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1 September 2017

The Honourable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By email only: chambers.ross.j@fwc.gov.au

Dear Justice Ross,

AM2014/84 - Professional Diving Industry (Industrial) Award 2010

I am writing to you in relation to the above matter, and the recent Full Bench Decision concerning the *Professional Diving Industry (Industrial) Award 2010* in [2017] FWCFB 3177.

Since the Decision was issued on 9 June 2017 the Union has been inundated with messages on social media from professional divers who have been performing inshore work in the industry as casual employees for most of their careers. The divers cannot understand how or why the Full Bench made a decision that resulted in a reduction in the casual hourly rate from \$35.64 to \$31.98.

There are a number of issues arising from the Decision that require clarification:

1. The 33 hour week for inshore divers was set out in the pre reform *Professional Divers – Maritime Union of Australia Award 2002*, and as the Full Bench observed at [103]:

“The distinction between inshore and offshore divers’ hours appears to date back to the early 1970s when inshore divers were first included in an award that had previously only provided for offshore divers”.
2. The Full Bench at paragraph [104] is inaccurate where it says that the proposed award provided for a 38 hour week and is incorrect where it says the proposed award made no reference to inshore divers working 6 hours 36 minutes per day. Clause 20.4 of the Union’s proposed draft award provided that for an inshore diver *“the ordinary hours of work for professional divers working inshore shall not exceed six hours and 36 minutes per day which may be worked between 6.00 am and 6.00 pm Monday to Friday”.*
3. The Union’s proposed draft award also sought a casual inshore diving hourly rate divisor of 1/1976 of the minimum annual rate (which is 1/38 weekly rate) but with a casual loading of 127.5%. When the AIRC published the current *Professional Diving Industry (Industrial) Award 2010* it included the 1/38 divisor with only 25% casual loading.
4. AMMA also filed a draft award for offshore/inshore and recreational diving during the award modernisation process which proposed that there be a casual hourly divisor of 33 for inshore divers and also provided that the span of ordinary hours for inshore divers be 6 hours 36 minutes per day Monday to Friday.
5. During the 2014 Modern Award Review the Full Bench has placed major emphasis on whether the subject award conditions have resulted from the arbitration of a dispute or from a consent arrangement between the parties to a historical award. At [112] the Full Bench concluded that the 33 hour week for inshore diving was introduced by consent and was not the *“subject of an arbitral determination”.*

6. During the 4 yearly modern award review in the AM2014/84 proceedings relating to the *Professional Diving Industry (Industrial) Award 2010* the MUA's position was firm that the 33 hours for inshore divers should stay and that if there was to be any change there should be a hearing.

It is apparent from the Decision that there was a long history of casual inshore divers being engaged on ordinary hours of 6 hours 36 minutes per day Monday to Friday, and a casual hourly divisor of 33 for hourly rates pay. Further, there was no evidence before the Full Bench that these Award conditions were the subject of a dispute or arbitrated outcome. Rather, it was a consent arrangement between the parties to a historical award.

In those circumstances, and consistent with the approach taken by the Commission during the 2014 Award Modernisation process there was no reason for the Full Bench to change the ordinary hours, and hourly rates for casual inshore divers.

Furthermore, the Union's submission in late 2015 was that if evidence was required to satisfy the Commission that there is merit in retaining the 33 hour week the Commission should facilitate an evidentiary case similar to that of the *Stevedoring Industry Award 2010*. However, almost a year and a half later the Full Bench without further notice issued its decision stating at [109]:

"Contrary to the MUA's submission of 31 December 2015, we are not persuaded that it is necessary to require an evidentiary case [to maintain the 33 hour week] similar to that undertaken in Stevedoring Industry Award 2010.

The fact is the Diving industry is unique in that the majority of inshore divers work in casual employment on short term engagements, and the Union was denied the opportunity to make out its evidentiary case against a change to the 33 hour week. In our view the Commission should have facilitated an evidentiary case so that the Full Bench could properly understand the effects of the decision on professional divers that ultimately reduced the rates of pay for casual inshore diving work.

Given the concerns raised in this correspondence the Union would like the opportunity to further discuss the effects of the decision with you and/or members of the Maritime Industry Panel at a time convenient to the Commission, and the Union.

Should you wish to discuss this matter further I can be contacted on email at Ian.Bray@mua.org.au or at the Union's National Office on (02) 9267 9134.

Sincerely,



Ian Bray
Assistant National Secretary
MARITIME UNION OF AUSTRALIA