DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Qantas Airways Limited
(AG2025/613)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 2 MAY 2025

Application for approval of an enterprise agreement – dispute settlement procedure – BOOT – award coverage – opportunity to provide undertakings

Introduction and background

[1] On 7 March 2025, **Qantas** Airways Limited applied for approval of the Qantas Airways Limited Pilots (Short Haul) **Enterprise Agreement** 2024 (EBA9), which covers pilots employed by Qantas in its short haul operations who are members, or eligible to be members, of the **A**ustralian and **I**nternational **P**ilots **A**ssociation.

[2] The AIPA is a bargaining representative for the Enterprise Agreement, as is the **A**ustralian **F**ederation of **A**ir **P**ilots. Both organisations have given notice under s 183 of the *Fair Work **Act** 2009* (Cth) that they want to be covered by the Enterprise Agreement if it is approved by the Fair Work **Commission**.

[3] The AFAP does not support the approval of the Enterprise Agreement for two reasons. First, the dispute resolution procedure in the Enterprise Agreement does not meet the requirements of s 186(6) of the Act. Secondly, **F**irst **O**fficers Under **T**raining would not be better off over all under the Enterprise Agreement compared to the Air **Pilots Award** 2020. This decision deals with those preliminary issues.

Dispute Settlement Procedure

[4] Section 186(6) of the Act relevantly requires the Commission to be satisfied that the enterprise agreement includes a term that provides a procedure that requires or allows the Commission to settle disputes about any matters arising under the agreement and in relation to the **N**ational **E**mployment **S**tandards. The dispute settlement procedure must also allow for the representation of employees covered by the agreement for the purposes of the dispute settlement procedure (s 186(6)(b)).

[5] In *Energy Australia **Yallourn** Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union*,[1] the Full Court of the Federal Court considered s 186(6) of the

[1] (2018) 281 IR 318

Act. *Yallourn* concerned a dispute about the remuneration payable to casual employees under a particular clause of an enterprise agreement. The Commission dealt with the dispute in its capacity as an arbitrator under the dispute settlement procedure in the applicable enterprise agreement. The determination at first instance by the Commission was the subject of an appeal to a Full Bench of the Commission. The employer then commenced proceedings in the Federal Court against the five unions covered by the enterprise agreement, seeking a declaration that, under clause 5.3 of the enterprise agreement, casual employees were to be remunerated in a particular way. In response, the five unions filed an interlocutory application seeking that the originating application be set aside for want of jurisdiction. At first instance in the Federal Court, Justice Bromberg ordered that the originating application be set aside on the basis that the Court had no jurisdiction to hear the proceedings because the controversy between the parties had been resolved by a decision of the Full Bench of the Commission under s 739(4) of the Act, acting as an arbitrator appointed pursuant to clause 28 of the enterprise agreement. Justice Bromberg's decision turned on the proper construction of the dispute settlement procedure in clause 28 of the enterprise agreement. On appeal to the Full Court of the Federal Court, the employer argued, as it had at first instance, that none of the five unions could raise a dispute under the dispute settlement procedure in clause 28 of the enterprise agreement. That argument was rejected. It followed that the Commission had jurisdiction to arbitrate the dispute and the decision of the Full Bench in the private arbitration extinguished the justiciable controversy between the employer and each of the unions with the consequence that the Court lacked jurisdiction to entertain the employer's application. In determining the proper construction of the dispute settlement procedure in clause 28 of the enterprise agreement, Justices Rares and Barker had regard to the legislative context in which it applied, including s 186(6) of the Act.[2] Their Honours went on to make the following relevant observations:

> "58. An enterprise agreement must be construed in its industrial and legislative context as an agreement made between parties engaged in an employment relationship in which employee organisations, such as the five unions, can, and often will, have a workplace right under ss 341(1) and or 183(1) of the Fair Work Act to play a part, including as a party to it. Those persons may not have been assisted by lawyers in the precise framing and expression of its terms.
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> 59. Here, when the Commission approved the Yallourn agreement it noted, pursuant to s 201(2), in its decision that the agreement once it came into operation under s 54(1) following the Commission's approval, "covered" each of the five unions. That had the consequence that it provided the terms and conditions that governed the rights and obligations of each of the five unions in respect of both Energy Australia, as employer, and its employees who were, or were eligible to be, members of the respective union: cf. Aldi Foods Pty Ltd (as general partner of Aldi Stores) (a limited partnership) v Shop Distributive and Allied Employees Association [2017] HCA 53; (2017) 350 ALR 381 at 388-389 [26]- [34], 396 [78] per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ.
>
> 60. An enterprise agreement is a statutory artefact made by persons specifically empowered by the Fair Work Act to do so: Marmara 222 FCR at 180 [90]. It has a legislative character, because it is a fair work instrument, as defined in s 12 of the Fair Work Act. The Act enables an enterprise agreement to be made between an employer and both its employees (by majority vote) and employee organisations, such as the five unions.

[2] *Yallourn* at [56]

61. As noted above, an enterprise agreement is a "workplace instrument" made pursuant to the Fair Work Act for a particular statutory purpose, namely to regulate an employment relationship in which, often, as in the present case, employee organisations will be involved. An employee organisation has a right, under s 540(2), to seek a remedy under Div 2 of Pt 4-1 of the Act "in relation to a contravention ... of a civil remedy provision ... in relation to an employee only if" the employee is or will be affected by the contravention and the particular union is entitled to represent his or her industrial interests. Each of the five unions had a workplace right, within the meaning of s 341(1)(a), because it had a role or responsibility under the Yallourn agreement and under s 341(1)(b), because it could initiate or participate in a dispute settlement process (within the meaning of ss 341(2)(j) and 186(6)).

62. Each of the five unions, as an employee organisation, could apply to the Court for an order under s 540(2) in relation to a contravention of, among others, s 50 (that prohibits a person from contravening a term of an enterprise agreement) as Energy Australia noted in its written submissions on the appeal and in addition, s 323(1)(a) (that requires an employer to pay an employee in full the amounts due to him or her in relation to the performance of work) (see s 539(2) items 4 and 10). It follows that each of the five unions had a workplace right under ss 323(1)(a) and 540(2) to initiate proceedings relating to compliance with cl 5.3 of the Yallourn agreement under s 341(1)(b), and also had a role or responsibility to enforce compliance with it under s 341(1)(a).

63. Since each of the five unions had a right to initiate proceedings in the Court, s 186(6) required cl 28 to provide a procedure to resolve a dispute that would be litigated in such a matter, because that dispute would arise under the Yallourn agreement, even if no individual employee had initiated a complaint, provided that Energy Australia had contravened its obligations under cl 5.3 in respect of one or more casual employees (see s 540(2)).
…

65. As s 172(1) of the Act provides, an enterprise agreement can be "about" matters pertaining to the relationship "between the employer ... and the employee organisation or employee organisations, that will be covered by the agreement". A dispute about, or involving, that relationship is a subject-matter for which s 186(6) requires a dispute resolution process to be included in an enterprise agreement. However, neither cl 28.1(a) nor par (3) of the model term, in Sch 6.1 to the Regulations, expressly addresses whether a dispute that any of the five unions may have with Energy Australia, arising under the Yallourn agreement as to its interpretation or Energy Australia's compliance with its terms, can be addressed only by discussions between the employer and one or more employees, without the involvement of the union(s) concerned.

66. Clearly enough, the literal phrasing of each of par (3) of the model term and steps 1 and 2 in cl 28.1(a) is apposite to cover a dispute that involves only the employer and one or more employees. However, both the model term and cl 28 are intended to provide, as s 186(6)(a)(i) requires, "a procedure that requires or allows [the Commission] ... to settle disputes ... about any matters arising under the agreement" (emphasis added). Therefore, a literal construction of cl 28 that precluded any of the five unions that are parties to the Yallourn agreement from initiating a dispute about a matter arising under it for which it has a workplace right, would defeat the purpose which the first three paragraphs of cl 28 (preceding cl 28.1) and ss 186(6) and 341(1) required the dispute resolution process in the clause to serve.

67. Energy Australia's argument that the Yallourn agreement did not provide any basis for any of the five unions to raise a dispute under cl 28 must be rejected. That is because, if the five unions themselves could never raise or pursue a dispute about their workplace rights, as employee organisations, covered by the Yallourn agreement within the meaning of ss 53(2), 172(1)(b) and 186(6)(a)(i), then cl 28 would not provide a procedure to settle a class of category

1 matters that could arise under the enterprise agreement. Accordingly, cl 28 would not comply with s 186(6).

68. Clause 28 itself defines category 1 matters as ones "that are in dispute, that go to the application or interpretation of this Agreement" and it states that it "facilitates access to [the Commission] for conciliation and, if necessary, arbitration" for those matters. The clause should be construed to ensure that it achieves that stated objective, and the requirements of s 186(6), in respect of all category 1 matters.

69. The particular provisions of cl 28.1(a) should not be construed so as to read down the general provisions of the introductory part of cl 28 or the facultative operation of cl 28.1(b). The latter permits "the parties" to agree to refer a dispute to the Commission "at any stage" for "speedy resolution". Clause 28.1(b) eschews the meretricious pedantry of Energy Australia's argument, and permits achieving the industrial, commercial and statutory objective of a comprehensive process to resolve all disputes of category 1 matters. It follows that any of the parties (Energy Australia, any of its employees and any of the five unions) between whom a dispute exists in respect of such a matter, can agree that the Commission can resolve it in accordance with the procedure in cl 28.

70. Energy Australia's submission, that it and the five unions would not be bound by any decision of the Commission in an arbitration under cl 28, and that each of it and they were free to commence proceedings in the original jurisdiction of this Court to seek declarations inconsistent with the arbitration decision, is self-evidently untenable and must be rejected. It would be recipe for industrial chaos if none of the five unions was bound by a resolution arrived at in the dispute resolution process even though cl 28 appeared, in its terms, to seek to achieve such a resolution.

71. The consequence of Energy Australia's argument would be that, although the Commission had resolved a dispute between it and its employees in a binding decision given under s 739(4), somehow both it and any of the five unions could evade the result of that statutorily mandated dispute resolution process. Such an absurd outcome would represent the antithesis of a dispute resolution process of the kind required by s 186(6) of the Fair Work Act. Indeed, if Energy Australia's argument were correct, then the Yallourn agreement could not comply with s 186(6) because it would not: provide a procedure that requires or allows the [Commission], or another person who is independent of the employers, employees or employee organisations covered by [it] to settle disputes ... about any matters arising under the agreement. (emphasis added)

72. Moreover, the dispute resolution process in cl 28 would be subverted if it were confined solely to matters covered by cl 28.1(a). That is because the introduction to cl 28 provided that category 1 matters included: matters that are in dispute, that go to the application or interpretation of this Agreement .... this clause facilitates access to the [Commission] for conciliation and, if necessary, arbitration.

73. The evident purpose of the Yallourn agreement was to ensure industrial peace at a large power plant in which there were many employees and five unions, each of whom had, or could have, different industrial and workplace concerns in respect of its own members (or employees eligible to be its members) and the other unions. The dispute resolution process in cl 28 would be pointless if it did not operate so as to bind all of those parties in a way that was certain. Unless all were capable of being bound, the requirement in s 186(6) of the Act, and the object of the parties themselves in agreeing to cl 28, could not be achieved. Instead there would be a chaotic decision-making process in which, on the one hand, the Commission could make binding arbitral awards between employees and Energy Australia, and on the other hand (as Energy

Australia argued), both it and the five unions would be free to challenge those awards collaterally by proceedings in the Court.

74. Moreover, cl 28.1(b) allowed "the parties" to agree "at any stage" to refer a dispute to the Commission "in the interest of speedy resolution of the dispute". Although cl 28.1(a) provided a process to be followed that, in most cases, fitted the circumstances, the parties had the right to depart from it as provided in cl 28.1(b). Reading the Yallourn agreement as a whole, and giving cl 28 a construction in its industrial, contractual and statutory context, a reasonable person in the position of the parties would have understood that each of the five unions had a right to initiate a dispute about category 1 matters that the Commission could conciliate and arbitrate.

75. Energy Australia's argument that a third party such as a union cannot be a "party principal" to an enterprise agreement must be rejected. As explained above, the five unions have workplace rights under the Yallourn agreement and can enforce them. The proposed enterprise agreement, on which the employees vote, necessarily includes clauses dealing with the role and status in which any party to (or covered by) it can raise a dispute and have it determined in accordance with s 186(6), if the employees or a majority of them vote to approve entry into it and the Commission approves it.

76. Thus, the provisions of the Yallourn agreement, dealing with the five unions and, as cl 2 provided, their status as parties (or "Parties") to it, were voted on and approved by the majority of the employees. If the majority vote against approval of an enterprise agreement under s 182, then, of course, no union will be covered by, or a party to, an enterprise agreement. But that will be because there will not be any such agreement. Conversely, where the employees vote to approve an enterprise agreement that makes provision for a union to have a role as a party, then when the union (which is likely to have had a role as a bargaining representative under s 185(1) in formulating what was put to that vote) gives notice under s 201(2) to seek that it be covered, it will be acting, as both the employer and its approving employees contemplated, to become "covered" and so a party in its own right with all of the rights of a party.

77. Energy Australia argued that, somehow, a union is not a full party to an enterprise agreement that the Commission notes (under s 201(2)) is covered by that agreement. Energy Australia contended that such a union only has the right to bring proceedings in a court under s 539(2) to enforce it, but not to use the dispute resolution procedure (such as cl 28) that s 186(6) requires to be an essential feature of an enterprise agreement. That argument makes no sense. Once the employees (or a majority) have voted to approve an enterprise agreement that provides for a union to be a party (even on the assumption that it must give notice under s 201(2)), both those employees and their employer will have expressed agreement to the union becoming a party to the enterprise agreement, with all the rights of a party and subject to any limitation of those rights as the document provides.

…

79. The approval mechanism that the *Fair Work Act* prescribes in ss 186, 187 and 201 does not, and is not intended to, exclude the role of an employee organisation, such as a union, to be a party to an enterprise agreement with the rights of each other party to it. That role, necessarily, is created and defined by the terms of an enterprise agreement and the exercise of any election by the union to give notice under ss 53(2) and 183(1) of the *Fair Work Act* to seek the Commission's notation in its decision under s 201(2) that it be covered and, so, to have a statutory status as a party to, and with full legal capacity to enforce, it under ss 50-53, 183(1) and 341(1) both in a judicial proceeding and also in accordance with its terms in a dispute resolution process under s 186(6), including in respect of matters referred to in ss 172(1), 341 and 540(2)."

[6] Justice Flick issued separate reasons in *Yallourn*. His Honour focused on the terms of the dispute settlement procedure but did not have regard to s 186(6) of the Act.

[7] Because the decision of the Full Court in *Yallourn* turned on the proper construction of the dispute settlement procedure in the applicable enterprise agreement, I accept the submissions advanced by Qantas that the reasoning of Justices Rares and Barker in relation to s 186(6) of the Act is *obiter dicta*. Qantas submits that I should not follow this reasoning in relation to s 186(6) because it is plainly wrong and is not seriously considered *obiter dicta*.

[8] Ordinarily, members of the Commission ought not depart from decisions of a superior court such as the Full Court of the Federal Court of Australia in relation to the construction of legislation, albeit in *obiter dicta*, particularly when they are considered judgments.[3]

[9] In my view, the reasoning of Justices Rares and Barker in relation to s 186(6) of the Act in *Yallourn* is not plainly wrong and does not fall into the category of being not seriously considered *obiter dicta*. Their Honours' reasoning includes a detailed analysis of relevant provisions of the Act, including the interrelationships between those provisions, over some 20 or so paragraphs. Although paragraph [61] of *Yallourn* correctly states what appears in s 540(2) of the Act insofar as it says that "[a]n employee organisation has a right, under s 540(2), to seek a remedy under Div 2 of Pt 4-1 of the Act 'in relation to a contravention … of a civil remedy provision … in relation to an employee only if' the employee is or will be affected by the contravention and the particular union is entitled to represent his or her industrial interests", I accept the submission advanced by Qantas that the reasoning of Justices Rares and Barker does not address the exception in s 540(3) of the Act. That provision relevantly states that s 540(2) "does not apply in relation to item 4 … in the table in subsection 539(2)". Item 4 concerns s 50 of the Act, which provides that a "person must not contravene a term of an enterprise agreement". It follows that a union may commence proceedings in a court in relation to a contravention or a proposed contravention of a term of an enterprise agreement even if it does not have a member who is affected by the contravention, or will be affected by the proposed contravention. However, this does not impact the correctness of the reasoning that each of the five unions in *Yallourn* "had a workplace right under s 323(1)(a) and 540(2) to initiate proceedings relating to compliance with cl 5.3 of the Yallourn agreement under s 341(1)(b), and also had a role or responsibility to enforce compliance with it under s 341(1)(a)".[4] As Justice Flick pointed out in *Yallourn*, there are cases in which a union, rather than one or more employees, wishes to have a dispute resolved with the employer.[5]

[10] Qantas also submits that if the AFAP's submissions about the reasoning of Justices Rares and Barker in relation to s 186(6) of the Act are correct, then a dispute settlement procedure must allow an inspector of the Fair Work Ombudsman to initiate a dispute under that procedure in order for the requirements of s 186(6) to be met because an inspector of the Fair Work Ombudsman has a right to initiate proceedings for contravention of a term of an enterprise agreement (s 50) and for amounts payable to an employee in relation to the performance of work (s 323). I do not accept this submission. It does not take into account the fact that, unlike an inspector of the Fair Work Ombudsman, a union that gives the requisite notice under s 183

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[3] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* [2022] FCAFC 28 at [19]-[22]

[4] *Yallourn* at [62]

[5] *Yallourn* at [130]

of the Act is covered by an enterprise agreement and so will be "a party in its own right with all of the rights of a party" to the enterprise agreement.[6]

[11] Finally, in my view, if the dispute settlement procedure in an enterprise agreement does not allow a union covered by the agreement to initiate a dispute over, say, the proper construction of a provision conferring an entitlement on employees, then the enterprise agreement will not include "a term that provides a procedure that requires or allows the FWC … to settle disputes about any matters arising under the agreement". It does not matter that an employee could initiate a dispute about the construction of the same entitlement under the dispute settlement procedure. That would be a different dispute, involving different parties. Section 186(6) requires that the dispute resolution procedure allows the Commission to be able to settle all disputes about any matters arising under the agreement.

[12] The approach I will take in relation to s 186(6) of the Act, as outlined above, is consistent with that taken in other proceedings before the Commission.[7]

[13] Clause 11 of the Enterprise Agreement provides:

> "11 Dispute settlement procedure
>
> *Note: For the purpose of this clause 11, 'party' means the Company and pilot(s) covered by this Agreement.*
>
> 11.1 This clause 11 applies where any dispute arises about any matters arising under this Agreement or in relation to the NES provided that this procedure will not apply to matters relating to a pilot's flying proficiency or to matters of operational safety.
>
> 11.2 It is important that pilots and the Company commit to resolving any disputes that may arise, however if such a dispute arises the following procedure must be followed:
>
> 11.2.1 The matter will first be discussed by the affected pilot(s) and Base Manager (or his/her delegate).
>
> 11.2.2 If not resolved, the matter will be discussed by the affected pilot(s) and the Chief Pilot (or his/her delegate).
>
> 11.2.3 Should an issue remain unresolved, it may be referred by either party to the Commission to resolve through private conciliation and/or arbitration.
>
> 11.3 Subject to the provisions of this clause, the parties to the dispute will accept the outcome of any arbitration.
>
> 11.4 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:

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[6] *Yallourn* at [76]-[79]

[7] See, for example, *Teys Australia Southern Pty Ltd* [2022] FWC 1096 at [4]-[9], *PHI International Australia Pty Ltd* [2024] FWC 3460 at [5]-[16], at *AMEIU v Primo Foods Pty Ltd* [2023] FWC 570 at [92]-[97], *CFMMEU v Mechanical Maintenance Solutions Pty Ltd* [2019] FWCFB 3585 at [35]-[38], *AFAP v PHI (International) Australia Pty Ltd* [2024] FWC 1007 at [52]

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

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

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

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

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

11.4.6 subject to clause 11.1 where the matter(s) in dispute cannot be resolved (including by conciliation) and one (1) party or both request, arbitrate or otherwise determine the matter(s) in dispute.

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

11.6 Any determination by the Commission under clause 11.4.6 must be in writing if either party so requests, and must give reasons for the determination.

11.7 Any determination made by the Commission under clause 11.4.6 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.

11.8 The Commission must not issue interim orders, 'status quo' orders or interim determinations.

11.9 A pilot may request to have a representative of his or her choice, which may include a representative from the Association (or 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.

11.10 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.

11.11 No party will be prejudiced as to the final settlement by the continuance of work in accordance with clause 11.10.

11.12 Where a bona fide safety issue is involved, the Company and the appropriate safety authority must be notified concurrently or at least a bona fide attempt made to so notify the authority.

11.13 For the avoidance of doubt, a union covered by this Agreement is entitled to initiate a dispute about a clause that confers an entitlement on that union."

[14] There are competing constructions in relation to whether a union can initiate a dispute under the dispute settlement provisions of clause 11. Qantas submits that clause 11 permits a union covered by the Enterprise Agreement to initiate a dispute about a clause that confers an entitlement on that union, but not any wider class of disputes. The AIPA submits that clause 11 permits all disputes to be progressed through clause 11.2 by the union itself, including but not limited to disputes which relate to a clause which provides a right to the union directly. The AFAP submits that clause 11 does not permit a union covered by the Enterprise Agreement to initiate any disputes; covered employee organisations have no role in the dispute settlement procedure other than as a representative when requested by a pilot.

[15] I prefer Qantas's construction of clause 11. In my view, words would need to be read into clause 11 to permit a union covered by the Enterprise Agreement to initiate disputes about any matter arising under the Enterprise Agreement (unless the clause in dispute conferred an entitlement on the union) or in relation to the NES. At the other end of the spectrum and having regard to the need to construe clause 11 with a purposive approach, as distinct from a narrow or pedantic approach,[8] it is sufficiently clear from clause 11.13 that it was objectively intended for a union covered by the Enterprise Agreement to be able to initiate a dispute about a clause that confers an entitlement on that union. The steps in clause 11.2 must be construed in light of the clear purpose of clause 11.13.

[16] Because clause 11 of the Enterprise Agreement does not, in my opinion, permit a union covered by the Enterprise Agreement to initiate a dispute other than a dispute about a clause that confers an entitlement on that union, I am concerned that the Enterprise Agreement does not comply with the requirement in s 186(6) of the Act that it "includes a term that provides a procedure that requires or allows the FWC … to settle disputes about any matters arising under the agreement". I will give Qantas an opportunity to provide undertakings to address this concern.

Award coverage for FOT

[17] The question of whether FOT will be better off overall under the Enterprise Agreement compared to the relevant award turns on whether FOT are covered by the Pilots Award. The AFAP contends that FOT are covered by the Pilots Award. Qantas contends that they are not. Qantas submits that FOT are either award free or are covered by the **Miscellaneous Award** 2020.

[18] The AIPA submits that the Commission does not need to determine the question of award coverage for FOT because, even if they are covered by the Pilots Award, s 206 of the Act operates to effectively increase the base rate of pay for FOT to the base rate of pay in the Pilots Award. Coupled with the over award benefits in the Enterprise Agreement, the AIPA submits that this will ensure FOT are better off overall under the Enterprise Agreement compared to the Pilots Award.

[19] I agree with the submission advanced by both Qantas and the AFAP that I must decide whether FOT are covered by the Pilots Award in order to determine the better off overall question. That is because, if Qantas's FOT are covered by the Pilots Award, they would be

[8] *James Cook University v Ridd* [2020] FCAFC at [65] (These principles were not disturbed on appeal to the High Court)

entitled to significant annual monetary allowances for (a) flying a turbo jet aircraft and (b) flying using an instrument rating (Schedule A, clauses 1.3(d) and 1.4 of the Pilots Award). These monetary allowances are not offset by the benefits provided for under the Enterprise Agreement.

Award coverage – statutory requirements

[20] For an enterprise agreement to pass the better off overall test, each award covered employee must be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee (s 193(1)(a)). An award covered employee for an enterprise agreement is an employee who is covered by the agreement and is covered by the modern award that is in operation and covers both the employer and the employee in relation to the work that he or she is to perform under the agreement (s 193(4)).

[21] A modern award covers an employee if the award is expressed to cover the employee (s 48(1)). Employees covered by a modern award must be specified by inclusion in a specified class or specified classes (s 143(5)(b)). A class may be described in a range of ways, including by reference to a particular industry or part of an industry, or particular kinds of work (s 143(6)).

[22] A modern award must not be expressed to cover classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards or who perform work that is not of a similar nature to work that has traditionally been regulated by such awards (s 143(7)).

Pilots Award

[23] Coverage of the Pilots Award is dealt with in clause 4. It relevantly provides:

> "**Coverage**
>
> 4.1 This occupational award covers employers throughout Australia of air pilots and helicopter aircrew and those employees.
>
> 4.2 The award does not cover an employee covered by an industry award that contains pilot or helicopter aircrew classifications or an employee excluded from award coverage by the Act.
>
> 4.3 This award does not cover employees who are covered by:
>
> (a) the *Medical Practitioners Award 2020*;
>
> (b) the *Airline Operations – Ground Staff Award 2020*;
>
> (c) the *Ambulance and Patient Transport Industry Award 2020*.
>
> …
>
> 4.7 Subject to clause 4.1, where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

> NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage."

[24] No party contended that any FOT to be employed by Qantas would be "covered by an industry award that contains pilot … classifications" (clause 4.2) or covered by any of the awards specified in clause 4.3.

[25] The expression "air pilot" is not defined in the Pilots Award. However, clause 2 defines a "pilot" as follows:

> "**pilot** means a person who is the holder of a commercial pilot's licence or airline transport pilot's licence and is employed under the provisions of the award, including pilots operating overseas from a base within Australia on behalf of the operator. The term pilot includes a check pilot, training pilot, first officer and second officer."

[26] The expressions "check pilot", "training pilot", "first officer" and "second officer" are defined as follows in clause 2 of the Pilots Award:

> "**check pilot** means a pilot who is approved by CASA to conduct, and who does so conduct, flight proficiency tests for the issue and renewal of pilots' approvals, ratings, licences, and who certifies to the competency of pilots so tested
>
> **training pilot** means a pilot other than a check pilot who is appointed to perform route endorsing and or training duties.
>
> **first officer** means a pilot who is appointed as first officer by the employer and who currently is licensed by CASA to act as second or third in command of an aircraft requiring 2 or more pilots.
>
> **second officer** means a pilot who is appointed as a second officer by the employer and who currently is licensed by CASA to act as third in command of an aircraft requiring more than 2 pilots."

[27] Clause 8 of the Pilots Award governs "types of employment". It provides:

> "8.1 Employees under this award will be employed in one of the following categories:
>
> (a) full-time;
>
> (b) part-time; or
>
> (c) casual.
>
> 8.2 At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual."

[28] Clause 11 of the Pilots Award governs "classifications". It provides:

> "11.1 All employees covered by this award must be classified according to the applicable structure as set out in the relevant schedules:

(a) Airlines/General aviation

See

"Schedule A—Classifications, Minimum Salaries and Additions to Salaries—Airlines/**General Aviation**

…

11.2 Employers must advise their employees in writing of their classification and of any changes to their classification.

11.3 The classification by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer."

[29] Schedule A of the Pilots Award relevantly provides:

"**Schedule A—Classifications, Minimum Salaries and Additions to Salaries—Airlines/General Aviation**

A.1 Classifications and minimum salaries

A.1.1 Aircraft classification and minimum salaries

Full-time pilots employed by an airline operation or a general aviation employer must be paid at least the following minimum annual salaries:

Classification	**Minimum salary per annum**	
	Captain	**First Officers Second Pilots**
	$	**$**
SINGLE ENGINE UTBNI 1360 KG	53,706	47,755
Single engine 1360 kg–3359 kg	55,989	47,755
Single engine 3360 kg & above	65,023	50,807
Multi engine UTBNI 3360 kg	62,532	48,919
Multi engine 3360 kg UTBNI 5660 kg	65,023	50,807
Multi engine 5660 kg UTBNI 8500 kg	68,581	52,933
Multi engine 8500 kg UTBNI 12000 kg	73,775	56,220
Multi engine 12000 kg UTBNI 15000 kg	79,294	59,863
Multi engine 15000 kg UTBNI 19000 kg	86,410	64,216

Classification	Minimum salary per annum	
	Captain	First Officers Second Pilots
	$	$
Multi engine 19000 kg & above—unless otherwise listed	92,452	67,664
Dash 8 100–15650 kg MTOW	86,410	64,216
Dash 8 200–16466 kg MTOW	86,410	64,216
Dash 8 300–19505 kg MTOW	86,410	64,216
Dash 8 400–28998 kg MTOW	92,309	67,664

A.1.2 Larger aircraft classifications and minimum salaries

Pilots employed on larger aircraft will be paid the following minimum annual salary:

Classification	Minimum salary per annum (full-time employee)		
	Captain	First Officer	Second Officer
	$	$	$
Fokker 28	148,583	98,491	
CRJ-50	148,583	98,491	
BAe-146	160,853	106,222	
Fokker 100	160,853	106,222	
Boeing 717	160,853	106,222	
Narrow body aircraft	168,634	111,060	
Wide body aircraft–single deck	193,611	127,404	77,284
Wide body aircraft–double deck	218,591	143,748	87,090

A.1.3 Additions to minimum salary

In addition to the minimum salary the following salary components will be paid as applicable.

…

(d) Flying a turbo jet aircraft

A pilot (excluding Fokker-28 pilots) flying a turbo jet aircraft will be paid **$13,219.97** per annum.

A.1.4 Pilots (excluding Fokker-28 pilots) who are required to carry out flying using an instrument rating will be paid an additional allowance as follows:

Instrument flying rating	$ per annum
Command or Class 1	7560.17
Co-pilot or Class 2	4916.18
Night VFR or Class 4	1890.04

…

A.1.6 First Officer/Second Pilot

A First Officer/Second Pilot will be paid the relevant instrument rating under clause 0 where applicable and in addition **65%** of the amounts specified in clauses A.1.3(a), A.1.3(c) or A.1.3(d).

…

A.1.12 Where a pilot who is engaged in a particular category or classification of work is required to carry out flying duties in a category or classification attracting a higher level of remuneration, the pilot will be paid for all such duties at the applicable higher rate of remuneration for a minimum period of 7 days and will at the same time be entitled to any higher employment benefits applicable to that category."

[30] Clause 13 of the Pilots Award governs "training-classifications". It relevantly provides:

"**Training—classifications**

13.1 Clause 13 does not apply to employees engaged in aerial application operations.

13.2 Where the employer requires an employee to reach and maintain minimum qualifications for a particular aircraft type in accordance with this award, all facilities and other costs associated with attaining and maintaining those qualifications will be the responsibility of the employer.

13.3 Where an employee fails to reach or maintain a standard required the employee will receive further re-training and a subsequent check. The employee may elect to have a different check pilot/check and training aircrew person (as applicable) on the second occasion.

13.4 Where an employee fails the second check in clause 13.3, the employee may, where practicable, be reclassified to the previous or a mutually agreed equivalent position.

13.5 Where employment commences under this award the employee's service required to be undertaken by the prospective employer, prior to commencing employment, during training period will be recognised and any training required to be conducted at the employee's cost will be reimbursed to the employee.

13.6 Training bonds—pilots

(a) An employer and a pilot may, by agreement, enter into a training bond whereby the costs of training which have been or are to be borne by the employer may be recovered from the pilot if the pilot ceases to be employed by the employer within a period of time agreed between the pilot and the employer, subject to the following:

(i) The training bond must be agreed between the employer and an individual pilot.

(ii) The training bond must be in writing, specify the amount of the bond, and be signed by the pilot prior to commencing training.

(iii) The maximum term of the training bond will be 2 years for piston engine/turbo prop aircraft and 3 years for jet aircraft.

(iv) The training bond amount cannot exceed **50%** of the actual cost of the training.

(v) The training bond amount reduces on a monthly pro rata basis over the term of the training bond when the pilot successfully checks to line.

(vi) A pilot can be subject only to one training bond at a time. Where a pilot is subject to one training bond, and subsequently enters into another, the bonds are not cumulative and the highest value training bond will apply.

(vii) The employer can recover an amount payable under a training bond only where the pilot resigns, or, subject to the provisions of clause 13.6(a)(viii), the pilot's employment is terminated for serious misconduct.

(viii) No amount can be recovered in the case of redundancy, loss of medical licence by the pilot, termination of employment by the employer (except where the termination is because of serious misconduct and there is no later finding by a court or tribunal, or acceptance by the employer, that the employee did not engage in the serious misconduct on which the termination was based) or where the pilot fails the training course.

(ix) A training bond cannot be entered into in circumstances where an employer directs a pilot to undertake training.

(b) For the avoidance of doubt, a training bond can be entered into between an employer and a pilot only in respect of:

(i) class and type rating training necessary to operate a particular aircraft, including the aircraft type for which the pilot was initially employed (including pre-employment training and initial class and type rating training); and

(ii) upgrade training (change in rank and status training)."

[31] Clause 21.12 of the Pilots Award governs indemnities. It provides:

"**21.12 Indemnity**

An employee 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 employer upon the employee's estate. Any claim made by any member of the public, passenger or other person upon the employee's estate as a result of any accident or happening caused by the employee when duly performing their nominated duty, whether efficiently or, as may be subsequently determined, negligently, will be accepted as a claim made against the employer. The employer will be solely responsible for all claims as a result of

operations by or travel in their aircraft. The foregoing will not apply to an employee who knowingly performs their nominated duty in a manner contrary to law or the employer's policy."

Relevant facts

[32] The Enterprise Agreement covers all pilots employed by Qantas in its short haul operations. Pilots employed in Qantas' short haul operations currently operate on the B737 aircraft only. The B737 aircraft is a "narrow body aircraft" within the meaning of clause A.1.2 of Schedule A to the Pilots Award. The A321XLR aircraft is scheduled to commence operating on Qantas' short haul network in June 2025. Currently, a Qantas pilot is only employed by Qantas to operate one aircraft type at a time (with the exception of one instructor).

[33] Clause 7 of the Enterprise Agreement includes the following relevant definitions of different classifications of pilot:

"**Captain**	a pilot employed to act in command of an aircraft.
First Officer	a pilot employed to act as second-in-command of an aircraft.
First Officer Under Training (FOT)	a new intake pilot employed by the Company to fill vacancies pursuant to clause 19.2
Pilot	a Captain or First Officer employed by the Company pursuant to this Agreement. A reference in this Agreement to a pilot also includes a FOT, unless the context requires otherwise.
SOT	a new intake employee undertaking Second Officer training under the LHEA [Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020 or any successor agreement]."

[34] Clause 17 of the Enterprise Agreement is concerned with the "status" of different classifications of pilot covered by the instrument. It provides:

"**17.1 Status**

17.1.1 The status of pilots will be ranked in the following descending order:

(a) Captain;

(b) First Officer;

(c) FOT.

17.12 A pilot who is cleared to line on completion of initial training on a short haul aircraft will have the status of First Officer on the aircraft type to which he or she is initially allocated.

17.13 Pilots transferring within the Company's short haul operations will retain their pre-transfer short haul status until they have been cleared to the line in their new category.

17.1.4 A FOT will obtain the status of First Officer upon being cleared to line after completion of initial training on the aircraft type to which he or she is initially allocated."

[35] Clause 19 of the Enterprise Agreement governs the allocation of pilots to aircraft types operated by Qantas. It relevantly provides:

"**19.2 Allocation of B737 and A320 vacancies**

19.2.1 Subject to clauses 16.5.4(b) and 19.2.2, where the Company has initial, additional or residual vacancies in a B737 or A320 First Officer category and there are insufficient bids from eligible bidders for those vacancies, the Company can employ persons as FOTs, to fill any unfulfilled vacancies.

…

19.2.5 A FOT may be required to operate on the aircraft type to which they are initially allocated for the duration of four (4) full training blocks following the training block in which the FOT commenced employment."

[36] The annual salary for a First Officer (year 1), with effect from the second full bid period after commencement of the Enterprise Agreement (if it is approved), will be $168,283.97.[9] B737 and A320 FOT will be paid $6,218.35 per 28 day bid period from the first full pay period after commencement of the Enterprise Agreement (if it is approved).[10] Clauses 27.4.2 and 27.4.4 make clear than a FOT does not become a First Officer until cleared to line on the aircraft type to which the FOT was initially allocated, and the FOT will be paid as a First Officer on being cleared to line as a First Officer.

[37] The duties of a pilot under the Enterprise Agreement include flying duties and training.[11] Qantas' pilots ordinarily undertake four simulator exercises a year, one line check assessment every two years, as well as emergency assistance training. In addition, if a Qantas pilot is being trained in a new type of aircraft, they undertake classroom training, simulator training, and inline training.

[38] A FOT employed by Qantas must hold either a commercial pilot's license or airline transport pilot's licence.

[39] In order for any pilot employed by Qantas to be appointed as a Captain, First Officer or Second Officer on any of its aircraft, the pilot must first undergo and successfully complete the relevant initial training program (referred to at Qantas as a 'training path'), made up of three primary phases:

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[9] Clause 27.3.3 of the Enterprise Agreement

[10] Clause 27.4 of the Enterprise Agreement

[11] Clause 31.1 of the Enterprise Agreement

(a) Phase 1 - Ground School: this training phase is conducted in a classroom and involves learning the aircraft systems and about operating in a commercial flying environment; completing a minimum of 24 hours in a fixed training device; conducting performance and systems exams; and a memory items and limitations quiz. This phase is typically completed over a period of approximately one month;

(a) Phase 2 - Simulator training: the pilot is required to undertake between 28 and 72 hours of simulator training, conducted in 4-hour sessions over a period of approximately two to four weeks (depending on the training course); and

(b) Phase 3 - Line training: the pilot is rostered to undertake a series of supervised line flights (or line sectors). Depending on the training course, the line training phase can take up to 11 weeks to complete.

[40] Once the pilot has successfully completed Phases 1 and 2, they become 'type rated' for that aircraft type. This means they have obtained the necessary flight crew qualification required by the **C**ivil **A**viation **S**afety **A**uthority and are licensed for that aircraft type. However, the pilot must also successfully complete Phase 3 before they can operate on the aircraft (as a Captain, First Officer or Second Officer - as relevant) outside of a training capacity. This is because Part 121 of the ***c**ivil **A**viation **S**afety **R**egulations 1988* requires a pilot (of any aircraft that can carry 19 or more passengers, which is the case for all aircraft in Qantas's long haul and short haul operations) to undertake and successfully complete a minimum number of line training hours (*i.e.* supervised flying hours) before the pilot is allowed to operate on a passenger aircraft without such supervision. The number of line flying hours required to be flown is determined by a combination of the role the pilot is training for (e.g. Captain, First Officer or Second Officer) and the aircraft type they are training to operate on.

[41] All Qantas type rated training programs meet the relevant CASR requirements and are approved by the CASA.

[42] For at least the last 27 years, new intake pilots have commenced employment with Qantas in its long haul operations. On accepting employment with Qantas, a new intake pilot is appointed as (and acquires the status of) a "**S**econd **O**fficer Under **T**raining", irrespective of any qualifications the new intake pilot might already hold and any prior flying experience they might have, and is classified and paid as such under the Qantas long haul enterprise agreement.

[43] A SOT must undertake and successfully complete the relevant training path, before they can be allocated to a long haul aircraft type. Once this process is complete, the pilot acquires the status of a Second Officer. The pilot's category is then a combination of their status and the aircraft type they have been allocated to (e.g. A380 SO).

[44] Currently, the average length of time it takes for a SOT to complete the training path is as follows: Phase 1 (ground school) – approximately one month; Phase 2 (simulator training) – approximately 32 hours of simulator training conducted in 4-hour sessions over a period of approximately two to three weeks (depending on the training course); and Phase 3 (line training) – two supervised line flying sectors over approximately three to seven days.

[45] A SOT must complete Phase 1 of their training path, before moving onto Phase 2. They must then successfully complete Phase 2, before moving onto Phase 3. A SOT does not perform any flying duties during Phases 1 and 2. A SOT must successfully complete Phase 3 before they can be appointed by Qantas as a Second Officer on the relevant long haul aircraft type.

[46] The Qantas long haul enterprise agreement contains a SOT classification and associated pay rates that are considerably lower than Second Officer pay rates. This was also the case with respect to a number of the predecessor instruments in long haul operations, including the *Qantas Airways Limited Pilots (Long Haul) Workplace Determination 2013* made by the Commission.

[47] The Enterprise Agreement expressly contemplates (for the first time) new intake pilots being directly employed into Qantas's short haul operations in certain circumstances, in the position of a FOT. There are no SOTs or Second Officers in Qantas's short haul operations as only two pilots are required to operate the B737 (and the A321XLR once it commences operating). Similar to a SOT, a FOT will be required to undertake and successfully complete the relevant training path before they are able to be appointed as a First Officer by Qantas on the B737 or A321XLR aircraft (as relevant).

[48] The FOT training path will contain the same training phases as explained above in relation to SOT in long haul. As with SOT, FOT must complete Phase 1 of the relevant training path, before moving onto Phase 2. They must then successfully complete Phase 2, before moving onto Phase 3. The proposed timelines for the FOT type rated training program are as follows: Phase 1 (ground school) approximately one month; Phase 2 (simulator training) – approximately 60 hours of simulator training conducted in 4-hour sessions over a period of approximately four to five weeks (depending on the training course); and Phase 3 (line training) – over approximately five weeks.

[49] A FOT does not (and cannot) perform any flying duties during Phases 1 and 2. Phase 3 of the FOT training path in short haul will be longer than Phase 3 of the SOT training path in long haul. This is necessary in order to meet the regulatory requirements, as the CASR require a minimum of 100 hours and 10 sectors of supervised line training to be undertaken by the FOT before they can operate as a First Officer outside of a training capacity (i.e. without needing to be rostered with and supervised by a Training Captain) on the B737 or A321XLR aircraft.

[50] At a high level, Phase 3 of the FOT training path will involve the following three key stages:

- Stage 1 – a FOT must complete a minimum of six line flying sectors (involving the FOT performing take offs and landings) supervised at all times by a 'Stage 1- approved' Training Captain. An observing safety pilot will also be present on the flight deck during these sectors and can assist or operate in place of the FOT if Training Captain deems it necessary to ensure the safe operation of the flight. During Stage 1, the FOT must demonstrate that they can safely manipulate the aircraft to the satisfaction of the Training Captain before they can progress to Stage 2. It is expected that the average time it will take a FOT to complete Stage 1 will be 1 week.

- Stage 2 – during this stage, the FOT must then successfully complete a minimum of 24 line sectors, supervised at all times by a Training Captain. There will be no observing

safety pilot present during these line sectors. Again, during this stage, the FOT must demonstrate they can safely manipulate and operate the aircraft to the satisfaction of the Training Captain before they are cleared to undertake their 'release to line' assessment in Stage 3. It is expected that the average time it will take a FOT to complete Stage 2 will be 3 weeks.

- Stage 3 – during this stage, the FOT must successfully complete a minimum of four line sectors during which a Training Captain (which must be different to the Training Captain that supervised the pilot in Stages 1 and 2) assesses whether the pilot is ready to operate as a First Officer without the supervision of a Training Captain. If this occurs, the pilot will have completed Phase 3 of the relevant FOT training path. It is expected that the average time it will take a FOT to complete Stage 3 will be one week.

[51] The purpose of Phase 3 of the FOT training path is to satisfy the regulatory requirements explained above. These requirements must be successfully completed before Qantas can, from a regulatory perspective, appoint the pilot as a First Officer on the B737 or A321XLR aircraft (as relevant) and roster them to fly on its network alongside a line Captain (as opposed to a Training Captain, who a FOT must be rostered with and supervised by for all line training flying). It is expected that the average time it will take a FOT to complete Phase 3 of the training path, including satisfying the 100 supervised line flying hours required by the CASR, will be a total of five weeks.

[52] Notwithstanding the matters set out above, Mr Andrew Stead, Qantas Head of Training and Checking, accepted in his evidence that the regulatory requirements do not affect whether Qantas can appoint a person in the role of First Officer. The regulatory requirements affect whether Qantas can allow the person to fly a plane unsupervised. The relevant part of the regulations states that a person cannot fly unsupervised until they have completed the training pathway.

[53] Qantas plans, from a rostering perspective, for a FOT to undertake a slightly higher number of line flying sectors than the minimum number of sectors set out above. This is to accommodate unplanned events such as weather events, sick leave and flight cancellations and ultimately ensure that the 100 supervised line flying hours required by the CASR are completed.

[54] It is expected that the average time it will take a FOT to complete the entire FOT training path (i.e. Phases 1, 2 and 3) will be 12 weeks. It is possible a FOT may not successfully complete one of the phases of the FOT training path. In these circumstances, and where this cannot be addressed with additional training, it is possible their employment with Qantas may not continue.

[55] Once a FOT successfully completes all three phases of the relevant training path and participates in a final training interview, they will be "cleared to line" (i.e. Qantas will change the pilot's status from FOT to First Officer and allocate them to the relevant short haul aircraft, and roster them accordingly - as contemplated by clause 17.1.4 of the Enterprise Agreement). In this context, Qantas will employ/appoint FOT in the same staged process as it currently employs/appoints SOT. Only once this occurs, will the pilot be a First Officer appointed by Qantas on the relevant aircraft type, which will entitle the First Officer to be paid the applicable First Officer rates of pay under the Enterprise Agreement.

[56] There are two seats in the front of the planes used in Qantas' short haul operations. A FOT will occupy one of those seats when undertaking their training during a commercial flight. Both pilots wear a Qantas uniform and both have to be able to fly the plane. The FOT must be able to fly the plane in an emergency if the Captain is unable to do so.

[57] The principal distinctions between the role of a FOT as compared to the role as a First Officer, are that:

- the purpose of the performance of the functions of a FOT, including all line flying activities, is to complete the necessary regulatory and Qantas training to safely fly passenger aircraft along with a line Captain, whereas the purpose of the performance of the functions of a First Officer is to safely fly passenger aircraft along with a line Captain;

- a substantial portion of the time spent as a FOT involves no flying activities (or readiness for flying activities), which is not the case with a First Officer; and

- because of the requirements under Phase 3 of the training path for all flying activities of a FOT to be supervised by a Training Captain (and also observed by a 'safety pilot' in Stage 1 of Phase 3), a FOT cannot be utilised in the same manner that a First Officer can (who can be assigned to operate on any short haul flight alongside any Captain, rather than being limited to flying that is rostered with, and supervised by, a Training Captain).

[58] The relevant facts, as set out above, are taken from the witness statement and oral evidence of Mr Stead. Mr Stead was cross examined at the hearing. I found his evidence to be both credible and reliable.

Qantas's submissions

[59] Qantas submits that FOT are not appointed by it as First Officers, which is a requirement of the definition of a "First Officer" in clause 2 of the Pilots Award. FOT will only become appointed as First Officers once they successfully complete the necessary training program of about 12 weeks' duration.

[60] Qantas submits that FOT do not perform the work of First Officers and cannot act like First Officers, FOT cannot be used by Qantas as First Officers, the job of a FOT is not the same as the job of a First Officer, and there are clear differences between the roles of FOT and First Officer, as explained by Mr Stead. Qantas cannot utilise a FOT in phases 1 and 2 of their training. Qantas can only utilise FOT in phase 3 of their training in limited circumstances, as explained by Mr Stead.

[61] Qantas submits that the expression "employed under the provisions of the award" in the definition of "pilot" in clause 2 of the Pilots Award means that the Pilots Award provides a classification and rate of pay for the "pilot".

[62] Qantas submits that it is apparent from the requirement in clause 11.1 of the Pilots Award that employees covered by the Pilots Award "be classified according to the applicable structure as set out in the relevant schedules", coupled with Schedule A relevantly setting rates of pay for Captains and First Officers, that a pilot will not be covered by the Pilots Award unless they are a Captain or a First Officer.[12] As to clause 11.2 of the Pilots Award, Qantas submits that it is apparent from Mr Stead's evidence that Qantas has no intention of providing FOT with any advice in writing of any change to their classification as a First Officer until they complete the necessary training. As to clause 11.3 of the Pilots Award, Qantas submits that the principal function of the employment of a FOT is to undertake training and FOT are not performing any of the functions of a First Officer, apart from training. Qantas contends that the ongoing training of a First Officer or Captain is not the same as the initial training of a FOT. If a Captain is being trained in a different type of aircraft, they do not become entitled to the higher rate of pay for the new aircraft type unless and until they pass the training and are assessed as competent to operate the new aircraft type. This is analogous to the position of a FOT, who is in a relatively short period (about 12 weeks) of training to become, and be appointed to, the role of First Officer.

[63] Qantas submits that FOT are in an analogous position to SOT under the Qantas long haul enterprise agreement. SOT receive a lower pay rate than Second Officers under that enterprise agreement.

[64] Qantas submits that clauses 13.2 and 13.3 do not assist, for they refer to "an employee", not a "pilot". It is submitted that this is consistent with FOT not being "pilots" within the meaning of the Pilots Award.

[65] Qantas submits that clauses 13.5 and 13.6 contemplate an employee being employed and trained before they become a "pilot" within the meaning of the Pilots Award.

[66] Qantas relies on the history of the Pilots Award. In particular, Qantas points to the fact that there were a number of enterprise awards in operation at the time the modern award for pilots was made and those enterprise awards included a classification equivalent to FOT, at a significantly lower pay rate than First Officers. For example:

- the Qantas Shorthaul Pilots' Award 2000 included a classification known as **P**ilots **U**nder **I**nitial **T**raining, which is effectively the same as the FOT classification in the Enterprise Agreement. PUIT were paid a rate significantly lower than First Officers under the Qantas Shorthaul Pilots Award 2000;

- the Ansett Airlines of Australia (Pilots) Award 2000 included a classification known as Intake Pilots (equivalent to FOT). They were paid significantly less than First Officers under the Ansett Airlines of Australia (Pilots) Award 2000;

- the Australian Airline Pilots' Award 2000 included a classification known as Australian Airlines Pilot Under Training (equivalent to FOT). They were paid about 50% of the hourly rate of a First Officer under the Australian Airline Pilots Award 2000; and

[12] Second Officers are not relevant to this case

- the National Jet Systems Pilots' Award 2002 included a classification known as Trainee Pilot (equivalent to FOT). They were paid significantly less than First Officers under the National Jet Systems Pilots' Award 2002.

[67] Accordingly, Qantas submits that, at the enterprise level, pre-modern awards distinguished between First Officers and what were effectively FOT.

[68] When the Pilots Award was first made in 2009, there was no discussion or submission about the inclusion or otherwise of a classification equivalent to FOT when early drafts of the award were published for comment. On 6 March 2009, the AFAP made the following submissions in relation to the coverage of the new proposed modern award:

> "4. There are six pre-reform Industry Awards covering Australian Pilots:
> • Aerial Agricultural Aviation Pilots Award 1999 * (AP765615)
> • Helicopter Pilots (General Aviation) Award 1999 * (AP783494)
> • Pilots' (General Aviation) Award 1999 * (AP792332)
> • Regional Airlines Pilots' Award 2003 * (AP829753)
> • Pilots' (General Aviation) Superannuation
> • Award 1999 (AP792389)
> • Qantas/Australian Airlines Pilots Integration
> • Award 1994 (AP794089)
>
> The first four are designated Common Rule Awards.
>
> 5. There are five pre-reform Enterprise Awards covering Australian Pilots:
> • Ansett Airlines of Australia (Pilots) Award 2000 (AP765716)
> • Australian Airlines Pilots' Award 2002 (AP819199)
> • National Jet Systems Pilots' Award 2002 (AP820003)
> • Qantas Short Haul Pilots' Award 2000 (AP805947)
> • Civil Aviation Safety Authority Award 1996 **
>
> …
>
> 9. The AFAP proposes that a new modern Pilot Occupational Award be created to replace the current ten industry awards. The new award to be titled "Air Pilots' Occupational Industry Award 2010" ("new award").
>
> …
>
> 18. The new award proposed by the AFAP is intended to only apply to pilots who have historically been covered by the awards in paragraphs 4 and 5 herein.
>
> 19. The new award is not intended to extend the classes of pilots covered, nor include employees designated as management and not already covered by an award…"

[69] Qantas points out that the AFAP did not submit that there was an intention for the new modern award to retain coverage of new trainee pilots in the role equivalent to FOT and to significantly increase the rates of pay for those employees because they had moved to the classification of First Officer under the new award.

[70] On 4 September 2009, the Air Pilots Award 2010 was published.[13] It did not include a classification equivalent to FOT. The award has not been amended in any relevant respect since it was first made.

[71] Qantas submits that either the making of the Air Pilots Award 2010 conferred on employees in the position of a FOT a massive pay increase because they fell within the definition of "pilot" and the classification of First Officer even though this massive pay increase had not been the subject of any remarks by any of the relevant parties or the Commission or, which is much more likely, the classification equivalent to a FOT dropped out of coverage of the Air Pilots Award 2010. Qantas submits that many categories of employees in different industries dropped out of coverage of particular modern awards when they were made and the purpose of the Miscellaneous Award is to cover such employees.[14]

[72] Qantas submits that FOT were previously covered by enterprise awards. FOT received substantially less pay under those enterprise awards than First Officers. FOT then dropped out of coverage of the Air Pilots Award 2009 when it was made and became (and remain) either award free or covered by the Miscellaneous Award for the 12 week period of their training. They will become covered by the Pilots Award when they are appointed as First Officers. But Qantas submits that there is and was no intention to regard FOT as First Officers when they are not appointed as First Officers, do not work as First Officers, and have never traditionally been First Officers.

[73] As to the fairness argument advanced by the AFAP, Qantas submits that it is open to the AFAP to apply to vary the Pilots Award to include a new classification equivalent to that of FOT.

AFAP's submissions

[74] The AFAP submits that FOT are covered by the Pilots Award. In accordance with the settled rules of construction, the term First Officer under the Pilots Award should, so the AFAP contends, be given a practical meaning informed by the internal context of the Pilots Award and the industrial context it is intended to operate in.[15] The AFAP submits that the pedantic and technical meaning advanced by Qantas should be rejected.

[75] The AFAP submits that FOT as defined by the Enterprise Agreement are individuals who hold requisite commercial pilot licenses and have significant pilot experience. The initial training includes simulator training undertaken by those First Officers which is analogous to the routine simulator training undertaken by Qantas pilots on a 6 monthly basis. Once the initial period of training is complete, a pilot progresses to "line-training" which requires those First Officers to fly Qantas aircraft on commercial flights carrying Qantas customers, albeit under the supervision of a qualified training pilot. That is, the AFAP submits that Qantas requires FOT to perform the work of a First Officer on its commercial services.

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[13] PR988690

[14] *United Voice v Gold Coast Kennels* [2018] FWCFB 128 at [36]-[53]

[15] *Kucks v CSR Ltd* (1996) 66 IR 182 at 184

[76] The AFAP submits that the terms of the Pilots Award, properly construed, make clear that individuals employed under the Enterprise Agreement as FOT are covered by the Pilots Award. The AFAP relies on the definitions of "pilot" and "First Officer" in clause 2 of the Pilots Award. The AFAP also submits that under the provisions of the Pilots Award a pilot will be employed in one of three categories: full-time, part-time or casual: cl 8.1. That is, where a pilot is employed by a covered employer as a full-time, part-time or casual employee, the AFAP submits that they are employed under the provisions of the Pilots Award. In relation to classification, cl 11 provides that "all employees covered by this award must be classified according to the applicable structure set out in the relevant schedules". Schedule A sets out the relevant classifications and minimum salaries for "Airlines/General Aviation". Clause A.1 of Schedule A provides a system of salary classification by reference to a pilot's type of employment for the purposes of cl 8.1 and the aircraft they are employed to fly. Clause A.1.1 provides that "Full-time pilots employed by an airline operation or a general aviation employer must be paid at least the following minimum annual salaries…" Clause A.1.2 expands on cl A.1.1 by providing that "pilots employed on larger aircraft [including expressly narrow body aircraft such as the Boeing 737 and the Airbus A320] will be paid the following minimum annual salary…" It follows, so the AFAP contends, that a full-time pilot employed by Qantas to fly a narrow body aircraft, such as a FOT, is covered by the Pilots Award.

[77] The AFAP submits that FOT are appointed by Qantas as First Officers, albeit with the qualification that they are in training. The AFAP also submits that FOT have the same practical responsibilities as First Officers, save for the capacity to perform the role unsupervised.

[78] The AFAP submits that the employment type and classification machinery of the Pilots Award makes no distinction between a pilot who is undergoing training whilst performing the work for which they are employed and a pilot who is not. It follows, so the AFAP contends, that individuals employed by Qantas as FOT are First Offices for the purposes of the Pilots Award and are covered by that Award.

[79] The AFAP submits that further contextual support can be found in the clauses of the Pilots Award that deal with training and classification, safety and pilot indemnity. The AFAP submits that clause 13.2 of the Pilots Award would have little work to do if an employee was not covered by the award where they had not "reached" minimum qualifications for a particular type of aircraft as required by their employer and "under training". The work in reaching and maintaining those qualifications required by Qantas must be work performed by employees covered by the Pilots Award for clause 13.2 to have practical utility. Similarly, the AFAP submits that clause 13.3 of the Pilots Award anticipates that covered employees will undergo training during the course of their employment. The AFAP further submits that clause 13.6(b) provides that the type of training anticipated by the Pilots Award, and capable of being subject of a bond, includes (i) class and type rating training necessary to operate a particular aircraft, including the aircraft type for which the pilot was initially employed (including pre-employment training and initial class and type rating training) and (ii) upgrade training (change in rank and status training). The existence of those express terms, including terms permitting training bonds (cl 13.6), strongly indicates, so the AFAP submits, that no distinction is to be made between a First Officer under the Pilots Award who is undergoing, or has completed, training required by their employer.

[80] The AFAP submits that the Pilots Award provides sophisticated limitations on the amount and method of work that can be required by pilots covered by the Pilots Award. For example, in the absence of general or employer-specific exemptions to, or concessions under, the regulations approved by CASA from time to time (cl 15.2(b)), clauses 15.4 and 15.6-8 of the Pilots Award codify limitations on the way in which, and the number of hours, a covered employee can be required to fly. Contrary to the implications arising from Qantas' position, the AFAP submits that there is no textual or contextual support for the proposition that these provisions of the Pilots Award, intended to preserve pilot (and passenger) safety, have no operation in relation to employees who are in fact required to operate aeroplanes carrying passengers during a period of supervised training. Rather, the provisions of the Pilots Award in relation to pilot fatigue and safety provide contextual support, so the AFAP contends, for the proposition that employees required to fly aeroplanes on commercial services are covered by the Pilots Award.

[81] Similar to the provisions of the Pilots Award that relate to pilot (and passenger) safety, the AFAP submits that clause 21.1.2 provides an indemnity in favour of employee pilots in relation to damage for loss of an aircraft or equipment and other claims that may be made upon an employee's estate by the employer or members of the public as a result of an accident or happening caused by the employee when performing their duty. FOT are required to operate aircraft in Qantas's commercial operations. Contrary to the implications arising from Qantas's position, the AFAP submits that the indemnity in clause 21.1.2 provides contextual support for the proposition that employees who are in fact required to operate aeroplanes carrying passengers during a period of supervised training are covered by the Pilots Award. The alternative would require the inference that those pilots performing "in line" training were not intended to be indemnified, while the supervising pilot sitting next to them is.

[82] The AFAP submits that the nature of the work performed by FOT falls outside that anticipated by s 143(7) of the Act. It is submitted that the unavailability of that provision provides support for a broad and practical construction of First Officer under the Pilots Award, and includes those employed to fly aircraft when undertaking training in order to do so unsupervised.

[83] For these reasons, the AFAP submits that the definition of First Officer in the Pilots Award, properly construed in its industrial context, including the frequent and routine training of commercial pilots, is intended to include a First Officer undertaking training necessary for the performance of their role. Accordingly, the AFAP submits that FOT for the purposes of the Enterprise Agreement are covered by the Pilots Award.

[84] The AFAP submits that, in circumstances where FOT fly a Qantas plane for profit (i.e. on a commercial route), there would be an inherent unfairness and a lack of common sense if FOT did not have the protection of the Pilots Award.

Consideration

[85] I have had regard to the history of the Pilots Award and the enterprise awards that were in force before the modern award was made in 2009. The significance of history and context as

an aid to the construction of awards is not in doubt.[16] There are, however, limits on the extent to which the resolution of questions of construction may be driven by reference to history and context, and a liberal approach to construction, because ultimately what is to be determined is the proper construction of the instrument based on the objective meaning of the text.[17]

[86] The history set out above demonstrates that the Air Pilots Award 2010 was made by the Commission as part of the award modernisation process. The relevant terms of the award have not been amended since that time. The history gives rise to two competing contentions. First, there does not seem to have been any objective intention to remove from coverage of the Air Pilots Award 2010 any classifications of employees who had historically been covered by awards in the relevant industry. This would include new pilots in a classification similar to that of FOT. But secondly, there does not seem to have been any objective intention for new pilots in a classification similar to that of FOT to be automatically elevated, on the making of the modern award, to the classification of First Officer (which classification they had never been in) and be entitled to be paid the minimum salary of a First Officer in circumstances where those employees had traditionally been entitled to a much lower pay rate than First Officers during their initial period of training. Although I found the history and context informative, I do not consider that it has any determinative bearing on the construction of the provisions of the Pilots Award which are relevant to this matter.

[87] The Pilots Award specifies the classes of employees it covers by reference to the occupations of "air pilots" and "helicopter aircrew". The definition of "pilot" in clause 2 of the Pilots Award has two elements. First, the person must be the holder of a commercial pilot's licence or airline transport pilot's licence. That element is clearly satisfied in the case of FOT. Secondly, the person must be "employed under the provisions of the award". I do not accept the AFAP's contention that a person will be "employed under the provisions of the" Pilots Award simply by being employed in the category of a full-time, part-time or casual employee in accordance with clause 8 of the Pilots Award. Reading the expression "employed under the provisions of the award" together with the requirement in clause 11.1 for employees covered by the Pilots Award to be "classified according to the applicable structure as set out in the relevant schedules", I am of the view that a reasonable person would understand the expression "employed under the provisions of the" Pilots Award to mean that the person falls within one of the classifications covered by the Pilots Award and has their minimum salary set by it.

[88] Schedule A to the Pilots Award deals with classifications and minimum salaries. Schedule A does not contain a skills based classification structure or provide detailed criteria for particular classifications. Schedule A classifies a range of aircraft, by type and size, and then sets a minimum salary for the different categories or classifications of pilot who may be employed on the aircraft. The relevant classification of aircraft for Qantas's short haul operations is "narrow body aircraft" (clause A.1.2 of Schedule A). Minimum salaries are set by the table in clause A.1.2 for Captains and First Officers who may be employed on "narrow body aircraft". If follows that a FOT employed by Qantas in its short haul operations must be in the classification of Captain or First Officer, within the meaning of the Pilots Award, to be covered by the Pilots Award. FOT are clearly not Captains. The issue for consideration is whether FOT are First Officers within the meaning of the Pilots Award.

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[16] *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 518

[17] *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1173 at [128]

[89] There are two elements to the definition of First Officers in clause 2 of the Pilots Award, both of which must be satisfied. First, the pilot must be "appointed as first officer by the employer". Secondly, the pilot must be "currently … licensed by CASA to act as second or third in command of an aircraft requiring 2 or more pilots".

[90] As to the first element, "it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry".[18] It is clear from both the evidence of Mr Stead and the relevant terms of the Enterprise Agreement set out above that a FOT is not appointed by Qantas as a First Officer, and will not be appointed as a First Officer unless and until they satisfactorily complete all elements of the 'training path'. This is not just a matter of ticking a box, nor is it a case of form over substance. The industry and regulatory environment in which Qantas operates means that Qantas has an obligation not to appoint pilots to a particular classification unless it is satisfied that the pilot has been trained and tested in that classification. The Pilots Award must be construed in this context. I do not accept the AFAP's submission that a FOT is appointed by Qantas as a First Officer, albeit under training. The appointment of a FOT to the classification of First Officer will not take place until the 'training path' is completed with success by the FOT.

[91] There might have been some force to the submission that a FOT is, in reality, a First Officer who has, by implication, been appointed to that classification under the Pilots Award if they undertook materially the same duties and functions as a First Officer. However, on the evidence before the Commission, that is not the case. FOT do not undertake the same work, duties or functions as First Officers. During the first two phases of their training, FOT do not fly a plane on a commercial route. Instead, FOT undertake classroom training and then training in a simulator. This is different to the ongoing training that a First Officer or Captain has to undertake on an annual basis, after they have been 'type rated' for a particular aircraft. The third phase of training for a FOT takes place on a commercial route, but the FOT must be supervised by an instructor pilot and later by a Training Captain. This is to be contrasted to a First Officer, who can be assigned by Qantas to operate on any short haul flight alongside any Captain, regardless of whether he or she is a Training Captain. The purpose of the performance of the functions of a First Officer is to safely fly aircraft together with a Captain, whereas the purpose of a FOT employed by Qantas is to undertake and complete the 'training path' of about 12 weeks' duration, so that they may be appointed to the classification of First Officer. I accept Qantas's submissions that FOT do not act like First Officers and Qantas cannot utilise FOT as First Officers. In the first two phases of their training, Qantas cannot utilise FOT at all as First Officers in a commercial flight. In the third phase of training, Qantas can only utilise a FOT as a First Officer in a commercial flight in the initial stage of phase 3 training with an instructor pilot and then during the balance of phase 3 training with a Training Captain. I am also satisfied that when Qantas determines that a FOT has satisfactorily completed the necessary training and Qantas appoints the FOT to the classification of First Officer, it will only be at the time of the appointment, not before, that the employee will be at the skill level required to be exercised by a First Officer in order to carry out the principal functions of a First Officer (clause 11.3 of the Pilots Award).

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[18] *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503, per Street J

[92] The 'principal purpose test' is sometimes used to assess whether an employee is covered by an industrial instrument such as an award. The test was summarised in *Carpenter v Corona Manufacturing* as follows:[19]

> "In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed. In this case, such an examination demonstrates that the principal purpose for which the appellant was employed was that of a manager. As such, he was not "employed in the process, trade, business or occupation of ... soliciting orders, obtaining sales leads or appointments or otherwise promoting sales for articles, wares, merchandise or materials" and was not, therefore, covered by the Award."

[93] A Full Bench of the Commission explained various features of the 'principal purpose test' in *Broadspectrum Limited v United Voice*:[20]

> "... the required analysis of the principal purpose is to be conducted by reference to the work performed by the employee. The test enunciated is primarily of utility where an employee performs a mixture of duties some of which fall, prima facie, within the coverage of the award or classification under consideration and some of which do not. However the test cannot be used to bring an employee within the coverage of an award or classification where the employee does not perform any of the prescribed work duties."

[94] It must also be remembered that the 'principal purpose test' is "a rule of construction only and must give way to the clear language of an award".[21] That is particularly so in the present case where, unlike many awards, the classifications contained within Schedule A to the Pilots Award do not contain descriptions of the duties to be performed by different classifications of employees such as First Officers. Instead, the requirements of a First Officer are set out in the definition of First Officer in clause 2 of the Pilots Award. It follows that I do not consider the 'principal purpose test' to be of any real assistance in the present case. In any event, I am satisfied that the principal purpose of a FOT employed by Qantas is to undertake and complete the 'training path' of about 12 weeks' duration, so that they may be appointed to the classification of First Officer. This does not align with the duties and requirements of a First Officer, who can be assigned to operate on any short haul flight alongside any Captain, regardless of whether he or she is a Training Captain. It follows from this analysis that an application of the 'principal purpose test' results in a conclusion that FOT do not fit into the classification of First Officers under the Pilots Award.

[95] As to the second element of the definition of "first officer" in the Pilots Award, Qantas did not submit that FOT were not "currently … licensed by CASA to act as second or third in command of an aircraft requiring 2 or more pilots". Having regard to the evidence given by Mr Stead, I do not consider that this second element of the definition of "first officer" in the Pilots Award is an impediment to a FOT being classified as a "first officer".

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[19] (2002) 122 IR 387 at [9]

[20] [2017] FWCFB 3202 at [31]

[21] *Federated Engine Drivers and Firemen's Association of Australasia v Maffra Co-operative Milk Products Co Ltd* (1940) 42 CAR 836; applied in *Choppair Helicopters Pty Ltd v Bobridge* [2018] FCA 325 at [66]

[96] As to contextual provisions within the Pilots Award, clauses 13.2 and 13.3 refer to requirements which may be imposed by an employer on "an employee to reach and maintain minimum qualifications for a particular aircraft type". Those provisions refer to "employees", not "pilots". In any event, the provisions have work to do in the case of First Officers and Captains who may be required by their employer to "reach and maintain minimum qualifications" for a different aircraft type. I therefore do not accept the AFAP's submission that these provisions would have little work to do if an employee was not covered by the Pilots Award where they had not "reached" minimum qualifications for a particular type of aircraft.

[97] I do not consider clause 13.5 of the Pilots Award to be of contextual assistance. It contemplates a circumstance in which an employee has relevant experience and training before commencing with their new employer under the Pilots Award.

[98] The fact that a training bond may be entered into between an employer and a pilot in accordance with clause 13.6(b) of the Pilots Award, including in respect of *initial* class and type rating training, provides contextual support for the proposition that a new pilot, such as a FOT, may be a "pilot" within the meaning of the Pilots Award. However, it does not necessarily follow that a FOT meets the requirements of a First Officer under the Pilots Award. The classifications of "pilot" contained within Schedule A to the Pilots Award extend beyond First Officers and Captains. For example, (a) there is a distinction between First Officers and "Second Pilots" (an undefined term) in relation the classifications of aircraft contained in clause A.1.1 of the Pilots Award and (b) there is a classification of "Co-pilot" (an undefined term) in Schedule B of the Pilots Award. Notwithstanding that neither of those parts of Schedule A have relevance to Qantas's short haul operations, the existence of these other categories of "pilot" suggests that clause 13.6 may have work to do insofar as it applies to Second Pilots and Co-pilots in respect of their initial class and type rating training. Having said that, there does not seem to be any rational explanation as to why an employer may have the benefit of clause 13.6 in relation to the initial class and type rating training for Second Pilots and Co-pilots, but Qantas would not in respect of FOT because they are not First Officers, and therefore not "pilots" covered by the Pilots Award, until they are appointed by Qantas as First Officers. On balance, I consider that clause 13.6 provides some contextual support for the case advanced by the AFAP.

[99] I do not accept Qantas's submission that clause 13.6 of the Pilots Award contemplates persons not being employed as "pilots" under the Pilots Award and receiving training in that capacity prior to being appointed as First Officers and coming within the coverage of the Pilots Award. The Pilots Award confers rights and imposes obligations on persons to whom it applies. A person must be covered by an award before it can apply to them. "Pilots", as defined in clause 2, are covered by the Pilots Award. Clause 13.6 confers a right on an employer covered by the Pilots Award to recover training costs which it incurs on training a "pilot", including the initial class and type rating training for a "pilot". An agreed training bond is the means by which that right can be enforced. An employee must be a "pilot", and therefore covered by the Pilots Award, in order to enter into such a training bond.

[100] Clause 15 of the Pilots Award provides protections for pilots covered by the award in relation to fatigue, including limits on hours of work and rest periods. Clause 21.12 provides a benefit to pilots covered by the award by way of an indemnity in relation to loss and damage arising from an employee performing their duty. These benefits provide some contextual

support for the AFAP's argument that employees such as FOT who are required to operate aircraft carrying passengers during a period of supervised training are covered by the Pilots Award.

[101] The contextual arguments concerning clauses 13, 15 and 21.12 of the Pilots Award relate to the benefits and obligations conferred and imposed by those provisions. There is force to the argument that these benefits and obligations should, as a matter of fairness, be extended to FOT because they belong to a category of pilots who sit in the same cockpit as other (award covered) pilots and are required, as part of their duties, to fly commercial aircraft, carrying passengers, for profit. This argument also supports the contention that it was not intended for persons in a classification akin to FOT, who had traditionally been covered by awards,[22] to fall outside coverage of the relevant award when the modern award was first made in 2009. I cannot discern that there was any such objective intention when the modern award was first made in 2009. However, nor can I discern any objective intention for persons in a classification akin to FOT to be automatically elevated, on the making of the modern award, to the classification of First Officer, a classification they had never held during their limited period of initial training, and thereby receive a very significant pay rise.

[102] Ultimately what is to be determined is the proper construction of the Pilots Award based on the objective meaning of the text, considered in context, and taking a liberal approach to construction by reason of the nature of the instrument under consideration. The most important text under consideration in the present case is the definition of First Officer in clause 2. For the reasons explained above and having regard to the contextual and other matters set out above, I am satisfied that a FOT will not be appointed by Qantas as a First Officer unless and until they satisfactorily complete their training program of about 12 weeks. The safety-critical nature of the industry in which these employees are operating demonstrates that there are good reasons why the appointment of a FOT as a First Officer does not take place until the necessary training is complete. Until the training is complete, the work, duties and responsibilities of the role of a FOT is materially different to that of a First Officer.

[103] For the reasons given, I conclude that FOT are not First Officers within the meaning of the Pilots Award, and they are not covered by the Pilots Award. I consider that employees in a classification equivalent to that of FOT inadvertently fell out of coverage of awards governing pilots when the Air Pilots Award 2010 was made in 2009 and the previous enterprise awards ceased to operate. This may provide an appropriate basis to consider (in other proceedings) whether the Pilots Award should be amended to include a FOT type classification.

[104] I am satisfied that FOT are covered by the Miscellaneous Award. The purpose of that award, which contains broad and generic classification descriptors, is to provide "minimum (and minimalistic) conditions of employment for a miscellaneous range of employers and employees, not identified by reference to any industry, business function or occupation, who are not covered by any other modern award".[23] Rates of pay for FOT under the Enterprise Agreement far exceed even the highest rates of pay under the Miscellaneous Award. Taking into account all the benefits and detriments of the Enterprise Agreement compared to the Miscellaneous Award, I am comfortably satisfied that FOT will be better off overall under the

[22] s 143(7) of the Act

[23] *United Voice v Gold Coast Kennels* [2018] FWCFB 128 at [37]

Enterprise Agreement than they would be under the Miscellaneous Award. No party submitted to the contrary.

Undertakings

[105] I give Qantas until 4pm on 6 May 2025 to provide any undertakings it wishes to proffer to address the concern identified above in relation to the dispute settlement clause in the Enterprise Agreement.

DEPUTY PRESIDENT

Hearing:
16 April 2025

Appearances:
Mr M. Follett KC and Mr D. Ward, of counsel, appeared for Qantas Airways Limited
Mr H. Crosthwaite, of counsel, appeared for the AFAP
Mr L. Saunders, of counsel, appeared for the AIPA

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