From: Sarah Cerche [mailto:sarah.cerche@mial.com.au]
Sent: Thursday, 14 April 2016 5:12 PM
To: AMOD
Subject: Four Yearly Modern Award Review - Group 3 Awards - Technical and Drafting Matters

Dear Associate to Justice Ross,

Please find attached correspondence in relation to technical and drafting matters for the following group 3 awards on behalf of Maritime Industry Australia Ltd:

Seagoing Industry Award
Ports Harbours and Enclosed Water Vessels Award
Marine Towage Award

Kind regards,

Sarah

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14 April 2016

Associate to Justice Ross
Fair Work Commission
11 Exhibition St
Melbourne VIC 3000

Dear Associate to Justice Ross,

Re: Group 3 Exposure Drafts - Drafting and Technical Issues

We refer to the amended timetable outlined in a statement issued by President Ross on 23 March 2016 relating to submissions on technical and drafting issues in published Group 3 Award exposure drafts.

Maritime Industry Australia Ltd (MIAL) represents employers of employees performing work in the maritime industry covered by the following sub Group 3C Awards.

- Seagoing Industry Award 2010 (SIA)
- Marine Towage Award 2010
- Ports Harbours and Enclosed Water Vessels Award 2010 (PHEWV Award)

MIAL makes the following comments in relation to the exposure drafts published on the Fair Work Commission's website. These comments relate to technical and drafting issues and attempt to respond to some of the queries highlighted throughout the exposure drafts.

Seagoing Industry Award 2016 – Exposure Draft

Clause 3

We understand that the coverage provisions of the SIA will be the subject of a Full Bench hearing in matter AM2016/5, and accordingly, the wording in this clause may change.

Clause 6

Clause 6 in the exposure draft purports to contain an explanation of the effect of temporary licences by reference to temporary licences granted under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Coastal Trading Act). Clause 6.2 further sets out that provisions contained within Schedule A – Vessels Granted a Temporary Licence, apply exclusively to vessels granted a temporary licence. Clause 6.3 confirms that certain Parts of this award do not apply to vessels granted a temporary licence.

Within the SIA, provisions applying to temporary licensed ships are contained in Part B of the award. For foreign vessels who are carrying domestic cargo, reference to "Part B" has become ingrained within the industry vernacular. MIAL is concerned that a change to that understood terminology, from Part B to Schedule A, is likely to be confusing to operators who only

occasionally have interaction with the Australian industrial relations system. Reference to Part B applying to temporary licensed vessels should be maintained.

In addition, clause 6.2 states that "The provisions contained within Schedule A – Vessels Granted a Temporary Licence, apply exclusively to vessels granted a temporary licence. A definition of temporary licence is contained at 6.1. MIAL is concerned that this clause may be confusing. The *Fair Work Act 2009* applies to foreign vessels that meet the definition of *temporary licensed ship* in the *Fair Work Regulations 2009* (FW Regulations) at regulation 1.15B. This definition relevantly states a temporary licensed ship means a ship:

(a) that is used to undertake a voyage authorised by a temporary licence; and

(b) to which one of the following applies:

i. within 12 months before commencing the voyage, the ship commenced at least 2 other voyages authorised by a temporary licence…

(Other criteria is transitional and relates to permits which were issued prior to the implementation of the Coastal Trading Act).

The SIA can only apply to vessels covered by the FW Act. Therefore clause 6.2 may be confusing if operators are not aware that a vessel is only subject to the FW Act if it meets the definition in FW Regulations.

Finally, MIAL suggests a slight change to the wording of Part B to reflect that a vessel operates under a temporary licence, rather than being granted one. Section 28 of the Coastal Trading Act is set out below.

28 Application for temporary licence

(1) A person may apply to the Minister for a temporary licence to enable a vessel to be used to engage in coastal trading over a 12-month period if the person is:

(a) the owner, charterer, master or agent of a vessel; or

(b) a shipper.

In a technical sense, the temporary licence is granted to the applicant (owner, charter, master, agent, and shipper) rather than to the vessel.

Clause 7.2

Parties are asked to comment on the interaction of clause 7.2 with clause 14.2(e). This is because a full time employee is stated to be engaged to work at least 38 ordinary hours plus reasonable additional hours, whereas the leave ratio in 14.2(e) is calculated on the basis of a 35 hour working week. MIAL understands that the calculation of leave entitlements on the basis of a 35 hour working week is the result of prior industrial negotiation in pre-reform awards. It is not inconsistent with 7.2 which contains the standard full time working week.

Clause 9

Most employees working in the seagoing industry live and work on board the vessel for extended periods, and accrue what is commonly called a leave factor which is set out in clause 14.2. The SIA also sets out minimum aggregate salaries payable to employees covered by the SIA. It is unnecessary for clause 9 to specify whether meal breaks are paid or unpaid, given that clause 10.3 specifies that the annual salaries have been fixed on an aggregate basis taking into account all aspects and conditions of employment.

Clause 10

Clause 10.2 in the exposure draft refers to Marine Orders Part 3, which no longer regulate training and qualification standards under the *Navigation Act 2012*. Further, depending on the vessel on which duties are performed, the *Marine Safety (Domestic Commercial Vessel) National Law 2012* may apply to training, qualifications and duties performed by crew. A more generic reference to appropriate regulation in clause 10.2 may be appropriate.

Clause 12.9(b)

MIAL notes that this clause appears to have been replicated from the Maritime Industry Seagoing Award 1999. The term trappings is also undefined in that award. MIAL suspects this clause has little utility in the contemporary seagoing industry.

Clause 14.2

MIAL does not consider that clause 14.2 requires amendment.

Proposed A.3.1 of Schedule A.

We repeat our position that Part B should be retained as Part B. MIAL have previously provided our view that hours ordinary hours of work in this clause is not inconstant with the NES in correspondence dated 17 June 2015.

Proposed A.4.1

MIAL has previously provided a response that clause A.4.1 incorporates the NES entitlement to annual leave on 17 June 2015.

Schedule of hourly rates

We are not aware of vessels which are covered by Part A of the current award being paid hourly rates or having difficulty with the current aggregated wage in the SIA. Certainly for vessels in Part B, in order to calculate overtime payments, employers have been required to break down the weekly wage contained in Part B. There would be utility for Part B of the award to include a schedule of hourly rates, although MIAL has limited visibility of whether operators covered by Part A of this award would benefit from a schedule of hourly rates.

The term “repatriation” is a commonly understood term in the industry, however if it is not used in the SIA then it need not be included in the definitions.

Ports Harbours and Enclosed Water Vessels Award 2016

Clause 3.2

MIAL understands that coverage provisions in relation to this award will be subject to Full Bench proceedings AM2016/5, meaning that the drafting in the clause may be subject to change.

Currently clause 3.2 refers to the ports harbours and enclosed water vessels industry as meaning the operation of vessels of any type wholly or substantially within a port harbour or other body of water within the Australian coastline or at sea on activities not covered by the *above* awards. The relevant awards are listed in clauses 3.3 and 3.4 *below*. This appears to be a referencing anomaly.

Clause 8 Breaks

The exposure draft contains a note requesting parties to make submissions as to which breaks are paid and which are unpaid in clauses 8.2 to 8.4. MIAL submits that it is intended that the meal breaks referred to in these clauses are intended to be unpaid. For example clause 8.2(c) determines that by mutual agreement between the employer and employees concerned, a 20 minute rest period may be taken without deduction of pay instead of the prescribed hour for breakfast. In these circumstances it appears clear that the hour break for breakfast is intended to be without pay. It would be unreasonable to expect an employee to forgo an hour break that is paid for a 20 minute paid rest break, as is facilitated in clause 8.2(c).

The same rationale applies in relation to clause 8.4 tea breaks. This view is further supported by clause 8.5(c) which makes a distinction between breakfast and tea breaks, and paid rest periods.

Clause 10 Minimum Wages and Allowances

The exposure draft contains a note about whether classification definitions should be inserted into the PHEWV Award. MIAL understands that coverage provisions including consideration of additional classifications within the existing structure will be the subject of a Full Bench hearing. MIAL may be better placed to consider whether classification definitions are necessary once this is finalised.

MIAL does not consider that allowances referred to in the note within the exposure draft on page 12 should be considered expense related allowances.

Clause 10.1(j)

In the absence of a definition of junior employee within the award, MIAL considers this allowance should be deleted as it is unnecessary.

Clause 10.1(o) Waiting orders

The exposure draft contains a note asking whether clause 10.1(o) should be updated to take into account mobile phones. MIAL suggests that this clause is out of step with contemporary society, and suspects it has little utility in practice. A more appropriate clause would seem to be that an employer be required to reimburse the employee the cost of any call where an employee is required to place telephone orders, regardless of the phone used.

Clause 10.1(p) Towing

The exposure draft contains a note requesting views as to whether references to normal wage should be replaced with “ordinary hourly rate”. As far as possible, MIAL submits that terminology within the award should be consistent.

Part 5 Penalties and Overtime

MIAL does not consider a need to define a span of ordinary hours, given the diversity of operations covered by the PHEWV Award. This would create an inflexibility within the award, and this matter is not the subject of a request for variation. It is more than a technical or drafting matter.

Marine Towage Award 2016 – Exposure Draft

MIAL understands that the coverage provisions of the Ports Harbours and Enclosed Water Vessels Award and the Seagoing Industry Award are the subject of review by a Full Bench in matter AM2016/5. Subject to the outcome of those proceedings, there may be consequential amendments necessary to the Marine Towage Award.

Clause 9.3 Special voyages in harbour towage operations

MIAL is not clear about what is being asked in the note contained in the exposure draft at the bottom of page 10. It appears as though clause 9.3(b)(i) contains a schedule for “ad hoc” special voyages that may be a day or so. Where such work is undertaken for a day, provided the employee worked full time, their weekly wage would increase. Where such work is undertaken regularly/continuously clause 9. 3 (including 9.3(b)(i)) does not apply.

Clause 10.4(d)(i) expense related allowance

MIAL does not see any difficulty with the current clause.

Yours sincerely,

Sarah Cerche
Industry Employee Relations Manager
Maritime Industry Australia Ltd.