour about that specific question. I need to take some instructions from my members about how closely the work is aligned.

PN703

DEPUTY PRESIDENT HAMILTON: Well, if they are all in the same cabin, they have to work together and the requirements would be the same or similar.¹³

21. Following this exchange, the AMWU consulted with its helicopter aircrew membership, revisited its position and confirmed that it was not opposed to the concept of the Pilots Award being varied to include coverage of helicopter aircrew, and famously, (or perhaps infamously) submitted the following:

"197. The AMWU understands that the operational hours of work for pilots and aircrew operating on the same helicopter are structured in the same way.

198. Aircrew have the same fatigue risk management standards as pilots.

¹³ [Transcript of Proceedings 20 July 2019 PN697-PN703.](#)

199. Aircrew have the same level of training and duty hours as pilots.

200. Flight and duty hours are the same as the pilots. The duty hours change depending on the job role. However, the duty hours mirror and are identical to the pilots. Duty is on call ready to fly. Flying time is separate. Both have restrictions and accrue fatigue.

201. If Aircrew and Pilots are on different rosters, then the Helicopter would need to land every time that any Aircrew or Pilots had flown the maximum number of hours or were due for rest. Rostering Aircrew and Pilots on the same rosters alleviates this problem and therefore is the main way in which most Aircrew and Pilots are rostered.

202. These parameters mean that the rostering would be identical.

203. At many bases, the pilots and Aircrew will be flying together with a fixed crew of Pilot, Aircrew and Rescue crew attached to a Helicopter.

204. In surveillance operations, there may be some differing rostering arrangements. Surveillance Aircrew may not necessarily fly with the same pilots. However, the same roles exist in every flight and the same parameters for duty hours applies.

205. Pilots, Aircrew and engineers live in the same standard quarters. The accommodation facilities are generally shared.

206. On the basis of these common parameters, the AMWU would support a variation to the coverage of the Air Pilots Award 2010 as long as there is retained the helicopter aircrew specific entitlements in a separate schedule.”¹⁴

22. These submissions were then extracted in the July 2019 Decision at paragraph [70], and the Commission then went on to make its findings about the construction of the FW Act.

23. By making these submissions the AMWU seeks to assist the Commission in exercising its duty under s.156 of the Act, and in light of the findings that the Commission has already made about the operation of s.163 of the FW Act.

Application of the Modern Awards Objective

24. On 20 September 2017 the AMWU made the following submissions in support of its application for a new modern award, that addressed s.134 and the modern awards objective:

¹⁴ [AMWU Submissions dated 20 August 2018](#) [197]-[206].

“(a) relative living standards and the needs of the low paid

74. This particular matter is neutral in the consideration as a result of industry wages being significantly higher than the Modern Award System’s Wage structures which are connected to the C10 rate.

(b) the need to encourage collective bargaining

75. Ensuring specific Award coverage of Helicopter Aircrew may support and encourage collective bargaining.

76. The Aircraft Cabin Crew Award 2010 was used for the purposes of the Better Off Overall Test for the approval of the Babcock Mission Critical (sic) Services Australasia Aircrew Enterprise Agreement 2016. The decision did not query the appropriateness of this Award for the purposes of the BOOT, specifically noting that this was the Award “as declared by the Employer.” The employer’s view is evident from the Form 16 and 17 which are at Appendix B.

77. Having clearer and specific terms and conditions for Helicopter Aircrew will not only make the safety net more relevant for the purposes of the Better Off Overall Test, but it will also make the Better Off Overall Test simpler to apply.

78. Given the significant difference between the wages paid in the industry and the Minimum Award wages, there will be strong incentive for workers to collectively bargain to retain their industry wage rates.

The creation of Award Coverage for Helicopter Aircrew may also in some circumstances discourage collective bargaining if businesses believe that the Award rates are to be interpreted as the industry standard. The Union strongly opposes any inference or indication that the wages in the draft award are to be interpreted as the industry standard for wages. The wages in the Draft Award are what the Commission has decided are “properly fixed minimum rates” and are aligned to the C10 rate, which is the principle applied by the Commission across the Modern Award System.

80. Overall, as long any decision is clear that the wage rates are “properly fixed minimum rates” and not reflective of industry standards, the AMWU submits that the Award should encourage collective bargaining.

(c) the need to promote social inclusion through increased workforce participation

81. *The AMWU submits that the creation of a Modern Award may support a clearer career path for civilian Helicopter Aircrew. This may support increased workforce participation amongst Helicopter Aircrew who remain and progress through the career path.*

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

82. *The AMWU submits that creating a clear space of coverage and specific Helicopter Aircrew entitlements within the Modern Award System is likely to promote flexible modern work practices and the efficient and productive performance of work. Specifically, creating a clearly defined space of coverage for Helicopter Aircrew allows for Modern Award System wide changes, which are decided in major cases regarding work practices to have a more direct impact upon Helicopter Aircrew.*

83. *For example, decisions about Award Flexibility, such as the Award Flexibility Common Issue decision in this 4 yearly review of modern awards can be more directly considered for application to Helicopter Aircrew.*

(da) the need to provide additional remuneration for overtime, unsocial, irregular or unpredictable hours, weekends or public holidays, or working shifts

84. *The expansion of Modern Award System coverage to include Helicopter Aircrew will ensure that additional remuneration is provided in the safety net specifically for Helicopter Aircrew and in taking into account the specific and unique work arrangements which Helicopter Aircrew have.*

85. *For example, requirements to work an additional day in the roster or to be called in from standby are not adequately comprehended by the Miscellaneous Award 2010 or the Domestic, Regional or International Crew Schedules of the Aircraft Cabin Crew Award 2010.*

(e) the principle of equal remuneration for work of equal or comparable value

86. *This is a neutral consideration.*

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

87. *This is a neutral consideration. The industry is currently engaged in collective bargaining. The confirmation of a clear minimum safety net of terms and conditions will be unlikely to disturb that.*

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

88. *The expansion of Modern Award System coverage to include Helicopter Aircrew will simplify and improve understanding of the Modern Award System as it applied to Helicopter Aircrew. Presently, there is some confusion about whether the Aircraft Cabin Crew Award 2010 is applicable despite not having relevant classifications or whether the Miscellaneous Award 2010 is applicable.*

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

89. *The expansion of Award coverage to include the Helicopter Aircrew career path may positively impact upon employment growth. A clearly set out career path may support an increased interest in the occupation.*

90. *The low likelihood of Helicopter Aircrew being reliant upon the Award Safety net for their paid rates means that the expansion of Award Coverage will not have an impact upon inflation.*

91. *An increase in Helicopter Aircrew capabilities is likely to have a positive impact upon the performance and competitiveness of the national economy.*

92. *Overall, this is likely to be a slightly positive consideration. However, the small number of Helicopter Aircrew in the economy and the limited areas where they provide support mean that any impact is likely to be small.*¹⁵

25. The AMWU considers that these submissions are equally applicable to the Commission's consideration as to whether the Pilots Award should be varied to include coverage of helicopter aircrew. Accordingly, the AMWU relies on and repeats the above submissions.

26. The only consideration that is materially different when considering a variation to the Pilots Award, as compared with the making of a new modern award is s.134(1)(da) – the need to provide additional remuneration for employees working overtime. Prima facie,

¹⁵ [AMWU Submissions 20 September 2017](#).

this consideration tells against a variation to the Pilots Award because that award does not provide for additional remuneration for pilots working overtime.

27. However, it is the AMWU's submission that this is not fatal to the concept of helicopter aircrew being covered by the Pilots Award. Relevantly, the AMWU notes the comments of the Commission at [71] that parties:

"identify what existing provisions of the Air Pilots Award might appropriately apply to helicopter aircrew and what modifications might be necessary in order for that award to cover helicopter aircrew in a way consistent with the modern awards objective"¹⁶

28. Accordingly, the AMWU considers that the modern awards objective could be achieved by the Pilots Award being varied to include provisions dealing with overtime penalties for helicopter aircrew classifications in a similar way as had been proposed in the AMWU's draft award.

Response to the Submission of the AFAP

29. The objection by the AFAP to the potential of varying the Pilots Award can be broadly characterised as proceeding on the following bases:
- a. The assumptions upon which consideration was given to varying the Pilots Award are flawed;
 - b. The Pilots Award should not be varied to include helicopter aircrew because it is an occupational award; and
 - c. It would be inconsistent with the modern awards objective to vary the Pilots Award to cover helicopter aircrew classifications.

Assumptions as to common parameters between pilots and aircrew

30. The AFAP appear to have taken issue with the submissions of the AMWU regarding the similarities between helicopter aircrew and pilots. For example, the AFAP submit the following at [9]-[11]:

"The AFAP notes with concern the numerous statements and comments regarding the similarity of duties, conditions, training and regulatory parameters between helicopter aircrew and helicopter pilots. These statements inaccurately attempt to detail similar, if not identical, work arrangements and conditions between the two groups.

The AFAP, through the provision of witness evidence from helicopter pilots

¹⁶ 4-yearly Review of Modern Awards – Proposed Helicopter Aircrew Award [2019] FWCFB 4748.

attached within Appendix 1 of this submission, can show that there are in fact significant differences between helicopter pilots and helicopter aircrew. These differences exist in training, licensing, regulatory oversight, fatigue management, rostering, duties and responsibilities.

As a result of the evidence provided in this submission the AFAP contends that the assumptions upon which consideration was given to varying the Air Pilots Award are flawed. The AFAP seeks that reconsideration be given by the Commission into varying the Air Pilots Award to address the requirements of section 163(2).”¹⁷

31. The AFAP’s request (above) that “reconsideration be given by the Commission into varying the Pilots Award to address the requirements of section 163(2)” is misconceived. The Commission has already made finding that the relevant sections of the Act require it to first exhaust its consideration of whether an existing award can be varied before it determines to make a new award.¹⁸
32. The AMWU does not cavil with much of the witness evidence adduced by the AFAP, (although it notes that large parts of the witness statements are better characterised as submissions and opinion rather than witness evidence that goes to establishing relevant facts). For example, the AMWU accepts that there are significant differences between Helicopter Aircrew and Pilots particularly as regards training and licensing.
33. However, the AMWU contends that neither highlighting distinctions (nor indeed, similarities) between two occupations does not form a proper basis for the Commission to make a determination with regards to s.163(2). Rather the AMWU contends that the Commission must consider the particulars of what is being proposed and determine whether what is being proposed is necessary to achieve the modern awards objective. Whilst similarities and distinctions between the two occupations may be relevant to the factors that the Commission is required to consider as per s.134(1) the Commission cannot properly inform itself based on either the AMWU’s previous submissions regarding the similarities between aircrew and pilots, nor indeed the AFAP’s submissions in response.
34. In any case, the distinctions that the AFAP seeks to draw between helicopter aircrew and pilots are overstated. For example, despite claiming concern as to the asserted similarities between Pilots and Aircrew as submitted by the AMWU, the AFAP has been unable to demonstrate precisely which of these assertions is incorrect.

¹⁷ [Submissions of the AFAP of 4 October 2019](#) [9]-[11].

¹⁸ *4-yearly Review of Modern Awards – Proposed Helicopter Aircrew Award* [2019] FWCFB 4748 [71].

35. Contrary to the submission of the AFAP, the AMWU submits that the assertions in its August 2018 submission have been left largely undisturbed when the evidence of both the AFAP and the AMWU witnesses is considered.

36. For example, the evidence establishes that:

- Operational hours are the same for aircrew and pilots working on the same helicopter;¹⁹
- Whilst aircrew are not strictly speaking subject to CASA regulation, the practical reality is that Helicopter Operators apply the same fatigue risk management standards to both occupations;²⁰
- Flight and duty hours are necessarily the same for aircrew and pilots, and that this means that rostering is identical;²¹
- At many bases pilots and aircrew will be flying together with a fixed crew of pilot, aircrew and rescue crew attached to a helicopter;²²
- Whilst there are significant distinctions in the training that is required to become a pilot compared with aircrew, the currency and recency standards are similar for both occupations;²³

The relevance (or otherwise) of the fact that the Pilots Award is an occupational award

37. The AFAP make much of the fact that the Pilots Award is an occupational award in support of their objection. At [5] it is contended that:

“that bar (consideration of whether an existing award should be varied to provide coverage) ought to be higher when the contemplated existing award is an occupational award because the question of whether other occupational groupings ought to be covered by an occupational award has already been considered and determined by the Commission.”²⁴

38. This submission ignores the text of the *Fair Work Act 2009* which makes no distinction regarding the Commissions power to vary the coverage provisions of occupational awards compared with industry awards.

39. The AMWU does not cavil with the submission that consideration of whether to vary an existing award to cover employees *“should be an exhaustive analysis, based on all*

¹⁹ Witness Statement of Richard Wing [7]-[8].

²⁰ Ibid [12].

²¹ Ibid [21]

²² Ibid [7].

²³ Ibid [25]-[28].

²⁴ [Submissions of the AFAP of 4 October 2019](#) [5].

*available factual evidence*²⁵ however the AMWU submits that such factual evidence is only relevant if it goes to the sections of the Act dealing with the Commission's modern award powers, necessarily, this will be s.134 of the Act.

40. In this context it is relevant that the AFAP's submissions and evidence about the history of the Pilots Award, or that awards status as an occupational award go to the AFAP's organisational preference that the Pilots Award only cover Pilots. This appears to be based on fears that pilots may have their unique terms and conditions undermined. For example, the AFAP submit that:

*"The AFAP has real concerns that attempting to accommodate two different safety nets within the one award (and potentially any number of others), while simultaneously moving away from the occupational basis of the Air Pilots Award, presents a future risk to pilot specific clauses being placed in jeopardy."*²⁶

41. The AMWU can appreciate the need for the AFAP to protect the interests of pilots, which the AMWU agrees is a unique and highly specialised occupation. However, the AMWU struggles to understand precisely how pilots' interests would be jeopardised if the Pilots Award were varied to include aircrew.
42. In any event, speculation about what may or may not happen in the future is not relevant to the Commission's consideration of this application. Any future variation to the Pilots Award would need to be considered on its merits at the appropriate time. To the extent that such a hypothetical variation application would adversely affect pilots' interests there would likely be a strong argument to make that such a variation would not be necessary to achieve the modern awards objective.
43. The submissions of the AFAP that go to the potential complexities that could result in a variation to the Pilots Award are relevant, because the Commission has a duty to ensure that the modern awards system is simple and easy to understand.²⁷
44. In this context, the following submission by the AFAP is relevant:

*"The AFAP notes that the exclusion of a cohort of aircrew working in various fixed wing (aeroplane) operations could result in employees employed as aircrew being covered by differing awards. The aeroplane aircrew remaining within the Miscellaneous Award and the helicopter aircrew as a schedule to a current award, or under the Draft Award."*²⁸

²⁵ Ibid.

²⁶ Ibid [24].

²⁷ Fair Work Act 2009 (Cth) s.134(1)(g).

²⁸ Ibid [16].

45. In response to the submission regarding fixed wing aircrew, the reason the AMWU did not include these classifications in its proposed award (nor does it seek to include them now) because it does not have the appropriate constitutional coverage under its eligibility rules to enable it to cover these occupations, and accordingly does not have standing to make such a submission/application.
46. Whilst the AMWU agrees that it is unfortunate that the occupation of aircrew person in a fixed wing aircraft would (the AMWU assumes) be covered by the Miscellaneous Award whilst Aircrew person would be covered by either the Pilots Award or a new award, this is not a reason to not vary the Pilots Award to include such occupations. The absence of fixed wing aircrew classifications in the Pilots Award is not going to make that award any more complex or difficult to understand.
47. To the extent that it could be argued that the absence of such classifications in the same award as helicopter classifications would make the modern award system as a whole more complex and difficult to understand the AMWU agrees that that may be correct but notes that that would be the case regardless of whether the Pilots Award is varied to include helicopter aircrew or a new award is made.
48. In any case there is no evidence before the Commission to establish this that it is contrary to the modern awards objective for air crew in helicopters and fixed wing aircraft to be covered by different awards. For example, the AMWU has produced a substantial amount of evidence directed at establishing the industry standard conditions for helicopter aircrew. The industry standard conditions and entitlements for air crew operating in a fixed wing aircraft may well be substantially different, which would be a relevant consideration as to whether such occupations should be contained in the same award.
49. Therefore, the AMWU contends that consideration about how aircrew in fixed wing aircraft occupations should fit into the modern awards system does not need to be dealt with as part of this proceeding, nor should it have any bearing on the Commission's consideration as to whether it should vary the Pilots Award to cover helicopter aircrew.
50. This submission by the AFAP is also relevant:

“The extensively prescriptive nature of the Air Pilots Award, coupled with the differences existing between the roles, responsibilities, training and regulation of pilots and aircrew, will mean that the likely outcome of the current proposal would be to isolate the conditions enjoyed by pilots, from those the Commission would deem suitable for inclusion in a modern Award for helicopter aircrew. The AFAP believes that as the minimum safety net for pilots and aircrew are significantly different, the logical conclusion of such an exercise would be the need to create an ‘award within an award’.”²⁹

²⁹ [Submissions of the AFAP of 4 October 2019](#) [23].

51. The AMWU agrees that there are some differences between pilots and aircrew, and for that reason the appropriate safety net is not precisely the same. This means that there would need to be some terms of the award that apply to pilots but not aircrew, and some terms that apply to aircrew but not pilots.
52. The AMWU does not agree however, that this would necessarily constitute an award within an award. Whilst there are differences between pilots and aircrew, there is significant cross over with respect to the appropriate safety net for both occupations, as reflected by the significant overlap between the terms provided for in the Pilots Award and the terms proposed in to be included in the AMWU's draft award.

Response to AFAP submissions regarding s.134(1)

53. The AMWU has already addressed the application of the s.134 considerations to this application, see [24]-[25]. The AMWU will briefly respond to the submissions of the AFAP on this issue.
54. With respect to s.134(a) the AFAP submit:

“The AFAP contends that the witness evidence provided confirms that the relativities between helicopter aircrew and pilots are limited. There is little to no career, training, or regulatory correlation existing between the two groups. The potential retention of aeroplane aircrew within the Miscellaneous Award would also undermine any current relativities existing for the complete aircrew occupational group (helicopters and aeroplanes). The AFAP also fears that attempting to establish two minimum safety nets within the one Award could potentially jeopardise the retention of pilot specific clauses that have been agreed by all parties when establishing the Modern Award.”³⁰

55. The AMWU submits that this submission is misplaced. Section 134(1)(a) requires the Commission to consider *“relative living standards and the needs of the low paid.”*³¹ This is confirmed by the Annual Wage Review 2014-2015 Decision, where the Expert Panel stated that:

“The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant. [311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the

³⁰ Ibid [27].

³¹ Fair Work Act 2009 (Cth) s.134(1)(a).

essentials for a “decent standard of living” and to engage in community life, assessed in the context of contemporary norms.”³²

56. It can be seen from the above that s.134(1)(a) is not concerned with relativities between different classifications. For the same reasons, the AFAP’s “fears” are self-evidently irrelevant to what the Commission is required to consider under s.134(1)(a).

57. With respect to s.134(1)(b) and (c) the AFAP submit that:

“The consideration to vary the Air Pilots Award should not impact either the encouragement of collective bargaining or promotion of social inclusion.”³³

The AMWU has addressed this consideration in previous submissions.

58. With respect to s.134(d) the AFAP submit:

“The potential confusion that could arise from departing from the current entire occupational award for pilots into covering another part-occupation for helicopter aircrew may negatively impact the retention of pilot specific clauses. The AFAP has concerns that parties to a varied award in the future may reasonably seek to promote flexibility and modern work practices based on either one occupational group or the other, to the detriment of either or both occupational groups.”³⁴

59. This submission is also misplaced. Section 134(1)(d) is concerned with the efficient and productive performance of work. It is not concerned with how pilot specific clauses may be impacted by the proposal to include helicopter aircrew classifications.

60. To the extent that the AFAP has “concerns” about what a party may or may not do (by way of variation application) in the future is a matter for the Commission to determine at the relevant time. The modern awards objective cannot be said to not be met based on mere speculation by the AFAP.

61. With respect to s.134(1)(da) the AFAP submit:

“The four respective aspects covered within this sub paragraph are currently addressed or omitted within the Air Pilots Award. For example, the matter of overtime is not addressed at all within the Air Pilots Award. The matters of hours of work are quite uniquely addressed as they are based on limitations prescribed by Civil Aviation Orders as regards fatigue. In seeking to address these aspects within

³² *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

³³ [Submissions of the AFAP of 4 October 2019](#) [28].

³⁴ *Ibid* [29].

their Draft Award the applicant has reasonably and necessarily, had to address the particular work arrangements that apply to helicopter aircrew but not pilots. The logical consequence when therefore applying consideration of this sub-paragraph for two discrete occupational groups will be the necessity to provide two safety nets within the one award.”³⁵

62. The AMWU agrees that the Air Pilots Award doesn't deal with these matters. Nevertheless, that does not of itself mean that varying the Award to include helicopter aircrew would be contrary to the modern awards objective, particularly if the award were varied to include (for example) an overtime entitlement for aircrew. The AMWU does not agree that overtime is not applicable to pilots. As detailed in the witness statements of Richard Wing, pilots can and do accept overtime.³⁶

63. With respect to s.134(1)(e) the AFAP submit:

“The AFAP notes that no work has been undertaken to review the comparable value of work for pilots and aircrew. It would be reasonable to assume that if the Commission chose to vary the Air Pilots Award that a party will seek at some point to undertake such a review. If the current proposals for a helicopter aircrew award/variation were to progress it would also be reasonable to predict that those aircrew currently excluded from this process”³⁷

64. The AMWU submits that this submission is misplaced. The phrase “equal remuneration for work of equal or comparable value is defined in s.302(2) of the FW Act to mean “*equal remuneration for men and women workers for work of equal or comparable value*”.³⁸

65. Accordingly, the AMWU submits that this consideration is neutral in these proceedings. In any case, assumptions by the AFAP about what may or may not happen in the future is not relevant to the Commission's exercise of modern award powers.

66. With respect to s.134(1)(f) the AFAP submit as follows:

“The AFAP notes that the impact on business in reviewing the draft Award, has been and is currently still disputed between the parties to the original application. The AFAP would reconfirm that parties to the current Air Pilots Award, which includes Cobham Aviation Services, a late intervener, reached a consensus position in the establishment of the Air Pilots Award, including that the Award ought to be an occupational award. The clear regulatory oversight that the AFAP witness evidence confirmed only applies to pilots, could become confused and muddled

³⁵ Ibid [30].

³⁶ Witness Statement of Richard Wing [19].

³⁷ [Submissions of the AFAP of 4 October 2019](#) [31].

³⁸ *Fair Work Act 2009* (Cth) s.302(2).

should a part occupational group be included to the Air Pilots Award who are not subject to such same regulation.”³⁹

67. This submission is also misplaced. Firstly, there are no parties to the Pilots Award (or indeed any modern award). Secondly, there is no evidence before the Commission about the impact on business, and the submission that regulatory oversight could become “confused and muddled” is mere speculation and not relevant to the Commission’s consideration.

68. If Cobham Aviation Services or any other operator is concerned about the potential impact of including helicopter aircrew in the *Pilots Award*, they are perfectly entitled to make such a submission during these proceedings. No doubt they don’t need the AFAP to speak for them.

69. With respect to s.134(1)(g) the AFAP submit:

“The AFAP believes that the most significant negative that could arise from varying the Air Pilots Award will be departure from the current well understood basis that the Air Pilots Award has been and is a clearly occupational based award. To include a part occupational group on the basis that the two groups work within the same aircraft without establishing regulatory, training, or work practice similarities will undermine that clear and well-established understanding. While it has never been appropriate to describe the Air Pilots Award as simple, it is clearly and uniquely prescriptive to accommodate the discrete type of employment in being a pilot. Moving away from that occupational nature of the Air Pilots Award will cause confusion as the varied award will have to address two minimum standards within the one award. In addition, unsustainability may arise as those aircrew currently excluded from the review process seek to address any inequality that may arise as a consequence of their exclusion.”⁴⁰

70. The AMWU accepts that there are many distinctions between Helicopter aircrew and pilots. For this reason, it is the AMWU’s submission that the modern awards objective would not be achieved if these aircrew specific entitlements were not also included in the Pilots Award if that award is varied to include aircrew classifications.

71. The AMWU accepts that the inclusion of such occupational specific clauses may add a level of complexity to the Pilots Award. On the other hand any fair and relevant safety net (whether in the form of a new award or a variation to the Pilots Award) for helicopter aircrew is going to include many of the same features as apply to pilots such entitlements

³⁹ Ibid [32].

⁴⁰ Ibid [33].

include but are not necessarily limited to hours of work, duty free days, various allowances, accident pay, Death and TPD insurance and indemnity.

72. As part of the s.134(1)(g) consideration the Commission is required to give consideration *“need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards”*.⁴¹
73. Thus whether or not varying the Pilots Award to include helicopter aircrew is going to make the Pilots Award more or less complicated doesn’t resolve the consideration under s.134(g) because the requirement is to maintain a simple and easy to understand modern award system, (and not necessarily a simple and easy to understand individual modern award).
74. Whilst the AMWU agrees that whether an individual modern award is simple and easy to understand is relevant to whether the modern awards system as a whole is simple and easy to understand. However, the distinction is important for the purposes of the present proceedings if the alternative to varying the Pilots Award is the making of an entirely new modern award. For example, the Commission may consider that including helicopter aircrew classifications in the Pilots Award may make that award slightly more complicated, but make the modern award system (as a whole) simpler and easier to understand considering:
- d. the status quo (that the miscellaneous award applies); or
 - e. the alternative (that a new modern award is made).
75. Furthermore, it is relevant that s.134(g) requires consideration of the need to avoid unnecessary overlap of modern awards. This is relevant to the Commission’s consideration under this section considering there is an overlap between many of the entitlements in the Pilots Award and what the AMWU has submitted would constitute a fair and relevant safety net for helicopter aircrew.
76. With respect to s.134(1)(h) the AFAP submit that *“this sub paragraph will, in all likelihood, remain relatively unaffected by the Commission’s current consideration of varying the Air Pilots Award. It is noted that sustainability, performance and competitiveness have been addressed in part during submissions from employer organisations into the applicant’s Draft Award.”*⁴²

The AMWU has addressed this consideration in previous submissions.

⁴¹ *Fair Work Act 2009* (Cth) s.134(g).

⁴² [Submissions of the AFAP of 4 October 2019](#) [34].

Conclusion

77. The AFAP's objection to the prospect of the Pilots Award being varied to include helicopter aircrew is mostly based on its preference as an organisation that the Pilots Award only cover pilots, and speculation about what might happen in the future should the Commission determine to include helicopter aircrew in the Pilots Award.
78. Neither constitutes a proper basis to decline to make a determination to vary the Pilots Award as a way of resolving the AMWU's application in AM2016/3.
79. The AMWU accepts that the Commission may ultimately decide that any specific proposal by the AMWU to vary the Pilots Award would be contrary to the modern awards objective, and, as a necessary extension, decline to make such a variation determination. However, the AMWU contends that there is nothing in the material filed by the AFAP that presently prevents the Commission from making such a determination or continuing to consider whether to make determination to vary the Pilots Award.
80. In the event that the Commission accepts the submissions of the AFAP and declines to vary the Pilots Award, the AMWU respectfully submits that having already found that an alteration to the status quo is necessary to achieve the modern awards objective,⁴³ the Commission should determine to make a new modern award to cover helicopter aircrew.

GABRIEL MILLER

National Research Officer
5 November 2019

⁴³ *4-yearly Review of Modern Awards – Proposed Helicopter Aircrew Award* [2019] FWCFB 4748 [66].

FAIR WORK COMMISSION

Matter No: AM2016/3

Applicant: Australian Manufacturing Workers' Union

WITNESS STATEMENT OF RICHARD WING

I, Richard Wing of [REDACTED] in the State of Victoria, solemnly and sincerely declare:

PERSONAL INFORMATION

1. I make this statement from my own knowledge except where I have indicated otherwise. Where I make a statement based on information provided to me, I believe the information is true and correct.
2. I am employed as an Aircrew Officer by Babcock Mission Critical Services (**Babcock**). I have been employed by Babcock in this role since March 2017.
3. Prior to working for Babcock, I worked as a Helicopter Load Master for the Royal New Zealand Air Force. A Helicopter Load Master is essentially the same role as aircrew officer but with a wider scope of duties. For example, I did work including battlefield support, search and rescue, counter terrorism.
4. In total I have worked as an Aircrew Officer or related occupations since June 2004.

HOURS OF WORK AND ROSTERING

5. The hours that I work are based on the needs of Ambulance Victoria which my employer Babcock is contracted to.

Lodged by: Gabriel Miller
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6. Currently, I work a 10/14 roster. This means that I work two 10-hour days (7am to 5pm) then two 14-hour nights (5pm to 7am the next day) followed by 4 days off. When I finish on the morning after a night shift, I have the rest of that day off plus an additional three full 24-hour periods off work.
7. Whilst working this roster pattern on this contract, I work with a crew of three including a Pilot and a MICA flight paramedic.
8. Pilot and Aircrew are rostered to work precisely the same roster pattern and hours. The reason for this is because from a practical tasking perspective it makes sense for Pilots and Aircrew to work the same pattern.
9. I have read the witness statement of Mr David Croal and note the assertion that:

“(aircrewperson) regularly work a roster involving 24-hour periods and accept overtime beyond the flight and duty limits set for pilots.”
10. This is not my experience. As I state above, on the Ambulance Victoria contract an Aircrew Officer work the same rosters as pilots. I acknowledge that this is the only roster I have worked on since I’ve been in Australia, however it is my experience that for EMS the 10/14 roster is fairly standard across the industry.
11. I am aware of Aircrew officers at Rockhampton and Mackay in Queensland that work for Babcock working the same 10/14 roster pattern as in Victoria. However, from time to time when a person goes on leave, they have to go on

a three-person 24-hour shift. This is the same for pilots and aircrew. This means that the 24-hour pattern is not specific to aircrew.

FLIGHT AND DUTY HOURS

12. Babcock uses a Flight Risk Management System to monitor the fatigue levels of both its Pilots and Aircrew. Babcock also allow for a 14-hour duty period.
13. The FRMS system monitors both flying and duty time, both of which accrue fatigue. We (pilots and aircrew) need to maintain as low a fatigue level as possible.
14. At the start of a shift there are a number of tasks that need to be completed. If these tasks take two hours to complete, then that constitutes two hours of duty time. If I was then to rest for four hours, those hours would not come out of my duty time.
15. However, if the crew were dispatched on a task at 7am and didn't return until 4pm, this would constitute 9 hours of duty.
16. If I have adequate rest facilities, or a rest area, and I am not completing a work-related task, then I am "not on duty". Even though I am at work and on call, from an FRMS perspective, I am not on "duty".
17. Duty could be any work-related task, including completing daily checks on the Helicopter, cleaning the helicopter, or completing training in the hangar. They are all classed as "duty".
18. Continuing this example I start work at 7am and immediately complete two hours of 'daily tasks' on the aircraft then rest for four hours, I would still have 12 hours of duty time left.

19. By way of further example, if I complete an hour of work in the morning then rest for eight hours, my duty time is reset; even though I am at the nine-hour point of a 10-hour shift. This means that I can be on duty for another 14 hours. This is where overtime or 'shift extensions would apply'. So, our day shift finishes at 5pm at night. If we were to fly past the rostered end of shift hours, we are entitled to an overtime payment. As would the pilot in this scenario. They get the same overtime rights as aircrew officers.
20. "Flying time" by distinction is "wheels up to wheels down." For example, if I were dispatched at 7am and did not return to base until 12pm only the hours spent in the air count as flying time. To clarify, if an accident scene is 30 minutes flight time away from base, the hospital is an hour flight time away from the scene, and the return journey from the hospital to the base is 30 minutes; the total flight time is 2 hours. However, the duty time would be five hours.
21. This is precisely the same for the pilots, because Babcock applies the same FRMS to both the Pilots and Aircrew.
22. On the Ambulance Victoria Contract an Aircrew Officer is always carried on a task. In fact, it is a company requirement that Aircrew Officers sit in the Front Left Seat (FLS) when flying low level using Night Vision Goggles. Notwithstanding this, duty and flight time are necessarily the same for both Pilots and Aircrew.

TRAINING

23. Pilots obviously go through a much more extensive and regulated training program to become qualified than Aircrew, both Aircrew and Rescue Crew officers. They are licensed, and Aircrew are not.

24. However, Aircrew do get endorsements. For instance, to perform the duties of a rescue hoist operator, Aircrew Officers are required to gain the CAO 29.11 winch endorsement. This involves a training program and a requirement to pass a flight test. It is true, technically, that we have no license to be endorsed, but in a practical sense we are required to go through the training and tests in order to get that endorsement. The same applies for operations using Night Vision Goggles, where aircrew are trained in accordance with CAO 82.6.
25. The training hours to become a licensed Pilot are obviously quite extensive, this is not the same for Aircrew. To that extent I agree that there are significant differences in relation to the training that is required to become a qualified Pilot compared with aircrew.
26. However, there are similarities between post qualification training and testing for Aircrew and Pilots.
27. For example, both occupations are required to do:
 - a. Day and night operational proficiency checks; and
 - b. Recency training.
28. Aircrew Officers are also required to complete
 - a. Static winch training;
 - b. Winch malfunction training.
29. The main difference, I believe, is our training is driven by the Company and contractual requirements and training and testing for Pilots is driven by Company and contractual requirements in addition to the CASA requirements.

30. There are elements of this testing and training that would be pilot specific and elements that are aircrew specific.

NON-PILOT FLYING DUTIES

31. 90% of my role during flying hours involves front left seat duties in the aircraft, next to the Pilot. The Pilots at Babcock who are employed on the Ambulance Victoria EMS contract however are single pilot multi engine IFR qualified, so they don't specifically need me to sit up the front. I'm there to help with navigation, help with radio (although not in relation to air traffic) and liaising between the pilot and the MICA paramedic. My duties include:
- a. Manipulating the flight planning system;
 - b. Entering Flight plans;
 - c. Entering search patterns;
 - d. Briefing the crew on potential landing sites;
 - e. Beacon searching using the aircraft direction finding equipment;
 - f. Entering weight and balance information;
 - g. Performing emergency procedures in accordance with the emergency checklist with the pilot;
 - h. Completing the normal checklists with the pilot.
32. The amount that we do in the aircraft is really dependent on the pilot, but the list of duties mentioned earlier is the minimum Aircrew Officers complete when sitting in the Front Left Seat. If the pilot doesn't want us to do anything, we won't, and they will do it all themselves - they are the pilot in command. However, we are there to 'offload' the pilot as much as possible so they can concentrate on flying the aircraft and safely managing the completion of the task. Aircrew Officers are an integral part of the flight crew. Also, utilising Aircrew Officers in Non-flying duties is best practice from a Crew Resource Management perspective.

33. I note the assertion of Matthew Nielsen at [9] that:

“I note that it has been claimed that TCMs may conduct ‘non-flying pilot (NFP) duties’. This is also erroneous as whilst TCMs may be trained in supporting licenced aircrew, they cannot conduct NFP duties as they are not part of the Flight Crew. NFP duties are interchangeable between flight crew but not TCM’s and include such duties as radio calls, checklist use, flight planning, flight management system programming and aircraft systems management and monitoring”

I don’t entirely agree with that statement based on my current experience at Babcock. If I’m sitting in the front left seat and there is an aircraft malfunction, then I run the checklist and the Pilot completes the actions using the ‘challenge and response’ model.

34. We do run checklists; we do monitor systems and generally backup the Pilot on a number of things. Providing clearance information is an integral part of what we do. I don’t agree that we’re not an integral member of the flight crew. I accept that CASA may have a different view, but certainly from a company perspective, they would certainly consider us to be an integral part of a flight crew.

CASA MEDICAL

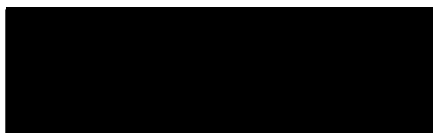
35. I refer to the witness statement of Matthew Nielsen at [7]:

Pilots are required to maintain a CASA mandatory standard of medical certification as a part of their ability to fly commercially. This medical certification is provided through a specially approved Designated Aviation Medical Examiner (DAME). Failure to achieve certification can lead to a pilot licence being suspended and ultimately revoked. The medical checks must be obtained every 12 months (every 6 months over 60 years of age) with the burden of evidence to be provided to overcome a failed medical, resting with the pilot. Time required to overcome a failed medical can potentially and severely impact a pilots income which is why the Loss of Licence Insurance cover contained within the Air Pilots Award is an essential requirement for a pilot. There is no such mandatory requirements for TCM. Some employers do mandate a lower standard of aviation medical standards for TCM's but this is employer rather than regulator driven.

I completely agree that it is not a CASA requirement for Aircrew to pass medicals, and it is a company driven requirement. However, Mr. Nielson is incorrect in his assumptions of the consequences Aircrew failing a CASA medical.

36. It is an industry standard that Aircrew are required to pass a CASA class 2 medical as a minimum. Some contracts will require Aircrew to have a class 1 medical from CASA.
37. If an individual holds a CASA class 2 medical, then CASA assesses that person within the criteria of a CASA class 2 medical guidelines; regardless if they are an Aircrew Officer, Pilot, or Air Traffic Control. As an example, in November 2017 I went for a CASA class 2 medical which I initially failed due to a slight colourblindness issue.
38. CASA offered a Day Visual Flight Rules (**Day VFR**) restriction. Even though I don't have a license, am not a pilot, or ever touch the flight controls, I was still assessed as though I did. The "burden of evidence" as referred by Matthew Nielson rested on me to overcome the failed medical.

39. In another example, another Aircrew Officer I worked with at Babcock had an issue with kidney stones. Even though he doesn't hold a license, he wasn't able to fly until a CASA DAME cleared him to go back to work.
40. There is another example in Essendon where an Aircrew Officer was stood down for a period because they had vertigo. They couldn't go back to work until the CASA DAME cleared them.
41. In the last 12 months, there has been at least one employee of Babcock, that I know of, that lost their job because they couldn't keep a class 2 medical.
42. Even though Aircrew have the same challenges as pilots in the event of failing a CASA medical. Aircrew do not have the same level of protection as pilots because we do not have any equivalency to the loss of license insurance afforded to the pilots.



RICHARD WING

4 / 11 / 2019
...../...../.....
DATE