

## IN THE FAIR WORK COMMISSION

**Matter No:** B2024/91

**Applicant:** Network Aviation Pty Ltd

**Respondents:** Australian and International Pilots Association & Ors

### **Outline of submissions for the Transport Workers' Union of Australia**

#### **A. Introduction and overview**

1. These submissions are filed in accordance with the directions of Beaumont DP of 14 April 2025. They concern the implications of the judgment of Full Court of the Federal Court in *Corporate Air Charter Pty Ltd v Australian Federation of Air Pilots*<sup>1</sup> for the workplace determination which the Commission is required to make in these proceedings. The upshot of the Full Court's decision is that time when pilots perform "reserve" or "stand-by duty" is, for the purposes of the *Air Pilots Award* 2020, time when an employee is undertaking work duty and time for which the employee is required to be paid.<sup>2</sup>

#### **B. Legislative context and the Award**

2. Pursuant to s 272(4) of the *Fair Work Act 2009* (Cth), a workplace determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under s 193 of the FWA.
3. Clause 15.6 of the Award deals with "reserve" or "stand-by" duty. It provides that an employee on reserve or stand-by duty is to be contactable within any scheduled reserve duty period and imposes an obligation on the employee to report for the appointed duty no later than 2 hours after being contacted.
4. In *CAC v AFAP*, the Full Court determined that rostered stand-by duty is "work" under the Award<sup>3</sup> as well as "paid work".<sup>4</sup>
5. The upshot of the Full Court's analysis for the purposes of the present matter is that in order for the terms of the workplace determination concerning "reserve" or "stand-by" duty to provide terms and conditions that do not leave employees worse off than they would be under the Award, they must ensure that time spent by employees engaged on rostered stand-by duty is paid.

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<sup>1</sup> [2025] FCAFC 4.

<sup>2</sup> *CAC v AFAP* at [7] (Logan, Dowling and McDonald JJ).

<sup>3</sup> At [49].

<sup>4</sup> At [67].

**C. Provisions of the proposed workplace determination**

Reserve duty

6. The *Network Aviation Pilots Enterprise Agreement 2023* presently defines “duty period” at cl 5.1(4) as “*all time that the Pilot is undertaking duties at the instruction of the Company*”.
7. Pursuant to cl 5.1(9) of the *Network Aviation Pilots Enterprise Agreement 2023*, a reserve period is defined as “*a period of time during which a Pilot is required to be available and contactable for duties but is not performing duties.*”
8. The **Australian Federation of Air Pilot** filed a draft workplace determination on 8 October 2024 which provides that “reserve duty” is, on the analysis contended for by the AFAP, paid work. The provisions concerning “reserve duty” set out in the AFAP’s draft determination are “agreed terms” for the purposes of ss 270(2) and 274 of the FW Act.
9. Clauses 5.1(4), 5.1(9), and 9.1.3, and the AFAP’s notes as to how those provisions are to be construed, are as follows:
  - a. Clause 5.1(4) – Duty period:  
***Duty Period*** means all time that the Pilot is undertaking duties at the instruction of the Company. [Note: For the purposes of passing the Better off overall test as required by s 272(4), we submit that this clause should read “***Duty Period*** means all time that the Pilot is undertaking duties at the instruction of the Company, inclusive of reserve.”]
  - b. Clause 5.1(9) – Reserve period:  
***Reserve Period*** means a period of time during which a Pilot is required to be available and contactable for duties but is not performing duties. [Note: For the purposes of passing the Better off overall test as required by s 272(4), we submit that this clause should read “***Reserve Period*** (Standby Period) means a duty period during which a Pilot is required to be available and contactable.”]
  - c. Clause 9.1.3:  
*The ordinary hours of work are seventy six (76) hours per fortnight, when averaged over a twelve (12) month period.* [Note: For the purposes of passing the Better off overall test as required by s 272(4), we submit that this clause should read “Total duty hours (as per definition) of work must not exceed more than 76 hours per 14 consecutive days.”]
10. So long as the above provisions are construed and applied consistently with what is set out in the AFAP’s notes, the provisions will be consistent with minimum requirements stipulated by the Award as explicated in *CAC v AFAP*. It is the TWU’s contention that the plain and ordinary meaning of the above provisions, read in context (including the context provided by the Award) and purposively are congruent with the analysis of the Full Court in *CAC v AFAP*.
11. If, contrary to the above submission, the Commission concludes that the agreed terms are not to be so construed and applied, an issue arises as to the interplay between the requirement in s 272(4) (that the determination would, if the determination were

an enterprise agreement, pass the better off overall test)<sup>5</sup> and s 270(2) (which requires a workplace determination to include “agreed terms”, being terms of the kind set out in s 274). In other words, what is the position where an agreed term would result in a workplace determination not including terms that would enable the workplace determination to pass the better off overall test?

12. This conundrum is resolved as a matter of construction and a consideration of which provision is leading and which is subordinate. The principles were outlined by the plurality in *Project Blue Sky v Australian Broadcasting Authority*:<sup>6</sup>
  - a. a statute is to be construed on the premise that its provisions are intended to give effect to harmonious goals;
  - b. where there is conflict between particular provisions of a statute, that conflict is to be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve the result that would best give effect to the purpose and language of the provisions, while maintaining the unity of all the statutory provisions; and
  - c. this will often require determining which provision is leading and which is subordinate provision. In other words, the hierarchy of the provisions must be ascertained in a manner that gives effect to the purpose and language of the statute, whilst also maintaining the unity of the statutory scheme.
13. The following matters point to the requirement in s 272(4) of the FW Act having precedence over the requirement that a determination include one or other agreed terms:
  - a. the obligation under s 272(4) applies to the “terms” of the determination generally and is not limited to terms which are about matters still in issue or which are agreed terms;
  - b. the FW Act envisages that employees cannot be “worse off” and must in fact be “better off” under enterprise agreements and workplace determinations than if a modern award covered and applied to them;<sup>7</sup>
  - c. the terms of a modern award are part of the guaranteed safety net detailed in s 3(b) of the FW Act and which, as a “guaranteed safety net”, cannot and should not be undercut by the process of making and approving enterprise agreements under Part 2-4 of the FW Act or the making workplace determinations under Part 2-5;

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<sup>5</sup> Noting that such terms are “core terms” which must be included in the determination for the purposes of s 270(1)(b) of the FW Act.

<sup>6</sup> (1998) 194 CLR 355 at [69]-[70].

<sup>7</sup> See for instance: FW Act, ss 186(2)(d) and 193.

- d. in the context of enterprise agreements, all terms are “agreed”<sup>8</sup> but s 193 nonetheless requires that Commission to ensure that the terms of an agreement leave employees better off overall. It would be anomalous and inconsistent for a different regime to apply to “agreed terms” under s 272(4); and
  - e. the purpose of s 272(4) is, as set out in *Network Aviation Pty Ltd v AFAP*,<sup>9</sup> to ensure that bargaining representatives cannot resile from agreements on terms prior to intractable bargaining declarations being made or the conclusion of any post declaration period.<sup>10</sup> That purpose does not indicate that such terms can or should be ones which are not subject to the requirement under s 272(4).
14. In the result, if there is, in the case of a particular term or terms, a conflict between the requirement that the Commission include terms in a workplace determination which are “agreed terms” and the obligation to ensure that the determination include terms that would, if the determination were an enterprise agreement, pass the better off overall test, the latter obligation is the leading provision and must take precedence. This entails that the Commission can adjust agreed terms to ensure conformance with the requirement in s 272(4).
15. In the present matter, the agreed terms concerning reserve duty could be clarified as follows to ensure that employees are not left worse off:
- a. Clause 5.1(4) – Duty period:  
***Duty Period** means all time that the Pilot is undertaking duties at the instruction of the Company, which includes all time on reserve.*
  - b. Clause 5.1(9) – Reserve period:  
***Reserve Period** (Standby Period) means a duty period during which a Pilot is required to be available and contactable.*
  - c. Clause 9.1.3:  
*The ordinary hours of work are seventy six (76) hours per fortnight, ~~when averaged over a twelve (12) month period.~~*

*Overtime for duty and flight hours*

16. The TWU’s draft workplace determination filed 23 September 2024 provides for an additional hourly payment for each flight hour flown in excess of 59 hours in clause 10.8.5, which was in the following terms:

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

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

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<sup>8</sup> By the employer and requisite majority of employees voting in accordance with ss 181-182 of the FW Act.  
<sup>9</sup> (2024) 333 IR 14.  
<sup>10</sup> At [138]-[139].

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

- (i) a Pilot will receive a credit of one flight hour for each flight simulator duty hour worked, to a maximum of four hours per simulator duty;*
- (ii) a Pilot will receive a credit of one flight hour for each company-approved administrative ground duty hour worked, to a maximum of two hours per day; and*
- (iii) a Pilot on annual leave will receive a reduction to the flying hours prorated for the period of annual leave taken during the roster period.*

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

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

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

17. To ensure consistency with the analysis in *CAC v AFAP* and that the above complies with s 272(4), time spent on “reserve” should be counted towards a duty hours threshold that attracts an additional payment. This can be achieved by the following drafting changes to clause 10.8.5 that allow for a duty hour threshold in conjunction with flight hours:

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

~~*For each hour flown of duty in excess of 59 hours in a roster period, a*~~

~~*A Pilot will be entitled to an hourly payment at the Additional Hourly Payment rate set out in Schedule 1 for each hour they achieve in excess of:*~~

- ~~*a) 59 flying hours in a 28 day roster period; or*~~
- ~~*b) 152 duty hours (including hours spent on reserve) in a 28 day roster period.*~~

~~*Where both flight and duty hour thresholds in subclauses (a) and (b) are exceeded in a roster period, a Pilot will only be entitled to a single Additional Hourly Payment for each hour worked, regardless of whether that hour contributes to both thresholds.*~~

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

- (i) a Pilot will receive a credit of one flight hour for each flight simulator duty hour worked, to a maximum of four hours per simulator duty;*
- (ii) a Pilot will receive a credit of one flight hour for each company-approved administrative ground duty hour worked, to a maximum of two hours per day; and*
- (iii) a Pilot on annual leave will receive a reduction to the flying hours prorated for the period of annual leave taken during the roster period.*

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

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

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

**D. Conclusion**

18. The above amendments should be made to clause 10.8.5 in light of the analysis in *CAC v AFAP*. To the extent that the Commission forms the view that, contrary to the AFAP's contentions, the agreed terms are not to be construed in the manner set out in the AFAP's notes, the above amendments should be made to cll 5.1(4), 5.1(9) and 9.1.3.

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**6 May 2025**