IN THE FAIR WORK COMMISSION

AT MELBOURNE

AM2018/14 – AIR PILOTS AWARD 2010

SUBMISSION OF THE AUSTRALIAN FEDERATION OF AIR PILOTS

(On the question of a proposed training bond clause)

Introduction

1. The AFAP files these submissions in accordance with the directions dated 4 December 2019. They are directed to whether the exposure draft of the *Air Pilots Award 2010* (the **Award**) should include a training bond clause and, if so, what the terms of such a clause should be.

2. These submissions should be read in conjunction with the AFAP's submissions of 13 February 2019, 17 April 2019 and 20 August 2019.

3. The principal submission of the AFAP remains that no variation should be made to the Award through the modern award review process to include a training bond clause in the Award, and that any amendment to existing cl 13 should be made pursuant to an exercise of power under s 160 of the *Fair Work Act 2009* (Cth). If, however, the Commission determines that a training bond clause should be included in the Award, the AFAP submits that any such clause should be in the form set out in the proposal of 17 November 2019 (the **November Proposal**), subject to the inclusion of a hard cap on training costs.

Background and statutory context

4. Whether the Award should be varied to provide for training bonds and, if so, the terms of such a variation must be considered in context.

5. First, the proposal to introduce a training bond clause into the Award must be considered in light of the industrial history of the Award. The existing Award clause is in the following terms:

> **16.2** Where the employer requires a pilot 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.

6. The Award does not provide for the use of training bonds. Any contractual training bond directed to the subject matter of cl 16.2 is unenforceable. Training bonds can lawfully be included in enterprise agreements provided that the agreement meets the better off overall test.

7. The current position reflects long-standing industrial arrangements. Those arrangements are discussed in detail in the AFAP submissions dated 13 February 2019 at [16]-[18], and in its submissions of 20 August 2019 at [4]-[11].

8. The Commission must not proceed, therefore, on the basis that the existing industrial arrangements have been arrived at by mistake or through inadvertence. Rather, the existing arrangements reflect the considered position of both the Commission, and its predecessor industrial bodies, as to the fair and reasonable minimum conditions that should apply in the industry.

9. The Commission must also not proceed on the basis that there has been a change in the law giving rise to a need to alter the existing Award scheme. In particular, the decision in the Loaded Rates Case[1] did not change the law; it explained it. The legislative framework within which the Award was made has not changed, and any Award variation must be not approached on the basis that it has. Instead, any variation must be approached by reference to whether the variation would meet the modern awards objective.

10. Rex's assertion that it did not know that training bonds were relevant to the BOOT should be rejected (and is, in any case, irrelevant). Rex has known since at least 2007[2] that training bonds are to be assessed against the minimum award standard. Moreover, the approval of agreements under the FW Act has always proceeded on the basis that the agreement as a whole had to meet the BOOT (rather than any individual clause).[3] Any misapprehension of the law by Rex is irrelevant to the statutory task.

11. Second, training bonds are presently capable of lawful inclusion in an enterprise agreement only where the better off overall test is met having regard to the cl 16.2 entitlement. Consequently, employers and employees (or their bargaining representatives) must bargain for an agreement that leaves employees better off overall. In this way, enterprise bargaining is promoted, and training bond clauses cannot be used to undermine the fair and reasonable

---

1 [2018] FWCFB 3610.

2 See *Regional Express Holdings Ltd v Clarke* [2007] FCA 957.

3 See, for example, the *Sunstate Airlines (Qld) Pty Ltd Pilots Enterprise Agreement 2011.*

minimum standards set by the Award. As noted above, the decision in the Loaded Rates Case did no more than explain the law; it should not be used as cover to reduce the fair and reasonable minimum standards in the Award. As noted by the AFAP in its earlier submission, a case for such change must be made.

12. Third, the inclusion of a training bond clause in the Award will reduce the minimum entitlements of employees. Presently, cl 16.2 provides an absolute minimum entitlement. The presence of cl 16.2 and the absence of a clause permitting training bonds in the Award has the consequence that employers wishing to use training bonds must bargain for the inclusion of such a bond in an enterprise agreement. In this way, employers are able to utilise bonds only where there is a commensurate benefit to employees and employees are able to exercise bargaining power to affect the terms of the bond. The inclusion of a training bond in the Award fundamentally alters the minimum entitlements of employees and the relative bargaining positions of employers and employees.

13. Consistent with this position, the Office of the Employment Advocate adopted the practice (with respect to the no disadvantage test) of halving the training cost of the bond and placing the halved value under the Award side of the NDT. The effect of this approach was to **raise** the minimum standard secured by the Award by 50% of the training cost. Thus, an employer was lawfully able to enter into a bond for up to 50% of the training cost, but not more. For present purposes, the point is that the proposed inclusion of a training bond clause in the Award reduces an employee's existing entitlement under cl 16.2, provides no commensurate benefit elsewhere and removes (or reduces) an employer's incentive to bargain.

14. In circumstances where the entitlement presently reflected in cl 16.2 reflects long-standing industrial arrangements, the case for change must be clearly made. And, where such a case is made, the amendment to the Award must go no further than is necessary to address the mischief that has arisen.

15. Fourth, and relatedly, the Commission's modern award review powers cannot be lawfully exercised for the purpose of conferring a commercial benefit on employers. The high attrition rates described by Rex at [9] and [10] are irrelevant to the Commission's task under a 156 of the FW Act. High attrition rates are experienced across a range of industries. The fact of high attrition rates is not a proper basis for the Commission to vary the Award to confer a commercial benefit on an employer and reduce employee's minimum standards.

16. Fifth, and consequently, the Commission must therefore give careful attention to its power to vary to Award. The Commission is exercising power under s 156 of the FW Act. In doing so, it must act consistently with s 134 of the FW Act, which requires it to ensure that modern awards, together with the National Employment Standards, meet the modern awards objective.[4] An amendment made pursuant to s 156 which does not meet the modern awards objective prescribed by s 134 would be beyond power. Consequently, the Commission must be positively satisfied that the proposed variations would meet that objective and are otherwise consistent with the statutory scheme.[5]

17. Finally, the Commission would err by having regard only, or principally, to the areas of dispute between the interested parties. The clause to be included in the exposure draft must, in the context of the Award as a whole and considered with the NES, meet the modern awards objective. That is so irrespective of the extent of any agreement between the interested parties.

The proposed clauses

18. If the Commission is satisfied that the Award should be amended pursuant to the modern award review to provide for training bonds, there are three competing proposed clauses, being:

    (a) the **November Proposal**, supported by the AFAP, Alliance[6] and RAAA;

    (b) the clause proposed on 18 December 2019 by QANTAS (the **QANTAS Proposal**); and

    (c) the clause proposed on 18 December 2019 by Rex (the **Rex Proposal**).

19. There are three points of difference between the proposed clauses, being:

    (a) the meaning of actual costs in proposed cl 16.6(1)(E);

    (b) whether the pro rata reduction in the training bond amount should start to reduce:

---

4 Penalty Rates Decision [2017] FWCFB 1001 at [101]-[102].

5 There are a number of provisions of the Act relevant to the task, and which are discussed in the Penalty Rates Decision.

6 Submissions of Alliance dated 20 December 2019 (the **Alliance Submissions**).

(i) from the commencement of training; or

(ii) from when the pilot successfully checks to line; and

(c) the type of training for which a bond can be required.

20. In addition, the AFAP submits that any clause inserted into the Award should cap the training bond at a fixed amount.

Actual cost

21. The dispute around the phrase "actual cost" has two elements, being whether to define actual costs at all, and what should be included in any definition.

22. As to the first, it is important that a clear definition of actual cost is included. As the Submissions of Rex dated 18 December 2019 (the **Rex Submissions**) at [19] and the submissions of QANTAS dated 18 December 2019 (the **QANTAS Submissions**) at [18] make clear, there is significant scope for disputes as to the meaning of "actual cost", including whether "actual" costs include only direct costs, or both direct and "indirect" costs[7] and, in either case, the costs that fall within those descriptors. The ambiguity inherent in the phrase "actual costs" creates some risk of disputation. Such an outcome would not promote the modern awards objective. Moreover, participants in bargaining must understand the content of the minimum standard prescribed by the Award to understand what might be included in an enterprise agreement and whether such an agreement passes the BOOT. It is undesirable for a new Award clause to generate uncertainty about these matters.

23. Further, the Commission's task in assessing whether to include such a clause in the Award requires clarity as to the nature and extent of the benefit that will accrue to employers and the detriment that will be caused to employees. Only then can the Commission assess whether the clause meets the modern awards objective.

24. For these reasons, "actual costs" should be defined. Doing so will provide clarity for employers and employees about their legal rights and entitlements, reduce the likelihood of disputation, ensure that bargaining proceeds from a clear understanding of the Award entitlement, provide

---

7 Rex Submissions at [19].

a clear foundation for the BOOT assessment and assist the Commission to determine whether the proposed clause meets the modern awards objective.

25. As to the costs that can be bonded, only direct costs should be included. Such costs should be clearly defined (in the terms of the November Proposal) and (contrary to the submission of QANTAS[8]) that definition should be exclusive, not inclusive.

26. When determining the terms of any training bond, the Commission must bear in mind that the difficulty that exists in negotiating an enterprise agreement containing a training bond that meets the BOOT has not arisen through inadvertence. It is a feature of the statutory scheme. As such, there should not be, absent clearly articulated, evidence based, reasons, an amendment to the Award that confers a substantial benefit on employers without providing a counterbalancing benefit to employees. No clearly articulated, evidence based, reasons have been advanced that support such an outcome.

27. The prevalence of training bond clauses in enterprise agreements evidences their value to employers (as a tool for securing ongoing service) and employees (as a tool for negotiating above Award terms and conditions). Their omission from the Award therefore promotes the modern awards objective of encouraging enterprise bargaining. Including a term any wider than that proposed by the AFAP would further reduce employees' minimum Award entitlements, confer a substantial benefit on employers and be inimical to enterprise bargaining.

28. As such, Rex's submission at [18] that existing bonds would not be "permissible" should be rejected. Such bonds would remain permissible as part of enterprise agreements that meet the BOOT. Emphasising again what is said above: the function of the Commission is not to amend the Award to support Rex's (or any aviation employer's) commercial imperatives.

29. Consequently, any Award clause should do no more than establish a minimum entitlement which provides a foundation for enterprise bargaining. In this way, the Award can facilitate training bonds without undermining the incentive for enterprise bargaining.

30. As such, the actual costs that can be bonded should be those set out in the November Proposal, and only those costs. Those costs represent a fair and reasonable description of the costs likely to be expended by an employer. Any further or additional costs (including the indirect costs

---

[8] at [19].

proposed by Rex and the additional direct costs proposed by QANTAS) can be the subject of bargaining. To expand the clause beyond the November Proposal would be to confer a substantial benefit on the employer, without any commensurate benefit to the employee. In that regard, it must be recalled that the inclusion of a training bond clause in the Award undermines the minimum conditions enjoyed by employees in this industry for many years. It is a significant step that ought to be approached cautiously.

Cap on actual training costs

31. In addition, the Commission should impose a cap on the amount of any training bond. This submission represents a change to the November Proposal. That cap should take the form of 50% of actual costs or an agreed value (which may vary by type), whichever is the lower. A cap on training bonds is an important fetter on the otherwise substantial power of an employer to determine training costs. Employees are particularly vulnerable with respect to instruments such as training bonds. They have no control over the manner or form of training, the method by which the training is delivered or whether the costs of the training are reasonable and proportionate. Any suggestion that an employee can negotiate the question of actual costs should be rejected; an employee's capacity to negotiate in such situations is illusory.

32. Without the benefits and protections that accrue to employees as part of the process of enterprise bargaining (such as the right to be represented by a bargaining representative, the right to take protected industrial action) this vulnerability is heightened. The inclusion of a cap will act as a bulwark against exploitation and unfair terms. It will further the minimum wage objective, promote enterprise bargaining and assist in ensuring that the Award continues to provide a fair and reasonable minimum standard for employees.

Bond should reduce from commencement of training

33. The November Proposal provides for the training bond to reduce on a pro rata basis over the term of the training bond, from the commencement of training. This is a fair and reasonable minimum standard, which provides a base line that can be varied through enterprise bargaining.

34. There is presently no consistent approach to when the amount of the training bond starts to reduce. The carefully worded submission of QANTAS at [10] ("consistent with **a number of** enterprise agreements") does not say otherwise. Moreover, two of the agreements relied on by QANTAS at [10] do not have the effect asserted by QANTAS. Clause 54.8.6.2 of the Sunstate

Airlines (Qld) Pty Ltd Enterprise Agreement 2015 and cl 57.7.1 of the Eastern Australia Airlines Pty Ltd Pilots Enterprise Agreement 2015 (which are directed to Initial Command Bonds) prescribe that the reduction commences from appointment to a command. In both cases, the **appointment** takes place **prior** to the training commencing, not afterward.

35. As such, the Commission should not proceed on the basis that the submission of QANTAS at [10] represents a commonly accepted industry standard. Rather, it should acknowledge that there is variance in when the amount of the training bond starts to reduce.

36. The training bond should start to reduce from the commencement of training. First, that represents the date from which the pilot is required to devote the whole of their time and attention to the training task. Contrary to the submissions of QANTAS at [9] and Rex at [12], an employer starts to receive a benefit from the moment the employee enters training. The employee is, from that time, gaining knowledge and skills that will ultimately be employed in the employer's business. The benefit will be fully realised once the employee checks to line, but it is wrong to say that there is no benefit accruing to the employer during the period of training.

37. Moreover, the AFAP rejects Rex's characterisation of training bonds (at [12]). A training bond is not a safeguard against "unreasonable costs" where a pilot fails to provide a "reasonable return of service" or to provide a "disincentive" for pilots to leave employment before they provide sufficient valuable service as a fully operational pilot.[9] That may reflect Rex's commercial imperatives, but it does not reflect the purpose of any training bond clause that is to be inserted into an industrial instrument providing for minimum standards. The purpose of a training bond is to balance two competing interests: the interest of pilots in securing in-service training without paying upfront costs and the interests of employers who fund such training in receiving an appropriate return on their training investment.

38. Third, and relatedly, it must be recalled that employers obtain a substantial advantage from training their employees. They obtain a skilled workforce, trained to company standards using company methodologies, often in the context of a competitive employment market. In this regard, aviation employers are no different to other employers who using training, development and career advancement as a means of employee retention and who incur costs in doing so. All such employers face the risk that an employee will leave their employment

---

9 Rex Submissions at [12]-[13].

before the full value of the training cost has been realised and all such employers are required to address employee retention rates. Notwithstanding this, training bonds are not a common feature of modern awards. The particularities that attach to training bonds must not obscure this, and any Award variation should not be approached on the basis that aviation employers require commercial assistance from the Commission.

39. Rather, third, the Award should reflect fair and reasonable **minimum** conditions. At [11], QANTAS asserts that the minimum standard is that the bond reduces from check to line, and that employees wanting to reduce their bond from the commencement of training can bargain to achieve this result. This represents a complete inversion of the existing Award scheme. Presently, employers wanting to security for the obligation in cl 16.2 must bargain with their employees to achieve it, including as to the terms on which the bond reduces. QANTAS contends that a fair and reasonable minimum standard is for the reduction in the bond amount to commence only after the employee checks to line and that employees can bring this date forward by trading other terms and conditions or offering up further efficiencies in the course of enterprise bargaining. This represents not the minimum fair and reasonable standard, but the ultimate aim of employers. Such a result would undermine the minimum wage objective and undermine enterprise bargaining. It would be contrary to the minimum awards objective.

40. The effect of QANTAS' submission at [11] cannot be overstated. In essence, QANTAS submits that the Commission should insert into the Award clause a term that QANTAS is presently required to bargain for and to place on employees the obligation to provide suitable efficiencies in the course of bargaining if they want to improve on the term. As noted above, this represents a complete inversion of the present Award structure and provides a substantial benefit to employers with no commensurate benefit to employees. QANTAS makes no attempt to explain how this meets the modern awards objective, nor could any persuasive argument to that effect be advanced.

41. Further, Rex's submission at [14] highlights the lack of principle underpinning its position. It is equally possible (indeed, it is more likely) that training delays will be in the control of the employer. Systemic or employer-directed training delays will affect substantially more pilots than the rare case of an extended illness (of which the AFAP is not aware of any instance, and about which there is no evidence). As such, the only basis for Rex's assertion that the reduction should commence from when a pilot is checked to line is a resort to a rare and unlikely circumstances that might affect a small number of pilots. It falls well short of the evidence

based, logical and rational argument necessary to persuade the Commission to exercise its powers to include such a clause.

42. The November Proposal strikes a balance between a fair and reasonable minimum standard and the need to promote enterprise bargaining.

Types of training that can be bonded

43. The November Proposal provides for training bonds to be used in two circumstances, being:

(a) for class and type rating training, necessary to operate a particular aircraft and initial class and type rating training; and

(b) upgrade training (change in rank and/or status training).

44. QANTAS supports the November Proposal, subject to the inclusion of "downgrade" training.[10]

45. Rex seeks to expand the clause to include:

(a) subsequent type rating training for additional aircraft types; and

(b) any change in grade training.[11]

46. "Downgrade" training should not be included. QANTAS provides some context for circumstances in which downgrade training is required.[12] Those examples make clear that a inherent in the bid back is a benefit to both the employer and the employee. The employer retains the services of skilled employee and the employee is able to continue in employment that accommodates the changed circumstances. There is no rationale consistent with the modern awards objective for a training bond for downgrade training.

47. Rex offers no explanation of how a clause of the breadth it seeks furthers the modern awards objective. It submits that it is "fundamental"[13] that an employer should be able to enter into a bond "whenever there is a significant cost associated with training required in the employment of a particular pilot" but offers no explanation at all of why this is "fundamental" nor the principles that underpin that conclusion. Such a circumstance might be a desirable commercial

---

10 QANTAS Submissions at [12]-[16].
11 Rex Submissions at [16].
12 QANTAS Submissions at [15].
13 Rex Submissions at [16].

outcome for Rex, but it has no place in a modern award that sets fair and reasonable minimum standards.

Conclusion

48. The submissions of the Rex and QANTAS fail to engage with the Commission's statutory task. They do not advance any explanation for how the terms they seek advance the modern awards objective, nor do they link that explanation to the evidence before the Commission. Instead, they are focussed on securing a clause that best serves their commercial interests.

49. That approach is to be rejected. If a training bond clause is to be included, it must go no further than is necessary to address the mischief that has arisen, being the difficulty of negotiating an enterprise agreement that both contains a training bond clause and meets the BOOT.

50. In considering the terms of such a clause, the Commission should bear in mind that the inclusion of any form of training bond clause reduces the minimum entitlements of employees to whom the Award applies and reduces their capacity to bargain for better terms and conditions, and that this situation is heightened the more rights and entitlements the clause confers on employers.

51. As such, any clause should provide a minimum entitlement that is fair and reasonable, and which encourages enterprise bargaining.

27 December 2019

Siobhan Kelly

Counsel for the Australian Federation of Air Pilots