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Associate to Vice President Hatcher
Fair Work Commission
80 William Street
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Dear Associate,

AM2014/196 & 197 - 4 YEARLY REVIEW OF MODERN AWARDS
CASUAL AND PART TIME EMPLOYMENT

1. We act for the Maritime Union of Australia (**MUA**).

2. Direction 1 in the 5 July 2017 decision of the Full Bench in [2017] FWCFB 3541 at [902] invited interested parties to make further submissions concerning the proposed model casual conversion clause (**proposed model clause**), including whether it requires adaptation to meet the circumstances of particular awards.

3. These submissions concern the *Stevedoring Industry Award 2010* in particular and generally adopt and rely on the submissions filed by the ACTU dated 2 August 2017 where relevant.

Proposal for casual conversion in the *Stevedoring Industry Award 2010*

4. The Full Bench in [2017] FWCFB 3541 articulated its proposed model clause at [381] and immediately thereafter made reference to the *Stevedoring Industry Award 2010* at [382]:

> [382] We will provide interested parties an opportunity to make further submissions concerning this proposed model clause, including whether it requires adaption to meet the circumstances of particular awards, in accordance with the directions appearing at the end of this decision. We will also provide interested parties, in accordance with those directions, an opportunity to make further submissions concerning whether there is any appropriate form of casual conversion provision which might be placed in the *Meat Industry Award 2010* or the ***Stevedoring Industry Award 2010*** having regard to the views we have expressed in relation to those awards earlier in this decision.

5. Having given the matter careful consideration we submit that three simple changes to the proposed model clause will result in a casual conversion clause which is satisfactory for the purposes of the *Stevedoring Industry Award 2010*. The three changes to the proposed model clause are:

   (i) Change "part-time employee" to "guaranteed wage employee";
   (ii) Change "part-time employment" to "guaranteed wage employment"; and
   (iii) Change "pattern of hours" to "number of hours".

6. A marked up casual conversion clause for the *Stevedoring Industry Award 2010* is provided at **SCHEDULE A**.

7. The proposed clause in its final form is provided at **SCHEDULE B**.

Pattern of hours v number of hours

8. Since it is clear from the Full Bench Decision that casual employment and the stevedoring industry have a long and close history[1] it would be odd to exclude casual conversion from the *Stevedoring Industry Award 2010*.

9. We submit that the change from part-time employee/employment to guaranteed wage employee/employment should not be an issue because guaranteed wage employment is a form of part-time employment.[2] The fit is a good one.

10. The change from "pattern of hours" to "number of hours" however may require more detailed consideration.

11. The nature of the stevedoring industry is the irregularity of the work. In the AM2014/90 *Stevedoring Industry Award 2010* proceedings comprehensive evidence of the nature of stevedoring work was given by Warren Smith, MUA Assistant Secretary in his statement dated 24 December 2014 and his statement in reply dated 28 January 2015[3] which we refer to, adopt and rely on in for the purposes of this submission. In his reply statement at paragraph 6 Mr Smith said:[4]

> *"Workers in the stevedoring industry face a unique set of challenges. It is a 24-hour industry scheduled around the arrival and departure times of multi-million dollar cargo ships. There is a great deal of pressure to load and discharge these ships as quickly as possible in order to maintain their efficiency and utilization. Workers are therefore required to be flexible and their work-time is scheduled around ship arrivals and departures, which are frequently subject to change. 24-hour shift work is almost always required, and less than 20% of the workforce have rosters in which more than 50% of shifts are predictable. Most workers have no roster at all. Almost all workers in the industry, permanent or not, must call in daily to find out if they are due to work or not, and if so at what time. This frequently unpredictable 24-hour shift work has grueling health effects, and is exceedingly challenging for workers" family lives."*

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[1] See references to stevedoring (or dock work) in [2017] FWCFB 3541 at [16] to *Barnett v Port of London Authority* [1913] 2 KB 115; at [19] and [23] to *Cue v Port of London Authority* [1914] 3 KB 892; at [19], [22] and [23] to *Price v Guest, Keen and Nettlefolds Limited* [1918] AC 760; at [19]; at [30] to *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 15 CAR 297

[2] "Guaranteed wage employment" is defined in Clause 10.2 of the *Stevedoring Industry Award 2010:* "A guaranteed wage employee is an employee who is guaranteed a minimum number or an average number of full shifts each week, or instead of that engagement, is provided the equivalent payment".

[3] See FWC AMOD webpage – Awards under review - AM2014/90 Stevedoring Industry Award 2010 - https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review/award-stage/award-review-documents/MA000053?m=AM2014/90

"Guaranteed wage employment" is defined in Clause 10.2 of the *Stevedoring Industry Award 2010:* "A guaranteed wage

[4] See also Statement of Warren Smith in Reply dated 28 January 2014 at paras 6, 11, 12, 13, 14, 16, 18, 19 20.

12. In its decision in *Stevedoring Industry Award 2010* [2015] FWCFB 1729 the Full Bench said at [64] in relation to stevedoring work generally :

> *"...the highly unusual nature of shift allocation systems for waterfront labour warrant a swings and roundabout approach to award entitlements. Greater demands on employees that contribute to a more intrusive availability requirement than in most other areas of employment warrant a more generous ordinary hours prescription. This provides compensation for the inconvenience of the rostering arrangements in the stevedoring industry. The allocation practices arising from the need for flexible labour requirements obviously contributed to the unique structure of the award hours provisions and remain relevant today."*

13. It is important to note that these observations of the Full Bench related to permanent employment. The significance of work patterns in the stevedoring industry, and the reason why a casual conversion clause would work, is that there is no significant difference in the regularity or irregularity of the work whether an employee is engaged on a permanent, part-time (or guaranteed wage) or a casual basis. Therefore the relevant "pattern hours" worked by a casual employee would not require significant adjustment to equally be worked by the employee as a full time or a part time (or guaranteed wage) employee.

14. But because the patterns of work for full time, part-time (or guaranteed wage) or casual employees in the stevedoring industry are all irregular, it follows that a measure other than "pattern of work" be used as the grounds for casual conversion. The logical, and simplest, measure is the number of hours worked and that is the reason for our third change to the proposed model clause.

Existing casual conversion provisions in stevedoring industry enterprise agreements

15. A number of stevedoring industry enterprise agreements already include casual conversion provisions. Extracts from these agreements are provided at SCHEDULE C and include:

    (a) *DP World Sydney Enterprise Agreement 2015* [5] (also *DP World Melbourne Enterprise Agreement 2015*; *DP World Brisbane Enterprise Agreement 2015*; and *DP World Fremantle Enterprise Agreement 2015*

    (b) Flinders Adelaide Container Terminal Stevedoring Enterprise Agreement 2014-2017 [6]

    (c) *Qube Ports Pty Ltd Port of Adelaide Enterprise Agreement 2016* [7] (also applies to ports nationally)

    (d) Patrick Bulk Port Services Melbourne Enterprise Agreement 2015 [8] (also applies to ports nationally)

16. The existing provisions relating to casual conversion prescribed by the enterprise agreements operating in the stevedoring industry are either aspirational, restrictive and lack certainty in their interpretation or are on the contrary are overly prescriptive.

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[5] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae415829.pdf
[6] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae409868.pdf
[7] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae424506.pdf
[8] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae416312.pdf

17. This fact alone supports the MUA's argument that the stevedoring industry would benefit from the inclusion of the proposed casual conversion clause in the *Stevedoring Industry Award 2010*.

Yours faithfully,

McNALLY JONES STAFF

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SCHEDULE A

DRAFT DETERMINATION (showing amendments)

Fair Work Act 2009
s.156–4 yearly review of modern awards

4 yearly review of modern awards—Casual Employment and Part-time employment (AM2014/196 and AM2014/197)

STEVEDORING INDUSTRY AWARD 2010
[MA00053]

Stevedoring industry

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL SYDNEY, XX YYY 2017

4 yearly review of modern awards – casual employment

A. Further to the Full Bench decision issued by the Fair Work Commission on 5 July 2017[9], the above award is varied as follows:

1. By inserting the following new clause 10.4:

10.4 Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or ~~part-time employment~~ **guaranteed wage employment**.

(b) A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a ~~pattern of hours~~ **number of hours** on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or ~~part-time employee~~ **guaranteed wage employee** under the provisions of this award.

(c) A regular casual employee who has worked an average of 35 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked at the rate of an average of less than 35 hours a week in the period of 12 months casual employment may request to have their

9 [2017] FWCFB 3541.

employment converted to ~~part-time employment~~ **guaranteed wage employment** consistent with the ~~pattern of hours~~ **number of hours** previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or ~~part-time employment~~ **guaranteed wage employment**, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or ~~part-time employee~~ **guaranteed wage employee** in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(i) Where it is agreed that a casual employee will have their employment converted to full-time or ~~part-time employment~~ **guaranteed wage employment** as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or ~~part-time employment~~ **guaranteed wage employment**; and

(ii) if it is agreed that the employee will become a ~~part-time employee~~ **guaranteed wage employee**, the matters referred to in clause 10.2.

(j) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time or ~~part-time employment~~ **guaranteed wage employment**, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time or ~~part-time employment~~ **guaranteed wage employment**, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or ~~part-time employment~~ **guaranteed wage employment**.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).

VICE PRESIDENT

SCHEDULE B

DRAFT DETERMINATION

Fair Work Act 2009
s.156–4 yearly review of modern awards

4 yearly review of modern awards—Casual Employment and Part-time employment (AM2014/196 and AM2014/197)

STEVEDORING INDUSTRY AWARD 2010
[MA00053]

Stevedoring industry

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL SYDNEY, XX YYY 2017

4 yearly review of modern awards – casual employment

A. Further to the Full Bench decision issued by the Fair Work Commission on 5 July 2017[10], the above award is varied as follows:

2. By inserting the following new clause 10.4:

10.4 Right to request casual conversion

(h) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or guaranteed wage employment.

(i) A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a number of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or guaranteed wage employee under the provisions of this award.

(j) A regular casual employee who has worked an average of 35 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(k) A regular casual employee who has worked at the rate of an average of less than 35 hours a week in the period of 12 months casual employment may request to have their employment converted to guaranteed wage employment consistent with the number of hours previously worked.

10 [2017] FWCFB 3541.

(l) Any request under this subclause must be in writing and provided to the employer.

(m) Where a regular casual employee seeks to convert to full-time or guaranteed wage employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(n) Reasonable grounds for refusal include that:

(j) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or guaranteed wage employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(j) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(k) Where it is agreed that a casual employee will have their employment converted to full-time or guaranteed wage employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or guaranteed wage employment; and

(ii) if it is agreed that the employee will become a guaranteed wage employee, the matters referred to in clause 10.2.

(j) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(o) Once a casual employee has converted to full-time or guaranteed wage employment, the employee may only revert to casual employment with the written agreement of the employer.

(p) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(q) Nothing in this clause obliges a regular casual employee to convert to full-time or guaranteed wage employment, nor permits an employer to require a regular casual employee to so convert.

(r) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or guaranteed wage employment.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).

VICE PRESIDENT

SCHEDULE C

Casual conversion clauses in existing enterprise agreements

DP World Sydney Enterprise Agreement 2015

Part A - Applying to Brisbane, Freemantle, Melbourne and Sydney

31.0 SUPPLEMENTARIES

31.1 Terms of Engagement

31.1.1 Supplementaries shall be recruited and trained in accordance with the Company's requirements.

31.1.2 Supplementaries shall not be placed in roster panels and shall be available for totally irregular allocation.

31.1.3 Any redundancy provisions applicable to Permanent Employees shall not be applicable to Supplementaries.

31.1.4 All active Supplementary Employees who have worked for greater than 9 months and whose earnings for the previous nine months exceed the VSE Minimum Salary prorated for a VSE, will be appointed to the position of VSE.

31.1.5 The appointment will be subject to satisfactory performance.

NOTE. In the *DP World Sydney Enterprise Agreement 2015* Supplementaries are casuals (clause 7.9). VSEs are Variable Salary Employees are Guaranteed Wage Employees and are referred to in clause 10 of the Award. VSEs receive a minimum salary set out in a table.

Flinders Adelaide Container Terminal Stevedoring Enterprise Agreement 2014-2017

25.2.4.5 All active Supplementary Employees (excluding interhire employees} who have worked for greater than 24 months and whose earnings for the previous twelve months exceed the minimum guarantee for a VSE, will be appointed to the position of VSE.

25.2.4.6 The appointment will be subject to the promotion criteria in clause 26.6.

Qube Ports Pty Ltd Port of Adelaide Enterprise Agreement 2016

Part A - Applies to Ports Nationally

The *Qube Ports Pty Ltd Port of Adelaide Enterprise Agreement 2016* contains the following categories of employment:

Full time Salaried Employees (FSE) have an Annualised Accumulated Hours ("AAH") requirement of 1820 hours including approved leave.

Provisional Full Time Salaried Employee ("PFSE") have an AAH requirement of 1820 hours including approved leave. A PSFE shall remain a PFSE for 24 months and will automatically convert to a FSE if they have met their hours over the 24 months provisional period. The number of additional PFSEs will equal the number of VSE who have achieved 1820 worked hours in the previous Year, divided by two (rounded up to the next whole number). If a PFSE fails to continue to meet the minimum hours

requirement of 1820 hours on average over the 24-month period of their provisional FSE appointment and provided the PFSE has been allocated on an equitable basis in accordance with clause 10.1, the PFSEs appointed will revert to a VSE position.

Variable Salary Employee ("VSW") VSEs will not be placed in roster panels and will be available for totally irregular allocation. Any redundancy provision applicable to full-time permanents will be applicable to a VSE to the extent of the minimum salary. VSEs will not be required to work more consecutive shifts than the equivalent FSE in the same location.

Provisional Variable Salary Employees (PVSE) Once engaged, a PVSE will remain a PVSE for a period of 24-months. A PVSE who has met the minimum VSE guarantee over that 24-month period will automatically convert to a VSE position after 24 months. PVSEs have the same terms and conditions VSEs.

Guaranteed Wage Employees (GWE) GWEs will not be placed in roster panels and will be available for totally irregular allocation. GWEs will be paid the composite rate for leave for all purposes. GWEs will have a fortnightly guarantee payment equal to 28 ordinary hours payment at the weekly rate for a grade 2 Employee. In each consecutive 12-week period, total actual average fortnightly earnings will be reconciled against the GWEs guarantee to ensure the guarantee level of work has been achieved. In the event the guarantee has not been met, the fortnightly guarantee will be reviewed and reduced to reflect actual earnings for the prior 12-week period.

Supplementary Employees. Supplementary Employees will be available for totally irregular allocation. Supplementary Employees will be paid the composite hourly rates set out in Part B of this Agreement which includes the casual loading.

Patrick Bulk Port Services Melbourne Enterprise Agreement 2015

Part A - Applies to Ports Nationally

The *Patrick Bulk Port Services Melbourne Enterprise Agreement 2015* provides that the parties will conduct a six monthly formal review of the application of the Agreement including why the Company should maintain or adjust the size and composition of the workforce. This is "Subject to rights and discretion of Management being maintained" (clause 8). The intent of this Agreement is to achieve with the Company work practices and arrangements that do not impede the process of ongoing charge to continuously improve the viability, efficiency and productivity of the Company (clause 9.1).

These provisions are aspirational and do little to prescribe a system of casual conversion.