

IN THE FAIR WORK COMMISSION

Matter No.: AM2018/14

Re Application by: Australian Federation of Air Pilots

OUTLINE OF SUBMISSIONS IN REPLY OF THE AUSTRALIAN FEDERATION OF AIR PILOTS TO THE AMENDED OUTLINE OF SUBMISSIONS OF ALLIANCE DATED 12 AUGUST 2019 AND THE AMENDED OUTLINE OF SUBMISSIONS AND EVIDENCE IN RESPONSE OF ALLIANCE DATED 12 AUGUST 2019

1. This outline of submissions addresses the material filed by Alliance Airlines Pty Ltd ("**Alliance**") on 12 August 2019 in relation to the application for a substantive change to clause 16 of the *Air Pilots Award 2010* ("**Air Pilots Award**") (as opposed to the applications made by Regional Aviation Association of Australia ("**RAAA**") and Alliance under section 160 of the *Fair Work Act (2009)* (Cth) ("**FW Act**").
2. The Fair Work Commission, when conducting the 4 Yearly Review of Modern Awards, follows the principles set out in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 and *Security Services Industry Award 2010* [2015] FWCFB 62.
3. In particular:
 - (a) Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made ([2014] FWCFB 1788 at [60] point 3);
 - (b) The objective of the modern awards review is to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account various matters ([2014] FWCFB 1788 at [23], reiterating section 134(1) of the FW Act);

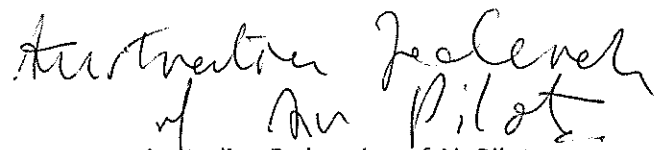
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- (c) In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective ([2014] FWCFB 1788 at [60] point 5); and
- (d) A substantive case for change is required. The more significant the change, in terms of impact of a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operations of the awards, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes ([2015] FWCFB 62 at [8]).
4. The AFAP's approach to clause 16 of the Air Pilots Award is reflected in the industrial instruments as they existed from time to time. Since award simplification in the early 1990s, the AFAP's approach has formed part of the minimum safety net of terms and conditions created by awards.
5. The historical background filed by the AFAP in this proceeding demonstrates that clause 16 of the Air Pilots Award operates in the way set out by the AFAP (being that bonding provisions are acceptable as long as they are contained in statutory agreement with the appropriate trade-offs and protections afforded by, currently, the better off overall test ("BOOT")). In accordance with the principle set out at paragraph 3(a) above, the AFAP's approach to clause 16 of the Air Pilots Award should be taken to have met the modern awards objective at the time of the award modernisation process. It should be noted that the RAAA was involved in the creation of the Air Pilots Award and it did not indicate a contrary approach during that process.
6. Alliance has not filed, nor has any other party to these proceedings, probative evidence as required by the principle set out at paragraph 3(d) above that would demonstrate that the variations sought by Alliance and the RAAA are necessary to meet the objective of a fair and relevant minimum safety net due to changed circumstances in the industry. As required by the principles set out at paragraph 3(b) and (c) above, the Commission should not proceed to vary clause 16 as proposed by Alliance and the RAAA as it cannot be satisfied that it is necessary to meet the modern awards objective.

7. What the variations proposed by Alliance and the RAAA seek to do, in particular proposed clause 16.6, is to deal with the apparent confusion that has arisen in the application of the BOOT to various enterprise agreements. The 4 yearly award review is not an appropriate vehicle to remedy that confusion. The examples provided by the Alliance, in particular the *Virgin Australia Narrow Body Aircraft Pilots' Enterprise Agreement 2018* contained at amended paragraph 32 of the Amended Outline of Submissions dated 12 August 2019 (originally 13 February 2019), deal with the results of enterprise bargaining and the application of the BOOT as determined by various members of the Fair Work Commission in the circumstances of those particular enterprise agreements.
8. The application of the BOOT takes place on a case by case basis. Enterprise agreements that are subject to the BOOT are created by a variety of separate workplaces that may or may not share common ideals or interests. A variation to the award based on apparent confusion when applying the BOOT to these differing workplaces is not necessary to create a fair and relevant minimum safety net that applies industry wide.
9. Although industry participants may have differing opinions on how the BOOT is to be applied, or whether the BOOT has been satisfied in a particular scenario, it is ultimately a matter for the Commission and is also subject to any appeal processes. The various approaches taken by the various industry participants in the examples provided by Alliance are the product of individual negotiations that took place in particular and individual industrial spaces. Similarly, the approach of the AFAP to the enterprise agreements referred to in the witness statements of Tracie Deegan filed on 5 July 2019 and 2 September 2019 deals with individual bargaining processes. However, the approaches taken to individual enterprise agreements are not relevant to the question of whether substantive changes to clause 16 should be made and do not constitute probative evidence for the purposes of the 4 yearly review of modern awards.
10. The AFAP reiterates that bonding provisions may be enforceable, but to be enforceable they must be created via an enterprise agreement. Employers can guarantee a return on their investment in training – via an enterprise agreement. For example, Airnorth has a statutory collective agreement that provides for bonding arrangements. When the AFAP agrees that those bonding provisions are followed, it takes no issue with their enforceability. Similarly, with all other negotiated enterprise agreements that contain bonding provisions, again the AFAP takes no issue with the enforceability of those provisions. Operators that do not have an enterprise agreement

are open to utilise the enterprise bargaining scheme provided for by the FW Act. Given that an underpinning policy behind our industrial relations statutory scheme is to promote collective enterprise level bargaining, clause 16 of the Air Pilots Award should not be varied because some operators choose not to bargain at the enterprise level.

11. The status quo of clause 16 of the Air Pilots Award was summarised by the Commission in *China Southern West Australian Flying College* [2012] FWA 8272 at paragraphs [10] – [12], as part of the 2 year review. That exposition agrees with the position of the AFAP, being that the inclusion of bonding provisions in the Air Pilots Award is not necessary to give effect to the modern awards objective, and the subject of bonding is more appropriately dealt with in enterprise bargaining.
12. There is no evidence that would support the notion that enterprise bargaining is no longer an appropriate vehicle in which to deal with training bonds. Although Alliance may be uncomfortable with the approach of the AFAP as to whether the BOOT has been satisfied or not in a particular enterprise bargaining approval application, that is ultimately a matter for the member of the Fair Work Commission at that time. It is not an appropriate basis on which to vary clause 16 of the Air Pilots Award.


Australian Federation of Air Pilots

20 August 2019