From: Simon Miller [mailto:Simon.Miller@afap.org.au]
Sent: Friday, 28 July 2017 4:54 PM
To: Chambers - Gostencnik DP
Cc: Simon Lutton; Joanne Janes; Cate Larkins; James Mattner; Marcus Diamond; Kathy Srdanovic (kathy.srdanovic@ashurst.com); jon.lovell@ashurst.com; Ruchi Bhatt (ruchi.bhatt@aigroup.com.au)
Subject: RE: AM2014/252 - Air Pilots Award 2010

Dear Associate,

Concerning progress on the Commission's Review of the *Air Pilots' Award 2010*, the AFAP reports as follows:

(i) Revised Summary of Submissions – Technical and Drafting

Item 13: Casual Employment – Definition of "Flight Time"

The AFAP had originally submitted that "flight time" be defined as under clause 3.19 of the pre-reform Pilots' (General Aviation) Award 1998 as follows:

> *Flight time means time on duty as a crew member in an aircraft and is calculated from chock to chock.*

In early April, subsequent to correspondence between the parties, the AFAP provided Ashurst, as the representatives of Qantas, with the following revised definition:

> *Flight time means not less than the total time between when an aircraft first moves from its parking place, until the latter of the aircraft coming to rest at the designated parking position or until all engines are stopped.*

We have sought and await confirmation from Ashurst on their client's instructions regarding this revised definition.

Item 38: Dealing With Excessive Annual Leave

In late March, Ashurst submitted a proposal regarding excess annual leave.

In response, and further to correspondence between the parties, in late May the AFAP submitted the attached proposal to Ashurst (cc'd to the Australian Industry Group).

We have sought and await confirmation from Ashurst on their client's instructions regarding our proposal.

(ii) Summary of Proposed Substantive Variations

There has been no further progress on the two substantive variations proposed by the AFAP.

(iii) Prospect of Resolution

Assuming that Ashurst and the Australian Industry Group promptly confirm their respective positions on the matters referred to above in (i), the AFAP considers it possible that these matters can be resolved prior to 17 August 2017.

We trust that this report is of assistance to the Deputy President. Please contact Simon Miller of this office if you have any queries about this report, or wish to discuss further.

Yours sincerely

Simon Miller
Industrial Advisor

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26 May 2017

Ms Kathy Srdanovic
Counsel
Ashurst
12 Moore Street
CANBERRA ACT 2601

By email: *Kathy.srdanovic@ashurst.com*

WITHOUT PREJUDICE

Dear Ms Srdanovic

4 Yearly Review of Modern Awards - Air Pilots Award 2010: Response to the Qantas Group Proposal of 27 March 2017 on Excessive Annual Leave

We refer to the discussion draft Qantas Group proposal on excessive annual leave dated 27 March 2017 ("**proposal**"), and the draft model clause on annual leave published by the Fair Work Commission ("**draft model clause**").

In response, referring to the specific clauses of both the proposal and the draft model clause, we say as follows:

(a) Excessive Annual Leave Accruals – Clause 1.3: General Provision

We oppose the proposed amended reference to 10 weeks' paid leave in clause 1.3(a).

Whilst the rate of accrual of annual leave in the *Air Pilots' Award 2010* ("**Award**") and the Exposure Draft of the *Air Pilots Award 2016* (republished 5 January 2017) ("**Exposure Draft**") differs from other modern awards, we consider that the model clause is based on the concept of "excessive annual leave accrual" reflecting the leave accrued in excess of 2 years by a full-time employee.

Consistent with this view of the model clause, clause 27.2 of the Award and clause 23.2 of the Exposure Draft, we consider that "excessive annual leave accrual" should be defined in clauses 1.3(a), 1.4(b)(iii) and 1.5(c)(iii) as more than 84 days (inclusive of Saturdays, Sundays and public holidays).

(b) Excessive Annual Leave Accruals – Clause 1.4: Direction by Employer that Leave be Taken

We oppose the proposed insertion of clause 1.4(b)(v). We do not consider it necessary.

Should any such enterprise-based rostering arrangements be included in an enterprise agreement, then we would expect that:

(i) these rostering arrangements themselves either reflect or improve the Award position for pilots as a minimum standard, or

(ii) are part of a package of terms and conditions that satisfy the "better off overall test" in accordance with s193 of the *Fair Work Act 2009 (Cth)* ("**Act**").

Excluding valid award flexibility agreements made pursuant to clauses 7 of the Award and the Exposure Draft, should such enterprise-based rostering arrangements not be included in an enterprise agreement, and they are assessed to not either reflect or improve the Award position for pilots as a minimum standard, then we would make representations on behalf of any affected members, including the pursuit of their legal rights under the Award if necessary.

In addition, as a consequence of our proposed definition of "excessive annual leave accrual" outlined above, we consider that the reference to 6 weeks in clause 1.4(b)(i) of the draft model clause be amended to 63 days (inclusive of Saturdays, Sundays and public holidays) and that the reference to 4 weeks in clause 1.4(d) be amended to 42 days (inclusive of Saturdays, Sundays and public holidays).

(c) Excessive Annual Leave Accruals – Clause 1.5: Request by Employee for Leave

We oppose the proposed amendments to clause 1.5(c)(iii), (v) and 1.5(d). As for the reasons outlined above regarding clause 1.4(b)(v), the references to enterprise-level rostering arrangements are unnecessary.

In addition, as a consequence of the proposed amendment to clause 1.4(b)(i) of the draft model clause outlined above, for the sake of consistency, we consider that the references to 6 weeks in clause 1.5(c)(i) be amended to 63 days (inclusive of Saturdays, Sundays and public holidays) and 4 weeks in clause 1.5(d) be amended to 42 days (inclusive of Saturdays, Sundays and public holidays).

(d) Other Consequential Amendments – Clause 23.4 of the Air Pilots Award 2010

We oppose the removal of clause 23.4(b) of the Exposure Draft. We consider that clause 23.4(b) provides helpful guidance to employers and pilots on when annual leave can be taken, without binding them.

We also oppose the proposed change to clause 23.4(d), to the extent that it is unnecessary to allow for rostering arrangements at the enterprise level.

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In addition, the proposed change does not rectify the current issues faced by pilots resulting from the employers' application of clause 27.4 of the Award (replicated as clause 23.4 of the Exposure Draft) to unilaterally direct when pilots take annual leave.

We consider that any such direction is inconsistent with section 88 of the Act, which provides agreement between employer and employee as the basis for the taking of paid annual leave.

Consequently, we consider that clause 23.4(d) should be removed, and replaced by a new clause 23.4(d) which either stipulates that annual leave be taken in accordance with the National Employment Standards ("**NES**"), or states what the NES provides in this regard.

Please contact Simon Miller at smiller@afap.org.au or on (03) 9928 5737 or should you have any queries or wish to discuss these matters further.

Yours sincerely

Simon Lutton
Executive Director

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