DECISION

Fair Work Act 2009
s 234—Intractable bargaining declaration

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
(B2024/91)

DEPUTY PRESIDENT BEAUMONT
DEPUTY PRESIDENT O'KEEFFE
COMMISSIONER LIM

PERTH, 12 JULY 2024

Intractable bargaining determination – preliminary hearing about 'agreed' matters for s 274 of the Fair Work Act 2009 (Cth)

1. Introduction and outcome

[1] On 5 February 2024, Network Aviation Pty Ltd as Trustee for The Network Trust T/A Network Aviation Australia (**Network**) applied for an intractable bargaining declaration (**intractable bargaining declaration/declaration**) pursuant to s 234 of the *Fair Work Act 2009* (Cth) (**Act**) in respect of the bargaining with the Australian Federation of Air Pilots (**AFAP**), the Australian and International Pilots Association (**AIPA**) and the Transport Workers' Union of Australia (**TWU**) (collectively the **unions**) for the proposed *Network Aviation Pilots Enterprise Agreement 2023* (**proposed agreement**). On 15 March 2024, the Commission made an intractable bargaining declaration that was accompanied by an order giving effect to the declaration and specifying a post-declaration negotiating period.[1]

[2] The post-declaration negotiating period started on 15 March 2024 and ended on 28 March 2024. The matter remained unresolved at the end of that period and, as no order for a further post-declaration negotiating period was made,[2] it now falls upon the Commission to make an intractable bargaining workplace determination 'as quickly as possible' under s 269 of the Act.

[1] *Network Aviation v Australian Federation of Air Pilots, Australian and International Pilots Associate & Transport Workers' Union of Australia* [2024] FWC 685.

[2] *Fair Work Act 2009* (Cth), s 235(A)(2).

[3] An intractable bargaining workplace determination must include certain terms. These include the 'core terms' set out in s 272,[3] the 'mandatory terms' set out in s 273,[4] terms that the Commission considers 'deal with the matters that were still at issue' at either the time of the intractable bargaining declaration or, if there was a post-declaration negotiating period, the end of that period,[5] and the 'agreed terms'[6] as provided for by s 274.[7] This decision focuses only on the latter of those 'terms', namely the 'agreed terms'. The parties are in dispute over which terms, if any, are 'agreed terms' for the purposes of ss 270(2) and 274(3) of the Act.

[4] Briefly stated, an 'agreed term' for an intractable bargaining workplace determination is understood to be any of the following:

a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and
b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
c) if there is a post declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.[8]

[5] The note to s 274 of the Act, specifies that the determination must include an agreed term and as such refers to s 270(2) of the Act. Section 270(2) specifies that the determination must include the agreed terms for the determination. There will, of course, be circumstances where it is found that there are no agreed terms.

[6] The position of Network, the AIPA and the TWU is that as at 5 February 2024 there were 'agreed terms' as understood by reference to s 274(3) of the Act. The agreed terms were all of the terms of the proposed agreement that was balloted over December – January 2024 (commonly referred to by the parties as the **22 December Proposed Agreement**), save the term regarding the low-experience first officer rates and those terms dealing with ten additional matters that will be later described and explained.[9]

[7] The AFAP contends that as at 5 February 2024 when the application for a declaration was filed, there were no 'agreed terms' because there was a genuine conditional reservation that individual terms that were agreed, were in fact agreed on the conditional basis that a final satisfactory package was ultimately achieved. That is, because bargaining between the parties '…proceeded on the basis of an overall package, with nothing being agreed until everything is

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[3] Ibid s 270(1)(b).

[4] Ibid s 270(1)(c).

[5] Ibid s 270(3).

[6] Ibid s 235(A)(2).

[7] Ibid s 270(2).

[8] Ibid s 274(3) (a)-(c).

[9] Network's Outline of Submissions 18 April 2024 [40], [25] and [26]; AIPA's Outline of Submissions 17 April 2024 [13]; TWU's Outline of Submissions 17 April 2024 [54].

agreed,'[10] and as not all terms had been agreed there were no 'agreed terms'. The AFAP acknowledges that if the evidence does not support there being a genuine conditional reservation, it will not succeed with its argument that there were no 'agreed terms'.

[8] Briefly stated, we are satisfied that the evidence does not support a finding that there was a genuine conditional reservation of the type referred to in the decision of the Full Bench in *UFU v Fire Rescue Victoria* (***UFU***).[11] It follows that we have found that there are 'agreed terms', as was contended by Network, the AIPA and the TWU. Our detailed reasons follow as do the 'agreed terms' as were set out in the 22 December Proposed Agreement (Attachment A), with the exception of those terms that were not agreed, as set out at Attachment B of this decision.

2. Background

[9] In the lead up to the hearing, the parties submitted a Statement of Agreed Facts (**SOAF**). Those agreed facts are set out below. In addition to the SOAF, evidence was provided by three witnesses, none of whom were required for cross examination:

a) Captain Evan Wayne Bartlett, General Manager Flight Operations and Chief Pilot of Network;
b) Chris Aikens, Senior Industrial Officer of the AFAP; and
c) Edward Nell, Industrial Officer of the TWU.

[10] Bargaining started in 2019 when Network issued a notice of employee representational rights to its employed pilots in relation to bargaining for a proposed enterprise agreement to replace the *Network Aviation Pilots Enterprise Agreement 2016*.[12] In early 2020, bargaining was paused because of the COVID-19 pandemic.[13] It recommenced on 13 September 2022.[14]

[11] The AFAP, the AIPA and the TWU are each default bargaining representatives pursuant to s 176 of the Act.[15] There are no other bargaining representatives.[16]

[12] Between 13 September 2022 and 27 March 2023, there were ten bargaining meetings.[17]

[13] For the purpose of an upcoming bargaining meeting on 13 March 2023, on 1 March 2023, Captain Bartlett sent an email to the bargaining parties containing an attachment headed 'High-level summary of bargaining positions as at 28 February 2023'.[18] This email included the following:

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[10] Statement of Agreed Facts (**SOAF**) [34], Attachment 15. Also see SOAF [5], [6], [28]; Witness Statement of Chris Aikens [18] (**Aikens Statement**).

[11] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 (***UFU v FRV***).

[12] SOAF [1].

[13] Ibid.

[14] Ibid [3].

[15] Ibid [2].

[16] Ibid.

[17] Ibid [4].

[18] Ibid [5].

> Dear bargaining reps
>
> Further to our bargaining meeting on Monday, please see attached, on a without prejudice basis, our high-level summary of what we consider to be the current state of bargaining overall.
>
> While nothing is agreed finally until everything is agreed, we hope this summary provides a useful framework for making substantial progress at our full-day meeting planned for Monday, 13 March.
>
> In addition, we note that the joint union committee undertook on Monday to provide Network with its position on a range of matters, including pay and the calculation of a 'day rate'. As discussed, please provide this by tomorrow- Thursday, 2 March. We look forward to seeing you on 13 March.
>
> Regards
>
> Evan Bartlett
> General Manager Flight Operations and Chief Pilot

[14] On 24 March 2023, after the 13 March 2023 meeting was completed, Network provided the AFAP with a document containing slides which summarised the current status of negotiations.[19] At the bottom of each page of this document are the words: 'No items in this proposal are agreed until all items are agreed.'[20]

[15] On 27 March 2023, Network and the unions reached in-principle agreement in respect of the terms of the proposed agreement and the unions agreed they would endorse the proposal and recommend its support with their respective members.[21]

[16] On 15 June 2023, the AFAP indicated that it would not endorse the proposed agreement.[22]

[17] On 28 July 2023, the AFAP provided Network with a revised position with respect to its claims for a proposed agreement.[23]

[18] On 25 August 2023, the AFAP filed an application for a protected action ballot order with the Commission.[24] On 5 September 2023, Network and the unions attended a s 448A compulsory conciliation conference during the ballot period.[25] The conference did not result in the resolution of the outstanding issues in bargaining.[26] Following the conference, there were a small number of outstanding drafting issues with the TWU and the AIPA, which were resolved over the coming weeks.[27]

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[19] Ibid [6].

[20] Ibid.

[21] Ibid [7].

[22] Ibid [8].

[23] Ibid [9].

[24] Ibid [10].

[25] Ibid.

[26] Ibid [11].

[27] Ibid.

[19] After the s 448A compulsory conference, Network, and the TWU and the AIPA progressed the proposed agreement and ultimately an in-principle position on a proposed agreement was reached with these two unions.[28]

[20] On 30 September 2023, Captain Bartlett emailed the pilots with the access period materials (including a copy of the proposed agreement (the **30 September Proposed Agreement**)) for voting between 8 October 2023 and 12 October 2023. This proposed agreement had the support of the TWU, but not the AIPA and the AFAP.[29]

[21] On 12 October 2023, the ballot results were declared. The 30 September Proposed Agreement was not voted up.[30]

[22] On 18 October 2023, Network filed an application under s 240 of the Act for the Commission to deal with a dispute about the proposed agreement.[31]

[23] The s 240 application was allocated to a Commission member. Several conferences were held before the Commission, including one on 10 November 2023.[32]

[24] On 10 November 2023, Network and the unions reached in-principle agreement in respect of the terms of the proposed agreement and the unions agreed they would endorse the proposal and recommend its support with their respective members.[33]

[25] On 10 November 2023, a joint statement was issued to the pilot workforce by Network, the AFAP, the AIPA and the TWU, which confirmed that the parties had reached in-principle agreement on the proposed agreement.[34]

[26] On 29 November 2023, Network commenced another access period for the pilots to approve the proposed agreement (the **29 November Proposed Agreement**), consistent with the in-principle agreement reached with the unions. Each of the unions endorsed a 'yes' vote for the proposed agreement from their respective members.[35] The 29 November Proposed Agreement was not voted up.[36]

[27] After this unsuccessful vote and following further discussions between the bargaining representatives about the status of the proposed agreement, changes were made to the 29 November Proposed Agreement.[37] For pilots, these were in the nature of improvements to the terms and conditions proposed, and for Network, the introduction of a reduced base salary

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[28] Ibid [12].

[29] Ibid [13].

[30] Ibid [14].

[31] Ibid [15].

[32] Ibid [16].

[33] Ibid [17].

[34] Ibid [18].

[35] Ibid [19].

[36] Ibid [20].

[37] Ibid [21].

for low-experience first officers that applied until a first officer reaches 1500 flying hours or three years' service.[38]

[28] On 21 December 2023, Captain Bartlett sent a communication to all pilots confirming that Network had been able to make further adjustments to reshape the proposed agreement (**December Communication**).[39] The December Communication stated, in part, that:

> …In pleasing news we've now reached in principle agreement with the bargaining representatives of all three unions again on the proposed Agreement, which includes:
>
> - **Replacement of FIFO allowances with DHA** – the DHA will apply to the period between sign-on and sign-off in any port on any day (but not overnights) from agreement commencement (Capt: $10.93, FO: $7.11).
> - **Introduction of a higher tier Additional Hourly Payment** once a Pilot exceeds 75 flying hours in a roster period at a rate from $156 for a First Officer and $250 for a Captain;
> - **Ability to opt in/out of airport duty** once every 12 months;
> - **Removal of 8 week notice period** – instead remaining at a 4 week notice period;
> - **Clarity around A Days** with explicit wording in the proposed Agreement that A Day cannot be converted into a reserve period;
> - **At 5 hours from the end of an RA period, no duty can be assigned** – unless by agreement.
>
> This is in addition to the benefits in the previous proposed EA including:
>
> - **An improved accommodation selection process** with an agreed list of accommodation at non-capital city ports.
> - **Introduced a limitation on the maximum number of reserve periods (to seven)** in a roster period. This is an entirely new limitation where previously no restriction existed.
> - **Changes to a minimum of 4 paired days off along with a minimum of 9 days** off per 28-day roster period.
> - Introduced a **documented selection and promotion process** that provides increased transparency in the career advancement process.
>
> …[40]

[29] On 22 December 2023, this further version of the proposed agreement was put to the pilots for voting on 3 January 2024 (the 22 December Proposed Agreement). The 22 December Proposed Agreement is annexed to this decision at Attachment A;[41] It was not voted up.[42]

[30] On 23 January 2024, the AFAP wrote to Network outlining seven potential issues said to have been raised by the AFAP members as being 'crucial for potential endorsement'.[43] An extract of the AFAP's correspondence reads as follows:

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[38] Ibid [21].

[39] Ibid [22].

[40] Ibid Attachment 6.

[41] Ibid [23] Attachment 7.

[42] Ibid [24].

[43] Ibid [25].

> …we can now confirm that the main areas that the membership have flagged as being crucial for a potential endorsement by the pilot group, are as follows (in no order of priority):
>
> 1. 2 Hour sign-on
> 2. No 4am starts after days off
> 3. Business class duty travel
> 4. DHA rate as other Qantas entities
> 5. Increased overtime rate
> 6. 10 days off per roster period
> 7. A revised rostering appendix to spell out more clearly rostering protections…[44]

[31] On 1 February 2024, Mr Nell of the TWU wrote to Network outlining three issues that TWU members 'would like to see addressed'.[45] The three issues were stated in the following terms:

> 1. Additional Hours rate – the Tier 2 rate to be applicable for any flying hours flown above 59 per roster period.
> 2. Number of RDOS – to be increased to 10.
> 3. Clearer (less ambiguous) wording in relation to rostering provisions.[46]

[32] On 2 February 2024, Lungaka Mbedla of the AIPA wrote to Network indicating that it had recently surveyed its members, and as a result it proposed changes to the proposed agreement in relation to two issues. Those two issues were:

> AIPA's view is that further changes are needed to get the proposed EA over the line. Accordingly, we propose the following changes based on feedback from our members:
>
> 1. 10 RDOs, and
> 2. Removal of tier 1 of the Additional Hourly Payment, so that all hours flown in excess of 59 hours attract the higher tier 2 rate.[47]

[33] At 2.22PM on 2 February 2024, Network responded to the AFAP's email dated 23 January 2024, informing the AFAP that five cost items were now 'unagreed' for the purpose of a 'Workplace Determination' and included the following:

> During bargaining and throughout the section 240 conferences that led to in-principle agreement twice being reached, the Company has (repeatedly) made clear its position that it could only agree to concessions on the basis that:
>
> (1) agreement to a particular item was subject to agreement on the overall package; and
> (2) the overall package could not exceed a particular cost to the Company…

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[44] Ibid Attachment 8.

[45] Ibid [26].

[46] Ibid Attachment 9.

[47] Ibid Attachment 10.

Terms now unagreed

As it appears that the AFAP is (or at list its members are) now pursuing further improvements (albeit some vaguely expressed) on top of the matters that the Company was prepared to agree to in the package put forward in the proposed agreement, certain terms contained in the proposed agreement will, of necessity, become matters at issue for the purposes of any intractable bargaining related workplace determination.

Those matters now unagreed are:

- improvements made to salary tables (including the new Year 7 and 10 salaries)
- DHA
- Backpay
- improvements in the Additional Hourly Payment rate and structure
- RDO provisions – definition of an RDO and restrictions around an RDO…

If any further improvements are sought which will drive up the cost of any agreement or workplace determination, other significant cost items which the Company was otherwise prepared to agree to, will also be at issue. Without limitation, the Company's position on Training Pilot allowances, the number of RDOs and the rostering of and utilisation of Available Days would also need to be considered.[48]

[34] At 2:27pm on 2 February 2024, Network wrote to the TWU and the AIPA in response to their correspondence, in which it informed the AIPA and the TWU that five cost items were now 'unagreed' for the purpose of a 'Workplace Determination':

Relevantly, as the unions appear to be pursuing further improvements on top of the matters that the Company was prepared to agree to in the package put forward in the proposed agreement, certain terms contained in the proposed agreement will, of necessity, become matters at issue for the purposes of any intractable bargaining related workplace determination.

Those matters now unagreed are:

- improvements made to salary tables (including the new Year 7 and 10 salaries)
- DHA
- Backpay
- improvements in the Additional Hourly Payment rate and structure
- RDO provisions – definition of an RDO and restrictions around an RDO…

If any further improvements are sought which will drive up the cost of any agreement or workplace determination, other significant cost items which the Company was otherwise prepared to agree to, will also be at issue. Without limitation, the Company's position on Training Pilot allowances, the number of RDOs and the rostering of and utilisation of Available Days would also need to be considered.[49]

[35] On 5 February 2024, Network filed an application under s 234 of the Act.[50]

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[48] Ibid Attachment 11.

[49] Ibid Attachment 12.

[50] Ibid [30].

[36] On 29 February 2024, a further version of the proposed agreement was again put to the pilots for voting (the **29 February Proposed Agreement**). The 29 February Proposed Agreement was the same as the 22 December Proposed Agreement.

[37] The AFAP, the AIPA and the TWU did not endorse a 'yes' vote for the 29 February Proposed Agreement to their respective members.[51]

[38] On 5 March 2024, the AFAP wrote to Network.[52] In that correspondence, the AFAP alleged that Network were not meeting the good faith bargaining requirements and advised that it was 'in agreement on all of the terms of the proposed agreement other than the terms detailed within the attachment to this letter. You will note this sets out specifically the 7 points we had previously advised the Company of following the surveying of members'.[53]

[39] In respect of the 'proposed agreement' referred to in the AFAP's correspondence of 5 March 2024, the AFAP correspondence identifies that the 'proposed agreement' was in the same form as that voted upon by employees in January 2024 and that notwithstanding Network's assertion that five matters that previously been agreed were now no longer agreed, the company had in fact reinstated those matters (presumedly in that proposed agreement):

> 1. I refer to the email from Network Aviation Pty Ltd (the Company) on 28 February 2024, advising employees that:
>
>   a. the Company proposes to submit a proposed agreement (the proposed agreement) for a vote of the employees;
>   b. the proposed agreement is in the same form as that voted upon by the employees in January 2024; and
>   c. the voting period will open on Friday 8 March and close on Tuesday 12 March 2024…
>
> 4. As you are aware, following the last unsuccessful vote, we:
>
>   a. dutifully spent time surveying our members on multiple occasions to seek to identify with more precision the matters that need to be improved to bring about a successful vote;
>   b. provided a list of these matters; and
>   c. sought to meet with you to negotiate these matters.
>
> 5. However, you have:
>
>   a. rejected out attempts to meet with you;
>   b. asserted that 5 matters, that were previously agreed, are now unagreed;
>   c. filed an intractable bargaining application; and
>   d. now, unilaterally and without any prior notice to us put the proposed agreement out for voting, reinstating the 5 matters.

[51] Ibid [32].

[52] Ibid [33].

[53] Ibid Attachment 14.

> 6. You have also advised employees in the 29 February 2024 email that if the proposed agreement is not approved the Company will again withdraw agreement in respect of the 5 agreed matters.[54]

[40] On 8 March 2024, Network responded to the AFAP's correspondence of 5 March 2024, denying that it was not meeting the good faith bargaining requirements and advising AFAP that 'as you know, bargaining has proceeded on the basis of an overall package, with nothing being agreed until everything is agreed'.[55] In that same correspondence of 8 March 2024, Network stated that 'the Company has made clear that it has put other items in issue, which was a necessary response to the AFAP's pursuit of new claims involving additional cost'.[56]

[41] The voting period for the 29 February Proposed Agreement opened on 8 March 2024 and closed on 12 March 2024.[57] The 29 February Proposed Agreement was not voted up.[58] The result of that ballot was a 76.72% 'no' vote as a percentage of valid votes.[59]

[42] On 15 March 2024, the Commission made an intractable bargaining declaration which specified a post-declaration negotiating period of 13 days, concluding on 28 March 2024.[60]

[43] On 22 March 2024, Network wrote to the unions outlining its position in respect of the 'agreed terms' for the proposed agreement. In that correspondence, Network stated its position that the 'agreed terms' between the bargaining representatives were all of the terms of the 22 December Proposed Agreement, save for 11 items:

> As you know, on 10 November 2023 the bargaining representatives reached in-principle agreement in respect of the terms of the proposed agreement. Each of the unions positively endorsed that proposed agreement. After that vote was not endorsed at a ballot, changes were made to the proposed agreement, including the introduction of a DHA and reduced base salary for low experiences First Officers (LE FO Rate). In respect of that proposed agreement, it was endorsed by the AFAP and the TWU. To our understanding, it was also endorsed by AIPA, save that AIPA had expressed concerns about, and could not be said to have agreed with, the LE FO Rate.
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> Thereafter:
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> - On 23 January 2024, the AFAP raised seven issues.
> - On 1 February 2024, the TWU raised three issues.
> - On 2 February 2024, AIPA raised two issues (both of which were raised by the TWU).
> - On 5 February 2024 and before filing the IBD application, Network made clear that it did not agree to five issues.

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[54] Ibid Attachment 14.

[55] Ibid [34].

[56] Ibid Attachment 15.

[57] Ibid [35].

[58] Ibid.

[59] Ibid.

[60] Ibid [36].

As a result, as at the date the application was filed, it is Network's position that the 'agreed terms' between the bargaining representatives were all of the terms of the proposed agreement put to the pilots in December 2023 (voting in January 2024), save for the following:

	Claim	Bargaining representative	EA clause
1	2 hour sign on	AFAP	N/A proposed new clause 20.6.3
2	No 4am starts after days off	AFAP	20.1.4
3	Business class duty travel	AFAP	N/A proposed clause (possibly in 9.27.1)
4	DHA rate	AFAP, Network	10.6, Schedule 1
5	Overtime rate	AFAP, AIPA, TWU, Network	10.8.5
6	10 days off per roster period	AFAP, AIPA, TWU	20.1.1
7	Revised rostering provisions	AFAP, TWU	20
8	LE FO Rate	AIPA	10.3, 10.4
9	Improvements to salary tables	Network	10.1-10.4
10	Backpay	Network	10.1, 10.2
11	RDO provisions	Network	201.

We note that in correspondence of 5 March 2024, the AFAP again confirmed its agreement to all of the terms of the proposed agreement put to the pilots in December 2023 (and again in March 2024), save for the seven items identified above and attributed to the AFAP. There was no change in AIPA or the TWU's position. Therefore, the above also represents the "agreed terms" as at the date of the declaration.[61]

[44] Network also invited each of the unions to confirm their position in respect of the 'agreed terms' for the proposed agreement, which each union did, as follows:[62]

a) on 26 March 2024, the TWU informed that its position in respect of the 'agreed terms' between bargaining representatives was that all terms included in the 22 December Proposed Agreement were agreed save for the 11 items as listed above;[63]
b) on 27 March 2024, AIPA also informed that its position in respect of the 'agreed terms' between bargaining representatives was that all terms included in the 22 December Proposed Agreement were agreed save for the 11 items as listed above;[64]
c) on 27 March 2024, the AFAP responded to Network's correspondence of 22 March 2024 informing Network that its position was that there are no 'agreed terms' within the meaning of ss 274(3)(a) and 274(3)(b) of the Act.[65]

[45] An extract from Network's correspondence concerning the 'terms' not agreed is annexed as Attachment B.

[61] Ibid Attachment 16.

[62] Ibid [37].

[63] Ibid [38] Attachment 17.

[64] Ibid [39] Attachment 18.

[65] Ibid [40] Attachment 19.

3. Statutory framework

[46] With the intractable bargaining declaration having been made and the post-declaration negotiation period of 13 days having passed, the provisions of Division 4 of Part 2-5 of the Act, which deal with the making by the Commission of intractable bargaining workplace determinations, are invoked.

[47] We have observed that s 269 relevantly requires that, where an intractable bargaining declaration has been made, the Commission must make a workplace determination as quickly as possible after the end of the post-declaration negotiation period.

[48] Sections 270(1)(a) and 270(2) of the Act specify that, amongst other things, the intractable bargaining workplace determination must include the 'agreed terms' and terms that the Commission considers 'deal with the matters that were still at issue' at either the time of the intractable bargaining declaration or, if there was a post-declaration negotiating period, the end of that period.

[49] An 'agreed term' for an intractable bargaining workplace determination is defined in s 274. That section is entitled 'Agreed terms for workplace determinations'. Section 274(2) details what an 'agreed term' for an industrial relation workplace determination is, whilst s 274(3) addresses 'agreed terms' for intractable bargaining workplace determinations. The latter section is set out in full at paragraph [4] of this decision, therefore proving unnecessary to repeat.

[50] As was identified by the parties, s 274(3) in its current form was inserted into the Act by s 70C in Schedule 1 to the *Closing Loopholes No.2 Act*[66] (the **Closing Loopholes No.2 Act**). That provision repealed the extant s 274(3) and substituted it with the current s 274(3). By s 2 of the Closing Loopholes No.2 Act, this provision commenced operation when the Closing Loopholes No.2 Act, received Royal Assent on 27 February 2024.

[51] An express transitional provision at clause 110 (subclause 2) of Schedule 1 to the Act provides that that new provision applies to any determinations – that is the workplace determination - made on or after commencement. That is, intractable bargaining determinations made on or after the commencement of Part 5A (regardless of when the application for an intractable bargaining declaration or the intractable bargaining declaration was made).[67]

[52] We now turn to the background of the insertion of s 274(3) in its current form and other extrinsic materials including the *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill* (the **Revised EM**).

[53] Prior to the amendment effected by the Closing Loophole No.2 Act, s 274(3) was in the following terms:

> An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at which of the following times applies, agreed should be included in the agreement:

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[66] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

[67] Ibid, cl 110 Schedule 1.

(a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the termination relates – at the end of the post-declaration negotiating period;

(b) otherwise – at the time the intractable bargaining declaration was made.

[54] Section 274(3) was originally contained in the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (the **Closing Loopholes Bill**). The Closing Loopholes Bill was divided in the Senate and passed by both Houses of the Commonwealth Parliament on 7 December 2023.[68] The Closing Loopholes Bill, which became the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), did not include the amendments to s 274(3), which were ultimately passed by the Commonwealth Parliament on 7 February in the *Fair Work Legislation Closing Loopholes No.2) Bill 2024* which became the Closing Loopholes No.2 Act.

[55] The Revised EM sets out the purpose and intent of s 274(3), noting that s 274(3) is intended to operate *cumulatively* such that additional terms may become 'agreed terms', at each step. The Revised EM clarifies that once a term is an 'agreed term' according to any of paragraphs 273(3)(a)-(c), it remains an 'agreed term' and cannot later become a term dealing with a matter still at issue or be left out of the determination.[69] It is intended that this approach would narrow the matters still at issue at each stage.[70]

[56] According to the Revised EM, s 274(3) would ensure that bargaining representatives cannot retract their agreement to proposed terms once an intractable bargaining declaration application is made, explaining:

> If a bargaining representative sought to retract their agreement to a term at an earlier stage or resisted agreeing to a term in an attempt to have the matter determined by the FWC, the good faith bargaining requirements in existing section 228 may be relevant. In determining which terms to include in a workplace determination, the Full Bench (under existing section 275 of the FW Act) must take into account factors included whether the conduct of bargaining representatives was reasonable and the extent to which bargaining representatives have complied with good faith bargaining.[71]

[57] In summary and to recount, the dates for assessment of when a term is agreed in accordance with s 274(3) of the Act, is each of the following times[72]:

a) when the application for an intractable bargaining declaration is lodged;
b) when the intractable bargaining declaration is made; and
c) at the end of any post-declaration negotiating period, if there is one.

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[68] See the explanation in the *Fair Work Amendment (Closing Loopholes) Bill 2023* (Cth).

[69] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [600] (**Revised EM**).

[70] Ibid.

[71] Ibid [601].

[72] Ibid [600].

4. Submissions

[58] Each of the parties filed written submissions and at the hearing, comprehensive oral submissions were made. An abridged version of those submissions follow.

4.1 Network's submissions

[59] Network's submissions, in part, focused on the position adopted by the AFAP. Network frames the AFAP's position in the following terms.

[60] First, in the absence of agreement from all bargaining representatives to all terms, there could not be agreement on anything.

[61] Secondly, because, either on 22 December 2023 through to 8 January 2024, the AIPA had not given agreement to one clause, or, alternatively, before 5 February 2024, the parties had mutually withdrawn agreement to a number of other clauses, of necessity, there could not have been agreement to anything on 5 February 2024.

[62] Thirdly, the AFAP appears to suggest that, upon the failing of the employee ballot (presumedly for the 22 December Proposed Agreement), any agreement there was between the bargaining representatives was effectively washed away.

[63] In terms of the legislative provisions and applicable legal principles, Network submits that there is broad, if not total, alignment between the parties. Network submits that all parties had referred to *UFU*. Further, whilst *UFU* was decided in a slightly different legislative context before the Closing Loopholes No. 2 Act closed a loophole itself created by the Closing Loopholes No. 1 Act and there may be a question, in an appropriate case, as to what, if any, impact those amendments have on the standing of *UFU*, at least parts of *UFU* were agreed with for the purpose of the hearing.

[64] Network contends the agreement, as referenced in s 274(3), must co-exist at the three points in time as identified in the statute, those points being cumulative. However , it observes that all parties referred to the point in time as 5 February 2024 only, the other two dates, that is when the declaration was made and at the end of the post-declaration bargaining period, did not add to the debate because no further terms were agreed at those times.

[65] Network further contends that whilst s 274(3) is a definitional provision which defines 'agreed terms', the section itself does not actually define what is meant by 'agreed', as was identified in *UFU*.[73] According to Network, the relevant agreement being spoken of in the statutory provision, is that between the four bargaining representatives.[74]

[66] Expanding upon the concept of what 'agreed' means and what terms should be included in the proposed agreement, Network essentially draws upon the statement of principles in *UFU*, citing the proposition that when assessing what is agreed for the purposes of s 274(3), there might be a 'spectrum of consensual dealings', from formal contracts on the one hand to mere

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[73] See *UFU v FRV* (n 11) [111] and [140].

[74] Ibid see [108].

understandings on the other[75] However, at all parts of that spectrum there remained a requirement for a meeting of minds or consensus.[76]

[67] In line with *UFU*, Network expresses that the question of whether it was agreed that particular terms 'should be included' in a proposed agreement, involves a forward-looking exercise that is determined objectively at the applicable time required by Act.[77] Ultimately, whether an agreement existed, was an objective consideration, said Network.[78]

[68] Adopting the submissions of the TWU,[79] which Network acknowledged essentially referred to the statements of principle in *UFU*, Network accepted:

> [20] 'Agreed is the past participle of 'agree; and the phrase 'have agreed' deploys the past tense to indicate that the focus is on whether the parties had, at any of the times detailed, been of 'one mind' or had 'come to an "understanding" or had "reached consensus"'[80] about a particular subject, viz., the terms that should be included in the agreement.
>
> [21] 'The Agreement' is a reference to the proposed agreement the subject of the negotiations and bargaining.
>
> [22] The 'consensus' or 'acceptance' of the bargaining representatives is about terms that 'should be included in the agreement'. The word 'should' is used as a modal verb to indicate what ought happen or occur, but not necessarily what will occur. It is future focused[81] and conveys that the agreement of the bargaining representatives is about terms that ultimately should be included in a proposed agreement to be made by the employer and voting group of employees.

[69] Network further submits that in addition to the above mentioned propositions, the Full Bench in *UFU* acknowledged that the reality of bargaining for an enterprise agreement can provide important context for discerning whether bargaining representatives had agreed certain terms that should be included in the proposed agreement. Network submits that it is a question of substance, not form, and that ritual incantations of buzzwords, is not enough.

[70] Turning to the reality of bargaining as it had unfolded from the 30 September Proposed Agreement,[82] the following points can be distilled from Network's submissions and the evidence before the Commission:

a) the 30 September Proposed Agreement, was agreed to by the TWU, but not the AIPA or the AFAP, the 29 November Proposed Agreement, was agreed to by all bargaining representatives, and the 22 December Proposed Agreement, also

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[75] Ibid [142].

[76] Ibid at [142].

[77] Ibid at [144] and [145].

[78] Ibid, see [112] and [145].

[79] TWU Outline of Submissions (n 9) [20] to [22]; see *UFU v FRV* (n 11) [112] and [145].

[80] *UFU v FRV* (n 11) [140]-[143].

[81] Ibid [144].

[82] SOAF (n 10) Attachment 3; Digital Hearing Book (**DHB**), 23-55.

commanded the agreement of all bargaining representatives, save for one clause which was not agreed to by the AIPA;[83]

b) the 29 November Proposed Agreement runs for just short of 40 pages – it is quite detailed. Whilst there were changes from the 30 September Proposed Agreement through to the 29 November Proposed Agreement, in a holistic sense, those variations, were distinctly minor;[84]

c) examples of the changes between the 30 September Proposed Agreement and 29 November Proposed Agreement included minor language changes and some new clauses. Clause 9.25, for example, was a new clause dealing with the selection and employment process. Clause 9.27.7 addressed accommodation at non-capital cities for travelling pilots. There were some changes to the pay rates and operative dates at clause 10,[85] and there were some changes to the Schedule 1 allowances,[86] and also some minor changes to rostering provisions in Part F of that document.[87]

d) virtually every single part of 29 November Proposed Agreement did not change from the 30 September Proposed Agreement and virtually every single part did not change through to the 22 December Proposed Agreement;[88]

e) whilst with respect to the 30 September Proposed Agreement, the AFAP and the AIPA did not agree to the overall package, a great many clauses – a vast majority, ultimately came to be agreed by those two organisations twice thereafter;

f) there were changes from the 29 November Proposed Agreement to the 22 December Proposed Agreement albeit wages and allowances did not move, other than one particular allowance,[89] and the changes were less than those between the 30 September Proposed Agreement and the 29 November Proposed Agreement (*see* the email from Captain Bartlett to employees dated 21 December 2023,[90] which sets out those changes):

   i. the replacement of the FIFO allowance with the DHA (*see* clause 10.6[91] and Schedule 1 (allowances)[92] of the 22 December Proposed Agreement);

   ii. the introduction of a higher tier Additional Hourly Payment (*see* clause 10.8.5 of the 22 December Proposed Agreement and the introduction of a second tier[93] – previously it was all hours over 59 received the same allowance. This change gives effect to a certain allowance over 59 hours and a higher allowance for hours after 75;[94]

   iii. the ability to opt in and out of airport duty at clause 20.5.1 of the 22 December Proposed Agreement;[95]

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[83] Transcript PN49.

[84] Ibid PN50.

[85] SOAF (n 10) Attachment 5; DHB (n 82) 80 and 81.

[86] Ibid; DHB 91.

[87] Ibid; DHB 87.

[88] Transcript PN52.

[89] Ibid PN54.

[90] SOAF (n 10) Attachment 6; DHB (n 82) 95.

[91] DHB 122.

[92] Ibid 132.

[93] Ibid 123.

[94] DHB 132; Schedule 1 of the 22 December Proposed Agreement.

[95] DHB 129.

iv. the removal of eight-week notice period at clause 9.7.1 of the 22 December Proposed Agreement;[96]
v. the provision of clarity around 'A' days at clause 20.4 of the 22 December Proposed Agreement;[97]
vi. change to duty assignments after five hours at clause 20.3.5 of the 22 December Proposed Agreement;[98] and
vii. the introduction of the low-experience first officer rate at clauses 10.3 and 10.4 of the 22 December Proposed Agreement).[99]

[71] Network further notes that there were two other very minor changes to the 22 December Proposed Agreement, including at clause 10.10 regarding the automation of the claims process for allowances and at clause 20 regarding the equitable allocation of duty hours to pilots.[100] However, the sum total is that all of the clauses in the 22 December Proposed Agreement were agreed by everyone, apart from, of course, the low-experience flying officer rate.[101]

[72] Network submits that it is in that context between 8 January 2024, when the ballot closed for the 22 December Proposed Agreement and 5 February 2024, that the parties put in issue ten further matters.[102] However, importantly, said Network, and as acknowledged by each of the AIPA and the TWU, there was no evidence of any retraction, retreat or resiling with respect to all of those other agreed matters from any bargaining representatives at any point in time, in that period.[103]

[73] Returning to the AFAP's argument, Network presses that the AFAP is driven to contend that because some magic words were uttered or written at some point, a blanket is thrown over the whole of the bargaining with some overarching condition or reservation, the necessary consequence of which is that if there is even one word or one number in dispute or not agreed by any bargaining representative at any of the statutory times in s 274(3), the inevitable consequence is that there is no agreement to anything.[104]

[74] Insofar as there was no evidence of reservation or retraction by the bargaining representatives, beyond the 'incantation', Network asks that the Commission refer to the AFAP's letter of 5 March 2024[105] and the TWU's submission that the idea that the AFAP had retracted its agreement to the terms of the 22 December Proposed Agreement by 5 February 2024, was rejected by that same letter.[106]

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[96] Ibid 108.

[97] Ibid 129.

[98] Ibid 129.

[99] Transcript PN58-60.

[100] Ibid PN60-63.

[101] Ibid PN64.

[102] Ibid PN65.

[103] Ibid PN65.

[104] Ibid PN66.

[105] DHB (n 82) 148-154; SOAF (n 10) Attachment 14.

[106] Ibid.

[75] Network extracted certain paragraphs from the AFAP's letter of 5 March 2024, including the following:

> However you have:
>
> (b) asserted that five matters that were previously agreed are now unagreed.[107]

[76] According to Network, this paragraph referred to Network's letter of 2 February 2024, just before the filing of the application, and from this letter, that is, as of 2 February 2024, at least, the AFAP itself regarded those matters as agreed and every other matter as agreed, save for the ones that they had presently in issue.[108]

[77] At paragraph 6 and 7 of the AFAP's letter of 5 March 2024, the following was stated:

> 6. You have also advised employees in the 29 February 2024 email that if the proposed agreement is not approved, the company will again withdraw agreement in respect of the five agreed matters.[109]
>
> 7. The above conduct by the Company constitutes a failure to comply with the good faith bargaining requirements in the FW Act. IN order to rectify this non-compliance, we request that you agree to:
>
> a. call off the vote on the proposal agreement;
> b. resume bargaining meeting with the bargaining representatives;
> c. give genuine consideration to the list of matters we have provided; and
> d. refrain from the capricious and unfair withdrawal of agreed items.

[78] Network observed that as of 5 March 2024, the AFAP was saying, 'We don't want you to withdraw any other agreed items' when their argument before the Commission was to now say that, at the same time, there were no 'agreed terms' whatsoever. Network asks rhetorically, in our view, 'how could the withdrawal of agreement to a term that is not agreed possibly be capricious or unfair?' On this basis, argues Network, the factual premise for the AFAP's letter was directly inconsistent with the 'new case' that the AFAP were now advancing before the Full Bench.

[79] To further emphasise this point, Network refers to paragraph 9 of the AFAP's letter of 5 March 2024, which read as follows:

> It is concerning that rather than working with us to resolve the points of disagreement, the company is using the threat of withdrawing agreement on currently agreed matters to gain a strategic advantage.

[80] Network submits that the case presented by the AFAP is a tactical reversal of a previously held position and the better and more accurate characterisation of what the bargaining representatives are doing is found in, for example, paragraph 7 of the AIPA's submissions, where the AIPA states:

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[107] Transcript PN76-77.

[108] Ibid PN78.

[109] Ibid PN80.

> Fairly read in context, what was happening was that the employee bargaining representatives were reserving to themselves the ability to change their position in response to changes of position from one or other of the bargaining representatives.[110]

4.2 The AIPA's submissions

[81] With respect to the interpretation of s 270 of the Act, the AIPA submits that in making an intractable bargaining determination in circumstances where, as here, there has been a post-determination negotiating period, the Commission must include: (a) any 'agreed terms' (*see* s 270(2) of the Act); and (b) separately, terms which in the Commission's view deal with 'the matters that were still at issue' at the end of the negotiating period (*see* s 270(3)(a)). The AIPA observed that there had been an apparent deliberate choice to focus on 'matters' in s 270(3) as distinct from 'terms' – the former importing a focus on more general substance – what were the things the parties were at odds on – while the latter, in contrast, suggested a concrete view, although unlikely that specific drafting would need to be agreed.

[82] Noting that s 274(3) defines 'agreed terms' and that the section had been recently amended by the Closing Loopholes No.2 Act, the AIPA says that the use of 'and' makes it clear that the provision is meant to operate cumulatively, that is, once something is agreed at one step it remains so for the purpose of the section. Such approach, said the AIPA, aligned with that expressed in the Revised EM.

[83] The AIPA submits that the section is not on its face ambiguous and to the extent that any ambiguity is suggested, it is resolvable by reference to the Revised EM. The entire point of the section, said the AIPA, is to prevent bargaining representatives from resiling from positions which had, in substance, been agreed should form part of any enterprise agreement to gain a later tactical advantage.

[84] According to the AIPA, the factual position as of 5 February 2024, was as follows:

a) as at 10 November 2023, the bargaining representatives had reached complete agreement on all the terms that should be included in the proposed agreement;
b) following an unsuccessful vote, over the course of 23 January 2024 to 2 February 2024 the three employee bargaining representatives advanced in aggregate eight issues that they wanted addressed, reflecting a change in position such that the corresponding terms could be said to be not agreed; and
c) similarly, on 2 February 2024 Network identified five matters in response (i.e. concessions that it had previously made) that were no longer agreed.

[85] In its correspondence on 2 February 2024, Network had said that its position in bargaining was that 'agreement to a particular item was subject to agreement on the overall package'.[111] The AIPA submits that this, when fairly read in context, is confirmation that if employee bargaining representatives changed their position on a certain point, it might trigger Network adjusting its position in response, on different but related issues. The AIPA presses that this is a rational response, and what in fact happened.

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[110] DHB (n 82) 246.

[111] SOAF (n 10) Attachment 11; SOAF [28].

[86] The AIPA submits that the abovementioned reading is not contradicted by Network's subsequent (perhaps regrettably bullish) correspondence of 8 March 2024, stating 'nothing being agreed until everything is agreed'.[112] According to the AIPA this letter, framed in stronger terms than Network's 1 March 2023 use of a similar phrase, which in context really is more about caution as to prejudice than anything else – is best understood as late-stage puffery designed to put pressure on employees to accept the deal they had just rejected, following Network's tactical decision to re-ballot it before the intractable bargaining declaration was heard.

[87] The AIPA observes that the letter of 8 March 2024 post-dates the 2 February 2024 correspondence, which in its terms puts forward a completely different position. Even if Network had changed its position, and for a moment wanted to blow up the existing consensus entirely, s 274(3) operates to prevent it from doing so post application, says the AIPA.

[88] Regarding the statement 'nothing is agreed until everything is agreed', the AIPA submits that in the industrial context that it reflects (depending on the circumstances) the following:

a) first, a position that concessions made are apt to be withdrawn if the other side's bargaining position mutates, which simply reflects the inherently fluid nature of bargaining; or
b) second, performance art of the kind that Network was plainly engaging in on 8 March 2024.

[89] The AIPA concludes that as nothing was further agreed, it is not necessary to consider the other two limbs of s 274(3). The 'agreed terms' for the purposes of s 270(3) are every term found in the proposed agreement balloted over December – January 2024, aside from the eleven identified items.

4.3 The TWU's submissions

[90] The TWU submits that the question of what, if any 'agreed terms' there are, raises consideration for the first time the proper construction and application of s 274(3) of the Act, as amended by the Closing Loopholes No.2 Act.

[91] Having outlined the legislative history of the provision and addressed that each subparagraph deals with a particular point in time and the reference to 'bargaining representative' refers to one of either appointment or default, the TWU observed that each subparagraph requires ascertainment of terms which the relevant bargaining representatives 'had agreed' at the times nominated 'should be included in the agreement'.

[92] In respect of the three critical dates for analysis of 'agreed terms', the TWU submits, as do the other parties, that those dates are: (a) 5 February 2024 (the date Network made the application under s 234); (b) 15 March 2024, when the declaration was made; and (c) 28 March 2024, at the end of the post-declaration negotiating period.

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[112] Ibid Attachment 15; SOAF [34].

[93] The TWU provided a condensed history in respect of any terms that were agreed for the purpose of the 5 February 2024 date, an abridged version follows:

a) on 10 November 2023, Network and the unions reached what was described as an 'in-principle' agreement about the contents of a proposed new agreement,[113] and endorsed a 'yes vote' it – it is therefore apparent that each of the unions and Network concurred about the terms that should be included in a new agreement;
b) the vote for the proposed agreement was a failure;[114]
c) further discussions ensued between the AFAP and Network as a consequence of the unsuccessful vote, the upshot of which was that the AFAP made a proposal which was accepted by Network and the AFAP (together with the TWU and AIPA) agreed to endorse the proposed new agreement and advocate for a 'yes' vote amongst the voting group;[115]
d) at this point, there had been no resiling by any bargaining representatives from the terms the subject of the 29 November Proposed Agreement but the addition of further terms which concerned the AFAP members and which the AFAP and other bargaining representatives concurred should be included in the agreement;
e) a further proposed agreement was put to the vote and the vote was, again, unsuccessful;[116]
f) on 23 January 2024, the AFAP sent correspondence to Network detailing seven issues raised by its members which it said were 'crucial for potential endorsement'.[117] It did not, said the TWU indicate that it had ceased to agree or concur that the terms contained in the agreement put to a vote in late December 2023 should not be included in the proposed agreement;
g) on 1 February 2024, the TWU sent correspondence to Network outlining three issues it said its members would like to see addressed.[118] The TWU did not resile from its agreement with the proposition that the terms set out in the 22 December Proposed Agreement should be included in the agreement;
h) on 2 February 2024, the AIPA wrote to Network outlining that as a result of a survey of its members, it proposed two changes to the proposed agreement, which, if made, could procure agreement.[119] The AIPA's correspondence did not otherwise impact its position in relation to the balance of the 'agreed terms';
i) later on 2 February 2024, Network corresponded with the AFAP in purported response to the AFAP's 23 January 2024 correspondence.[120] Notwithstanding that the AFAP had not purported to 'unagree' any terms and had simply made suggestions about revisions to the proposed agreement to secure majority support Network peremptorily pronounced that five matters were 'unagreed'. The five matters that Network pronounced were unagreed were: (i) improvement to salary

[113] Ibid [17]-[18].

[114] Ibid [19]-[20].

[115] [2024] FWC 685 [112]-[113].

[116] SOAF (n 10) [23]-[24].

[117] Ibid [25].

[118] Ibid [26].

[119] Ibid [27].

[120] Ibid Attachment 11.

tables; (ii) DHA; (iii) backpay; (iv) improvement to the additional hourly payment rate and structure; and (v) RDO provisions.

[94] The TWU submits that Network did not indicate that it was 'unagreeing' to any other terms. Network penned similar correspondence to the TWU and the AIPA which it also sent on 2 February 2024.[121] Again, said the TWU, that correspondence did not indicate Network was resiling from its position that it agreed to all terms, just the five 'cost items'.

[95] The TWU holds the view that as at 5 February 2024, the bargaining representatives agreed that the terms outlined in the 22 December Proposed Agreement (with the exception of those outlined in Attachment B) should be included in the proposed agreement, and as such those terms were there 'agreed terms' for the purposes of s 274(3) and must be included, by virtue of s 270(2), in the workplace determination.

[96] The TWU submits that none of the above is controverted by correspondence from Network summarising 'at a high level' the current state of bargaining that 'nothing is agreed finally until everything is agreed'.[122] The AFAP had agreed, by reason of its concurrence with the in-principle deal and endorsement of the agreements put to the votes in November 2023 and December 2023, that the terms of those agreements should be included in the agreement. The TWU says it is nonsensical to suggest otherwise. According to the TWU, the AFAP did not 'genuinely reserve' its position on particular terms or the entire agreement.[123]

[97] The TWU further submits that any attempt to place reliance on Network's 8 March 2024 correspondence, which refers to bargaining having proceeded on the basis of an 'overall package' with 'nothing being agreed until everything is agreed', should also be rejected.[124] The bargaining representatives had agreed in November and December 2023 what terms should be included in the proposed agreement and there had been no conduct by any of them that would suggest that *all* terms were now 'unagreed'. The TWU pressed that the offhand remark in Network's 8 March 2023 correspondence was doltish and irrelevant. It did not (and could not) alter the objective reality about what had in fact occurred in November and December 2023, nor the state of affairs extant as at 5 February 2024.

4.4 The AFAP's submissions

[98] As would be evident by now, the AFAP sits in opposition to the positions advanced by the other parties. It submits that there are no 'agreed terms' for the purposes of s 270(2), for the following reasons.

[99] The AFAP notes that to resolve the preliminary issue as to whether there are any 'agreed terms', the Commission will need to construe s 274(3) of the Act and to that end, the Commission has the benefit of clear guidance from the Full Bench in *UFU*.

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[121] Ibid Attachment 12.

[122] Ibid Attachment 1.

[123] Cf *UFU v FRV* (n 11) [147].

[124] SOAF (n 10) Attachment 15.

[100] The AFAP directs the Commission's attention to certain passages of that decision, including paragraph [108] and thereafter paragraphs [141] to [142], [143], and [145]. The AFAP further draws attention to what was said by the Full Bench in respect to terms being conditionally agreed:

> Section 274(3) defines agreed terms for an intractable bargaining workplace determination as a term that the bargaining representatives have (at the relevant time), agreed "should be included in the agreement." This directs attention to the potential final form of any agreement. While parties may sometimes agree that, regardless of any other issues, some terms should go in an agreement, s 274(3) does not extend to terms where there is a conditional reservation attached to all terms (or all key terms) being satisfactorily arrived at.
>
> When industrial parties are bargaining, they are doing so to secure a final package that is, overall, better than no new agreement at all. The final package will inevitably include a number of terms that each party is sufficiently happy with and, quite likely, other terms that the parties wished was excluded. Concession through the "give and take" of bargaining before a final package is approved do not, of themselves, indicate that the bargaining representatives consider all the terms up to the point should be included in a final package. They may do so for some terms, but for others they are either expressly or implicitly only doing so on the basis that the final package will be suitable. We consider so much is self-evident in industrial bargaining. What the position will be in a particular bargaining process will be determined on the circumstances of that process.
>
> Similarly, a party that conditionally states (however that condition is expressed) that certain terms should be included in an agreement has not necessarily agreed, as factual reality, that those terms should be included in the agreement. All that party might be conveying is that those terms are agreed on the basis that a satisfactory package will be achieved. A genuine conditional reservation is inconsistent with an agreement that the particular terms being discussed "should" (without reservation) be included in the proposed enterprise agreement. If s 274(3) provided for terms that were conditionally agreed, the position would be different. However, the statute does not provide for conditional agreements about terms and we consider it would constitute a significant alteration to the bargaining dynamic for enterprise agreements under the FW Act if it did so. We do not consider this was Parliament's intention.[125]

[101] The AFAP submits that whilst bargaining has a long history, the facts that are material to the preliminary issue are of short compass.

[102] The AFAP says that at all times bargaining between the parties '…proceeded on the basis of an overall package, with nothing being agreed until everything is agreed.'[126]

[103] The AFAP acknowledges that during bargaining there were four ballots – 30 September Proposed Agreement,[127] 29 November Proposed Agreement,[128] 22 December Proposed Agreement[129] and 29 February Proposed Agreement,[130] all of which were unsuccessful.

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[125] Also see *Australian and International Pilots Association v Qantas Airways Limited* [2013] FWCFB 317 at [18] and *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWCFB 127 at [122].

[126] SOAF (no 10) [34] Attachment 15. Also see SOAF [5], [6], [28]; Aikens Statement (no 10) [18].

[127] Ibid [13]

[128] Ibid [19]

[129] Ibid [23]

[130] Ibid [31]

[104] The third ballot was the last ballot (22 December Proposed Agreement) to be conducted prior to the application for an intractable bargaining declaration being made on 5 February 2024; this date being the point in time provided for in s 274(3)(a).[131]

[105] The AFAP and TWU endorsed a 'yes' vote in the third ballot, but AIPA did not.[132]

[106] On 23 January 2024, the AFAP wrote to Network and outlined seven potential issues that were raised by AFAP members as 'crucial for potential endorsement'.[133] Similarly, on 1 February 2024, the TWU outlined three issues that its members would like to see addressed,[134] and on 2 February 2024, the AIPA sought changes in respect of two issues.[135]

[107] Network wrote to the AFAP on 2 February advising that it no longer agreed to five items which had been included in the 22 December Proposed Agreement.[136]

[108] A fourth ballot was conducted in the period between the application for an intractable bargaining declaration being made and the Commission making the intractable bargaining declaration on 15 March 2024. This date being the point in time provided for ins 274(3)(b).

[109] The AFAP, the TWU and the AIPA did not endorse a 'yes' vote in the fourth ballot for the 29 February Proposed Agreement.[137] During the post-declaration negotiating period the bargaining representatives did not agree on any terms that should be included in the agreement.[138]

[110] The AFAP presses that under s 274(3)(a) the Commission must determine the question of what terms(if any) the bargaining representatives had agreed, as at 5 February 2024, that should be included in the agreement.

[111] The AFAP says the Commission ought to find that bargaining between the parties '…proceeded on the basis of an overall package, with nothing being agreed until everything is agreed.'[139] Thus, any terms to the extent that they were agreed between the parties were in the sense discussed in *UFU* only 'conditionally agreed'. That is to say, on the condition that an entire package was agreed.

[112] According to the AFAP, the facts unequivocally establish that as at 5 February 2024, the parties were not in agreement on the terms of an overall package.

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[131] Ibid [30]

[132] Aikens Statement (no 10) [23]. Also see *Network Aviation v Australian Federation of Air Pilots, Australian and International Pilots Associate & Transport Workers' Union of Australia* [2024] FWC 685 [8].

[133] SOAF (no 10) [25] and Attachment 8.

[134] Ibid [26] and Attachment 9.

[135] Ibid [27] and Attachment 10.

[136] Ibid [28] and Attachment 11.

[137] Ibid [32].

[138] Ibid [37]-[40]; Aikens Statement (no 10) [31]-[39].

[139] Ibid [34] Attachment 15. Also see SOAF [5], [6], [28]; Aikens Statement (no 10) [18].

[113] The AFAP submits that in the period between the rejection of the 22 December Proposed Agreement and 5 February 2024, the AFAP, the TWU and the AIPA each informed Network of changes they wanted to the overall package that form the 22 December Proposed Agreement. Furthermore, on 2 February 2024, Network, informed the AFAP that it no longer agreed to five items that had formed part of the overall package that formed the 22 December Proposed Agreement. AFAP says that this conduct, that is the conduct of the bargaining representatives seeking changes to the overall package, establishes without any doubt there was no agreement on an overall package as at 5 February 2024.

[114] The AFAP say that by their conduct in the period between the rejection of the 22 December Proposed Agreement and 5 February 2024, the bargaining representatives resiled from their support of the overall package that formed the 22 December Proposed Agreement and their agreement that its proposed terms should, without reservation, be included in the proposed agreement.

[115] In respect to the situation concerning the AIPA, the AFAP advances that the facts establish that the AIPA had not agreed to the terms in the overall package that formed the 22 December Proposed Agreement.[140] The significance of this, according to the AFAP, is that the 22 December Proposed Agreement was never agreed to by all of the bargaining representatives, which is plainly required by s 274(3)(a).

[116] The AFAP submits that at the time the declaration was made and at the end of the post declaration negotiating period there were no 'agreed terms'. However, it presses that in the scenario where the Commission accepts the position that there are no 'agreed terms', the AFAP does not expect that there will be a dispute that needs to be determined by the Commission in respect of every single term. Counsel for the AFAP explained that as was the situation in *UFU*, despite there being no 'agreed terms' within the meaning of s 274(3) of the Act, there will be many terms that are uncontroversial and ultimately only a confined list of matters will require substantive determination by the Commission.

5. Consideration

5.1 The interpretation of s 274(3)

[117] The interpretation of s 274(3) of the Act is relevant in this case. The principles of statutory interpretation are often cited, it being accepted that the starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provision was intended to remedy, in addition to the legislative history.[141]

[118] The plurality in *SZTAL v Minister for Immigration and Border Protection*[142] (**SZTAL**) succinctly described the contemporary approach to statutory construction. That description warrants repeating:

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[140] Aikens Statement (no 10) [23].

[141] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 352 at [14] (Kiefel CJ, Nettle and Gordon JJ); *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [59]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 at [26]-[37].

[142] [2017] HCA 34 (Kiefel CJ, Nettle and Gordon JJ).

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[143] (footnotes omitted)

[119] In *SZTAL* the importance of the purposive approach to statutory construction was emphasised. Such an approach is also required by s 15AA of the *Acts Interpretation Act 1901* (Cth) (**AI Act**). It requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object (noting that s 40A of the Act provides that the AI Act as in force on 25 June 2009, applies to the Act). The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. However, s 15AA requires one to construe the Act in the light of its purpose, not to rewrite it.

[120] We observe that the parties have referred to the Revised EM to explain the intent of the newly enacted s 274(3) and as such it is timely to note that reference to extrinsic materials, such as the Revised EM, cannot displace the clear meaning of the legislative text. As the High Court observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (*Alcan*): [144]

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

[121] Returning to s 274(3), a Full Bench of this Commission has, already, considered the interpretation of s 274(3). This fact was not lost on the parties who inevitably emphasised different passages of *UFU*, to support their various contentions. We ourselves are assisted in our interpretation of s 274(3) by *UFU*, and whilst the decision in *UFU* was decided in a different legislative context before the Closing Loopholes No. 2 Act, we are of the view that the reasoning of the Full Bench, in parts, remains instructive for current purposes.

[122] Prior to considering further the decision of *UFU* and its implications for this case, we make the following observations about newly amended s 274(3) and the legislative framework within which it sits.

[123] The objects of the Act can be found in s 3 of Part 1-1.

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[143] Ibid at [14]; also see *Australian Mines and Metals Association Inc v CFMMEU* [2018] FCAFC 223 at [76]-[86].

[144] See: (2009) 239 CLR 27 [47].

[124] Chapter 2, Part 2-5 of the Act, sets out those provisions about workplace determinations. There are two species of determination. One, industrial-action related workplace determinations and the other, intractable bargaining workplace determinations. It is the latter which is of focus here.

[125] Section 270(1) of the Act provides the '*Basic rule*' that an intractable workplace bargaining determination must comply with s 270(4) such that the determination must include prescribed 'terms'.

[126] As to the terms the Commission must include, they are, as previously noted: (a) core terms (*see* s 272); (b) mandatory terms (*see* s 273); (c) any 'agreed terms' (*see* s 270(2) and s 274(3)); and in this case, (d) separately, terms which in the Commission's view deal with 'the matters that were still at issue' at the end of the negotiating period (*see* s 270(3)(a)).

[127] The word 'term' is not defined in the Act. However, when one considers ss 270, 270A, 271, 272, 273, 274 and 275 of the Act, in addition to Part 2-4, it is apparent that the meaning of the word 'term' in Part 2-5 is analogous to the meaning attributed to the word in Part 2-4. The equivalent of the word in other legal settings and oft used in industrial parlance – is a 'clause'.

[128] Section 272 sets out the core terms of a workplace determination. For example, the nominal expiry date. Whilst the s 272(2) specifies the inclusion of a nominal expiry date and provides the upper most limit for the period, it does not instruct the Commission on the specific date. Ultimately, the Commission will decide the nominal expiry date of the determination, as referred to in s 272(2).

[129] The Commission is further obliged to include in the workplace determination the mandatory terms so described in s 273. Those mandatory terms include a term about settling disputes (s 273(2)), a flexibility term (s 273(4)), a consultation term (s 273(5)), and a delegates' rights term (s 274(6)). If the Commission is satisfied that an 'agreed term' for the determination would, if the determination were an enterprise agreement, satisfy the requirements for a settling disputes term,[145] a flexibility term[146] or a consultation term, under Part 2-4,[147] then that 'agreed term' is included in the determination.[148] While we make no comment as to whether specific drafting of an agreed term would be required for reasons later explained, we hold the view that for the Commission to undertake a comparative exercise between any 'agreed terms' for settling disputes, providing for flexibility or consultation and the requirements as set out in Part 2-5,[149] there would need to be substantive certainty about the content of the 'agreed term'.

[130] Regarding terms that deal with 'the matters that were still at issue' at the end of the negotiating period (*see* s 270(3)(a)), the AIPA observed that there had been an apparent deliberate choice by the legislature to focus on 'matters' in s 270(3) as distinct from 'terms' (as referred to in s 270(2)). The AIPA proposed that the former imported a focus on more general

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[145] See *Fair Work Act 2009* (Cth), ss 186(a) and (b) – term about settling disputes.

[146] See *Fair Work Act 2009* (Cth), ss 202(1)(a) and 203 – flexibility term.

[147] See *Fair Work Act 2009* (Cth), s 205(1) – consultation term.

[148] *Fair Work Act 2009* (Cth), ss 273(2)-(5).

[149] See *Fair Work Act 2009* (Cth), ss 186(a) and (b) – term about settling disputes, ss 202(1)(a) and 203 – flexibility term, and s 205(1) – consultation term.

substance – what were the things the parties were at odds on, while the latter, in contrast, suggested a concrete view.

[131] Section 270(3) firstly refers to the determination including 'terms'. The relevant 'terms' in this instance are those that deal with 'matters' that were still at issue at one of two temporal points. We accept that a 'matter' is of more general substance. For example, a 'matter' still in issue might be annual leave. In the determination the Commission would be obliged to include 'terms' that dealt with that 'matter' such as its accrual, amount, the taking of, a direction to take, and so on.

[132] Section 274(3) defines 'agreed terms' as referred to in s 270(2).

[133] Each subsection of s 274(3) deals with a particular point in time: (a) when the application for the intractable bargaining declaration was made; (b) when the intractable bargaining declaration was made; and (c) at the conclusion of any post-declaration period for the declaration.

[134] In respect of the three critical dates for analysis of 'agreed terms', we consider that those dates are, as accepted by the parties: (a) 5 February 2024 (the date Network made the application under s 234); (b) 15 March 2024, when the declaration was made; and (c) 28 March 2024, at the end of the post-declaration negotiating period.

[135] The adoption of the past participle 'agreed' and the phrase 'have agreed' deploys the past tense to indicate the focus is on whether the parties had, at any of the times detailed, been of 'one mind' or had 'come to an understanding' or 'reached consensus'[150] The word 'should' is used as a modal verb to indicate what ought happen or occur, but not necessarily what will occur. It is future focused[151] and conveys that the agreement of the bargaining representatives is about terms that ultimately should be included in a proposed agreement to be made by the employer and voting group of employees.

[136] As noted, each sub-section focuses on the bargaining representatives for the proposed agreement, being the persons who are by default or appointment 'bargaining representatives' for the purposes of s 176 of the Act. Hence, bargaining representatives will be the employer or a person appointed by the employer under s 176(1)(d), a union representing the industrial interests of one or more employees who will be covered by the proposed agreement under s 176(1)(b) or any other person (other than a union or a union official) appointed by an employee under s 176(1)(c).

[137] Subsections 274(3)(a)-(c), in terms, focus on the views and/or intentions of persons who will not necessarily participate in voting on the agreement – such that any consensus between bargaining representatives may, for whatever reason, not be reflected by the employees that the bargaining representatives represent. That is, however, irrelevant for the purpose of s 274(3) which focuses on whether there is a state of affairs of 'agreement' between bargaining representatives about what 'should' be included in a proposed agreement.

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[150] *UFU v FRV* (n 11) [140]-[143].

[151] Ibid [144].

[138] As to the purpose of s 274(3), as amended by the Closing Loopholes No 2 Act, the previous s 274(3) provided that only one of two time points were relevant in determining whether there were 'agreed terms'. Further, it is apparent that the predecessor section may have permitted a bargaining representative to resile from or retract agreements reached as to what terms should be included in a proposed agreement in a situation where bargaining had failed, and the Commission had made an intractable bargaining declaration. Arguably, bargaining representatives could resile from their agreement to terms: (a) at any time before a declaration under s 235(1) was made, including after an application for a declaration had been made and before the Commission made the declaration; and (b) if a s 235A post-declaration period was ordered, at any time before the conclusion of that period.

[139] The mischief apparent from these hypothetical situations was that which parliament sought to address by repealing and replacing s 274(3). The Revised EM makes pellucid, the new s 274(3) is intended to ensure that once a term is an 'agreed term' according to any of subsections 274(3)(a) to (c), it remains an 'agreed term' and cannot later become a term dealing with a matter still at issue or be left out of the determination. This in turn means that the intent of the section, is that a party cannot resile from terms agreed at each of the three points in time provided for in s 274(3).

[140] As noted, each subsection requires ascertainment of terms which those bargaining representatives had agreed at the times stipulated in subsections (a), (b) and (c), should be included in the agreement. In our view, these subsections may operate cumulatively by virtue of the use of the adjunct 'and', and the phrase in ss 274(3)(b)and (c) 'any other term in addition to' the terms mentioned, respectively, in either ss 274(3)(a) or (3)(a)-(b).

[141] However, the circumstances before us do not necessitate consideration as to the accretion of terms at the temporal points referred to in ss 274(3)(b) or (c), for it is evident on the material before us, and as agreed by the parties, no terms were 'agreed' as at the times referred to in ss 247(3)(b) and (c). Hence, while it might be the case that a party's attempt to resile from its agreement to one or more 'agreed terms' after one of the times detailed will be inutile, for current purposes the only critical time is that when the application for the intractable bargaining declaration was made (s 274(3)(a)).[152]

5.2 Agreed terms

[142] It was uncontroversial that ultimately the issue before us could be reduced to a consideration of whether as at 5 February 2024, that is the date Network made its application, there were any terms that the bargaining representatives had agreed should be included in the proposed agreement.[153]

[143] Beyond the time the application for the declaration was made, we find there were no further terms were agreed. This is despite the 29 February Proposed Agreement including terms that had been withdrawn from agreement by Network on 2 February 2024.[154] Those terms, namely the improvements made to the salary tables, the DHA, backpay, improvements to the

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[152] Transcript PNPN85- PN-92; SOAF (no 10) [31]-[39].

[153] Transcript PN251.

[154] SOAF (no 10) Attachment 11.

Additional Hourly Payment rate and structure, and RDO provisions, had been unilaterally inserted by Network into the 29 February Proposed Agreement. We are, however, are satisfied the agreement to those terms had been withdrawn prior to the application for the declaration and those terms had not been subsequently agreed to by bargaining representatives because of their unilateral inclusion in the 29 February Proposed Agreement.

[144] Whilst there was consensus between Network, the AIPA and the TWU that there were in fact 'agreed terms' as of 5 February 2024, it is understood the AFAP pressed there were no 'agreed terms' because bargaining had proceeded on the basis of an overall package with nothing being agreed until everything is agreed. On that basis, any terms, to the extent that they were agreed between the parties, were in the sense discussed in *UFU* of only having been 'conditionally agreed'. That is, a term was agreed on the condition that an entire package was agreed. It is that concept of 'conditional agreement', as traversed by the Full Bench in *UFU*, that has taken centre stage in the dispute before us.

[145] We consider it necessary to observe from the outset that the circumstances in *UFU* were markedly different to those confronting this Full Bench. In *UFU* the United Firefighters' Union of Australia (**Firefighters' Union**) and Fire Rescue Victoria (**FRV**) had been bargaining since July 2020 with a view to making a proposed enterprise agreement to replace an existing one. Bargaining had taken place against the framework of what was referred to as the '2019 Wages Policy'. The 2019 Wages Policy had been referred to in a 'Heads of Agreement' – an agreement the purpose of which was to provide for a range of industrial measures and processes for the implementation of the Victorian Government's fire service reforms and the establishment of FRV.[155] The establishment of the FRV had resulted in the absorption of all the functions of the Metropolitan Fire and Emergency Services Board and some of the functions Country Fire Authority.[156] The Heads of Agreement had been signed by the then Victorian Minister for Police and Emergency Services.[157]

[146] The matters included in the Heads of Agreement included an acknowledgement that the Heads of Agreement was consistent with the Victorian Government's 'Wages Policy'. As noted by the Full Bench in *UFU*, the 'Wages Policy' was evidently a reference to the Victorian Government's policy at the time titled 'Wages policy and the Enterprise Bargaining Framework' (**2019 Wages Policy**), as issued by the Treasurer of Victoria and Minister for Industrial Relations.[158] The 2019 Wages Policy applied to Victorian Government agencies and bodies, of which the FRV was one.

[147] The 2019 Wages Policy included a description of the Government's approval arrangements which public sector agencies had to meet before commencing bargaining, during bargaining and before seeking approval of final enterprise agreement.[159] They deserve repeating here.

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[155] *UFU v FRV* (n 11) [26].

[156] Ibid [28].

[157] Ibid [25].

[158] Ibid [31].

[159] Ibid [33].

[148] Obtaining authority to commence bargaining was required. During bargaining, the 2019 Wages Policy stipulated that all:

> offers should be made on an in-principle basis, with the public sector agency communicating that the offer is subject to government approval and may be subject to change to ensure compliance with the Wages Policy…[160]

[149] Regarding 'Approval requirements', the 2019 Wages Policy set out that all proposed agreements required the 'approval of Government prior to the commencement of any of the formal requirements outlined in the Fair Work Act.'[161] The 2019 Wages Policy distinguished between Major and Non-major Agreements. 'Major Agreements' were defined as any enterprise with a large public sector workforce, with a salary base in excess of $1 billion, or with significant industrial or financial risk, and/or strategic or operational importance to the Government. For Major Agreements the process of seeking Government approval of final agreements differed to that of Non-major Agreements, with a requirement for approval at a high level of Government.[162] Whilst a replacement wages policy took effect from 1 January 2022 (**2022 Wages Policy**)[163] and thereafter in 2023 (**2023 Wages Policy**),[164] they were found to have been broadly similar to the abovementioned requirements.[165] The 2023 Wages Policy provided that all proposed enterprise agreements required Government approval before the commencement of any of the formal approval requirements outlined in the Act and high level Government approval was require for Major Agreements.[166]

[150] The Full Bench found that the UFU was aware of each relevant iteration of the Government's wages policy and was also aware that FRV considered itself to be bound by such policies.[167]

[151] The Full Bench observed that by October 2023, the parties had not reached agreement on the 'overall package'. Reference was made to correspondence sent by the FRV to the UFU on the final day of the post-declaration negotiating period, which read, in part:

> …As you are aware, the 7 August Offer reflects the terms (including, amongst other things, proposed salary increases, lump sum payments and certain conditions) that the Victorian Government advised FRV it is prepared to approve on an overall package basis. FRV has not been authorised to agree to any other proposal and it is clear that UFU have rejected the 7 August Offer, including wages and conditions.
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> Unfortunately, in circumstances where FRV has made it clear that the 7 August Offer was put as a package, the UFU's rejection of this package means that there are currently no matters that

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[160] Ibid [37].

[161] Ibid [38].

[162] Ibid [39].

[163] Ibid [40].

[164] Ibid [75].

[165] Ibid [40], [76].

[166] Ibid [78].

[167] Ibid [105].

> meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination…[168]

[152] Before embarking on its consideration of s 274(3), the Full Bench in *UFU* noted that the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) had repealed the former 'serious breach declaration' provisions of the Act, replacing them with the then current form, and retitled the subdivision to 'Intractable bargaining declarations.'

[153] The Full Bench identified that s 274(3), as it was then, defines an 'agreed term' for an intractable bargaining and noted that there were a number of elements to section:

- *Firs*t, s 274(3) has, at its centre, a requirement that certain matters be "agreed";
- *Second*, the FW Act does not state that a term must be "agreed" *simpliciter*. The subject matter of what must be "agreed" is that there be a "term" of the proposed enterprise agreement concerned which "should be included in the agreement";
- *Third*, the agreement must be between the "bargaining representatives"; and
- *Fourth*, the agreement must exist at a defined point of time. Where there is a post-declaration negotiating period in place, the point in time is at the end of that period. If there is no post-declaration negotiating period, the point in time is at the time the intractable bargaining declaration was made.[169]

[154] It is uncontroversial that with regard to the fourth element the legislative amendment brought about by the Closing Loopholes No.2 Act speaks of an agreement existing at three defined points in time.

[155] As was identified by the Full Bench in *UFU*, the Act does not provide a definition of 'agreed', as it applies to the first element of s 274(3) described above. Nor does the Act give definitional guidance as to what is meant by the word 'should be included in the agreement'.[170]

[156] Clarification on the meaning of 'agreed', as referred to in s 274(3), was provided by the Full Bench at paragraphs [138] – [143]. Whilst unnecessary to repeat those passages in full, the following can be distilled:

a) agreement must co-exist at the point in time defined by the statute;
b) 'agreed' takes on its ordinary meaning; being the past participle form of 'agree', it refers to 'consent', to 'be of one mind' and to 'come to an arrangement or understanding';[171]
c) agreement may assume many forms, the looser form – an arrangement or understanding to the more formal, such as contract.[172] However, within that

[168] Ibid [91].

[169] Ibid [108].

[170] Ibid [11].

[171] Ibid [140].

[172] Australian Competition & Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475 (O'Bryan J) at [102](a) in UFU [142]

'spectrum of consensual dealings', there remains a requirement for a meeting of minds or consensus[173] about the proscribed statutory subject matter; and

d) it is understood that parties are free to resile from most forms of agreement, an agreement being a consensual dealing; and

e) an assessment as to whether parties are 'agreed' on a term is a matter to be assessed objectively;[174]

[157] The Full Bench accepted that the nature of the agreement is not to be approached in a formal, or legalistic manner, there remaining a requirement that, as a factual matter, the bargaining representatives need to have agreed that a term of a proposed enterprise agreement should be included in the proposed agreement.[175]

[158] At paragraph [147] of *UFU*, the Full Bench commenced its consideration of terms where there is a conditional reservation attached to all terms (or all key terms) being satisfactorily arrived at. Whilst we intend to address the reasoning of the Full Bench in paragraphs [147] to [154], we first turn to paragraphs [155] to [157], which were extracted in full in the AFAP's submissions.

> **[155]** Section 274(3) defines agreed terms for an intractable bargaining workplace determination as a term that the bargaining representatives have (at the relevant time), agreed "should be included in the agreement." This directs attention to the potential final form of any agreement. While parties may sometimes agree that, regardless of any other issues, some terms should go in an agreement, s 274(3) does not extend to terms where there is a conditional reservation attached to all terms (or all key terms) being satisfactorily arrived at.
>
> **[156]** When industrial parties are bargaining, they are doing so to secure a final package that is, overall, better than no new agreement at all. The final package will inevitably include a number of terms that each party is sufficiently happy with and, quite likely, other terms that the parties wished was excluded. Concessions through the "give and take" of bargaining before a final package is approved do not, of themselves, indicate that the bargaining representatives consider all the terms up to the point should be included in a final package. They may do so for some terms, but for others they are either expressly or implicitly only doing so on the basis that the final package will be suitable. We consider so much is self-evident in industrial bargaining. What the position will be in a particular bargaining process will be determined on the circumstances of that process.
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> **[157]** Similarly, a party that conditionally states (however that condition is expressed) that certain terms should be included in an agreement has not necessarily agreed, as factual reality, that those terms should be included in the agreement. All that party might be conveying is that those terms are agreed on the basis that a satisfactory package will be achieved. A genuine conditional reservation is inconsistent with an agreement that the particular terms being discussed "should" (without reservation) be included in the proposed enterprise agreement. If s 274(3) provided for terms that were conditionally agreed, the position would be different. However, the statute does not provide for conditional agreements about terms and we consider it would constitute a significant alteration to the bargaining dynamic for enterprise agreements under the FW Act if it did so. We do not consider this was Parliament's intention.

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[173] Australian Competition & Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475 (O'Bryan J) at [102](b) in UFU [142]

[174] *UFU v FRV* (n 11) [145].

[175] Ibid [146].

[159] The background against which the Full Bench in *UFU* ultimately determined there were no 'agreed terms' has been provided. That background essentially traces the bargaining between a public sector organisation and a union for an enterprise agreement, all the time confined by the limitations as provided in the 2019 Wages Policy, 2022 Wages Policy and the 2023 Wages Policy. As noted, at paragraph [158] of *UFU*, the Full Bench found that the UFU was aware of each relevant iteration of the Government's wage policy and that FRV considered itself to be bound by such policies. The Full Bench concluded that at all times the UFU had been aware that all offers were to be made on an in-principle basis, such that offers were subject to Victorian Government approval, and that to be approved by the Government, the proposed agreement must meet all the conditions specified in the applicable wages policy.

[160] At paragraph [147] of *UFU*, the Full Bench stated:

> [147] Where a party has, objectively assessed, genuinely reserved its position on particular terms or the entire agreement to the effect that matters are only agreed "in principle" or are "subject to" a satisfactory overall package being determined, then that is strongly indicative that those matters would not be "agreed" for the purpose of s 274(3).

[161] Appreciating that the industrial bargaining and the context in which it is conducted may differ from case to case, the Full Bench acknowledged that the circumstances of each case would need to be determined on the evidence in that matter.[176] The Full Bench continued that making statements during negotiations that particular terms or the entire agreement is agreed in-principle does not automatically preclude a finding of 'agreed terms' for the purpose of s 274(3) although it may do so in particular circumstances.[177]

[162] Referring to the 'ritual incantation' of words of qualification such as 'in-principle' or the recourse to an exclusion clause effectively long buried to antecedent negotiations, the Full Bench stated that such incantation or exclusionary clause may not, of themselves, act as a barrier to a finding that there are 'agreed terms' in a particular bargaining agreement.[178] Ultimately, the search for an 'agreed term' is for agreement in substance not form.[179] It is that search that we now embark upon.

[163] Ultimately, we are met by a factual question in respect of whether there was a conditional reservation. We accept that a conditional reservation can be achieved – so much is clear from *UFU*. However, did the utterances of Captain Bartlett in his correspondence of 1 March 2023 and 2 February 2024 (in addition to the footnote on the slideshow) or other conduct relied upon by the parties, achieve a conditional reservation - or is what occurred, an archetype of a ritual incantation case because, beyond the incantation, there is no evidence of reservation, retraction or resiling on terms.

[164] Writing to the three unions on 1 March 2023, Captain Bartlett attached to his email a 'High-level summary of bargaining positions as at 18 February 2023.[180] By this stage,

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[176] Ibid [148]

[177] Ibid [148]

[178] Ibid [149]

[179] Ibid [149]

[180] SOAF (no 10) [5].

bargaining had been on foot since 2019 albeit punctuated by a hiatus in early 2020 to September 2022, due to the COVID-19 pandemic.[181] That high level summary provided what Network considered to be the current state of bargaining overall. It then noted:

> *While nothing is agreed finally until everything is agreed*, we hope this summary provide a useful framework for making substantial progress at our full-day meeting planned for Monday, 13 March.

[165] Mr Aikens gave evidence that on 24 March 2023, after the 13 March 2023 meeting had taken place, Network provided the AFAP with a document containing slides which summarised the current status of negotiations.[182] Mr Aikens said that the document was to be used at an AFAP member meeting that day and consistent with the principle of nothing being agreed until everything was agreed – applying to the bargaining, at the bottom of each page of the document were the words:

> No items in this proposal are agreed until all items are agreed.[183]

[166] Whether the bargaining representatives for a proposed enterprise agreement are agreed as to a term, is a matter to be addressed objectively and not subjectively.[184] To reiterate, the Full Bench explains that the objective assessment is to be based on the factual matters that are known by the parties.[185]

[167] We first direct attention to what the abovementioned phrases mean in this context, and we consider there are two available interpretations.

[168] The first, 'everything' could be interpreted in its pure literal sense, literally everything, every word of the document, every concept, every matter that could be traversed by an enterprise agreement, which just seems inherently unlikely by itself in this context. The parties were not bargaining in circumstances equivalent to those in *UFU* where the agreement reached was subject to specified approval by high levels of the Victorian Government. In general, most negotiations in the industrial context, will traverse uncontroversial matters. It is particularly unlikely in the context in which the parties were negotiating, that is, in the situation of a rollover agreement, even where, to some degree, substantial changes were being negotiated, that the proposition being advanced by Network was that it would not agree to the dispute clause or the consultation clause in isolation, absent agreement on other terms.

[169] The alternative interpretation is that the phrase means 'everything controversial'. What that directs attention to is what is truly controversial throughout bargaining and, critically, on 5 February 2024. As we will see, the parties have, quite conveniently, identified outstanding controversial matters in an itemised list of 11 topic areas or terms. In terms of what Network was communicating, representing its state of mind, by use of the phrase '[w]hile nothing is agreed finally until everything is agreed', we consider the second interpretation is to be preferred for the following reasons.

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[181] SOAF [1].

[182] Aikens Statement (no 10) [20]; SOAF (no 10) Attachment 2.

[183] Aikens Statement (no 10) [20].

[184] *UFU v FRV* (no 11) [112].

[185] Ibid [112].

[170] The reality of bargaining in each individual case provides important context for assessing that factual question. At paragraph [70] of this decision, potted detail is provided of the evidence before the Commission in respect of that bargaining. We see no need to repeat that detail at length, but instead make the following observations.

[171] The 30 September Proposed Agreement, was agreed to by the TWU, but not the AIPA or the AFAP; the 29 November Proposed Agreement, was agreed to by all bargaining representatives, and the 22 December Proposed Agreement, also commanded the agreement of all bargaining representatives, save for one clause which was not agreed to by AIPA.[186] We acknowledge and accept that there were changes from the 30 September Proposed Agreement through to the 29 November Proposed Agreement, and on a whole, those variations, were distinctly minor.[187]

[172] In respect to the 30 September Proposed Agreement, the AFAP and the AIPA did not agree to the overall package, albeit this did not mean a great many clauses ultimately came to be agreed by those two organisations twice thereafter (*see* 29 November Proposed Agreement).

[173] As at 10 November 2023, the bargaining representatives had reached complete agreement on all the terms that should be included in the proposed agreement (the 29 November Proposed Agreement).[188] That the parties had reached an in-principle agreement (appreciating that there is no enterprise agreement until made) and the unions endorsed a 'yes vote' for the 29 November Proposed Agreement, we find that the unions and Network concurred about the terms that should be include in the 29 November Proposed Agreement.

[174] The pilots' rejection of the 29 November Proposed Agreement did not in turn mean that the terms of that proposed agreement were disavowed by the bargaining representatives. It is, after all, the terms as agreed by bargaining representatives not the voting cohort, that proves relevant for s 274(3).

[175] As to changes from the 29 November Proposed Agreement to the 22 December Proposed Agreement whilst wages and allowances did not move, other than one particular allowance,[189] other changes were detailed in the email from Captain Bartlett to employees dated 21 December 2023.[190] Network further notes that there were two other very minor changes to the 22 December Proposed Agreement, including at clause 10.10 regarding the automation of the claim process for allowances and at clause 20 regarding the equitable allocation of duty hours to pilots.[191] However, the sum total of all of other clauses in the 22 December Proposed Agreement were agreed by the bargaining representatives, apart from, the low-experience flying officer rate – with which the AIPA took issue (as will be examined shortly).[192]

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[186] Transcript PN49.

[187] Ibid PN50.

[188] SOAF (no 10) [17].

[189] Transcript PN54.

[190] SOAF (no 10) Attachment 6; DHB (no 82) 95.

[191] Transcript PN60-63.

[192] Transcript PN64; Witness Statement of Evan Wayne Bartlett (**Bartlett Statement**) [21]-[22].

[176] We do not consider that the changes made to the 29 November Proposed Agreement such that it became the 22 December Proposed Agreement, meant that all or any of the parties had 'resiled' from their prior position of agreeing to the terms as outlined in the 29 November Proposed Agreement. In these later stages of bargaining, it is evident that negotiations had progressed premised upon a 'proposed agreement'. As the proposed agreements were put to the vote and rejected, the bargaining representatives continued their negotiations – not on the basis of making wholesale changes to the entire proposed agreement or disavowing all terms previously agreed but, by responsive adjustments to certain controversial (or cost) terms in a bid to appease the cadre of pilots. Captain Bartlett's communication to the pilots on 21 December 2023, evinces this approach.[193]

[177] As to the AIPA not endorsing the 22 December Proposed Agreement, there are undoubtedly factual circumstances where a bargaining representative not endorsing an agreement could indicate complete disagreement with its terms. What is to be made of circumstances where endorsement from a bargaining representative is not forthcoming, turns on the evidence in each case. In this case, we do not accept that the absence of the AIPA's endorsement reflected complete disagreement with the terms of the 22 December Proposed Agreement.

[178] Captain Bartlett gave evidence that on 15 December 2023, Mr Cumming and Mr Fontana of the AIPA said that as representatives of AIPA they could see the merit in the claim (low-experience first officers' term), and that it would be effective in offsetting additional cost. However, they said they did not believe it would be supported by the AIPA's committee of management.[194] On 20 December 2023, a further meeting between the bargaining representatives was held and Mr Cumming communicated at the meeting that the AIPA was otherwise in agreement with the other terms of the proposed agreement (what subsequently became the 22 December Proposed Agreement), save the 'low-experience first officers' term.

[179] According to the AFAP, this evidence has to be appreciated and analysed in its proper context, namely the context that bargaining had been proceeding on the basis of nothing being agreed until it was all agreed. The AFAP submits that the situation in respect of the AIPA is distinct and the facts establish that the AIPA had not agreed to the terms of the overall package that formed the 22 December Proposed Agreement. The significance of this, is, according to the AFAP, that the 22 December Proposed Agreement was never agreed to by all the bargaining representatives, which the AFAP asserts is plainly required by s 274(3)(a).

[180] First, we disagree with the contention that what is required by s 274(3)(a) is agreement to the 22 December Proposed Agreement by all bargaining representatives. The focus is on agreed 'terms' not agreed 'proposed agreements'.

[181] Secondly, we are unaligned with the interpretation that bargaining had proceeded on an all or nothing approach because of words used by Network in its correspondence or communications in March 2023. The bargaining between the parties does not manifest such intent. It is evident that in respect of the 22 December Proposed Agreement there was consensus as to the terms of that proposed agreement by the bargaining representatives – with the

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[193] SOAF (no 10), Attachment 6.

[194] Bartlett Statement (no 196) [18].

exception of one term. Whilst one term was not agreed upon by all, the AIPA did not remonstrate that the 22 December Proposed Agreement should not be put to the vote, and the remaining bargaining representatives endorsed a 'yes' vote for that proposed agreement and agreed for it to be put to the vote. Why? because essentially all bargaining representatives had agreed to its terms and the words written by Captain Bartlett in March of 2023, caused no sense of hesitation.

[182] After the unsuccessful vote for the 22 December Proposed Agreement, we see the AFAP on 23 January 2024, the TWU on 1 February 2024 and the AIPA on 2 February 2024, outlining issues that were, respectively, considered crucial for potential endorsement, ones they would like to see addressed or otherwise were raised in response to a survey of members. The unions were proposing specific changes to the 22 December Proposed Agreement to get it 'over the line', to borrow from the parlance of the AIPA.[195]

[183] Thereafter, by correspondence dated 2 February 2024, Network responds to the AFAP setting out that 'agreement to a particular item was subject to agreement on the overall package' and the 'overall package could not exceed a particular cost to the Company'.[196] These sentences in Network's 2 February 2024 correspondence to AFAP cannot be read in isolation. The letter of 2 February 2024 is to be construed on its terms, having regard to the objective background facts known to the parties.[197] Network continues in that same correspondence to state, 'certain terms contained in the proposed agreement, will, of necessity, become matters at issue for the purposes of any intractable bargaining workplace determination'.[198] Network then proceeds to expressly withdraw agreement from those terms in the 22 December Proposed Agreement, where improvements had been made to salary tables, the DHA, backpay, improvements to the Additional Hourly Payment rate and structure, and the RDO provisions in respect of the definition of an RDO and the restrictions around an RDO. .

[184] Those items are all obvious cost items in response to the unions raising items with an obvious increased cost (with perhaps the exception of the revised rostering appendix).[199] It is reflective of the bargaining that had been occurring between the parties, the kind of give and take in respect of those matters that sat within the 'cost envelope', rather than an absolutely conditional, not one word can be accepted unless everything is settled. In our view, it distils to this: the unions are now pursuing specified new items in light of the failed vote and Network has essentially walked back on particular concessions it had previously made. Network did not put anything else at issue, although it forewarned that should any further improvements (union improvements) be sought that would drive up the cost of any agreement or workplace determination: 'other significant cost items which the Company was otherwise prepared to agree to, will also be at issue'.[200] Network goes on to name those cost items but does not withdraw agreement to those items.

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[195] SOAF (no 10) Attachment 10.

[196] SOAF (no 10) Attachment 11; DHB (no 82) 142.

[197] *UFU v FRV* (n 11) [172].

[198] SOAF (no 10) Attachment 11; DHB (no 82) 143.

[199] Ibid Attachment 8; DHB 136.

[200] Ibid Attachment 11; DHB 143.

[185] In our view, Network's statements that 'agreement to a particular item was subject to agreement on the overall package' and the 'overall package could not exceed a particular cost to the Company',[201] when fairly read, in context, was simply a proposition that, because certain additional items had then been put in issue by each of the three unions after the failed vote on the 22 December Propose Agreement, in response, Network was doing the same in respect of certain items. For example, if an employee bargaining representative changed their position on a certain cost term, it might trigger Network adjusting its position in response to a certain term– which Network did. There was no suggestion in their communication that the unions or Network were now recanting or resiling from, all other terms that had been agreed to that point.

[186] We consider it is not open to draw inference that the unions' conduct of raising further issues over the course of 1-2 February 2024, or the conduct of Network on 2 February 2024, in walking back from specific terms previously agreed, meant that agreement on all other terms was withdrawn. We consider, Network made clear, it is only the matters set out in that correspondence that are 'unagreed'. There is no recantation by Network of its agreement to any other term, or any other 'matter', to use the phraseology of Captain Bartlett.

[187] Mr Aikens gives evidence that at bargaining meetings Captain Bartlett or Mr Nathan Safe, Executive Manager Industrial Relations at Qantas, would preface any improvements to existing conditions in the proposed agreement as being agreed in-principle and nothing was agreed until everything was agreed.[202] In our view, the documentary evidence prior to 5 February 2024, is a species of evidence which we prefer over the post facto assertions of witnesses, without casting aspersions on any of the witnesses in this case, and of course, observing that our preference is in the context of a dispute before this Commission where the central and indeed sole issue is whether there are any 'agreed terms'.

[188] The importance of approaching fact-finding based on the contemporaneous documentary record and objective circumstances was described by Lee J in *Transport Workers' Union v Qantas (No. 1)*.[203] His Honour sets out an approach to fact-finding which, in our view, is germane to the present case where section 274(3) is in issue - that what matters most is the proper construction of contemporaneous notes and documents and the probabilities that can be derived from those notes and other objective facts.

[189] His Honour, at paragraph 17, sets out that that approach is one which is premised on the assumption that contemporaneous notes and documents are the extemporaneous and unvarnished product of the conduct of internal dealings or communications between the contesting parties, and that confidence can be placed on the contemporaneous record, particularly where that record is unfiltered and sufficiently complete.

[190] We consider that the attachments we have referred to in the SOAF prior to 5 February 2024 are unvarnished and unfiltered communications which reflect the position of the parties and their understanding of the position of other parties contemporaneously, and those are the matters, rather than the assertions made, for example, in Mr Aikens' statement, upon which we prefer to rely. It follows, we have accorded weight to the correspondence of the

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[201] Ibid Attachment 11.

[202] Aikens Statement [18]; DHB (no 82) 203.

[203] *Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873 [16] and [17].

bargaining representatives prior to the date the application for the declaration was made, cognisant of the possibility that communications post that date, in these circumstances, may prove hortatory of each party's case. This is not to say that evidence post 5 February 2024 has not been considered. Ascertainment that there were no further 'agreed terms' post 5 February 2024, required consideration of the conduct, correspondence and other communications between the bargaining representatives post that date. However, insofar as those communications that post-dated 5 February 2024 evinced whether a term was an 'agreed term' as at 5 February 2024, for the reasons detailed it is the correspondence between the bargaining representatives prior to 5 February 2024 that we prefer.

[191] As an aside, in respect of Network's adjustment of its position on 2 February 2024, whether that conduct was reasonable for the purposes of s 275(f) of the Act, is not in issue here and therefore does not necessitate comment.

[192] Read contextually and in light of its purpose, s 274(3) in the case before us requires an assessment of the state of agreement or concurrence between the bargaining representatives as at 5 February 2024.

[193] The evidence before us supports a finding that bargaining progressed between the bargaining representatives on the basis that there was not a 'genuine conditional reservation' of the type referred to in *UFU*.[204] We find it was not the case that terms were only agreed subject to a satisfactory overall package. Whilst we accept Mr Aiken's and Captain Bartlett's evidence that Captain Bartlett had issued communication that referred to the statements as referenced at paragraphs [163] and [164] of this decision, we consider that the focus on certain lines uttered in bargaining in this context is not particularly helpful and is preternatural as to what in substance occurred.

[194] Finally, we return to the AFAP's submission that whilst it says there are no 'agreed terms', it does not expect that there will be a dispute that needs to be determined by the Commission in respect of every single term. Counsel for the AFAP had explained that as was the situation in *UFU*, despite there being no 'agreed terms' within the meaning of s 274(3), many terms would prove uncontroversial and ultimately only a confined list of matters would require substantive determination by the Commission.

[195] Counsel for the AFAP appeared to be referring to paragraph [5] of *UFU*, where the Full Bench noted that whilst the FRV and the Minister pressed there were no 'agreed terms', they identified a confined list of ten specific matters that would require substantive determination, with the balance of matters not contested nor likely to be the subject of substantive submission as to their inclusion in an intractable bargaining workplace determination. Essentially, it appeared that the AFAP was distinguishing between a term that rises to the legal test of what an 'agreed term' is and a term that whilst not agreed, would not be contested in respect of the determination at the next step.

[196] In Network's correspondence to the unions of 22 March 2024, it was made resoundingly clear that if there were no agreed terms then every term would be in issue for the purposes of a

[204] *UFU v FRV* (n 11) [157].

workplace determination.[205] It follows that the AFAP makes its submission premised upon a presumption which is not open to it and, in any event, in determining what the 'agreed terms' are, that is a confined task of construing s 274(3) and applying the facts as they are found. Ultimately, whether a term that is not an 'agreed term' is going to be contested between the parties in any determination, is not relevant to this task.

6 Conclusion

[197] Because we have found there was not a genuine reservation of position, it follows that we have determined that there are 'agreed terms' within the meaning of s 274(3). As at 5 February 2024, those 'agreed terms' were set out in the 22 December Proposed Agreement (Attachment A), with the exception of those terms that were not agreed, as set out at Attachment B of this decision.

[198] As the 'agreed terms' and those terms not agreed have been reduced to writing in Attachments A and B, there is substantive certainty about their content.

[205] SOAF (no 10) Attachment 16; DHB (no 82) 158.

Attachment A

NETWORK AVIATION

PILOTS ENTERPRISE AGREEMENT 2023

Table of contents

PART A - INTRODUCTION

1 Title

This Agreement shall be known as the Network Aviation Pilots Enterprise Agreement 2023 (the **Agreement).**

2 Parties

2.1 This Agreement covers:

2.1.1 Network Aviation Pty Limited (ACN: 082 007 350) as Trustee for the Network Trust Trading as Network Aviation Australia (the **Company**);

2.1.2 All Pilots employed by the Company as at the date the Agreement commences operation and thereafter;

2.1.3 the Australian Federation of Air Pilots (the **AFAP** or the **Federation**) of 4th Floor, 132-136 Albert Road, South Melbourne Victoria 3205;

2.1.4 the Australian and International Pilots Association (**AIPA**) of Suite 6.01, Level 6, 247 Coward Street, Mascot New South Wales 2020; and

2.1.5 the Transport Workers' Union (**TWU**) of Level 9, 447 Kent Street, Sydney, New South Wales, 2000.

3 Term and date of operation

3.1 The nominal expiry date of this Agreement will be 14 October 2027.

3.2 This Agreement will come into effect 7 days after it is approved by the Fair Work Commission (**FWC**), with some items subject to Schedule 2.

3.3 Negotiations for a replacement agreement will commence twelve months prior to the nominal expiry date of this Agreement.

4 Intent

4.1 This Agreement outlines terms and conditions of employment of Pilots employed by the Company.

4.2 The Agreement is intended to be read in conjunction with Company Policies and applicable rules and regulations, as varied from time to time. However, those materials do not form part of this Agreement.

4.3 The Agreement can be varied by consent of the Company and a majority of Pilots who cast a valid vote in respect of the variation, subject to approval by FWC, at any time during its operation.

4.4 After the expiry of the nominal term of this Agreement, the Agreement will continue to operate subject to the provisions of the *Fair Work Act 2009* (Cth).

4.5 The National Employment Standards prevail over the terms of this Agreement to the extent of any inconsistency.

5 Definitions

5.1 For the purposes of this Agreement:

(1) **Available Day** means a day on which a Pilot may be allocated a duty.

(2) **Classification** means a Pilot's fleet and rank.

(3) **Date of Joining** means the date upon which the Pilot commenced employment with the Company.

(4) **Duty Period** means all time that the Pilot is undertaking duties at the instruction of the Company.

(5) **Flight Duty Period** means any duty where a Pilot is in control of, or a member of the operating crew, of an aircraft within a Duty Period.

(6) **Flight Hours** means a Pilot's logged flight hours in an aircraft and does not include time in a flight simulator.

(7) **Pilot** means a Pilot employed by the Company and covered by this Agreement.

(8) **Re-assignable Period** means a Pilot's originally rostered Duty Period plus a Buffer Period totalling two hours during which time the Pilot must be available and contactable for duty.

(9) **Reserve Period** means a period of time during which a Pilot is required to be available and contactable for duties but is not performing duties.

(10) **Trip** means the entire period from sign on at home base (or base of temporary transfer) until sign off at home base (or base of temporary transfer). A Trip may include a number of duties over consecutive days.

(11) **Unavailable Day** means a day on which a Pilot cannot be allocated a duty unless agreed with the Pilot and the Pilot does not need to be contactable.

(12) **Union** means the TWU and/or AIPA and/or the AFAP. Any reference to Union in the plural refers to AIPA and AFAP and TWU.

PART B - CONSULTATION, FLEXIBILITY AND DISPUTE RESOLUTION INTRODUCTION

6 Consultation

6.1 This clause applies if the Company:

6.1.1 has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on Pilots; or

6.1.2 proposes to introduce a change to the regular roster or ordinary hours of work of Pilots.

6.2 In this clause, 'relevant Pilots' are the Pilots who are likely to be affected by a change referred to in subclause 6.1.

Major change

6.3 For a change referred to in subclause 6.1.1:

(a) the Company must notify the relevant Pilots, their representatives and the Pilot Working Group of the decision to introduce the major change; and

(b) clauses 6.4-6.9 apply.

6.4 The relevant Pilots may appoint a representative for the purposes of the procedures in this clause. If:

(a) a relevant Pilot appoints, or relevant Pilots appoint, a representative for the purposes of consultation; and

(b) the Pilot or Pilots advise the Company of the identity of the representative,

the Company must recognise the representative.

6.5 As soon as practicable after making its decision, the Company must:

6.5.1 consult with the relevant Pilots, their representatives and the Pilot Working Group about:

(a) the introduction of the change; and

(b) the effect the change is likely to have on the Pilots; and

(c) measures the Company is taking to avert or mitigate any adverse effect of the change on the Pilots; and

6.5.2 for the purposes of the discussion - provide, in writing, to the relevant Pilots:

(a) all relevant information about the change including the nature of the change proposed; and

(b) information about the expected effects of the change on the Pilots; and

(c) any other matters likely to affect the Pilots.

6.6 However, the Company is not required to disclose confidential or commercially sensitive information to the relevant Pilots.

6.7 The Company must give prompt and genuine consideration to matters raised about the major change by the relevant Pilots.

6.8 If a clause in this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the Company, the requirements set out in clauses 6.3(a), 6.4 and 6.5 are taken not to apply.

6.9 In this clause, a major change is likely to have a significant effect on Pilots if it results in:

6.9.1 the termination of the employment of Pilots; or

6.9.2 major change to the composition, operation or size of the Pilot workforce or to the skills required of Pilots; or

6.9.3 the introduction of a new aircraft type; or

6.9.4 the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or

6.9.5 the alteration of hours of work; or

6.9.6 the need to retrain Pilots; or

6.9.7 the need to relocate Pilots to another workplace; or

6.9.8 the restructuring of jobs.

Changes to regular roster or ordinary hours of work

6.10 For a change referred to in subclause 6.1.2:

(a) The Company must notify the relevant Pilots, their representatives and the Pilot Working Group of the proposed change; and

(b) Clauses 6.11-6.14 apply.

6.11 The relevant Pilots may appoint a representative for the purposes of the procedures in this clause. If

(a) A relevant Pilot appoints, or relevant Pilots appoint, a representative for the purposes of consultation; and

(b) The Pilot or Pilots advise the Company of the identity of the representative,

The Company must recognise the representative.

6.12 For a change that subclause 6.1.2 applies to, as soon as practicable after proposing to introduce the change, the Company must:

6.12.1 discuss with the relevant Pilots, their representatives and the Pilot Working Group about the introduction of the change; and

6.12.2 for the purposes of the discussion - provide to the relevant Pilots:

(a) all relevant information about the change, including the nature of the change; and

(b) information about what the Company reasonably believes will be the effects of the change on the Pilots; and

(c) information about any other matters that the Company reasonably believes are likely to affect the Pilots; and

6.12.3 invite the relevant Pilots to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

6.13 However, the Company is not required to disclose confidential or commercially sensitive information to the relevant Pilots.

6.14 The Company must give prompt and genuine consideration to matters raised about the change by the relevant Pilots.

7 Individual flexibility

7.1 The Company and a Pilot covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the Agreement if:

7.1.1 the agreement deals with one or more of the following matters:

(a) arrangements about when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; or

(e) leave loading; and

7.1.2 the arrangement meets the genuine needs of the Company and the Pilot in relation to one or more of the matters mentioned in paragraph 7.1.1; and

7.1.3 the arrangement is genuinely agreed to by the Company and the Pilot.

7.2 The Company must ensure that the terms of the individual flexibility arrangement:

7.2.1 are about permitted matters under section 172 of the *Fair Work Act 2009* (Cth) (the **Act**);

7.2.2 are not unlawful terms under section 194 of the Act;

7.2.3 result in the Pilot being better off overall than the Pilot would be if no arrangement was made;

7.2.4 do not have a detrimental effect on the entitlements, terms and conditions of any other Pilot; and

7.2.5 do not have any effect other than as a term of the Agreement.

7.3 The Company must ensure that the individual flexibility arrangement:

7.3.1 is in writing;

7.3.2 includes the name of the Company and the Pilot;

7.3.3 is signed by the Company and the Pilot and if the Pilot is under 18 years of age, signed by a parent or guardian of the Pilot and includes details of:

(a) the terms of the enterprise agreement that will be varied by the arrangement;

(b) how the arrangement will vary the effect of the terms;

(c) how the Pilot will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

7.3.4 states the day on which the arrangement commences.

7.4 The Company must give the Pilot a copy of the individual flexibility arrangement within 14 days after it is agreed to.

7.5 The Company or the Pilot may terminate the individual flexibility arrangement:

7.5.1 by giving no less than 28 days written notice to the other party to the arrangement; or

7.5.2 if the Company and the Pilot agree in writing—at any time.

8 Dispute settlement procedure

8.1 This clause 8 applies to disputes about any matters arising under this Agreement or in relation to the National Employment Standards (**NES**) provided that this procedure will not apply to matters relating to a Pilot's flying proficiency, matters of operational safety or Company policies and procedures.

8.2 It is important that Pilots and the Company commit to resolving disputes that may arise, however if such a dispute arises the following procedure must be followed:

8.2.1 The matter will first be discussed by the affected Pilot(s) and his or her direct supervisor.

8.2.2 If not resolved, the matter will be discussed by the affected Pilot(s) and senior management.

8.2.3 Should an issue remain unresolved, it may be referred by either party to the Commission to resolve through private conciliation and/or arbitration.

8.3 Subject to the provisions of this clause, the parties to the dispute will accept the outcome of any arbitration.

8.4 If a dispute is referred to the Commission for resolution, the Commission can take any or all of the following actions as it considers appropriate to resolve the dispute:

8.4.1 convene conciliation conferences of the parties or their representatives at which the Commission is present;

8.4.2 require the parties or their representatives to confer among themselves at conferences at which the Commission is not present;

8.4.3 request, but not compel, a person to attend proceedings;

8.4.4 request, but not compel, a person to produce documents;

8.4.5 where either party requests, conciliate or make recommendations about particular aspects of a matter about which they are unable to reach agreement; and

8.4.6 subject to clause 8.1 where the matter(s) in dispute cannot be resolved (including by conciliation) and one party or both request, arbitrate or otherwise determine the matter(s) in dispute.

8.5 The Commission must follow due process and allow each party a fair and adequate opportunity to present their case.

8.6 Any determination by the Commission under clause 8.4.6 must be in writing if either party so requests, and must give reasons for the determination.

8.7 Any determination made by the Commission under clause 8.4.6 must not require a party to act in contravention of an applicable industrial instrument or law. Where relevant, and circumstances warrant, the Commission will consider previous decisions of the Commission.

8.8 The Commission must not issue interim orders (other than procedural orders), 'status quo' orders or interim determinations.

8.9 A Pilot may request to have a representative of his or her choice, which may include a representative of a Registered Industrial Organisation of which they are a member, represent

them at any stage of this dispute settlement procedure. Any such representative nominated by the Pilot pursuant to this dispute resolution procedure will be allowed access to the Pilot on Company premises, or such other place as may be agreed to between the Company and the Pilot, so that relevant information and instructions can be obtained.

8.10 The parties to the dispute are entitled to be represented by legal representatives in proceedings pursuant to this dispute settlement procedure.

8.11 While the parties attempt to resolve a dispute, Pilots must continue to work as normal in accordance with this Agreement and the Pilot's contract of employment unless a Pilot has a reasonable concern about imminent risk to safety or health.

8.12 No party will be prejudiced as to the final settlement by the continuance of work in accordance with clause 8.11.

PART C - EMPLOYMENT RELATIONSHIP AND OTHER MATTERS

9 Employment conditions

9.1 **Work organisation and hours of work**

9.1.1 Work organisation

(a) The Company may employ Pilots on a permanent or part time basis.

(b) Where a Pilot is employed on a part time basis, the entitlements set out in this Agreement will apply on a pro-rata basis.

9.1.2 Hours of work

Hours of work will be determined in accordance with;

(a) the regulations approved by CASA from time to time; and

(b) general or employer specific exemptions to, or concessions under, the regulations approved by CASA from time to time; and

(c) a Fatigue Risk Management System (**FRMS**) that has been developed by the Company after consultation with Pilots and approved by CASA to apply to the Company's operations.

9.1.3 The ordinary hours of work are seventy six (76) hours per fortnight, when averaged over a twelve (12) month period.

9.1.4 The ordinary hours of work may be worked within a twenty four (24) hour period spread over seven (7) days, Monday to Sunday inclusive.

9.2 **Classifications and duties**

9.2.1 Pilots will be employed as Captains or First Officers.

9.2.2 The Pilot's duties may from time to time be altered or changed at the discretion of the Company providing they are within the Pilot's skill, competence and training, and are consistent with safety requirements.

9.2.3 Pilots will diligently and faithfully perform all the duties and responsibilities of their employment and such other duties as may reasonably be required from time to time.

9.2.4 Nothing in this Agreement precludes the movement of Pilots between Classifications at the direction of the Company.

9.2.5 The Company's performance appraisal programme and / or Pilot proficiency check(s) will form the basis of any changes to the Pilot's Classification.

9.2.6 Duties and responsibilities will be outlined in the Pilot's job description provided on the commencement of employment and as amended from time to time.

9.3 **Pilots will carry out instructions of the Company**

9.3.1 If a Pilot requests, a verbal instruction shall be confirmed in writing to the Pilot no later than 96 hours after the verbal instructions are given.

9.3.2 Without limiting the application of sub-clause 9.3.1, a Pilot will observe instructions and requirements contained in this Agreement and Company manuals.

9.4 **Exclusive service**

9.4.1 Pilots must not fly an aircraft during the period of his or her employment except in the service of the Company unless the Company consents in writing.

9.4.2 Pilots must not engage in any paid or unpaid employment which might adversely affect the performance of the duties of their position.

9.4.3 Pilots must not claim or accept any fee, gratuity, commission or other benefit from any person or persons other than the Company in payment for services concerned with the duties performed for the Company.

9.5 **Contact details**

9.5.1 Pilots will advise the Company in writing of their current residential address, contact telephone number and email address and will keep these details up to date.

9.6 **Probationary periods**

9.6.1 Appointments of new Pilots shall be initially for a period of up to six (6) months, in which case the employment may be terminated by either party giving one (1) week's notice within this probationary period.

9.6.2 The Company, or the Company's authorised representative, will assess the Pilot's suitability for the position during and prior to the expiration of the probationary period.

9.6.3 The probationary period is acknowledged to be an extension of the selection process and is clearly distinguished from permanent employment.

9.7 **Termination of Employment**

9.7.1 A Pilot's employment may be terminated by the Pilot giving four (4) weeks' notice to the Company, or by the Company giving four (4) weeks' notice to the Pilot if the Pilot is aged under 45 or (5) weeks' notice if the Pilot is aged 45 or over, or payment in lieu thereof as the case may be.

9.7.2 A reduced period of notice may be accepted when agreed between the Company and the Pilot.

9.7.3 The Company may terminate the employment of a Pilot at any time without notice (unless the NES provides otherwise), if the Pilot:

(a) engages in any act or omission constituting serious misconduct in respect of their duties;

(b) wilfully fails or wilfully neglects to perform or carry out their powers, functions or duties in an agreed manner;

(c) engages in offensive or harassing behaviour;

(d) breaches health and safety obligations;

(e) breaches policies and/or procedures;

(f) is found to be intoxicated or under the influence of illegal drugs;

(g) is found to be either providing, or receiving, goods or services without payment;

(h) is engaged in any conduct which in the opinion of the Company might tend to injure the reputation or standing of the Company;

(i) refuses or neglects to comply with any lawful and reasonable request by the Company, or any other person duly authorised by the Company;

(j) is found to be stealing;

(k) is found to have submitted a false entry on their time sheet /card, or entered a false time sheet /card on behalf of another Pilot;

(l) is convicted of an indictable offence.

9.7.4 If a Pilot gives the required period of notice, or having been given the required notice, leaves his or her employment before the end of the notice period without the Company's agreement, the Pilot shall not be paid for the duration of the unauthorised absence.

9.7.5 When a Pilot's employment is terminated by the Company for reasons unrelated to their conduct or capacity to perform his or her role, the Company will provide the Pilot with the opportunity to be recent in the licences and endorsements being utilised by the Pilot in the Pilot's employment at the time of the termination or reimburse the costs of the reasonable direct provider cost incurred by the Pilot for the renewal(s) upon production of a receipt within four (4) weeks of the termination date or such other period as agreed

9.7.6 Where, at the point of termination, a Pilot has accrued under this Agreement an entitlement to a day or days off, the Pilot will receive payment instead of such day or days at the normal rate of salary.

9.7.7 Where the Company has given notice of termination to a Pilot for reasons unrelated to the Pilot's conduct or capacity to perform his or her role, the Pilot will receive one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at a time that is convenient to the Pilot after consultation with the Company.

9.8 **Redundancy**

9.8.1 Redundancy is a decision made by the Company that the job being performed by a Pilot is no longer required to be performed, and that this decision is not due to the ordinary and customary turnover of labour. If the Company decides that a Pilot's position is redundant, the Company shall discuss with the Pilot different possibilities, such as working in another form of employment and other opportunities besides the ending of their employment.

9.8.2 If suitable alternative employment is found for the Pilot by the Company, the Pilot will not be entitled to any payments as prescribed by this provision (irrespective of whether the Pilot accepts the employment or not).

9.8.3 If employment is ended because of redundancy then, as well as notice or payment in lieu of notice, the Company will pay to the Pilot a severance payment in accordance with the NES.

9.8.4 Reverse date of joining for Pilots will determine the order for compulsory redundancies. Before undertaking compulsory redundancies, the Company will seek expressions of interest. The Company reserves the discretion to accept or reject expressions of interest.

9.8.5 The Company shall publish a date of joining list of all Pilots in its permanent employment and thereafter six-monthly.

9.8.6 Where an employee is transferred to lower paid duties by reason of redundancy, the Pilot will be given the following minimum notice or paid at the existing salary rate for the notice specified below.

Period of service	Minimum notice
Under 1 year continuous service	3 weeks
Over 1 year but under 3 years continuous service	6 weeks
Over 3 years continuous service	8 weeks

9.8.7 A Pilot given notice of termination in circumstances of redundancy may terminate his or her employment during the period of notice with the agreement of the Company. If the Company agrees to termination of the employment, the Pilot is entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

9.8.8 A Pilot given notice of termination in circumstances of redundancy will be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment. If the Pilot has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the Pilot must, at the request of the Company, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient. This clause does not confer an additional entitlement beyond clause 9.7.7.

9.9 **Rosters**

Rosters will be compiled and will be managed in accordance with the provisions set out in this Agreement and relevant Company policies.

9.10 **Public holidays**

Remuneration for hours worked on a public holiday is included in the annual salary and annual leave entitlements set out in this Agreement.

9.11 **Performance management**

9.11.1 The employment is performance based and performance appraisals will be conducted from time to time.

9.11.2 Pilots will be required to attain and maintain an appropriate level of competence.

9.11.3 Unsatisfactory performance shall be addressed by way of counselling and training where required. Continued unsatisfactory performance may result in termination of employment.

9.11.4 Subject to the conditions specified in this Agreement and without limiting clause 9.12 below, where the Company requires the Pilot to reach and maintain particular standards for a particular aircraft type or rating, all facilities and other costs associated with attaining and maintaining those standards will be the responsibility of the Company.

9.11.5 Where a Pilot fails to reach or maintain a standard required, the Pilot will receive further re-training and a subsequent check. The Pilot may elect to have a different assessor on the second occasion.

9.11.6 Where a Pilot fails the second check the Pilot may, where practicable, be reclassified to the previous or a mutually agreed position.

9.11.7 A Pilot retains the right to be terminated instead of being re-classified.

9.11.8 Where it is not practicable to re-classify the Pilot, the Company retains the right to terminate the employment.

9.11.9 Should the Pilot be assessed as not suitable for a new position prior to being cleared to the line, they will revert back to a position, and pay rate, equivalent to that held prior to the appointment to the new position.

9.12 **Demotion**

9.12.1 A demotion is a change to a lower Classification - i.e. from Captain to First Officer.

9.12.2 Where a Pilot is being considered for a demotion on the basis of the Pilot's operational suitability, a meeting will be convened to consider the case, subject to the following:

(a) The meeting will comprise one representative from the Company and one representative of the Pilot's choosing;

(b) The meeting will take place within 48 hours of the Pilot being informed that demotion was being considered;

(c) Prior to the meeting the Pilot will have the opportunity to make a written representation for consideration at the meeting;

(d) The findings of the meeting will be provided to the Chief Pilot who will decide the outcome of the matter.

9.12.3 Subject to clause 9.12.2, notwithstanding any other clause in this Agreement, the Company may demote a Pilot to a lower Classification where the Company is reasonably of the view that the Pilot's performance or conduct would warrant.

9.13 **Stand down**

9.13.1 The Company may stand a Pilot down in certain circumstances.

9.13.2 The Company may stand a Pilot down, without payment, when a Pilot cannot be usefully employed for any cause for which the Company cannot reasonably be held responsible.

9.13.3 Stand down will only be initiated if the length of stoppage exceeds 5 working days.

9.13.4 Should the length of stoppage exceed 5 days, all reasonable efforts will be made to provide those staff affected by the stoppage with alternative duties within their capabilities and qualifications before invoking a stand down provision. Stand down will only be initiated after this avenue has been exhausted.

9.13.5 A Pilot may request to take leave during a period of stand down.

9.13.6 A period during which the Pilot is stood down does not break a Pilot's continuity of service and counts as service for all purposes.

9.14 **Suspension**

9.14.1 The Company has the discretion to temporarily suspend a Pilot from duties whilst conducting an investigation of allegations of misconduct or breach of policies.

9.14.2 The period of suspension shall be only as long as reasonably necessary to conclude the investigation. Pilots will continue to receive salary during the suspension period provided that if the allegations are (in the opinion of the Company) substantiated, the Pilot will not be entitled to payment of salary during period of the suspension and appropriate disciplinary action will be taken which may include termination of employment.

9.15 **Deductions from pay**

9.15.1 The Company is authorised to deduct monies that are due to a Pilot in the event of overpayment of wages to a Pilot. The Company will deduct a maximum of 5% of the overpayment amount per pay period (or any greater amount as agreed with the Pilot), provided the deduction is agreed with the Pilot. The Company will provide the Pilot written notification of the amount to be applied and an explanation as to the reason for the overpayment.

9.15.2 The Company reserves the right to recover any outstanding amounts through application to the courts where the amount owing is in excess of the payment to be made to the Company.

9.15.3 The Company will pay any underpayments as soon as is practicable.

9.16 **Return of service**

9.16.1 The cost of type ratings obtained and any command upgrade training undertaken by Pilots employed under this Agreement for the purpose of operating Company aircraft will be paid for by the Company. Pilots recognise that these come at a considerable cost and it is a condition of employment that Pilots will execute a Type Deed for the applicable aircraft type prior to the commencement of any endorsement training, and in the case of command upgrade training, a Command Upgrade Deed.

9.16.2 Where a Pilot terminates their employment within two (2) years of a Pilot being checked to line post completion of endorsement training, any unpaid amount of any Type Deed sum is a debt due and owing to the Company by the Pilot, up to an amount not exceeding $40,000.

9.16.3 Where a Pilot terminates their employment within one (1) year of a Pilot being checked to line post completion of command upgrade training, any unpaid amount of any Command Upgrade Deed sum is a debt due and owing to the Company by the Pilot, up to an amount not exceeding $22,000.

9.16.4 If a Pilot terminates his or her employment and as a result fails to serve the applicable periods set out in Clauses 9.16.2 or 9.16.3 above, the amount payable under the bond will be prorated to the unexpired period of the bond.

9.16.5 In those cases where a Pilot's employment has been terminated on grounds of redundancy, retirement from employment as a Pilot or on grounds of ill health or similar circumstance, any indebtedness that is owing under an Type Deed or Command Upgrade Deed shall be waived by the Company.

9.17 **Uniforms**

9.17.1 Pilots are required to comply with the Company uniform policy.

9.17.2 Pilots are required to wear the uniform provided by the Company and as modified from time to time.

9.17.3 Pilots acknowledge that an allowance for the maintenance of the uniform has been provided in the annual salary.

9.17.4 Visible face and body piercing, tattoos and excessive jewellery is not permitted.

9.17.5 Pilots may be suspended from duty, without payment, until their presentation is acceptable to the Company.

9.17.6 All uniforms remain the property of the Company and must be returned in a clean condition on termination of employment.

9.18 **Occupational health and safety**

It is a requirement of the employment that the Workplace Health and Safety Act and the Company Policies and Procedures are adhered to.

9.19 **Fitness for work**

9.19.1 Pilots must attend for work in a fit state to safely and effectively perform their allocated duties and meet their employment obligations.

9.19.2 It is a condition of employment that Pilot remains fit for duty.

9.19.3 Where a concern exists regarding a Pilot's fitness for duty, the Company may require the Pilot to undergo such medical tests at the Company's expense that it deems appropriate. The Pilot agrees to undertake such tests as reasonably directed by the Company.

9.19.4 If a Pilot is taking medication, or suffers from any condition that may affect or limit their ability to carry out normal job tasks, they are to advise the Company before starting work and discuss alternative work arrangements.

9.19.5 Subject to any entitlement to personal leave, Pilots are not entitled to payment for any time for which they are required to work, but are prevented from doing so by the Company due to the Pilot being (in the opinion of the Company) unfit for work.

9.19.6 It is a condition of employment that the Company is advised without delay of any condition, physical or mental, that could affect a Pilot's work or the health and safety of other Pilots.

9.20 **Drugs, alcohol and smoking**

9.20.1 Pilots are not permitted to commence, undertake or return to work, while under the influence of alcohol or drugs.

9.20.2 Pilots are only permitted to smoke during approved work breaks and in a designated smoking area.

9.20.3 Smoking is not permitted in any enclosed workplace, or when in company uniform.

9.20.4 Any breach of this provision will result in disciplinary action which may lead to termination of employment.

9.21 **Copy of Agreement and NES**

The Company shall provide a copy of this Agreement and the NES to Pilots.

9.22 **Company property**

9.22.1 The Company will provide Pilots with appropriate equipment, products and consumables to carry out the requirements of the position. Any losses by way of theft or accident must be reported to management on the day they are lost or damaged.

9.22.2 The Company may, after full investigation, hold the Pilot responsible for the cost of such losses.

9.22.3 The Company reserves the right to inspect a Pilot's locker, bag and vehicle if kept on the Company's premises.

9.23 **Right to request part time employment**

A Pilot may request that his or her full time employment be changed to part time employment. If such a request is granted, the Pilot will be entitled to pay and conditions under this Agreement on a pro rata basis to those received by Pilots employed on a full-time basis.

9.24 **Change of Classification**

Temporary

9.24.1 The Company may require a Pilot to carry out flying duties of a different Classification either within the Pilot's home base or at a temporary transfer base.

9.24.2 If the relief or temporary transfer involves flying duties of a Classification attracting a higher level of remuneration and/or employment benefit, the Pilot will be paid for all such duties at the applicable higher rate and benefit appropriate to the Pilot's period of service with the Company for a minimum of one week. The remuneration

rate and benefits will return to the Pilot's normal rate at the expiry of the relief/transfer or one week, whichever is the latter.

9.24.3 If, during a relief or temporary transfer, a Pilot is required to carry out flying duties in a Classification attracting a lower level of remuneration, the Pilot will continue to receive their existing salary.

Permanent

9.24.4 On a change of Classification, years of service with the Company will determine the incremental level in the new Classification.

9.24.5 On promotion to a different Classification attracting a higher remuneration, the Pilot will maintain their existing salary until proficient in the new Classification.

Transfer to lower paid duties

9.24.6 Where a Pilot is transferred to lower paid duties by reason of reduction of establishment or phase out or withdrawal of aircraft type, the Pilot will be given the following minimum notice or paid at the existing salary rate for the notice specified below.

Period of service	Minimum notice
Under 1 year continuous service	3 weeks
Over 1 year but under 3 years continuous service	6 weeks
Over 3 years continuous service	8 weeks

9.25 **Selection and employment process**

9.25.1 The Company recognises that Pilots who join the Company do so with an expectation of a career path within the business. Further, the Company recognises that Pilots' desired career path may include aspirations including, but not limited to, advancement through the Pilot Classifications and opportunity to be involved in training and checking activities. The Company supports career growth for Pilots and is committed to providing the above opportunities to all Pilots within the confines of the opportunities available within the Company.

9.25.2 To facilitate career opportunities and support the above principles, the process in clause 9.25.3 to clause 9.25.8 will apply.

9.25.3 All vacancies for Classification change, higher duties and base transfers will be first advertised internally for a period of not less than seven (7) days.

9.25.4 The content to be contained in each advertisement will include (as applicable for EOIs/standing bids):

(a) Fleet type;

(b) Location of vacancy;

(c) Closure date of bid;

(d) Number of vacancies at each location; and

(e) Commencement date of technical training.

9.25.5 After the closing date of the advertisement, the Company will assess Pilots against the promotional criteria specified in the Flight Administration Manual.

9.25.6 The Pilots who are assessed as suitable will be contacted by the General Manager Flight Operations (or delegate) and provided a letter of appointment that includes conditions and terms of the appointment.

9.25.7 Should a Pilot subsequently withdraw their bid after signing the letter of appointment and before training commences, the Pilot may subsequently be considered frozen for the period of any relevant freeze period.

9.25.8 The Company retains the discretion to make appointments from applicants in a manner that facilitates risk prioritisation and business needs. Subject to this discretion when assessing applications, the Company will apply a position that is consistent with the Flight Administration Manual.

9.26 **Transfers**

Permanent

9.26.1 For a Pilot who is permanently transferred to another base at the direction of the Company, the Company will pay all reasonable expenses incurred by the Pilot for the consequential removal of the Pilot, immediate family (including dependent children under 21 years of age), and their furniture, possessions and personal effects as approved by the Company prior to the transfer.

9.26.2 Reverse date of joining will determine the order for assigned permanent base transfers. Prior to any compulsory transfers the Company shall seek expressions of interest. The Company reserves the right to accept or refuse any expressions of interest.

9.26.3 A Pilot transferred to a new home base will have the costs of appropriate accommodation paid by the Company until the Pilot has obtained suitable permanent accommodation for a period of up to two weeks.

9.26.4 A Pilot will be given no less than 56 days written notice by their employer of an intended permanent transfer, provided that within this period the Pilot will be given at least 28 days written notice of the actual date of transfer.

9.26.5 The Pilot and the Company may mutually agree in a specific case that a shorter period of time represents adequate notice.

9.26.6 Where a Pilot is permanently transferred they will be granted upon arrival at their new base such period of time, as they require up to a maximum of five days, free of all duty not including rostered days off to attend to personal matters arising from them being so transferred.

Temporary

9.26.7 A Pilot who is to be sent on a temporary transfer at the direction of the Company will be notified as soon as possible in advance, but unless the Pilot consents to less notice, this will in no case be later than 48 hours prior to the Pilot's scheduled departure from the Pilot's home base to commence such transfer.

9.26.8 Reverse date of joining will determine the order for assigned temporary base transfers. Prior to any compulsory transfers the Company shall seek expressions of interest. The Company reserves the right to accept or refuse any expressions of interest.

9.26.9 A Pilot whose child is due to be born will wherever possible, not be required by their Company to transfer away from the Pilot's home base during the two week period immediately preceding the anticipated confinement of their spouse or de facto partner and during the two-week period immediately following the birth of the child.

9.26.10 On completion of a temporary transfer assignment a Pilot will be granted one day free of all duty for each week or part thereof in respect of the Pilot's period of transfer at their home base.

9.26.11 Until such time as agreed alternative accommodation becomes available the provisions of clause 9.27.6 will apply to a Pilot on temporary transfer. The cost of such agreed alternative accommodation will be paid by the Company.

9.26.12 Where the temporary transfer is to be for a period in excess of 28 days the Company will pay the cost of travel for the Pilot's spouse or de facto partner and each dependent child as defined to join the Pilot when the agreed alternative accommodation is occupied by the Pilot. Where agreed alternative accommodation has not been found within 28 days of the commencement of the temporary transfer and provided the unexpired period of transfer is at least a further 28 days the Pilot will be entitled to reimbursement of the travel and accommodation costs of the Pilot's spouse or de facto partner and each dependent child.

9.26.13 In the case of a temporary transfer a Pilot will be reimbursed any actual reasonable personal expense to which the Pilot incurred as a result of such transfer away from the Pilot's home base.

9.26.14 If a Pilot on temporary transfer encounters special or unforeseen circumstances affecting the adequacy of either the Pilot's expense arrangements or the terms of the Pilot's transfer, the Pilot will be allowed additional expenses subject to the approval of the Company, and either the Pilot or the Company may raise for attention any inadequacy of terms of the transfer.

9.27 **Allowances**

Provision of transport and travel

9.27.1 A Pilot when required by the Company:

(a) to undertake any travel in the course of their employment;

(b) when required by the Company or CASA, subject to the Company's prior approval, to undertake any travel for the purposes of any training or certification; or

(c) for any other reason in the course of their employment,

will be provided with travel for all such duty travel at no expense to the Pilot.

9.27.2 Where the Company requires a Pilot to layover the Company will provide accommodation and travel at no cost to the Pilot and be confirmed prior to departure from home base.

9.27.3 Where any travel undertaken involves an overnight stop or stops, meals and accommodation arrangements will be in accordance with the provision of clause 9.27.6.

9.27.4 A Pilot will not be required to use their private vehicle on Company business without agreement with the Pilot. For the avoidance of doubt, this clause does not include private vehicle commuting from a Pilot's place of residence to home base.

Communications allowance

9.27.5 A Pilot will be paid an annual communication allowance of $720.00 to be paid in equal instalments in each pay period.

Accommodation and meal allowance

9.27.6 When a Pilot is required in the course of employment to layover from the Pilot's home base, the Pilot will be reimbursed all costs necessarily incurred in relation to accommodation and meals, in addition to an allowance of $22.77 per night. The additional allowance does not apply in the case of a temporary transfer from home base.

9.27.7 **Accommodation at non-capital cities**

(a) A list of approved accommodation locations for non-capital city locations shall be compiled prior to the commencement of this Agreement on the basis of mutual consultation between the Company and one Pilot representative per Union. The list of accommodation reflects ports that the Company operates to on a regular basis.

(b) If the Company or PWG proposes a change to the approved accommodation locations, they shall notify the other party of the proposal. The existing arrangements shall continue until any change to the approved accommodation locations has been agreed between the Company and the PWG.

(c) Where the Company proposes to commence operations to a port not on the list of approved accommodation locations, the Company and the PWG will agree to a list of approved accommodation locations for that port.

(d) If on an ad hoc basis the Company needs to provide accommodation at a port not on the list of approved accommodation, the accommodation shall be sourced from a Qantas Group approved service provider or in the absence of such, appropriate accommodation will be provided.

(e) Appropriate accommodation is at a minimum, quiet and free from factors which may reduce adequate rest, and provides a separate room with a toilet, minimum size of double size bed, block out curtains, couch or chair, closet, air conditioning and heating for each Pilot.

(f) When accommodation is provided that is not on the list of approved accommodation or where overnight accommodation provided is at a mine site, a Pilot will be paid a hardlying allowance of $159.81.

9.27.8 In capital cities, the Company will provide accommodation standards to a level consistent with that provided prior to the commencement of this agreement. An example of current accommodation for this purpose is at Hyatt Place, Essendon Fields in Melbourne. In determining such future accommodation, due regard must be given to the locality, environment inside and outside of the hotel, noise, transport, availability of acceptable standards of meals, services and recreational facilities.

9.27.9 Where a Pilot commences a tour of duty to or from a layover port involving duty during a meal period and such duty exceeds 30 minutes the Pilot will be provided with a meal and be paid the following allowances:

	Allowance
	$
0630-0800 hours	34.95
1200-1330 hours	49.35
1800-2000 hours	69.20
Incidentals	32.90

The allowances will be adjusted in line with any future Australian Taxation Office TD 2023 (Table 2) determinations while this Agreement remains operative.

Reimbursement of expenses - generally

9.27.10 The Company will reimburse a Pilot within a reasonable timeframe (and in accordance with the Flight Administration Manual) for all costs necessarily incurred by the Pilot which are associated with the operation of the aircraft, including expenses relating to the entertainment of or assistance rendered to passengers or clients.

Duty Variation Allowance

9.27.11 A Pilot will be paid a Duty Variation Allowance (**DVA**) when a Pilot accepts an alternate duty that is outside of the buffer period defined in clause 20.3.1 or a duty is delayed by more than two hours.

9.27.12 Until the Company provides notice otherwise, the Pilot must submit a claim for a DVA to receive payment.

9.27.13 The DVA will be payable for each hour (or part of each hour) that the duty is outside of the buffer period.

9.27.14 The DVA amount is set out in Schedule 1.

9.27.15 The total amount of the DVA payable will be capped at three (3) hours' pay. With the exception of a Working on a Rostered Day Off payment in accordance with clause 10.6.6, no other payments (including IPDs) will be made in respect of duty changes.

Early Call Allowance

9.27.16 A Pilot will be paid an Early Call Allowance when a Pilot signs on within 90 minutes of being called out from reserve.

9.27.17 The Early Call Allowance is set out in Schedule 1.

Passport Reimbursement

9.27.18 The Company will reimburse the cost of an 'ordinary passport' as defined by the Australia Passport Office. For the avoidance of doubt, this reimbursement will not cover any additional fees including priority processing and will apply only to passport costs incurred following commencement of this Agreement.

9.28 **Accident pay**

A Pilot who is receiving workers' compensation payments is entitled to the higher of:

9.28.1 the percentage of earnings paid under any statutory entitlements; or

9.28.2 the amount of accident compensation make-up pay the Pilot would be entitled to under the *Air Pilots Award 2020* (**Award**), where this amount is calculated at the rates of pay that apply under the Award.

For the avoidance of doubt, where 9.28.1 applies, the clause does not impose an obligation on the Company to pay any more than the relevant statutory obligation.

9.29 **Indemnity**

A Pilot will not be required to pay for damage or loss of aircraft or equipment used in the service nor will any lien or other claim be made by the Company upon the Pilot's estate. Any claim made by any member of the public, passenger or other person upon the Pilot's estate as a result of any accident or happening caused by the Pilot when duly performing their nominated duty, whether efficiently or, as may be subsequently determined, negligently, will be accepted as a claim made against the Company. The Company will be solely responsible

for all claims as a result of operations by or travel in their aircraft. The foregoing will not apply to a Pilot who is found by the Company to have deliberately or recklessly performed his or her nominated duty in a manner contrary to law or the Company's policy.

9.30 **Maximum Trip Length**

9.30.1 A maximum Trip length of four calendar days and three nights will apply to a duty, unless otherwise agreed with the Pilot.

9.30.2 Clause 9.30.1 does not apply to Pilots delivering or undertaking simulator training.

9.30.3 The maximum Trip length for a Pilot undertaking simulator training shall not exceed the duration of the required training and reasonable travel time unless otherwise agreed with the Pilot.

9.30.4 The maximum Trip length for a Pilot delivering simulator training shall not exceed a maximum of 21 days away from home base unless otherwise agreed with the Pilot.

9.31 **Pilot Working Group (PWG)**

9.31.1 The Company will establish a communication process with the Pilot representatives to discuss general workplace issues.

9.31.2 PWG Pilot representatives shall be rostered to attend PWG meetings with Company management at least once per quarter in a calendar year or at regular intervals agreed by the Company and the unions.

9.31.3 The PWG will be comprised of up to four (4) NAA Pilot representatives including:

(a) one Pilot nominated from each of the unions covered by this Agreement (TWU, AFAP and AIPA); plus

(b) one (1) Pilot representative elected by the NAA Pilots in accordance with clause 9.31.5.

9.31.4 The unions may nominate one alternative PWG Pilot representative to attend meetings in the absence of the nominated attendees.

9.31.5 Election of the one (1) PWG Pilot representative will be via an electronic ballot every two (2) years. The initial election will be held within three months from the commencement date of this Agreement. All Company Pilots will have the opportunity to nominate and will be given 14 days' notice of an election and the method for nomination in writing. All Company Pilots will be eligible to vote in the ballot and will be provided 7 days' opportunity to vote.

9.31.6 The objectives of these meetings include:

(a) to assist the Company in handling challenges and changed circumstances that may arise due to the growth of the Company; and

(b) to provide a forum for communication with Pilots on workplace issues (including changes to Company policies and procedures) that affect them

9.31.7 Each Union shall be entitled to request up to four days per calendar year for its PWG Pilot representative to be released on pay to attend Company related activities.

9.32 **Freeze Periods**

9.32.1 A Pilot who successfully completes training into a new aircraft type or new position will be subject to a freeze period for a duration of three years. The freeze period can be waived at the discretion of the Company.

PART D - PAY AND RELATED MATTERS

10 Pay

10.1 Annual salary and incremental pay scale for Captains

10.1.1 The annual salaries for Captains at year one (1), year three (3), year five (5), year seven (7) and year ten (10) levels under this Agreement will be as set out from the first full pay period (**FFPP**) in the following tables:

Captains (F100/E190)

Pilot's length of service with the Company	Annual Salary from the FFPP on or after 15 October 2022	Annual Salary from the FFPP on or after 15 October 2023	Annual Salary from the FFPP on or after Agreement commencement	Annual Salary from the FFPP on or after 15 October 2024	Annual Salary from the FFPP on or after 15 October 2025	Annual Salary from the FFPP on or after 15 October 2026
Commencement	$180,349.12	$185,759.59	$198,466.10	$204,420.08	$210,552.69	$216,869.27
3 years	$185,759.58	$191,332.37	$204,420.08	$210,552.69	$216,869.27	$223,375.35
5 years	$191,332.38	$197,072.35	$210,552.69	$216,869.27	$223,375.35	$230,076.61
7 years	$197,072.35	$202,984.52	$216,869.27	$223,375.35	$230,076.61	$236,978.90
10 years	$202,984.52	$209,074.06	$223,375.35	$230,076.61	$236,978.90	$244,088.27

Captains (A319/A320)

Pilot's length of service with the Company	Annual Salary from the FFPP on or after 15 October 2022	Annual Salary from the FFPP on or after 15 October 2023	Annual Salary from the FFPP on or after Agreement commencement	Annual Salary from the FFPP on or after 15 October 2024	Annual Salary from the FFPP on or after 15 October 2025	Annual Salary from the FFPP on or after 15 October 2026
Commencement	$199,969.04	$205,968.11	$218,674.62	$225,234.86	$231,991.91	$238,951.66
3 years	$205,968.11	$212,147.16	$225,234.86	$231,991.91	$238,951.66	$246,120.21
5 years	$212,147.16	$218,511.57	$231,991.91	$238,951.66	$246,120.21	$253,503.82
7 years	$218,511.57	$225,066.92	$238,951.66	$246,120.21	$253,503.82	$261,108.94
10 years	$225,066.92	$231,818.92	$246,120.21	$253,503.82	$261,108.94	$268,942.20

10.2 **Annual salary and incremental pay scale for First Officers**

10.2.1 Subject to clause 10.3, the annual salaries for First Officers at year one (1), year three (3), year five (5) and year seven (7) levels (year seven (7) level for A319/A320 First Officers only) under this Agreement will be as set out from the first full pay period (**FFPP**) in the following tables:

First Officers (F100/E190)

Pilot's length of service with the Company	Annual Salary from the FFPP on or after 15 October 2022	Annual Salary from the FFPP on or after 15 October 2023	Annual Salary from the FFPP on or after Agreement commencement	Annual Salary from the FFPP on or after 15 October 2024	Annual Salary from the FFPP on or after 15 October 2025	Annual Salary from the FFPP on or after 15 October 2026
Commencement	$114,884.42	$118,330.95	$129,276.76	$133,155.07	$137,149.72	$141,264.21
3 years	$118,330.95	$121,880.88	$133,155.07	$137,149.72	$141,264.21	$145,502.14
5 years	$121,880.88	$125,537.31	$137,149.72	$141,264.21	$145,502.14	$149,867.20

First Officers (A319/A320)

Pilot's length of service with the Company	Annual Salary from the FFPP on or after 15 October 2022	Annual Salary from the FFPP on or after 15 October 2023	Annual Salary from the FFPP on or after Agreement commencement	Annual Salary from the FFPP on or after 15 October 2024	Annual Salary from the FFPP on or after 15 October 2025	Annual Salary from the FFPP on or after 15 October 2026
Commencement	$126,959.45	$130,768.23	$141,714.04	$145,965.47	$150,344.43	$154,854.76
3 years	$130,768.23	$134,691.28	$145,965.47	$150,344.43	$154,854.76	$159,500.41
5 years	$134,691.28	$138,732.02	$150,344.43	$154,854.76	$159,500.41	$164,285.42
7 years	$138,732.02	$142,893.98	$154,854.76	$159,500.41	$164,285.42	$169,213.98

10.3 **Low Hour First Officers**

10.3.1 A Pilot who commences employment on or after the date of commencement of this Agreement with less than 1500 Flight Hours will be paid in accordance with clause 10.4.

10.3.2 Progression from the Low Hour First Officer pay table into the main pay scales in clause 10.2 will occur on the earlier of a Pilot acquiring 1500 Flight Hours or three years of service with the Company as a Pilot.

10.3.3 A move to a new pay level under clause 10.2 will take effect from the first full pay period on or after acquiring the minimum Flight Hours or relevant years of service.

10.3.4 When a Pilot transitions into the main pay scale in clause 10.2, they will commence at the pay level aligned to their years of service with the Company as a Pilot. The Pilot will also retain their anniversary date for the purposes of future incremental progression.

10.4 **Annual salary and incremental pay scale for Low Hour First Officers**

10.4.1 The annual salaries for Low Hour First Officers under this Agreement will be as set in the following tables:

Pilot's Classification	Annual Salary from the date of Agreement commencement	Annual Salary from the FFPP on or after 15 October 2024	Annual Salary from the FFPP on or after 15 October 2025	Annual Salary from the FFPP on or after 15 October 2026
Low Hour First Officer – F100/E190	$122,147.82	$125,812.26	$129,586.62	$133,474.22
Low Hour First Officer – A319/A320	$126,897.22	$130,704.14	$134,625.26	$138,664.02

10.5 **Reasonable additional hours**

10.5.1 Unless otherwise specified in this Agreement, the salary set out in this Agreement is inclusive of:

(a) payment for a reasonable amount of additional hours;

(b) payment for hours worked outside of the ordinary hours of work; and

(c) loadings, penalties, allowances and public holiday entitlements.

10.5.2 For the purposes of this Agreement, 'reasonable' shall mean the total of ordinary and additional hours worked each week and will not exceed ninety (90) hours of cumulative duty in any consecutive fourteen (14) days provided that over a 12 month period hours will not exceed 1976 hours (38 hours x 52 weeks). Hours for this purpose means the period from sign on to sign off for each duty (it does not include periods between sign on and sign off in a slip port).

10.6 **Duty Hour Allowance**

Pilots shall be entitled to a Duty Hour Allowance (**DHA**) as set out in Schedule 1 from the first full pay period after the commencement of this Agreement.

DHA is payable to Pilots for all Duty Hours. For the purposes of this clause, Duty Hours are defined as the period between sign-on and sign-off in any port on any day.

DHA will be treated as a wage-related allowance and will be adjusted from time to time in accordance with any changes to applicable Pilot salaries.

10.7 **Training Pilot Allowances**

A Pilot in a training role identified below will be paid a fixed allowance per annum. The allowance is to be prorated and paid in equal amounts in each pay period from the first full pay period after the commencement of this Agreement.

- Simulator Check Captain (including Examiners and Accreditors): $49,000
- Line Check Captain: $45,500
- Line Training Instructor: $35,000
- Simulator Instructor: $23,920

10.8 **Additional benefits**

The following additional benefits are provided by the Company to the Pilot during employment:

10.8.1 **Income protection insurance**

The Company will provide income protection insurance or similar cover that is available to the Company. If the Company is unable to secure income protection insurance on terms acceptable to the Company, then the Company will reimburse the Pilot, upon production of a receipt, for expenditure on such insurance up to $1,500 per annum.

10.8.2 **Term life and total and permanent disability insurance**

The Company will provide term life and total and permanent disability insurance. If the Company is unable to secure term life and total and permanent disability insurance on terms acceptable to the Company, then the Company will reimburse the Pilot upon production of a receipt, for expenditure on such insurance up $500 per annum.

10.8.3 **Loss of Licence Insurance**

Pilots will have the option of opting out of the insurance coverage identified in 10.8.1 and 10.8.2 and opting into Loss of Licence insurance. The Company will reimburse each Pilot who exercises this option and opts to take out Loss of Licence insurance the sum of $2,364 per annum (upon production of a receipt) as set by the *Air Pilots Award 2020* and as varied from time to time or as replaced.

10.8.4 **Jeppesen subscription**

The Company will provide each Pilot with access to any required Jeppesen operational documentation (as varied from time-to-time).

10.8.5 **Additional Hourly Payment**

Where a Pilot achieves more than 59 flying hours in a roster period, the Pilot will be entitled to receive an hourly payment.

For each hour flown in excess of 59 hours in a roster period, a Pilot will be entitled an hourly payment at the Additional Hourly Payment – Tier 1 rate set out in Schedule 1.

For each hour flown in excess of 75 hours in a roster period, a Pilot will be entitled an hourly payment at the Additional Hourly Payment – Tier 2 rate set out in Schedule 1. The Additional Hourly Payment – Tier 2 rate is paid to the exclusion of the Additional Hourly Payment – Tier 1 rate.

For the purpose of calculating the flying hours in a roster period for this clause:

(i) a Pilot will receive a credit of one flight hour for each flight simulator duty hour worked, to a maximum of four hours per simulator duty;

(ii) a Pilot will receive a credit of one flight hour for each company-approved administrative ground duty hour worked, to a maximum of two hours per day; and

(iii) a Pilot on annual leave will receive a reduction to the flying hours prorated for the period of annual leave taken during the roster period.

Hours accrued for the period a Pilot is undergoing a type rating do not contribute to the flying hour thresholds for an Additional Hourly Payment.

For part hours in excess of the flying hour thresholds, the payment will be pro-rated.

Until the Company provides notice otherwise, the Pilot must submit a claim for an Additional Hourly Payment to receive payment.

10.8.6 **Working on a Rostered Day Off**

Where a Pilot agrees to work a duty on a Rostered Day Off, the Pilot will receive a Working on a Day Off payment as set out in Schedule 1.

Where a duty infringes into a Rostered Day Off, the Pilot will receive a Working on a Day Off payment as set out in Schedule 1.

Until the Company provides notice otherwise, the Pilot will need to submit a claim for working on a Rostered Day Off to receive payment.

10.9 **Payment of wages and superannuation**

10.9.1 Wages shall be paid fortnightly in arrears by electronic funds transfer to a financial institution nominated in writing by the Pilot.

10.9.2 The Company will make superannuation contributions to a complying superannuation fund in respect of each Pilot. The superannuation fund to which contributions will be made in respect of a Pilot will be the fund chosen by that Pilot which is consistent with the choice of fund regime.

10.9.3 If a Pilot does not select a superannuation fund in accordance with the choice of fund regime, the Company will request the Australian Taxation Office to advise if the Pilot has an existing superannuation fund (**Stapled Fund**), to which the Company will make superannuation contributions. In the event that the Pilot does not choose a superannuation fund and does not have an existing Stapled Fund, the superannuation contributions in respect of that Pilot will be made to the Qantas Superannuation Plan (or any successor to that plan) being a fund that offers a MySuper product as the default fund for the purposes of the choice of fund regime.

10.9.4 Subject to the governing rules of the relevant superannuation fund, a Pilot may, in writing, authorise the Company to pay on behalf of the Pilot a specified amount from the post-taxation wages of the Pilot into the same superannuation fund as the Company makes the superannuation contributions.

A Pilot may adjust the amount the Pilot has authorised the Company to pay from the wages of the Pilot following the giving of three months' written notice to the Company.

10.10 **Automation of allowances**

The Company will endeavour to automate the claim process for allowances provided for in Schedule 1 within the life of the Agreement.

PART E - LEAVE

11 Annual Leave

11.1 The Pilot shall be entitled to 42 days paid annual leave (inclusive of Saturdays, Sundays and Public Holidays) for each completed year of service (excluding any periods of unapproved and/or unpaid absences).

11.2 Annual leave will be allocated pursuant to the annual leave allocation process that has been agreed with Pilots and is in place at the time that this Agreement becomes operative.

11.3 The Company may assign excess annual leave to Pilots with one (1) month's written notice. A shorter period of notice may be granted by mutual agreement. Excess annual leave is any amount of annual leave in excess of 42 days. Excess leave is accumulated in the manner set out in the annual leave allocation process.

11.4 Annual leave may be 'cashed out' up to a maximum of 14 days provided that:

11.4.1 the cashing out would not result in the Pilot's remaining accrued entitlement to paid annual leave being less than 4 weeks;

11.4.2 the agreement to cash out the leave is recorded in writing between the Pilot and the company; and

11.4.3 the Pilot is paid the full amount that would have been payable to the Pilot had the Pilot taken the leave forgone.

11.5 A Pilot must take an amount of annual leave during a particular period if the Pilot is directed to do so by the Company because, during that period, the Company shuts down the business, or any part of the business, in which the Pilot works.

11.6 When the workplace is closed, Pilots must take the annual leave as directed or if they have no accrued annual leave the Pilot is required to take unpaid leave.

11.7 The Company shall publish annual leave results within six (6) weeks for bulk annual leave requests from the closure of bulk annual leave bidding. Except where unforeseen circumstances prevent publication, at which time the Company will consult with the PWG with respect to a revised timeframe. Annual leave results do not incorporate ad hoc requests approved post roster publish.

11.8 Approval of ad hoc leave requests are subject to Company discretion. Ad hoc leave requests will be approved or denied by the Company within 7 days of receiving the request.

12 Long service leave

12.1 The long service leave legislation of the relevant state shall apply to the Pilot covered by this Agreement.

12.2 Taking long service leave must be by agreement. The Pilot is required to provide two (2) weeks' notice of the date from which the leave is to be taken. A shorter period of notice may be granted by mutual agreement with the Company.

12.3 Subject to long service leave legislation, a Pilot may request that long service leave be taken for twice the duration of the accrued entitlement at half the rate of pay that the Pilot would be otherwise entitled to receive.

13 Personal leave: sick leave and carer's leave

13.1 A Pilot will accrue ten (10) days of paid personal leave per annum based on continuous service.

13.2 Notwithstanding any provision to the contrary in the Qantas Group policy, a certificate from a medical practitioner, or other evidence satisfactory to the Company, must be provided for leave to be classed as paid personal leave.

13.3 Paid personal leave is calculated on the Pilot's rate of pay at the time of taking the leave, and shall accrue from year to year. Personal leave does not accrue during any period of unpaid leave.

13.4 The balance of paid personal leave is not paid out upon termination of employment.

13.5 Where the Pilot has exhausted all other paid personal leave entitlements, the Pilot is entitled to two days unpaid carer's leave on each occasion that a member of the Pilot's immediate family or household requires care and support due to illness or injury or an unexpected emergency affecting the family member. For absences to be classed as unpaid carers leave, the Pilot must provide proof of the illness or injury if requested by the Company.

13.6 The Pilot is required to notify the Regional Operations Centre (**ROC**) before their starting time on the first day of absence of their inability to attend for duty and where practicable state the nature of the illness or injury and the estimated duration of the absence.

13.7 An SMS message, or a message left with another Pilot, is not considered acceptable as contact with the ROC.

14 Upper Respiratory Tract Infection (URTI) leave

14.1 A Pilot is entitled up to six working days per annum (non-accruable) for sickness associated with an upper respiratory tract infection. The Company may require the production of specific medical certificate from a medical practitioner to support such absences.

15 Leave without pay

15.1 Leave without pay may be approved by the Company pursuant to Company policy.

16 Compassionate leave

16.1 The Pilot is entitled to 3 days paid compassionate leave per occasion in accordance with the following:

16.1.1 For spending time with a member of their immediate family or household who contracts or develops a personal illness, or sustains a personal injury, that poses a serious threat to his/her life.

16.1.2 After the death of a member of the Pilot's immediate family or household.

16.1.3 A child is stillborn, where the child would have been a member of the Pilot's immediate family, or a member of the Pilot's household, if the child had been born alive.

16.1.4 The Pilot, or the Pilot's spouse or de facto partner, has a miscarriage.

16.2 For the purposes of this Agreement, the Pilot's immediate family means a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the Pilot or a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the Pilot.

16.3 For absences to be classed as compassionate leave, the Pilot must provide proof of the illness, injury or death if requested by the Company.

17 Jury duty

17.1 A Pilot shall be allowed an approved leave of absence during any period when legally required to attend for jury duty.

17.2 The Pilot must notify the Company as soon as possible of the date upon which they are required to attend jury service and may also be required to produce proof of attendance for jury service.

17.3 The Company shall reimburse the Pilot the difference between the amount paid in respect of their attendance for jury service and the amount the Pilot would have received in respect of their ordinary time earnings.

18 Parental leave

18.1 Parental leave will be provided in accordance with the Qantas Group Parental Leave Policy as amended from time to time. Where the Parental Leave Policy does not cover specific matters it may be covered by this Agreement or in accordance with the NES.

18.2 After completing more than one year's continual service with the Company, a Pilot is entitled up to 52 weeks unpaid parental leave following the birth or adoption of a child.

18.3 A Pilot is required to give ten weeks' notice before parental leave is taken.

18.4 A pregnant Pilot may be transferred to safe duties if required by either the Company or the registered medical practitioner without loss of pay or conditions.

18.5 When returning to work, the Pilot is required to provide four (4) weeks' notice.

18.6 A Pilot will return to their previous position, duties and hours of work. If that position is no longer available, the Pilot will be given a comparable position in pay, status and working hours (where available).

18.7 If the Pilot does not wish to return to their previous position, duties and hours of work, continued employment will be subject to the availability of a suitable position.

19 Family and Domestic Violence leave

19.1 Family and domestic violence leave is provided for in accordance with the NES.

PART F – ROSTERING

20 Rostering Practices

This Part includes some matters previously contained in the Company's Rostering Protocol. Matters contained in the Rostering Protocol that are not included in this Part may, at Company discretion, be incorporated into the Company's Flight Administration Manual.

References in this Part to CAO 48 mean the Company's CAO 48.1 Appendix 7 FRMS (including any FRMS trial, as approved by CASA and varied from time-to-time) or other applicable CAO 48.1 ruleset.

Flight and duty time limitations will be as determined by the applicable CAO 48.1 ruleset (including any Appendix 7 FRMS or FRMS trial) as varied from time-to-time unless a more restrictive limitation applies under this Agreement.

The Company shall endeavour to provide an equitable allocation of Duty Hours for Pilots over a roster period.

20.1 Rostered Day Off (RDO)

20.1.1 Pilots are entitled to a total of nine (9) RDOs per twenty-eight (28) day roster period, with four (4) pairings of RDOs to occur within a roster period.

20.1.2 A Pilot will be rostered at least one paired RDOs for one (1) weekend each roster period.

20.1.3 RDO means a period of at least thirty-six (36) hours' free from duty for a single RDO, with an additional twenty-four (24) hours free from duty for each subsequent RDO.

20.1.4 A Pilot is not required to sign on earlier than 0400 the day after the calendar day which is designated as an RDO.

20.1.5 Unless otherwise agreed between the Pilot and Company, RDOs will be rostered to occur at the Pilot's home base.

20.1.6 An RDO may be rostered away from home base whilst undergoing training other than recurrent training. An RDO may be rostered away from home base whilst delivering simulator training.

20.1.7 Notwithstanding clause 20.1.3 which provides minimum periods free of duty, reserve periods with a commencement time prior to 0400 may still be allocated following an RDO.

20.2 Sign On/Sign Off Times - Annual Leave

20.2.1 For periods of Annual Leave six (6) consecutive calendar days or less, a Pilot will not be planned to sign off later than 2200 the calendar day before the period of Annual Leave and planned to sign on no earlier than 0400 the calendar day after the period of Annual Leave.

20.2.2 For periods of Annual Leave seven (7) consecutive calendar days or more, a Pilot will not be planned to sign off later than 2000 the calendar day before the period of Annual Leave and no earlier than 0800 the day after the calendar day after Annual Leave.

20.2.3 A Pilot will not be rostered any simulator training or line check within seven (7) days of the first calendar day after a period of Annual Leave seven (7) consecutive days or more, unless required to maintain currency.

20.3 Re-assignable Periods

20.3.1 Changes made greater than twenty-four (24) hours before a Pilot's rostered duty will be wholly contained within a Re-assignable Period that includes the Pilot's original

rostered Duty Period plus a buffer period totalling two (2) hours (Buffer Period), unless otherwise agreed with the Pilot.

20.3.2 Unless otherwise agreed with the Pilot, there will be no changes to the planned rostered duty of a Pilot within twenty-four (24) hours of the rostered duty.

20.3.3 The Re-assignable Period will be no longer than twelve (12) hours.

20.3.4 During a Re-assignable Period the Pilot must remain contactable for the period and any duty allocated to the Pilot must be entirely contained within the Re-assignable Period, unless otherwise agreed by the Pilot.

20.3.5 A Pilot may not be allocated a Duty Period that commences within 5 hours of the end of the Re-assignable Period, unless otherwise agreed by the Pilot.

20.3.6 In accordance with clause 9.27.11, a DVA will apply where a Pilot:

(a) accepts an alternate duty that is not wholly contained within the Buffer Period; or

(b) an alternate duty is delayed by more than two (2) hours.

20.3.7 A Re-assignable Period is able to be converted into a duty, but not a period of reserve or an Available Day.

20.3.8 For any avoidance of doubt, a Pilot who is displaced from their original rostered duty will only be assigned a duty or Re-assignable Period that falls entirely within the defined buffer periods and is not required to accept a duty outside of the buffer period.

20.4 **Available Days (A Day)**

20.4.1 A Days may form part of a Pilot's published roster. However, displacement from a duty once a roster is published will not result in an A Day and will instead become a Re-assignable Period in accordance with clause 20.3. A Pilot cannot be allocated a Reserve Period on an A Day.

20.4.2 A duty assigned on an A Day must be assigned prior to sign off from a Pilot's last Duty Period, Reserve Period or Re-assignable Period prior to the A Day, otherwise the A Day becomes an Unavailable Day.

20.4.3 A Pilot will not be assigned any duties on an Unavailable Day unless the Pilot agrees.

20.5 **Airport Duty**

20.5.1 From the commencement of this Agreement the Company will implement a process for Pilots to elect not to be rostered Airport Duties. The election period will be completed and implemented no later than the FFPP on or after 1 April 2024. A Pilot will be required to so elect for a minimum period of one year. The election process will be held annually and implemented by the FFPP on or after 1 April each subsequent year.

20.5.2 Subject to 20.5.1, the Company may require a Pilot to carry out an Airport Duty at the Pilot's home base airport or temporary transfer base airport.

20.5.3 An Airport Duty may only be rostered for the purpose of covering charter services.

20.5.4 The maximum rostered duration of an Airport Duty shall be four (4) hours.

20.5.5 An Airport Duty can be rostered a maximum of four (4) times in a roster period, unless agreed with the Pilot.

20.5.6 When an Airport Duty is assigned to a Pilot who was originally rostered a Reserve Period, the Airport Duty start time shall be at or after the originally published roster reserve start time unless agreed by the individual Pilot.

20.5.7 At any time whilst on Airport Duty the Pilot must be contactable for the purpose of being tasked to operate a flight(s).

20.5.8 Once a Pilot is required to operate a flight off of an Airport Duty, the entire duty time, from initial sign-on for Airport Duty, will count towards Flight Duty Period limitations.

20.5.9 An Airport Duty period will result in the Airport Duty being paid at the Additional Hourly Payment – Tier 1 rate set out in Schedule 1. If a Flight Duty Period is assigned to the Pilot while on Airport Duty, the Pilot will be paid for the entire period from the commencement of the Airport Duty to the later of the end of the Airport Duty or Flight Duty Period sign off time at a Pilot's home base at the Additional Hourly Payment – Tier 1 rate.

20.5.10 Until the Company provides notice otherwise, the Pilot will need to submit a claim for a payment under clause 20.5.8 for a completed Airport Duty.

20.5.11 The Company shall provide Pilots on Airport Duty access to a quiet, comfortable room for the period of the Airport Duty.

20.6 **Assignment from Reserve**

20.6.1 Unless otherwise agreed, Pilots on a single Reserve Period can only be assigned a single Duty Period that will sign on and sign off at their home base.

20.6.2 Pilots on consecutive days of reserve can be assigned duties over multiple days, including overnights away from home base. Unless otherwise agreed with the individual Pilot the assigned duties must sign on at home base on the first day and sign off at home base on the last day of the consecutive days of reserve.

20.7 **Consecutive Shifts**

20.7.1 If, in any consecutive 7-day period, a Pilot is assigned three (3) or more Flight Duty Periods involving late night operations, then for the Period, the combined numerical total of all assigned or reassigned:

(a) Flight Duty Periods involving late night operations; and

(b) Other Flight Duty Periods; and

(c) Reserve Periods

must not exceed four (4).

20.7.2 Late night operation means an operation where a Flight Duty Period includes more than 30 minutes between the hours of 2300 and 0530 local time at the location where the Pilot is acclimatised.

20.7.3 Prior to commencing a Duty Period or Reserve Period a Pilot must have had at least 36 consecutive hours off duty in the 168 hours before the projected end time of the rostered Duty Period or Reserve Period.

20.7.4 This is in addition to the requirements of CAO 48.1.

20.8 **Reserve Periods**

20.8.1 The Company may require a Pilot to carry out up to seven (7) Reserve Periods at the Pilot's home base airport or temporary transfer base airport within a roster period.

20.8.2 The maximum rostered duration of a Reserve Period shall be twelve (12) hours.

20.8.3 A Reserve Period may have a meeting scheduled during the Reserve Period. In these instances the Duty Period, including the Reserve Period must not exceed twelve (12) hours or that prescribed in CAO 48.1 and the following duty must be logged and used to determine the time free of duty (normal flight and duty limitations apply).

20.8.4 For a Reserve Period with a scheduled meeting the Duty Period starts at the time of the scheduled meeting and finishes at the completion of the Reserve Period even if no call out was required.

20.9 **Request to Work on a Rostered Day Off or Annual leave Day**

If operationally necessary, the ROC can ask a Pilot to work on an RDO or annual leave day. ROC will review iFlight to ascertain if any Pilots have volunteered to work on an RDO or annual leave day. Pilots who volunteer to work will be contacted prior to Pilots that have not volunteered. Pilots who are on annual leave and have not volunteered through iFlight will not be contacted by telephone. A text message may be sent to the relevant Pilot to ask if they are available for duty.

Flight Crew who agree to work on a RDO will be compensated as per clause 10.6.6 upon submission of the required form.

Flight Crew who agree to work on annual leave will be credited back that annual leave day. Flight Crew will then be compensated as per clause 10.6.6 upon submission of the required form.

SCHEDULE 1

All amounts listed in this schedule will be adjusted by 3% effective the first full pay period on or after:

- 15 October 2024
- 15 October 2025
- 15 October 2026

		F100/E190 FO	F100/E190 Capt	A319/A320 FO	A319/A320 Capt
Allowance Rate					
Working on a Rostered Day Off On a working day off Pilot agrees to work a duty that is less than 8 planned duty hours	Agreement Commencement	$910.24	$1,428.92	$975.00	$1,584.37
	15-Oct-24	$937.55	$1,471.79	$1,004.25	$1,631.90
	15-Oct-25	$965.67	$1,515.94	$1,034.38	$1,680.86
	15-Oct-26	$994.64	$1,561.42	$1,065.41	$1,731.28
Working on a Rostered Day Off On a working day off Pilot agrees to work a duty that is equal to or greater than 8 planned duty hours	Agreement Commencement	$1,137.80	$1,786.15	$1,218.75	$1,980.46
	15-Oct-24	$1,171.93	$1,839.73	$1,255.32	$2,039.88
	15-Oct-25	$1,207.09	$1,894.93	$1,292.98	$2,101.07
	15-Oct-26	$1,243.30	$1,951.77	$1,331.77	$2,164.10
Additional Hourly Payment – Tier 1 (Hourly Rate)	Agreement Commencement	$86.52	$139.05	$94.76	$154.50
	15-Oct-24	$89.12	$143.22	$97.60	$159.14
	15-Oct-25	$91.79	$147.52	$100.53	$163.91
	15-Oct-26	$94.54	$151.94	$103.55	$168.83
Additional Hourly Payment – Tier 2 (Hourly Rate)	Agreement Commencement	$155.74	$250.29	$170.57	$278.10
	15-Oct-24	$160.41	$257.80	$175.69	$286.44
	15-Oct-25	$165.22	$265.53	$180.96	$295.04
	15-Oct-26	$170.18	$273.50	$186.38	$303.89
Early Call Allowance (Per Occasion)	Agreement Commencement	$54.61	$85.74	$58.50	$95.06
	15-Oct-24	$56.25	$88.31	$60.26	$97.91
	15-Oct-25	$57.94	$90.96	$62.06	$100.85
	15-Oct-26	$59.68	$93.69	$63.92	$103.88
Duty Variation Allowance (Hourly Rate)	Agreement Commencement	$118.33	$185.76	$126.75	$205.97
	15-Oct-24	$121.88	$191.33	$130.55	$212.15
	15-Oct-25	$125.54	$197.07	$134.47	$218.51
	15-Oct-26	$129.30	$202.98	$138.50	$225.07
Duty Hour Allowance (Hourly Rate)	Agreement Commencement	$7.11	$10.93	$7.11	$10.93
	15-Oct-24	$7.32	$11.26	$7.32	$11.26
	15-Oct-25	$7.54	$11.60	$7.54	$11.60
	15-Oct-26	$7.77	$11.94	$7.77	$11.94

*(1) The Working on a Rostered Day Off payments, as represented in the above table, replace the allocation of days-in-lieu (**DIL**), or substitute days off (**SDO**). Any Pilot with an existing bank of DILs or SDOs at the commencement of this Agreement, will retain those DILs and/or SDOs for use at a future date.*

SCHEDULE 2– IMPLEMENTATION SCHEDULE

1 There are certain clauses in the Agreement that require changes to the supporting systems (**Affected Clauses**).

2 The following clauses will commence operation in accordance with the implementation date set out below.

3 The entitlement in clause 20.1.1 of this Agreement will begin to accrue from the first full roster period after the commencement of this Agreement.

4 Any entitlement accrued as per Schedule 2, Item 3 must be allocated within six months of the commencement of this Agreement.

Affected Clause/s	Description of Affected Clause/s	Implementation Date	Conditions and/or Notes
20.1.3	RDO period being thirty-six (36) hours	First full roster period commencing eight (8) weeks after this Agreement commences operation	Process will require testing that involves two (2) roster period's
20.1.1	Increase in minimum RDOs from eight (8) to nine (9)	First full roster period commencing eight (8) weeks after this Agreement commences operation	Process will require testing that involves two (2) roster period's
20.1.4 and 20.2.1	Earliest sign on of 0400 after RDO or Annual Leave period of six consecutive days or less	First full roster period commencing eight (8) weeks after this Agreement commences operation	Process will require testing that involves two (2) roster period's

EXECUTED AS AN INDUSTRIAL AGREEMENT

DATED this ..... day of .....

SIGNED for and on behalf of

Pilots employed by Network Aviation Pty Limited

.....	.....
Signature of representative	Signature of representative
.....	.....
Name of representative (print)	Name of representative (print)
.....	.....
Address of representative (print)	Address of representative (print)
.....	.....
Office of representative / Authority to sign	Office of representative / Authority to sign

.....
Signature of representative

.....
Name of representative (print)

.....
Address of representative (print)

Office of representative / Authority to sign

SIGNED for and on behalf of the

Network Aviation Pty Limited as Trustee for the Network Trust Trading as Network Aviation Australia

Signature of representative	Signature of representative
Name of representative (print)	Name of representative (print)
Address of representative (print)	Address of representative (print)
Office of representative / Authority to sign	Office of representative / Authority to sign

Attachment B

[199] Set out in the following table are the 11 non-agreed terms:

	Claim	**Bargaining Representative**	**EA clause**
1	2 hour sign on	AFAP	N/A proposed new clause 20.6.3
2	No 4am starts after days off	AFAP	20.1.4
3	Business class duty travel	AFAP	N/A – proposed new clause (possibly in 9.27.1)
4	DHA rate	AFAP, Network	10.6, Schedule 1
5	Overtime rate	AFAP, AIPA, TWU, Network	10.8.5
6	10 days off per roster period	AFAP, AIPA, TWU	20.1.1
7	Revised rostering provisions	AFAP, TWU	20
8	Low-experience first officer rate	AIPA	10.3, 10.4
9	Improvements to salary tables	Network	10.1-10.4
10	Backpay	Network	10.1, 10.2
11	RDO provisions	Network	20.1

DEPUTY PRESIDENT

Appearances:

Mr M Follett of Counsel for Network Aviation Australia.
Mr Y Bakri of Counsel for Australian Federation of Air Pilots.
Mr L Saunders of Counsel for Australian and International Pilots Association.
Mr P Boncardo of Counsel for Transport Workers' Union of Australia.

Hearing details:

Before the Full Bench
2024.
Perth (and by Video via Microsoft Teams):
2 May.

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