

FAIR WORK COMMISSION

Applicant: Australian Federation of Air Pilots

Respondent: Express Freighters Australia Operations Pty Ltd

Matter No.: G2025/2996

APPLICANT SUBMISSIONS

Introduction

1. These submissions are made in support of the application to terminate the *Express Freighters Australia Operations Pty Ltd Enterprise Agreement 2021 (EFA Agreement)* filed 3 September 2025 pursuant to section 226(1)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**).
2. The Applicant contends that the continued operation of the EFA Agreement is manifestly unfair for the employees it covers and applies to, and that its termination is appropriate in all the circumstances. This submission draws upon the comprehensive witness statement of Mr Simon Lutton, Executive Director of the AFAP, dated 7 October 2025.

Relevant statutory framework and jurisprudence

3. Section 226 of the FW Act outlines the circumstances in which the Fair Work **Commission** must terminate an enterprise agreement after its nominal expiry date. Section 225 provides that an application for termination may be made by an employer

Lodged by: Applicant
Address for Service: 132-136 Albert Road,
South Melbourne, VIC 3205

Telephone: (03) 9928 5737
Email: simon@afap.org.au

(or employee organisation) if the agreement has passed its nominal expiry date. As Mr Lutton deposes at [21] of his statement, the EFA Agreement nominally expired on 31 December 2024, thereby satisfying the threshold requirement under section 225 for this application.

4. The critical provision for this application is section 226(1)(a), which mandates termination if:

(a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or

5. However, the obligation to terminate under section 226(1) is qualified by section 226(1A):

(1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

6. In determining whether to terminate an agreement, the Commission *must* consider the views of the employees and employee organisations (s.226(3)) and *must have regard to* whether bargaining for a proposed enterprise agreement is occurring, and whether termination would adversely affect the bargaining position of the employees (s.226(4)). The Commission may also have regard to any other relevant matter (s.226(5)).

7. Following the recent amendments to s 226 of the Act, the reference to the public interest test formerly in s.226(a) has been removed.

8. In the recent Decision of the Commission in *Detection Security Management Pty Ltd*¹ Commissioner Tran relevantly observed that, “*While the legislation does not require*

¹ [2025] FWC 2432 at [17].

that I make an assessment about whether employees are better off under the Award than under the Agreement when considering this ground, that is the relevant point of comparison because of the consequences that flow from terminating an agreement."

9. Similarly, in *PKBurgerbiz*², Deputy President Clancy applied the s 226(1)(a) test of whether employees had been treated 'unfairly' and confirmed that a sustained finding that 'conditions under the Agreement have been less favourable than those under the Award' can constitute such unfairness.
10. *PKBurgerbiz* also highlights the importance of the Commission being "satisfied that it is appropriate in all the circumstances to do so" under s.226(1A) (para [6], [12]). While *PKBurgerbiz* found appropriateness in the employer's desire for administrative simplification (para [13]), the assessment of appropriateness is necessarily holistic and must consider the impact on employees.
11. Crucially, in *PKBurgerbiz*, the Commission was forced to infer employees' views due to a lack of evidence (para [7]). This stands in contrast to the compelling evidence before the Commission in the present matter.

The continued operation of the EFA Agreement is unfair for employees

12. It is submitted that the evidence demonstrates that the continued operation of the EFA Agreement is profoundly unfair for the employees it covers. This unfairness is multifaceted, spanning direct financial detriment, the absence of crucial Award entitlements, and the employer's conduct throughout the bargaining process.
13. Mr Lutton's evidence, particularly paragraphs [29]-[31], provides clear and undisputed data illustrating that the majority of EFA pilots are currently paid significantly below the minimum salaries prescribed by the *Air Pilots Award 2020*. He says:

² [2024] FWCA 2223, at [6], [8] and [11].

- (a) As of 1 July 2025, Captains flying Narrow-Body aircraft under the EFA Agreement receive \$193,157, a substantial \$9,343 less than the Award minimum of \$202,500.
- (b) Wide-Body Captains fare worse, receiving \$217,595 under the Agreement compared to the Award's \$228,351, a deficit of \$10,756.
- (c) First Officers, both Narrow-Body and Wide-Body, also suffer shortfalls of \$4,595 and \$8,393 respectively.

14. This is not a marginal difference; these are significant and ongoing underpayments that fundamentally undermine the economic welfare of these professional employees.

15. Beyond base salaries, the EFA Agreement fails to provide a range of allowances and benefits that are standard entitlements under the *Air Pilots Award 2020*. Mr Lutton details these omissions at paragraph 28:

- (a) Provision for days off only to be changed by agreement (Cl 15.8(f));
- (b) Night operations allowance (cl 20.2(b));
- (c) Overseas duty allowance (cl 20.2(d));
- (d) Loss of Licence reimbursement (cl 20.3(c)); and
- (e) 17.5% leave loading (cl 23.5).

16. The absence of those entitlements exacerbates the financial unfairness, meaning that even for comparable work, EFA pilots are denied entitlements that are universally recognised as minimum standards for their industry.

17. The evidence reveals a deliberate structural unfairness embedded within the EFA Agreement. Paragraph [9] explains that 99% of EFA pilots are "locked into the first increment or B-scale," effectively ensuring they receive the lowest possible rate under the Agreement, irrespective of experience or tenure beyond a certain point. This mechanism ensures that the "higher increments have no work to do," further depressing overall remuneration and preventing pilots from progressing financially

within the enterprise agreement structure. This is an egregious example of an agreement designed to keep wages artificially low.

18. The context of the EFA Agreement's negotiation further illustrates its unfairness. Mr Lutton deposes that Qantas/EFA "took the opportunity to fully exploit" the situation during and after the COVID-19 pandemic, paying below Award salaries and "threatening backpay" to pressure pilots into accepting an agreement that was barely above Award rates (para [20], [32]). EFA subsequently refused to top up salaries to Award levels and resisted commencing bargaining for a new agreement until compelled by AFAP applications to the Commission (para [24]). This historical and ongoing pattern of conduct has created an environment where employees are consistently disadvantaged and their industrial rights undermined.

19. The introduction of newer, larger, and more efficient aircraft (A321, A330) without corresponding salary increases, as detailed at paragraph [12], represents a further unfairness. Pilots are asked to operate more advanced and productive assets, yet their remuneration is suppressed below Award levels, demonstrating a clear imbalance between increased employee contribution and compensation.

Compelling views of employees and employee organisations (s.226(3)(a) and (c))

20. Unlike the *PKBurgerbiz* case where employee views were inferred due to a lack of direct evidence, the Commission has before it overwhelming evidence of the EFA pilots' strong desire for the termination of this Agreement.

21. Mr Lutton, as Executive Director of the AFAP, attests to receiving "multiple representations from EFA pilot members and representatives that the Agreement should be terminated as soon as possible because most EFA pilots would be better off under the Award" (para [33]). This is feedback from the affected workforce.

22. Furthermore, surveys conducted in late 2024 revealed that "over 80% of the EFA pilots surveyed wanted to both commence PIA and terminate the Agreement" (para [34]). This overwhelming majority is a powerful indicator of the widespread dissatisfaction and the perceived unfairness of the Agreement among the covered employees. The AFAP, as a registered employee organisation, fully supports this application, believing termination is in the best interests of its members (para [27]).

Appropriateness in all the circumstances (s.226(1A) & s.226(4))

23. It is respectfully submitted that terminating the EFA Agreement is not only warranted due to its inherent unfairness but is also eminently appropriate in all the circumstances.

24. Termination offers the immediate and most effective remedy to the chronic underpayment and lack of entitlements experienced by EFA pilots. Upon termination, employees would revert to Award conditions, thereby immediately receiving the minimum legal entitlements that the Agreement has failed to provide. This is a fundamental matter of fairness and compliance with industrial standards.

25. The evidence before the FWC paints a picture of protracted, difficult, and at times, coercive bargaining. Negotiations for a replacement agreement have been ongoing since 2018 (para [11]), marked by the Company's initial refusal of joint meetings, unilateral proposals voted down, and a second offer accepted under the implicit threat of no backpay (para [12], [16], [18]). The AFAP's attempts to secure a simple Award top-up clause were rejected (para [19]), leading to formal applications to the Commission and ongoing protected industrial action (para [24], [26]).

26. Far from adversely affecting employees' bargaining position (s.226(4)(c)), termination of this sub-Award agreement would create a level playing field, removing the disincentive for the Company to bargain genuinely for an agreement that meets modern industrial standards. Mr Lutton states unequivocally that termination "would

assist bargaining to terminate the existing Agreement" (para [27]). It is appropriate for the Commission to intervene when an expired agreement demonstrably impedes fair and productive negotiations.

27. The overwhelming desire of the workforce to terminate the Agreement, expressed through multiple representations and formal surveys, makes it unequivocally appropriate to grant this application. To allow the continued operation of an agreement that the vast majority of covered employees find unfair and detrimental would be to disregard their collective voice and the very purpose of the Act in fostering fair and productive workplaces.

Conclusion

28. In light of the compelling evidence from Mr Lutton's witness statement, and consistent with the principles enunciated in *PKBurgerbiz*, it is submitted that the EFA Agreement is demonstrably and fundamentally unfair to the employees it covers. The significant underpayment of salaries compared to the Award, the absence of key Award entitlements, the structural B-scale mechanism, and the employer's conduct all point to a continued operation that is inequitable.

29. Furthermore, the strong and clear wishes of the EFA pilots for termination, coupled with the ongoing difficulties in achieving a fair replacement agreement, make termination of the EFA Agreement eminently appropriate in all the circumstances.

30. Therefore, we respectfully urge the Commission to be satisfied that the continued operation of the EFA Agreement is unfair for the employees covered by it, and that it is appropriate in all the circumstances to order its termination under section 226(1)(a) of the *Fair Work Act 2009*.

Australian Federation of Air Pilots

Applicant

Date: 7 October 2025