

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/3

Applicant: AMWU

Submission in Reply of the Australian Federation of Air Pilots

4 yearly review of modern awards – Proposed Helicopter Aircrew Award

1. These submissions in reply of the Australian Federation of Air Pilots (AFAP) are made in accordance with the Directions issued on 22 November 2019 by the Fair Work Commission (Commission) in respect of the proposed Helicopter Aircrew Award (Draft Award).

Legislative Framework

2. To clarify the AFAP's position from the outset we recognise that whatever changes eventuate in relation to the Draft Award, the Commission's role is to ensure the Modern Award Objectives as set out in s134 are achieved. The AFAP also recognises that part of such a process in potentially establishing a new Modern Award is for the Commission to exhaust all consideration of varying an existing Award in accordance with s163(2).
3. The purpose of the AFAP's submission and evidence was not to seek s163(2) be ignored, rather the Commission revisit the applicability of varying the Air Pilots Award. The rationale for this position is that assumptions prompting such a consideration as summarised within paragraph 70 of the Commission's preliminary Decision of 8 July 2019, were flawed. The AFAP believes that the evidence provided by the AMWU, the AFAP and Cobham SAR Services Pty Ltd, all to differing extents, confirm those assumptions are more complex than that portrayed in the preliminary Decision.

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Evidence and Submissions

4. The AMWU, within their response, accepts there are significant differences between Helicopter Aircrew and Pilots. This acceptance is critical as the AFAP believes that attempting to recognise and accommodate such differences within the Air Pilots Award, in all likelihood will result in an Award within an Award eventuating, which it was noted the Commission was seeking to avoid.
5. The AMWU also characterises some of the AFAP evidence as being more of submission and opinion in nature. The AFAP recognises and accepts this to some extent but would firmly state that any submission and evidence that attempts to predict likely outcomes from changes that have not been attempted before, as regards the Air Pilots Award, will naturally take this form. We would state though that based on the history and uniqueness of the Air Pilots Award and the Pilot profession, such predictive views and fears are reasonably held.

Occupational Award and Other Aircrew

6. The AMWU has in their submission questioned the relevance of the AFAP raising the occupational nature of the Air Pilot's Award and identifying other aircrew currently excluded from the Draft Award. The purpose of the AFAP raising such matters was a reasonably held belief that these two aspects do impact significantly in any assessment of modern award objectives as prescribed in s134.
7. For example, the AMWU stated in paragraph 38 of their submission of 5 November, that no distinction between industry and occupational modern awards is provided for in the *Fair Work Act 2009 (the Act)*. The AFAP can only fully accept that this is the case. The purpose of providing some history and context for the Air Pilot's Award, especially through the evidence of Mr David Stephens, was to identify that occupational awards are relatively rare instruments and that the Air Pilots Award was unique and recognised as such by the Commission, employers and unions. The reasonably held fear of the AFAP was that to move away from this consensus position would significantly jeopardise any current clarity and be a negative factor when considering, in particular, s134(1)(g) of *the Act*.
8. The purpose of identifying other aircrew that would currently not be covered by the Draft Award was to further identify a real and reasonable fear that to move away from

an occupational award to one which only covered helicopter aircrew while excluding other aircrew, would in layman's parlance result in a 'dogs dinner of an award'. Such a messy eventual outcome would clearly result in greater confusion in applying and understanding the Air Pilots Award.

9. The AFAP notes that the submission and evidence from Cobham SAR of 5 November 2019, supports the AFAP's position regarding the current simplicity of retaining an occupational Air Pilots Award. It is also noted that employees of Cobham SAR would currently be able to fit within the classifications of the Draft Award but be excluded due to working within a fixed wing aircraft.
10. The AFAP does not agree with the applicant's position as detailed within paragraph 45 of their submission, that their eligibility rules in only covering helicopter aircrew should provide a reasonable basis for limiting the coverage of the Draft Award. As has been accepted by all those providing evidence, there is currently a cohort of aircrew who would fit within the classifications of the Draft Award but who would be arbitrarily excluded due to the constitutional coverage of the applicant.
11. The AFAP can summarise the importance of addressing the occupational nature of the Air Pilots Award and the exclusion of certain aircrew from the Draft Award, as being fundamental in retaining an industry wide acceptance that those working within the body of an aircraft should retain an occupational specific award. This concept and understanding is widely held, simple to understand and simple to apply.

Terms and Conditions and a Minimum Safety Net

12. The AFAP notes that the applicant recognises that many differences exist between the occupational groups of pilots and aircrew. This is supported by the fact that neither the AFAP nor the applicant sought to cross examine witness evidence. The applicant does though believe that such differences would not eventuate to an Award within an Award being a possible outcome.
13. The AFAP accepts that our respective positions are both partially predictive in nature. Both parties are attempting to gauge to what extent Aircrew terms and conditions and employment practices are similar to Pilot terms and conditions and practices. The AFAP has attempted through the provision of our witness statements to identify that

apart from the times when an Aircrew employee is in an aircraft with a Pilot there are very few similarities between the two occupations.

14. As was detailed in the AFAP witness evidence, mere physical proximity between two occupational groups, which was seemingly a pivotal factor to the Air Pilots Award being considered as a vehicle for the Draft Award, is not a sufficient premise to move away from an occupational award. The two most glaring examples being the occupational awards of Nurses and Medical Practitioners and Pilots and Cabin Crew, all of whom work in close proximity and all of whom have retained an occupational award for reasons explained within the AFAP evidence.
15. One aspect though the AFAP believes the Commission should turn their mind to in this matter is the overriding objective of s134 being the provision of a minimum safety net of terms and conditions. The AFAP's contention is that while the Air Pilots Award is such a minimum safety net, the Draft Award has seemingly taken an approach of applying terms and conditions more applicable to an Enterprise Agreement.
16. The AFAP addressed this within the evidence of Mr David Stephens (paragraphs 24 & 25) when he specifically detailed the matters that remained in dispute between the applicant and employers and elements that were also by consent contained within the Air Pilots Award.
17. The AFAP would wish to examine further some positions tabled by the applicant in their submission of 5 November 2019, in particular the apparent similarities between the occupational groups detailed within paragraph 36 of the applicant's submission as follows:
 - *“Operational hours are the same for aircrew and pilots working on the same helicopter;*
 - *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;*
 - *Flight and duty hours are necessarily the same for aircrew and pilots, and that this means that rostering is identical;*
 - *At many bases pilots and aircrew will be flying together with a fixed crew of pilot, aircrew and rescue crew attached to a helicopter;*
 - *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;”*

18. The AFAP contends that these five examples provided are a representative summary of the problems that exist in attempting to portray Pilot and Aircrew conditions as similar. For example, the first bullet point relates to 'operational hours'. Operational hours is not a term or concept defined or used within the Air Pilots Award. As detailed by the AFAP witness evidence, flight and duty hours are tightly prescriptive in accordance with third party (CASA) Regulations and Orders.
19. The second bullet point claims that the same fatigue risk management standards (FRMS) apply to both occupations. As has been confirmed through statements lodged by the AFAP and the AMWU, the FRMS is regulated by CASA through Civil Aviation Order 48.1 for pilots. Some employers choose to apply similar standards to aircrew for convenience, thus reiterating the position of the AFAP that the AMWU has approached this application from a main employer's current practice, rather than the safety net provision set by regulation.
20. The third bullet point claims that as flight and duty hours are the same for each occupation that rostering is therefore identical. The AFAP witness evidence has attempted to identify that this claim is not the case. The AFAP accepts that time spent in the body of the aircraft will be the same, although may not necessarily involve the same pilots across the entire length of an Aircrewman's duty. This is due to flight and duty time limitations only applying to pilots, which means that the necessity for Aircrew to either rest or have days off around flight and duty periods predominantly exists for convenience reasons.
21. The fourth bullet point, being similar to the third, is agreed in some instances where an employer chooses to apply the same prescriptive standards that must apply to Pilots, to Aircrew. The AFAP again questions whether the AMWU has approached the Draft Award from a minimum safety net standard required by s134.
22. The fifth and final bullet point again highlights the difference between minimum standards required for pilots in relation to currency and recency as set by CASA as opposed to those applied by an employer. This point is accepted in paragraph 29 of the AMWU witness statement provided by Richard Wing who states:

"The main difference, I believe, is our training is driven by the company and contractual requirements and training and testing is driven by company and contractual requirements in addition to the CASA requirements."

The AFAP contends that where employers seek to apply their own standards be that in regard to training or other standards of operation, these would be most appropriately applied via an Enterprise Agreement as opposed to a minimum safety net standard required by s134.

23. A further example of this discrepancy in approaching from a safety net or enterprise perspective is the issue of overtime. The prescriptive limits for pilots in relation to flight a duty times result in a safety net that cannot be varied through extending these limits and applying an overtime payment. Pilots do within many enterprise agreements have clauses that enable additional payments for working on days off, but these additional payments can never be reflected as overtime as the strict flight and duty limits cannot be varied or worked beyond by the pilot.
24. The AFAP also notes that the salary scales provided for in the applicant's Draft Award propose rates of pay for Aircrew that are over and above those of a First Officer/Co-Pilot. For example, the two rates in the Draft Award for a first year 'Rescue Crew' and 'Mission Co-ordinator' are \$834.40pw and \$882.80pw respectively. The first year Co-Pilot rate (being 70% of a Captains rate) is currently for a single engine helicopter \$725pw and \$774.21pw for a twin-engine helicopter. This would again seem to indicate that a safety net approach has not been taken in this instance. This could possibly explain why the witness evidence submitted from Cobham SAR raised concerns of potential economic impact for their operation.

Modern Award Objectives

25. The AFAP does not intend to restate and repeat our previous submission. We do though wish to clarify that our approach in exploring the occupational nature of the Air Pilots Award coupled with a reasonable belief that an 'Award within an Award' was highly likely and that this would directly and negatively impact the objectives prescribed in Ss134(1)(d) and 134(1)(g) of *the Act*. In addition the fact that the Air Pilots Award does not address the contents of s134(1)(da) is a further example that to now potentially address these factors within the Draft Award will in all likelihood lead to greater complexity, confusion and inefficiency.
26. In relation to s134(1)(f) the applicant submits that the AFAP does not need to speak on behalf of an employer in this regard. The AFAP disputes that only employee or employer representative organisations can comment on certain aspects regarding

modern award objectives. The AFAP had noted that the ongoing disagreements between the applicant and aircrew employers in progressing the Draft Award was further example of how this particular modern award objective may not be met. Such a position was again a reasonable view to hold based on the information at hand. It is further noted that the submission and evidence of Cobham SAR of 5 November 2019, has now confirmed the AFAP's view was not unreasonable.

27. A significant thrust of the AFAP has been that for various reasons explained both here and in previous submissions, the clear, well understood and universally accepted occupational nature of the Air Pilots Award was in jeopardy of becoming confused, complex and inefficient and that this was contrary in particular to s134(1)(g) of *the Act*.
28. The AMWU contends within their submission of 5 November that the Commission is to consider s134(1)(g) in the context of a modern award system as opposed to an individual modern award. This premise is seemingly based on a modern award and a modern award system being mutually exclusive. The AFAP wholeheartedly rejects this premise.
29. Any plain English approach to what constitutes a system will be that 'its sum will consist of its parts'. Any system without constituent parts will not exist and one can only exist with the other. To apply an overly simplistic interpretation that takes no account of one part of a system is just plainly wrong. A modern award is part of the modern award system and the more complex and inefficient you make an award the more complex and inefficient the whole system becomes. The AFAP accept that while the number of employees potentially covered by either a varied Air Pilots Award or Aircrew Award are small, it is incomprehensible to argue that a modern award is not part of a modern award system.

Conclusion

30. The AFAP fully supports the applicant in seeking to establish a more appropriate safety net than that of the Miscellaneous Modern Award. The AFAP does though firmly believe this is most appropriately done in accordance with the Modern Award Objectives via the establishment of an occupational award for all Aircrew

Date: 29 November 2019