IN THE FAIR WORK COMMISSION

Matter: B2024/91

Applicant: Network Aviation Pty Ltd

APPLICANT'S SUPPLEMENTARY SUBMISSION IN REPLY- BOOT

A. INTRODUCTION

1. On 6 May 2025, the Applicant (**Network**) and each of the AFAP, the TWU and the AIPA (collectively, the **Unions**) filed supplementary written material in relation to the implications of the judgment of the Full Court of the Federal Court in *Corporate Air Charter Pty Ltd v Australian Federation of Air Pilots*,[1] which concerned the treatment of periods of stand-by (or reserve) as paid work for the purposes of the *Air Pilots Award 2020* (**Award**).

2. In its supplementary submission dated 6 May 2025 (**Network SS**), Network submitted that, factoring in *Corporate Air*, s 272(4) of the *Fair Work Act 2009* (Cth) (**FW Act**) did not require the Full Bench to include any further or other terms to its **Draft Determination**, in addition to the agreed terms and Network's proposed terms to deal with the matters at issue, so as to be satisfied that it would pass the BOOT.

3. Each of the Unions have adopted different, and in some ways conflicting, positions in relation to this issue in their materials. However, each of them argues that as a result of *Corporate Air*, various agreed terms ought to be changed so as to ensure that the IBWD passes the BOOT. Though the Unions' arguments are put in a variety of ways, they boil down to the overly simplistic (and misconceived) proposition that, because reserve or stand-by is now to be treated as duty (or work) under the Award as a result of *Corporate Air*, the IBWD will not pass the BOOT unless it does the same. Why that

[1] [2025] FCAFC 45 (***Corporate Air***).

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is so is not made clear in the Unions' materials.

4. In the submissions set out below, Network replies to the submissions made by each of the Unions. In that endeavour, it continues to rely on all of its evidence in this proceeding, in addition to Mr Bartlett's statement of 5 May 2025 (**Sixth Bartlett Statement**), and Mr Bartlett's further statement (filed with these submissions) of 23 May 2025 (**Seventh Bartlett Statement**). In short:

   (a) the Unions' submissions erroneously assume (or, in the case of the TWU, erroneously argue) that it is open to the Commission to amend agreed terms (or not include agreed terms in the IBWD), which it is not;

   (b) further, the Unions' submissions fail the basic task of a BOOT analysis, being to perform a global assessment,[2] rather than considering specific entitlements in isolation, and they accordingly make the error of asserting that the IBWD would not pass the BOOT simply because non-duty reserve periods (under the IBWD) are work periods under the Award (with the concomitant prospect that pilots will work combined duty and reserve hours in a particular week which exceed 38);

   (c) in any event, that prospect is not reasonably foreseeable. The TWU and AIPA have offered no evidence, and instead assume what they have to prove. The evidence put forward by the AFAP is flawed and unreliable, the main reason for which is that it relies on pre-release roster data, rather than actual data as to the hours <u>actually</u> performed by pilots;

   (d) as is made clear in Network's evidence, when regard is had to actual combined duty and reserve hours performed by pilots in the 12 month period between March 2024 and March 2025, the average of which was far below the maximum ordinary hours, and which in no individual case exceeded the maximum, the Commission can be comfortably satisfied that the pattern of work put forward by the AFAP is in no way reasonably foreseeable;

   (e) based on the average duty and reserve hours over the past 12 months by rank and fleet-type, each pilot would be better off under the Draft Determination than

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[2] Section 193A(2) of the FW Act.

under the Award;[3] and

(f) further, even on the theoretical maximum of duty and flight hours that pilots could be required to work under the FRMS in a roster period and over 12 months, they would be, by every rank and fleet-type, better off under the Draft Determination than under the Award.[4]

5. Network therefore submits that its Draft Determination would comfortably pass the BOOT, irrespective of *Corporate Air*, and that it is therefore appropriate that the Full Bench make an IBWD in the terms proposed by Network.

B. MATTERS IN REPLY

B1. The Commission cannot make amendments to agreed terms

6. Section 270(2) of the FW Act mandates that the Commission "*must include the agreed terms for the determination*". Section 272(4) then provides that "*[t]he determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193*".

7. Each of the Unions has made submissions that, as a result of *Corporate Air*, and the requirement in s 272(4) that the IBWD pass the BOOT, the Commission can (and should) make amendments to the following agreed terms for the IBWD:

(a) the definition of "*Duty Period*" (clause 5.1(4) of the Draft Determination);

(b) the definition of "*Reserve Period*" (clause 5.1(9) of the Draft Determination);

(c) the ordinary hours of work (9.1.3 of the Draft Determination); and

(d) the "*Additional Hourly Payments*" (clause 10.8.5 of the Draft Determination).

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3 Seventh Bartlett Statement at [45].

4 Seventh Bartlett Statement at [41].

8. The only union to make any considered submission as to the Full Bench's ability to make those amendments given the obligation in s 270(2), is the TWU, which at least acknowledges the statutory hurdle (which, for the reasons set out below, is in fact a statutory barrier) to the amendments being sought by the Unions. The TWU poses the following question:[5]

> "*… what is the position where an agreed term would result in a workplace determination not including terms that would enable the workplace determination to pass the better off overall test?*"

9. The TWU contends that the circumstances of this matter expose a conflict between ss 270(2) and 272(4), in that the agreed terms which must be included in the IBWD would result in it not passing the BOOT (though no supporting evidence or analysis is provided in that regard). Therefore, it submits, the Full Bench should adopt the well-known interpretational guidance set out by the High Court in *Project Blue Sky*[6] to adjust the meaning of the provisions so as to give effect to their supposedly harmonious goals, which in this case is said to entail "*that the Commission can adjust agreed terms to ensure conformance with the requirement in s 272(4)*".[7]

10. Contrary to the TWU's submission, there is no conflict between ss 270(2) and 272(4) (or, at least, none arises in this matter). The obligation conferred by s 272(4) requires the Commission to include such terms as would enable the IBWD to pass the BOOT. A perception by the Commission that a workplace determination would fail to satisfy the BOOT because of the separate inclusion of all agreed terms pursuant to s 270(2), would require it to consider whether it must include additional terms to rectify that deficiency.

11. The TWU's proffered construction rests upon a false premise that the only way that the Full Bench could be satisfied that the IBWD passes the BOOT in this case is to vary the agreed meaning of "*Duty Period*" so as to include (rather than exclude, as was agreed) a "*Reserve Period*". There is no cogent rationale offered for the premise: it proceeds on the *a priori* assumption that, because of the difference between the treatment of reserve and duty between the Award and the agreed terms for the IBWD,

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5 TWU's Supplementary Submissions dated 6 May 2025 (**TWU SS**) at [11].

6 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

7 TWU SS at [14].

the latter would not pass the BOOT unless the proposed amendments were made. As is demonstrated below, that analysis is overly simplistic and, on the evidence, fundamentally incorrect.

12. Therefore, the Full Bench should reject the proposition put forward by each of the Unions that it can amend the agreed terms, either in the manner the Unions suggest or at all, on the basis that such an approach would be inconsistent with both ss 270(2) and 272(4).

13. Rather, in the event that, after all final analysis, the Commission is of the view that the inclusion of all agreed terms and all appropriate terms dealing with the matters at issue, the IBWD would not pass the BOOT, the Commission must then seek to include such additional terms in the IBWD so as to ensure that it does pass the BOOT.

14. In the event the Commission reached that conclusion, the Commission should give Network (and the Unions) an opportunity to be heard as to what additional terms might be necessary and appropriate to resolve the BOOT issue, much like would be done with undertakings in an enterprise agreement approval. The "amendments" proposed by the Unions, if instead made as some form of addition to the IBWD, are overly simplistic and could have other potential consequences which go well beyond resolving any immediate BOOT issue.

B2. The agreed terms clearly distinguish Reserve Periods from Duty Periods

15. As to the agreed terms, each of the Unions appear to argue that the Full Bench must treat (or construe) reserve as duty for the purposes of the IBWD, because that is how, following the Full Court's construction in *Corporate Air*, reserve and duty periods are treated under the Award.[8]

16. Contrary to those submissions, the correct interpretation of the relevant clauses of the IBWD, including the agreed terms, is not to be determined by reference to the interpretation of other clauses in other instruments. As the Full Bench has already determined in this proceeding, and as is now well-settled, when it comes to agreed terms under s 274(3), the question is, objectively assessed, what did the parties

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[8] The TWU submits (TWU SS at [10]) that, as a matter of construction, the IBWD (even with the agreed terms) would be interpreted in that manner. The AFAP appears to submit (AFAP SS at [7] and [12]) that the agreed terms do not have that effect, so must be varied so as to do so. The AIPA expressly submits (AIPA SS at [5]) that the agreed terms do not have this effect, so now require amendment.

agree?[9]

17. The importance of that focus is exemplified in cases such as this one, where the agreed terms were negotiated by the bargaining representatives as part of a suite. It would not be appropriate for the Commission to approach the IBWD, as the Unions submit it should, by considering significant terms, as they have been drafted and construed in other instruments, in isolation, and attributing the meaning of those terms in that context, to agreed terms for the IBWD. That point is manifest if the term "*Duty Period*" now reads to include "*Reserve Period*", when the suite of terms that the parties had agreed in bargaining evidently proceeded on the basis of a clear distinction being drawn between those two concepts.

18. Plainly, prior to the submissions now made by the Unions post-*Corporate Air*, no party seriously contemplated (nor contended) that any agreed terms for the IBWD (nor the proposed enterprise agreement) actually operated such that reserve would be counted as duty or ordinary hours at any of the threshold times in s 274(3). There is no evidence to support a view that the bargaining representatives intended that the terms would have that meaning, which was obviously what prompted the various "notes" contained in the AFAP's draft determination. Indeed, while the Unions sought to claim that "*standby is duty*" at an early stage in bargaining,[10] they evidently abandoned that claim when they agreed to the suite of terms that included definitions of "*Duty Period*" and "*Reserve Period*", which explicitly differentiated between the two concepts.

19. Therefore, to the extent that the submissions of the AFAP and the TWU are to the effect that the decision in *Corporate Air* can have any impact on the meaning of the relevant agreed terms, they should be rejected (as wrong in law). To the extent the submissions are that the parties can be taken to have agreed that the clauses were to operate as including a "*Reserve Period*" within the meaning of a "*Duty Period*", they should equally be rejected (as wrong in fact).

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9 *Network Aviation Pty Ltd as Trustee for The Network Trust T/A Network Aviation Australia v Australian Federation of Air Pilots, Australian and International Pilots Association, Transport Workers' Union of Australia* [2024] FWCFB 308 at [166].

10 See the document titled "*Joint Unions - Lifestyle Claims – Network Aviation EBA – Dec 22 Without prejudice*", commencing at HB1056, and in particular on HB1059.

B3. Network's Draft Determination passes the BOOT

20. Beyond the bare assertions that the Full Bench should make amendments to agreed terms in order to satisfy s 272(4), none of the Unions have engaged in any sort of detailed, global analysis of the kind that is called for by ss 193 and 193A of the FW Act, and which could satisfy the Full Bench that an IBWD that included the agreed terms would fail to satisfy the BOOT.

21. Each Union's primary position boils down to the following simplistic propositions:

    (a) under the Award, periods of reserve or standby are treated as duty;

    (b) the relevant agreed terms for the IBWD treat periods of reserve as not being duty; and

    (c) therefore, the IBWD would not pass the BOOT if it included the agreed terms.

22. As already mentioned, the position erroneously assumes that the only way that the Commission could be satisfied that the IBWD passes the BOOT is if the definition of "*Duty Period*" includes a "*Reserve Period*". Further, it erroneously assumes that the only way of assessing whether employees are "better off overall", is by a comparing the treatment of duty and reserve under the Draft Determination and the Award (*i.e.* without undertaking the required global assessment of the benefits conferred by each instrument as a whole).[11]

    <u>Not reasonably foreseeable that combined duty and reserve hours will exceed maximum ordinary hours</u>

23. In any event, the evidence does not support the Unions' position that pilots would be worse off under Network's Draft Determination than they would be under the Award, even taking account of the differential treatment between duty and reserve, which position is based on the proposition that pilots' combined duty and reserve hours would exceed the maximum ordinary hours of 1,976 in a 12-month period (or perhaps, 38 hours in a week or 76 hours in a fortnight). For the reasons set out below, that asserted pattern of work is not reasonably foreseeable and is therefore not to be

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[11] Exemplified by the TWU SS at [5] and [10]. See also AIPA SS at [6]-[7]. By contrast, the AFAP SS proceeds on a more conceptually sound foundation in this respect.

factored into the BOOT assessment.

24. Section 193A(6) of the FW Act provides that, in considering whether a particular instrument passes the BOOT, the Commission:

> "*… may only have regard to patterns or kinds of work … if they are reasonably foreseeable at the test time. In considering what is reasonably foreseeable, the FWC must have regard to the nature of the enterprise or enterprises to which the agreement relates.*"

25. This provision was inserted into the FW Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). The explanatory memorandum for the relevant Bill stated that the purpose of inserting the provision was to avoid situations in which patterns of work which were theoretically possible, but which were not expected to occur, prevented an otherwise reasonable agreement from passing the BOOT.[12]

26. As is well-established, the task for the Commission in conducting a BOOT analysis will usually involve a comparison between the total remuneration earned by employees under the proposed instrument as compared with the relevant award, and that assessment:

> "*… necessarily requires examination of the practices and arrangements concerning the working of ordinary and overtime hours by … employees that flow from the terms of the [proposed instrument].*"[13]

27. In *Apple Australia National Enterprise Agreement*,[14] a Full Bench considered whether the BOOT was satisfied in respect of employees who were paid an "all-in" annual rate. Those employees were exempted from payment of penalty rates for overtime. The Full Bench held, in relation to s 193A(6), that while the modelling as to the pattern of work performed by the employees demonstrated it was <u>possible</u> that they could be required to perform overtime hours, based on the evidence given by the employer as to the low practical reality of that occurring, and the rare circumstances if it did occur,

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12 Paragraph [785] of the Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth).

13 *Loaded Rates Agreements* [2018] FWCFB 3610 at [107] (Hatcher and Catanzariti VPP, Gostencnik DP, Lee and Harper-Greenwell CC).

14 [2023] FWCFB 185 (Hatcher J, Masson DP and Connolly C).

it was not reasonably foreseeable that the overtime work would be performed, and therefore did not weigh against the agreement passing the BOOT.[15]

28. As previously stated by Evan Bartlett, Network's General Manager Flight Operations and Chief Pilot, accounting for the finding in *Corporate Air* that reserve or standby is treated as duty under the Award, all pilots would be better off under the Network Draft Determination.[16] That statement was partly based on Mr Bartlett's analysis of the combined duty hours and reserve hours actually performed by Network pilots over the 12 month period from 23 March 2024 to 23 March 2025, and the outcome that no single pilot performed more than a combined 1,976 hours (being the maximum number of ordinary hours averaged over a 12 month period as provided for by the relevant agreed term for the IBWD).[17]

29. Only one of the Unions has put forward any evidence about the BOOT — the AFAP filed further statements of Stephen Maughan[18] and Chris Aikens.[19] On the basis of that evidence, the AFAP submits that the Full Bench should not be satisfied that Network's Draft Determination passes the BOOT.

30. In Mr Maughan's evidence, he utilises "*pre-release roster data*" from the 2024 calendar year to produce the combined duty and reserve hours performed by pilots in 2024, and states that that data shows a significant amount of Network pilots performing in excess of 38 combined hours per week, averaged over the 12 month period. Mr Maughan also isolates from that data a number of what he calls "*extreme working weeks*", and gives three examples of pilots performing in excess of 59 combined hours in particular weeks.[20]

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15 *Ibid* at [16]-[21].

16 Sixth Bartlett Statement at [13]-[17].

17 Sixth Bartlett Statement at [13] and EB-16. Mr Bartlett's statement was also based on the significant other benefits conferred by Network's Draft Determination, over and above the Award (Sixth Bartlett Statement at [14]-[16]).

18 Statement of Stephen Maughan dated 5 May 2025 (**Third Maughan Statement**).

19 Statement of Chris Aikens dated 5 May 2025 (**Fourth Aikens Statement**).

20 Third Maughan Statement at [19].

31. In Mr Aikens' evidence, he utilises Mr Maughan's combined hours data to conduct an analysis of the different positions of pilots under the Award as compared with the Draft Determination, as a result of the *Corporate Air* analysis. Mr Aikens reduces his analysis to a spreadsheet and suggests on the basis of it, that a majority of pilots would be paid less for those combined hours than they would be under the Award.[21]

32. As Mr Bartlett states in the Seventh Bartlett Statement, neither of these witnesses' evidence is reliable, mostly because Mr Maughan's roster analysis is significantly flawed in a way that has skewed the combined hours data much higher than in reality were actually worked during the period. There are several reasons for this.

33. *First*, Mr Maughan relied upon "*pre-release roster data*" for his analysis, which does not reflect the hours a pilot actually works. Mr Maughan accepts as much.[22] That is important because, due to operational requirements, roster duties frequently change, and therefore the hours captured on the pre-release rosters will not accurately reflect the combined duty and reserve hours actually worked. Mr Bartlett gives the following example in relation to pilots who are called out on reserve:[23]

> "*By way of example, a pilot may have a reserve period of 12 hours and be called out two hours into the reserve period for a seven hour flight duty. While Mr Maughan's analysis will capture 12 hours total, the actual total of duty hours worked and time spent on reserve is 9 hours and 15 minutes…*"

34. In that example, Mr Maughan's analysis would erroneously record the pilot as having performed 12 combined hours, an overstatement of almost three hours. The analysis conducted by Mr Bartlett, which was based on the hours that pilots actually worked, would accurately record the pilot having worked 9.25 hours.[24] Further, because Mr Maughan's analysis assumes that pilots worked 12 full hours on reserve (rather than having been called in for duty), Mr Aikens' rate analysis would not properly reflect the payments that would be made to the pilot in the scenario. For instance, Mr Aikens would not have calculated the pilot having been entitled to payment of the Duty Hours Allowance for the seven duty hours, nor that the pilot's flight hours gave rise to

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21 Fourth Aikens Statement at [17] and CA-20.

22 Third Maughan Statement at [10].

23 Seventh Bartlett Statement at [10].

24 Seventh Bartlett Statement at [10].

potential Additional Hourly Payments.

35. Therefore, for the purposes of determining what is a reasonably foreseeable pattern of work engaged in by pilots, and the associated payments that would have been made to them under the alternative instruments, the actual hours that they worked is a far more reliable variable than pre-release roster data.[25]

36. *Second*, Mr Maughan's analysis depends on the flawed assumption that a rostered "*Available Day*" (**A-Day**) equates to eight hours of duty. As Mr Bartlett explains, if a pilot with a rostered A-Day is not assigned a duty by 5pm the day prior, the day is converted to a day free of duty when the pilot is not required to be contactable. On a sample recent roster period run by Mr Bartlett, 42% of rostered A-Days resulted in pilots having a day free of duty.[26]

37. *Third*, Mr Maughan's analysis does not incorporate the effect of agreed terms for the IBWD. An example is the limitation on rostering reserve in a roster period to a maximum of seven with a maximum duration of 12 hours each (see the agreed term at clauses 20.8.1 and 20.8.2 of the Draft Determination). Mr Maughan's analysis counts <u>all</u> reserve periods per roster period in 2024. Yet, the aforementioned limitations will substantially curtail the amount of reserve periods that can be performed per roster period. Network began implementing those limitations in the ninth roster period of 2024, and the effects can be seen from the following table of instances in which pilots performed more than seven reserve periods in a roster period:[27]

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25 As Mr Bartlett opines: Seventh Bartlett Statement at [11].

26 Seventh Bartlett Statement at [14].

27 Seventh Bartlett Statement at [19].

Roster Period	F100/E190		A319/A320		Total
	CPT	FO	CPT	FO	
Roster Period 1	2	1	0	1	4
Roster Period 2	3	3	2	2	10
Roster Period 3	1	8	2	2	13
Roster Period 4	9	13	0	2	24
Roster Period 5	1	3	0	2	6
Roster Period 6	2	2	0	0	4
Roster Period 7	13	6	0	0	19
Roster Period 8	2	0	0	0	2
Roster Period 9	0	0	0	0	0
Roster Period 10	0	0	0	0	0

38. Mr Maughan's analysis contains a substantial amount of reserve periods that would not actually be performed under the IBWD as a result of those limitations.

39. Aside from the unreliability of the hours calculated on Mr Maughan's analysis, the hourly rates under the Award that were applied by Mr Aikens to those hours are flawed too, as they include amounts that should not be included, such as Additions to Salary, leave loading and a transport allowance. This appears to have led to the Award hourly rate utilised by Mr Aikens being inflated.[28]

The alleged "*extreme working weeks*"

40. Mr Maughan's roster analysis identifies three pilots who allegedly performed "*extreme working weeks*", each having performed combined hours of more than 59 hours in a week. The examples are flawed for the following reasons.

41. *First*, the analysis proceeds on the basis that pre-release roster hours equates to actual hours worked, which, for the reasons given above, is a particularly unreliable assumption.

42. *Second*, the attempt to extrapolate those extreme examples to make the point that pilots could have been required to work extreme hours in the course of a 12 month period does not stack up against reality: when measuring the pilots' combined duty and reserve hours actually worked in Mr Bartlett's 12 month test period, no pilot

28 Seventh Bartlett Statement at [48] to [51].

exceeded the maximum of 1,976, and the average combined actual hours was 1,347, more than 600 combined hours below the maximum. The average of combined hours in that 12 month test period per fleet and rank was as follows:[29]

Fleet/Rank	Average Duty Hours	Average Reserve Hours	Combined Hours
A319/320			
Captain	1190.63	263.38	1454.01
First Officer	967.76	267.55	1235.31
F100/E190			
Captain	1179.55	279.77	1459.32
First Officer	902.68	334.83	1237.51

As can be seen, no rank or fleet's average combined hours came within 500 hours of the maximum of 1,976 in the 12 month period.

43. *Third,* the agreed terms prevent the hypothetical "*extreme working week*" (*i.e.* more than 59 hours per week) being performed, because it is agreed that hours of work will be in accordance with Network's FRMS, which limits flight hours to 100 in any consecutive 28 day period, and duty hours to 100 in a 14 consecutive day period.[30]

44. *Fourth*, the actual hours performed by the three pilots in the "*extreme working week*" examples was far below the maximum when viewed over a 12 month period or per average roster period. By way of example, Mr Bartlett took from the AFAP's extreme examples the pilot who performed the highest actual combined hours in 2024, being 1508.55 (more than 400 hours below the maximum ordinary hours in a 12 month period), and performed a comparative calculation between the Award and Network's Draft Determination. For his combined hours in 2024, that pilot would have been better off under the Draft Determination to the tune of $55,418.56 ($248,122.48 under the Draft Determination compared with $192,703.62 under the Award). Similarly, in the 2024 roster period in which that pilot performed the highest number of combined hours (Roster Period 6), he would have been better off under the Draft Determination on the basis of his salary and the Duty Hour Allowance alone, to the tune of $2,772.30

29 Seventh Bartlett Statement at [34].

30 Seventh Bartlett Statement at [39].

($18,404.24 under the Draft Determination (salary and DHA only) compared with $15,631.94 under the Award).[31]

Conclusion on reasonably foreseeable patterns of work

45. Accordingly, the Full Bench should be satisfied that it is not reasonably foreseeable that pilots will be required to work a pattern of combined duty and reserve hours that exceed the agreed maximum of 1,976 hours in a 12-month period. Even in the cases that the AFAP characterises as the most extreme examples of high levels of work, the examples actually support Network's contention: it is not reasonably foreseeable that pilots will be required to work more than a maximum of combined duty and reserve hours, and in any event, those employees would clearly be better off overall under the IBWD.

46. The Full Bench should therefore reject the Unions' claim that the pilots would not be better off overall under the IBWD based on a requirement to regularly perform hours in excess of that maximum.

Comparison of remuneration based on theoretical maximum hours

47. Further to the above and notwithstanding s 193A(6), Mr Bartlett has prepared a model for the Commission on the basis of the hypothetical maximum of duty and flight hours that pilots could theoretically be required to work when regard is had to the limitations imposed by the Fatigue Risk Management System promulgated by the Civil Aviation and Safety Authority.[32]

48. That analysis shows that, even in the purely theoretical situation in which pilots were required to work those maximum duty and flight hours, depending on their rank and fleet type, they would be somewhere in the range of $66,940.34 (for a First Officer flying an F100) to $131,799.83 (for a Captain flying an A319/320) better off under the Draft Determination, than under the Award.[33]

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31 Seventh Bartlett Statement at [30].

32 Hours of work are to be determined in accordance with the FRMS: clause 9.1.2(c) of the Draft Determination (an agreed term).

33 Seventh Bartlett Statement at [41].

Additional claims raised by the TWU

49. In its submissions, the TWU alone now seeks the amendment of the agreed terms to the effect that the ordinary hours of work be 76 per fortnight (not to be averaged over a 12 month period (clause 9.1.3)).[34] Further, the TWU alone seeks that the Additional Hourly Payments be converted from being payable for "*flying hours*" over a particular threshold, to being payable for "*duty hours (including hours spent on reserve)*" (which in effect, means all hours). The only apparent rationale proffered for this change of position is the need to ensure that the IBWD passes the BOOT,[35] but no cogent submissions are made as to why each amendment would be necessary in that regard.

50. As to the first proposed amendment regarding averaging, the TWU's position on the Commission's ability to amend agreed terms is misconceived for the reasons given at paragraphs 6 to 14 above. Further, why the capacity for averaging over 12 months would need to be removed to comply with the BOOT is never explained.

51. As to the second proposed amendment regarding Additional Hourly Payments, the change is wholly without industrial merit or rationale, wholly inconsistent with the entitlement bargained for and agreed to by the TWU in the form of all three proposed enterprise agreements put to vote (which in each case was to compensate pilots — not for duty hours — but specifically for flying hours),[36] and, quite apart from those matters, for the reasons given above, unnecessary from a BOOT perspective.

52. The Full Bench should therefore reject the TWU's belated change of position on these matters.

Airport Duties

53. Finally, insofar as the Commission concludes that it is either permitted to amend agreed terms (and it does so), or it forms the view that further, additional provisions are necessary to comply with s 272(4) of the FW Act, Network contends that it is

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34 Although the AFAP (and AIPA) have submitted that the clause should be "read" in that way: AFAP note to clause 9.1.3.

35 TWU SS at [15] and [17].

36 *Network Aviation Pty Ltd as Trustee for The Network Trust T/A Network Aviation Australia v Australian Federation of Air Pilots, Australian and International Pilots Association, Transport Workers' Union of Australia* [2024] FWCFB 308 at [20], [26] and [27]. See also at [31], where it is recorded that the only form of dispute the TWU took with the Additional Hourly Payments was the rate to be applied to the relevant threshold of flying hours.

appropriate that clause 20.5 of the Draft Determination be made by the Commission (so as to deal with this matter at issue) in a form which enables Network to require pilots to perform Airport Duties on periods of reserve, rather than individual pilots opting in or out of that facility. If periods of reserve are now regarded, for all relevant purposes, as periods of work, then Network should have the ability to determine where that work is performed, as it does for all other kinds of work.

C. CONCLUSION

54. For the above reasons, the Full Bench should be satisfied that the Draft Determination would pass the BOOT on its current terms, and therefore that no additional terms must be included in the IBWD pursuant to s 272(4) of the FW Act.

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Matt Garozzo
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Dated: 23 May 2025

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