From: Nathan Keats [mailto:Nathan@mcnally.com.au]
Sent: Wednesday, 6 December 2017 2:44 PM
To: Chambers - Hatcher VP
Cc: AMOD
Subject: AM2016/5 - Seagoing Industry Award 2010; Marine Towage Award 2010; and Ports, Harbour and Enclosed Water Vessels Award 2010
Importance: High

Dear Associate

We provide the following submissions for the Maritime Union of Australia in advance of the hearing on 7 December 2017 that is listed before the Full Bench:

1. Outline of submissions of the MUA;
2. Schedule A to the submissions of the MUA;
3. Schedule B to the submissions of the MUA;
4. Index to MUA Bundle; and
5. MUA Bundle

Kindly upload this material onto the webpage for this matter.

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FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

1. These submissions are advanced by the Maritime Union of Australia (**the MUA**) in response to the Statement published by the Full Bench ([2017] FWCFB 5833), calling for submissions on:

    a. The "*preliminary view"* of the Full Bench that it may be appropriate to amalgamate the Seagoing Industry Award 2010 (**the Seagoing Award**), the Ports, Harbours and Enclosed Water Vessels Award 2010 (**the Enclosed Waters Award**), and the Marine Towage Award 2010 (**the Towage Award**) "*given the potential for the coverage of the industries to which the awards apply to overlap if the proposed exclusions from the respective awards are removed from each award";* and

    b. The draft Determinations regarding coverage of those awards published on 30 June 2017*.*

    These submission should be read with a bundle of documents filed with these submissions: **the MUA Bundle**.

2. With respect, there is no evidence of "*the potential for the coverage of the industries to which the awards apply to overlap"* if the exclusions from the respective awards are removed. The evidence before the Full Bench in AMD2016/5 about that subject does not extend beyond the evidence of Mr Bruno, Sea Swift's Chief Operating Officer. Sea Swift's operations are unique. Mr Bruno's evidence in cross-examination was (my emphasis)[1]:

    > *PN650… Sea Swift's operation it's fair to describe it as unique? --- Yes it is.*
    >
    > *PN651 It's unique in the sense that it has vessels that proceed to sea beyond bays, harbours and rivers, like your line haul vessels, as well as tug and barge operations as well as mother shipping operations. Is that correct? --- <u>It's unique by the diversity of the operations we have, correct. Unique in the types of vessels that we operate and in the area that we operate in. Additionally unique from the point of view of the tasks that are involved in each of those vessels and the breadth of those tasks.</u>*

3. There is no evidence that any other operator in any of the industries now reflected in the industry definitions in the Seagoing Award, the Enclosed Waters Award, or the Towage Award, operate vessels that individually cross those industry definitions, or operate businesses that reflect the "diversity of the operations" that Sea Swift has. Even in Sea Swift's business, there is no evidence that any individual employee works on different kinds of vessels that span the different industry definitions: his evidence suggests the employees work on one of the Sea Swift vessels (relevantly, although briefly, described by Mr Bruno at [16] – [24])

4. The history of the creation of these three awards in the Award Modernisation process (and indeed the delineations in award coverage before that process), the lack of any application to break-down the existing award structures in these industries in the 2012 Transitional Review, and the lack of

[1] Transcript 24 October 2016

application even in these modern award review proceedings by any organisation other that Sea Swift to alter the existing award structures, reflects the position that these various industries do not broadly overlap.

5. By way of summary, the MUA submits:

   a. The Full Bench should not amalgamate the three existing modern awards. To amalgamate the Awards does almost nothing to address the substantive issue identified by the Full Bench in [2017] FWCFB 1138, to which the present drafting exercise is directed. Overlapping coverage was not the issue identified by the Full Bench. Indeed, the problem identified was to precisely the opposite effect. The problem was the three modern awards had exclusionary coverage rules that operated so that only one of the modern awards could cover a particular employer (here Sea Swift) at any one time. The effect of the web of coverage created by those provisions was that the usual interaction rule in cl 4.5 of the Seagoing Award, cl 4.8 of the Enclosed Waters Award, and cl 4.8 of the Marine Towage Award could not effectively operate.

   b. There is no evidence before the Full Bench that vessels used in any of these three industries[2] regularly work across those industries, or that the employees regularly themselves perform work across vessels used in those industries, so as to give rise to such confusion in the application of the ordinary interaction rule (reflected in cl 4.5 of the Seagoing Award, cl 4.8 of the Enclosed Waters Award, and cl 4.8 of the Marine Towage Award) as to warrant its abandonment in these industries. The issue identified by the Full Bench earlier in these proceedings (in [2017] FWCFB 1138) can be more appropriately addressed by a different drafting mechanism within the existing award structures. Namely, redrafting the coverage terms so as to permit more than one modern award to cover an employer in these three industries. Put more simply, remove the impediments to the effective operation of the usual interaction rule.

   c. The Draft Determination for the Towage Award is appropriate. It would appear all parties to these proceedings accept the draft Towage Award determination published by the Full Bench is appropriate to be made.

   d. The draft Determinations for each of the Seagoing Award and the Enclosed Waters Award ought not be made. An alternative form of each of these Determinations are appended to this submission and marked Annexure 1. It is submitted these draft Determinations:

      i. Address the specific concern to which the parties' attention was drawn by the Statement of the Full Bench ([2017] FWCFB 5833), and will give rise to awards that are consistent with the modern awards objective;

      ii. Do as little violence to the scheme of awards created during the Award Modernisation Process as is possible, consistent with the need to ensure a simple, easy to understand, stable and sustainable modern award system[3]; and

      iii. Better address the substantive issue identified by the Full Bench in its decision of 24 February 2017, to which the draft Determinations published on 30 June 2017

[2] Meaning the seagoing industry as defined in the Seagoing Award, the ports harbor and enclosed waters industry as defined in the Enclosed Waters Award, and the marine towage industry as defined in the Towage Award.
[3] S 134(1)(g)

were directed ([2017] FWCFB 1138, in particular at [19] and [33]), than would simply amalgamating the three modern awards.

HISTORY OF AWARD COVERAGE IN MARITIME SECTOR

6. The Seagoing Award, the Enclosed Waters Award and the Towage Award find their genesis in Stage 3 of the Award Modernisation process (the Seagoing Award not ultimately being finalised until Stage 4 for reasons traced below). As originally conceived by the Commission in the decisions that outlined the Stage 3 process, these industries were broadly captured within what were then identified as the Maritime Industry and Port and Harbor Services[4]. There were in excess of 50 instruments identified as applying to the Maritime Industry and Port and Harbor Services that had to be rationalized along the "primarily" industry lines contemplated by cl 4 the Ministerial Request.

7. Draft awards and written submissions were lodged by a number of parties on or around 6 March 2009 (consistent with the directions of the Full Bench[5]). The MUA and AIMPE (who were jointly represented in those proceedings), had prepared and filed submissions and draft industry awards, breaking the broadly described Maritime Industry and Ports and Harbour Services into 7 identifiable industry sectors:

    a. Stevedoring Industry Award;

    b. Tug Industry Award (as it was then described);

    c. Maritime Industry Port Authorities & Construction Award;

    d. Maritime Offshore Oil and Gas Industry Award;

    e. Seagoing Industry Award;

    f. Dredging Industry Award; and the

    g. Port Harbour and Enclosed Water Vessels Award.

8. The submissions filed in support of each of those industry sectors traced the source of the conditions contained within the Draft award. So far as is presently relevant, the submissions (not the associated draft award) filed at that time for what became the Seagoing Award, the Towage Award and the Enclosed Waters Award, are found in the MUA Bundle Tabs 3 to 5**.**

9. The identification of the industry sectors was broadly built around a commonality of working environment and a commonality of working conditions.

10. Whilst there were some issues of detail (for example, whether marine tourism operators ought be properly reflected in their own award rather than what is now the Enclosed Waters Award), that segmentation of industry was broadly accepted by all the industry participants. For example:

    a. CSL (in responding to the delineation of Maritime Industry and Ports and Harbour Services), observed in its submissions of 6 March 2009 (MUA Bundle Tab 6) (paragraph 2.1, MUA Bundle pg 71-72):

        "It is submitted that the unique nature of the maritime industry requires differentiation between its different areas of operation and that it is impractical to implement award rationalisation on the basis that a single modern award to the range of employers and

[4] see [2008] AIRC 708; [2009] AIRCFB 100
[5] [2009] AIRCFB 100, Attachment C

employees covered by the awards identified as being in the maritime industry for award modernisation purposes."

In paragraph [12.1], CSL outlined that various sectors within the maritime industry were separately identifiable, and at [12.3] submitted (MUA Bundle pg 88):

> *The awards referred to in 12.1 fall into a number of categories in the maritime sector. These are the off-shore operations; vessels engaged in the shipping industry; the tug and port operations; and dredging and bunkering operations. It is submitted that the nature of each category is sufficiently diverse to warrant separate modern awards. Different terms and conditions of employment apply to employees in each of these categories.*

b. Australian Mines and Metal Association and the Australian Ship Owners Association (again, responding to the delineation of the Maritime Industry and Ports and Harbour Services), whilst confining their submissions to "*maritime industry operations in the seagoing and offshore oil and gas sectors of the maritime industry*"[6], having traced how they saw industry coverage being appropriately identified over paragraphs 7 and 8, observed in their submissions of 6 March 2009 (MUA Bundle Tab 7) (paragraph 9, MUA Bundle pg 149):

> *AMMA and ASA contend that it is appropriate that the maritime industry have a number of modern awards covering separate sub-sectors of the industry. AMMA and ASA contend that the Maritime industry contained at least two sub-sectors in which maritime operations are conducted – Offshore Oil and Gas and Seagoing. These two sectors have different industrial and operational needs and have historically been regulated separately.*

The summary of principles set out over paragraphs 7 focussed upon a commonality of systems of work, historical award regulation, and the view of industrial parties (reflecting the approach of the Full Bench to the coal industry[7]. At paragraphs [17] – [22] of those written submissions[8], the AMMA and ASA outlined how those principles ought apply in the maritime and ports and harbours areas of the maritime industry (MUA Bundle pg 151-152):

> *17. Based on the coverage principles set out above, there are various sectors or branches of the maritime industry that AMMA and ASA consider should be expressly excluded from the Offshore Oil and Gas - Maritime sector. These are:*
>
> *a. seagoing vessels trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers);*
> *b. tug boats;*
> *c. barges, self-propelled dredges, tugs or other self-propelled vessels, used in connection with the dredging of ports, harbours, bays, estuaries, rivers and channels; and*
> *d. near coastal or inshore operations covering such areas as ferries, water taxis, tourism charter vessels, coastal cargo vessels, surf and sea search rescue in coastal waters, water-borne police and emergency services vessels, port operations support vessels, marine environmental protection services vessels, and coastal commercial fishing.*
>
> *Seagoing Sector*
>
> *e. The proposed Seagoing Sector award will apply to seagoing vessels (as defined) trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers).*

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[6] paragraph [3]
[7] (12008) 175 IR 120 at [15] – [18]
[88] submissions that were embraced by the Dreding Industry Industrial Secretariat on transcript before the Commissioner Raffaelli, who was overseeing the Award Modernisation of the Maritime Industry, on 19 March 2009, PN56

18. For the purposes of the proposed award the term seagoing vessels include:

a. passenger transport, cruise vessels, bulk cargo vessels, container ships, roll-on roll-off passenger/car ferries and tankers.

19. This approach maintains the approach used in the current Maritime Industry Seagoing Award 1999 in respect of coverage by reference to vessels and trading.

Specific exclusions of industries

20. Based on the coverage principles set out above, there are various sectors or branches of the maritime industry, AMMA and ASA consider should be expressly excluded from the Seagoing - Maritime sector. These are:

a. propelled or non-propelled vessels that may, but are not limited to, be used in navigation, construction or drilling and includes ships, barges, drilling vessels or rigs, crane vessels, floating production facilities, tug boats, support vessels, supply vessels, standby/emergency vessels, pipe laying vessels, diving support vessels, lighter or like vessels, or any other vessels used in offshore and gas operations;
b. tug boats;
c barges, self-propelled dredges, tugs or other self-propelled vessels, used in connection with the dredging of ports, harbours, bays, estuaries, rivers and channels; and
d. near coastal or inshore operations covering such areas as ferries, water taxis, tourism charter vessels, coastal cargo vessels, surf and sea search rescue in coastal waters, water-borne police and emergency services vessels, port operations support vessels, marine environmental protection services vessels, and coastal commercial fishing.

21. Overlap between these separate sectors proposed to be excluded in paragraphs 17 and 21, and the proposed awards, will be minimal; and to include the distinct industry needs of those industries would require unnecessary modification of the terms and conditions applying. The rationale for the exclusion of these industries is consistent with those outlined in Paragraph 10.

22. These sectors or branches would be better regulated by modern awards that are aligned to the particular work performed.

11. Upon the first return of the Maritime Industry group before Commissioner Raffaelli (on 19 March 2009), the Commissioner observed, in responding to a concern of the representative of the dredging industry, that there was broad agreement even at that stage about how the appropriate regularion of the segments of the maritime industry (at PN63[9]).

12. It is convenient to look at what happened with respect to each of the three relevant industry awards thereafter.

MARINE TOWAGE AWARD HISTORY

13. As part of the consultation processes that preceded the first listing (on 27 March 2009, MUA Bundle Tab 9) of what was originally styled the Port and Harbour Services industry in the Award Modernisation Process, the industrial parties had discussed the area of marine operations now reflected in the marine towage industry as defined in the Towage Award, was appropriate for regulation as a stand-alone industry.

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[9] *...the maritime interest s together, have urged the Commission - I'm looking at the unions but I think there's agreement by the employer parties - that seagoing or maritime areas should be divided between those who are dealing with ports, others dealing with dredging, the tug industry is separate, the ocean transport industry is separate, and then we 've got the oil and gas as well. ...*

14. A draft of what became the Towage Award was filed in the Award Modernisation proceedings on behalf of the AIMPE and MUA on 6 March 2009. A draft modern award was also filed by the Marine Towage Employers Group (a collection of employers providing harbor towage services to commercial shipping, who were concurrently represented in the Award Modernisation proceedings[10]) on 6 March 2009. Both those drafts had a similarly framed coverage clause, reflective of what is now the marine towage industry.

15. The Marine Towage Employers Group draft award was supported by written submissions that supported a stand-alone industry award for the marine towage industry and provided detailed explanation for why that was appropriate (particularly at paragraph [9], MUA Bundle Tab 8 pg 158 - 161). In that respect, given the preliminary view of the Full Bench in these proceedings, the Commission would note the submissions of the MTEG echoed a point made by the MUA in the current proceedings (at [9(vii) – [(xii)]:

> *"(vii) An attempt to combine the Maritime Towage Award with a new modern award or awards for the other sectors in the port and harbour services industry, would appear only to be achievable by a very substantial reframing of standard conditions, or by a separate and comprehensive schedule to an award having wider application beyond the tugboat industry.*
>
> *(viii) The maritime towage employer group and the maritime unions are in accord with the proposal that there remain a separate award specific to the maritime towage industry, and appear to have reached a consensus on the coverage of such an award.*
>
> *(ix) The maintenance of a separate Maritime Towage Award is consistent with the position of employers and unions in the other sectors of the ports and harbour services industry.*
>
> *(x) The maritime towage industry comprises a substantial industry sector, with employees working in more than 35 ports around Australia.*
>
> *(xi) It is convenient, practicable and relatively straightforward to create a modern award for the maritime towage industry which satisfies the requirements of Part 10A of the Act and the Minister's Request.*
>
> *(xii) By contrast, creating a single modern award covering both maritime towage service and other sectors in the port and harbour services industry would be problematic and would not readily satisfy the requirements of Part 10A of the Act and the Minister's Request that awards be simple to understand and easy to apply and not extend to classes of employees who have traditionally been award free."*

16. The marine towage drafts awards were the subject of discussion during the listing of the Port and Harbour Services industry before Watson VP on 27 March 2009. As was identified by Mr McNally (appearing on behalf of the MUA and AIMPE), the relevant industry participants were agreed on stand-alone award covering the marine towage industry (PN17). Mr Morris, appearing on behalf of "towage employers apart from Stannards"[11] confirmed a consent position on a stand-alone award for the marine towage sector and its coverage, and noted there were relatively minor issues left for discussion on the content of an award for that industry (PN193 – 197). A copy of that transcript is at MUA Bundle Tab 9.

17. In supplementary submissions filed as the Award Modernisation proceedings progressed, the Marine Towage Employers Group (written submissions filed 22 April 2009: MUA Bundle Tab 10) confirmed there was industry agreement on the coverage for what is now the Towage Award.

18. An exposure draft of the Marine Towage Award 2010 was published by the Full Bench on 22 May 2009 (*Re Request from the Minister for Employment and Workplace Relations – 28 March 2008*

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[10] See paragraph 1 of the written submissions filed by the Marine Towage Employer Group dated 6 March 2009
[11] PN5

(2009) 182 IR 413; [2009] AIRCFB 450 at [171]), it would appear based on the "*well developed draft awards"* submitted by the parties[12] (MUA Bundle Tab 13).

19. The draft award for the Maine Towage Award relevantly included:

    a. A coverage clause essentially reflecting was is now in the Towage Award; and

    b. A Schedule A outlining classification descriptors.

20. So far as is presently relevantly, the submissions advanced by:

    a. The MUA and AIMPE in response to the exposure draft (written submissions filed on 12 June 2009), sought the deletion of the classification descriptors because of the impracticability of using Marine Orders, the Navigation Act, and relevant flagged state requirements to establish those descriptors. No submission was made on coverage, reflecting the agreement of the industry parties at that time.

    b. The Marine Towage Employers (filed on 12 June 2009), initially accepted the classification structure proposed in the exposure draft. However, at the hearing before the Full Bench in relation to the Towage Award (on 30 June 2009), it was submitted there was no need to include classification descriptors (PN3943). No submission was made on coverage, reflecting the agreement of the industry parties at that time.

21. On 4 September 2009, the Full Bench made the Towage Award (*Re Request from the Minister for Employment and Workplace Relations – 28 March 2008* (2009) 187 IR 192; [2009] AIRCFB 826 at [215] to [216]: MUA Bundle Tab 14), having made a minor amendment to the coverage clause so as to "*permit the application of the award to towage operations conducted by ports authorities and exclude its application to maintenance contractors covered by the Manufacturing Modern Award"*[13].

22. In the 2012 transitional review of the Towage Award, the only variations made were a minor typographical amendment to the expression "tonnage" where used in the instrument (sought by the MUA, AMOU and AIMPE and consented to by relevant employers[14]), and a minor amendment made to the way wage rates were expressed (made by the Commission of its own initiative): see [2012] FWA 6573.

23. No party appeared in the Transitional Review to suggest that the coverage clause was not operating effectively, without anomalies or technical problems, or was otherwise failing to meet the modern awards objective.

24. From this brief recitation of the history of the Towage Award, the Full Bench can see the genesis of the existing coverage term and the justification for a separate Towage Award being based on the decades old demarcation of industrial regulation by Awards of this Commission, which in turn were driven by disputes created amongst the participants of particular industry segments. The terms and conditions, being largely reflective of the significant pre-modernisation federal awards.

25. As noted above, no party to the current proceedings has sought to amalgamate the Towage Award into any other award. All parties have submitted the draft Determination for the Towage Award is appropriate to be made. It ought not be amalgamated into or together with any other.

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[12] (2009) 182 IR 413; [2009] AIRCFB 450 at [173]
[13] at [215]
[14] see submission of MUA, AMOU, AIMPE filed 2 June 2012

HISTORY OF THE SEAGOING AWARD

26. The industry now reflected in the definition of the seagoing industry within the Seagoing Award was part of the broadly described Maritime industry in the Award Modernisation process.

27. As noted above, in accordance with directions of the Full Bench, the MUA and AIMPE (who were jointly represented), prepared a draft award and submissions dealing with, amongst other areas, the seagoing industry, filed 6 March 2009.

28. The draft award prepared by the MUA and AIMPE in the Award Modernisation for the seagoing industry had a coverage substantially reflecting the coverage of the then longstanding federal award, the Maritime Industry Seagoing Award 1999 (or **MISA**). In submissions filed prior to the first listing of this industry before Commissioner Raffaelli on 19 March 2009, written submissions had been filed by the Australian Maritime Officers' Union[15], and the Australian Ship Owners Association and the Australian Mines and Metals Association[16], supporting the continued regulation of conditions for what became the "seagoing industry" as defined in the Seagoing Award, reflecting the historical MISA coverage. CSL in its submissions raised concern about the extension of a modern award to cover areas of the maritime sector extending beyond MISA[17] (which was ultimately addressed by a varied form of Ministerial Request), but otherwise directed its submissions to the content of the conditions contained within MISA rather than coverage.

29. The coverage of what is now the Seagoing Award and other modern awards drawn from the Maritime industry was, in substance, agreed from the first listing of the Maritime Industry in the Award Modernisation proceedings[18].

30. An exposure draft of what became the Seagoing Award was initially promulgated by the Commission on 22 May 2009 ((2009) 182 IR 413; [2009] AIRCFB 450; at paragraphs [112] – [119], noting at that time the exposure draft was said to reflect "*substantial agreement between the unions (the Maritime Union of Australia (MUA), the Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers Union (AMOU)) and employers represented by the Australian Mines and Metals Association (AMMA) and the Australian Ship Owners' Association (ASOA)"* and *"the current Maritime Industry Seagoing Award 1999 with the necessary amendments and inclusions reflecting standard modern award provisions".*

31. The exposure draft did not include part-time provisions (as sought by some of the employer interests) because the existing award did not provide for it and it *"is not a current employment practice in this industry"* (at [114]), and specifically took account of the particular needs of the seagoing industry:

> *"CSL Australia Pty Ltd (CSL), submitted that some key features of the current pre-reform award are inappropriate. These include annualised rates comprehensive of overtime, certain penalties and the leave factor. The current award reflects the outcome of the award simplification process and includes features of predecessor awards that have applied in this industry for many decades. Annualised salaries comprehending a range of components and the lengthy periods of leave recognise the nature of an industry where seagoing employees are required to remain on a vessel even when they are not physically working. It is a unique working environment and these award provisions reflect that fact. At this stage we are not persuaded that we ought to depart from current provisions."*

32. An amendment was made to the Minister's Award Modernisation request on 17 August 2009, resulting in consideration of the exposure draft of the *Seagoing Industry Award* being moved for

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[15] filed 6 March 2009, see in particular paragraphs [3] and [4]
[16] 6 March 2009, see in particular paragraphs [9], and [17] to [22] extracted above
[17] submitting at [12.5] that "*The scope of the MISA should not extend beyond its current application"*
[18] 19 March 2009, before Commissioner Raffaelli PN304

consideration to Stage 4 of the Award Modernisation process (see (2009) 186 IR 14; [2009] AIRCFB 765 and (2009) 187 IR 192; [2009] AIRCFB 826 at [162]).

33. A number of submissions were advanced as to the content of the initial exposure drafts, but none substantially sought alteration of the coverage of the proposed instrument (save in relation to the application of the modern award to foreign flagged ships operating on permit or license in Australian waters).

34. A further exposure draft of what became the Seagoing Award was published with the exposure drafts for Stage 4 of the Award Modernisation process on 25 September 2009 (see (2009) 188 IR 23; [2009] AIRCFB 865 at [152] – [163]). The further exposure draft separated out the regulation of terms and conditions of employment for vessels except those granted a temporary license under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Part A, noting a number of alterations were made to the terms and conditions proposed from the initial exposure draft, including the removal of classification descriptors[19]), and those operating under such a license (a new Part B). For those cover

35. Again a number of submissions were advanced as to the content of the initial exposure drafts, but not substantially so as to invite an alteration to coverage.

36. The final form of the Seagoing Industry Award 2010 was made by decision published 4 December 2009 ((2009) 190 IR 370; [2009] AIRCFB 945, at [159] – [160]). Insofar as it applied to domestic vessels it was "*unchanged from the exposure draft"* (at [165]).

37. In the 2012 Transitional Review for the Seagoing Industry Award, specific applications were made to vary[20] but no party sought to revisit the coverage provisions in the Seagoing Award, or indeed three instruments referred to in the Full Bench Statement in these proceedings.

38. From this brief recitation of the history of the Seagoing Award, the Full Bench can see the genesis of the existing coverage term and the justification for a separate Seagoing Award being based on the decades old demarcation of industrial regulation, to a segment of the maritime sector that has a very different operating environment to others within that sector.

HISTORY OF THE ENCLOSED WATERS AWARD

39. The history of the Enclosed Waters Award is somewhat more complex, in that it did not have a significant predecessor amongst the pre-modernised federal awards. In the initial phases of consultation for the Ports and Harbour Services sector, on 6 March 2009 the AIMPE and the MUA filed submissions and a draft Port Harbour and Enclosed Waters Award in both AM2008/41 and AM2008/49. In the transcript of proceedings before Watson VP on 27 March 2009 (the first listing for the Ports and Harbour Services sector), Mr McNally (appearing jointly for the MUA and AIMPE) explained that the award was to cover *"vessels that were not otherwise covered in the Tug Industry Award and Offshore and Gas Award, a Dredge Industry Award and a Seagoing Industry Award".*

40. In the pre-exposure draft consultations and submissions, the only substantial coverage issue was whether seagoing tourist operations should be covered by this general instrument or a stand alone instrument, given the nature of the working environment and conditions with vessels of that kind[21].

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[19] (2009) 188 IR 23 at [161]

[20] each resulting in a decision of VP Watson ([2013] FWC 5414, dealing with an application to vary the salary rates for Part B ships; [2013] FWC 4033, dealing with an application to vary the preamble to Part B; [2013] FWC 279 being a consent variation to update certain matters associated with changes to Marine Orders Part 28; [2012] FWA 10657 relating to new classifications; [2012] FWA 9092 again relating to Part B; , or ultimately by a Full Bench on appeal (see *AMOU v CSL Australia Pty Ltd* [2013] FWCFB 8338)

41. On 22 May 2009 the Full Bench issued a statement[22] and published an exposure draft for what became the Enclosed Waters Award, based on the '*well developed draft awards'* submitted by the parties, relevantly observing[23]:

> *We publish a draft Ports, Harbours and Enclosed Water Vessels Award 2010. It covers all marine operations in enclosed waters including ferries, barges, and all other miscellaneous vessels. We consider that tourist based charter operations should be excluded as these are more appropriately combined with seagoing tourist charter operations and covered by an award developed by reference to existing standards in the tourist industry. We deal with this award later.*

42. Clause 4 of the exposure draft provided:

> ***"4. Coverage***
>
> *4.1 This award covers employers throughout Australia in the port, harbour and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:*
>
> *(a) the Maritime Offshore Oil and Gas Award 2010;*
> *(b) the Seagoing Industry Award 2010;*
> *(c) the Port Authorities Award 2010;*
> *(d) the Dredging Industry Award 2010;*
> *(e) the Stevedoring Industry Award 2010;*
> *(f) the Marine Towage Award 2010;*
> *(g) the Marine Tourism and Charter Vessels Award 2010; and*
> *(h) the Sugar Industry Award 2010.*
>
> *For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline."*

43. On 12 June 2009 AIMPE and the MUA submitted in relation to the coverage of the draft Enclosed Waters Award that[24] (MUA Bundle Tab 11):

> *Upon reflection, we now realise that both the name for the award that we selected and the manner in which we defined the relevant industry, has failed to convey our real intention. That intention was to have created an award with coverage of the operation of all maritime vessels which were not covered by four other modern awards which we had sought.*

44. The submissions then proposed[25]:

> *In order to remedy that defect, it is submitted that, the name of the modern award should be altered to Maritime Industry (General) Award 2010 and the industries which the award covers should be "the operation of any type of vessel used for navigating by water".*

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[21] see by way of illustration the written submissions of the *Whitsunday Charter Boat Industry Association*, the written submissions of the Association of Marine Park Tourism Operators, and of the Commercial Vessel Association of NSW

[22] (2009) 182 IR 413; [2009] AIRCFB 450.

[23] Ibid at [172].

[24] See paragraph 4 of the submissions.

[25] Ibid at [7,8]

An amended sub-clause 4.1 of the exposure draft to give effect to this submission is as follows:

"4.1 This award covers employers throughout Australia in the maritime industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the Maritime Offshore Oil and Gas Award 2010;
(b) the Seagoing Industry Award 2010;
(c) the Port Authorities Award 2010;
(d) the Dredging Industry Award 2010;
(e) the Stevedoring Industry Award 2010; and
(f) the Marine Towage Award 2010;

For the purpose of clause 4.1, ***maritime industry*** *means the operation of any type of vessel used for navigating by water."*

45. On 30 June 2009 AIMPE and the MUA appeared before the Award Modernisation Full Bench and submitted (MUA Bundle Tab 13, pg 276):

PN3555 MR MCNALLY: In the Ports, Harbours and Enclosed Water Vessels Award we had proposed an industry as meaning employees engaged in or in connection with vessels and we widely define vessels. We finished up with an exposure draft which defined the industry as vessels operating within ports, harbours and other bodies of waters within the Australian coastline.

PN3556 It was the intention of the unions to have an award made that applied to all other maritime activities other than those covered by the specific awards, the Seagoing Award, the Offshore Oil and Gas Award and the Dredging Award and the Towage Award. In our submission filed in this matter on 22 June, that's filed in respect to the Ports, Harbours and Enclosed Waters Award, we address that difficulty and the award that we proposed or the coverage of the award that we propose is to operate in respect of all types of vessels used for navigation on waters that isn't covered by those other awards which we specifically refer to.

PN3557 We have suggested that the name of the award be changed to the Maritime Industry General Award 2010 because the name of the award that we previously suggested was confusing and it certainly confused the Commission in that they made an award that only was in enclosed internal waters. What the intention is and what the need is, is to have an award that covers coastal waters including the territorial sea 12 miles out and possibly beyond.

46. On 4 September 2009 the Full Bench issued a further statement and published the Enclosed Waters Award, observing ((2009) 187 IR 192; [2009] AIRCFB 826 at [219] (MUA Bundle Tab 14).

"The Maritime Union of Australia (MUA) and The Australian Institute of Marine and Power Engineers (AIMPE) sought to retitle the award as the Maritime Industry General Award to reflect a desire that the award apply to vessels which venture beyond ports and harbours. The current scope clause is not so confined but we have decided to make this clearer by adding additional words to the definition of the industry. We decide below to confirm the Marine Tourism and Charter Vessels Award 2010. Employers and employees covered by that award will be excluded from the provisions of this award. It is unnecessary to maintain an exclusion with respect to the Sugar Industry Award 2010. Exclusion of

employees of local governments and maintenance contractors have been inserted. We consider that the existing title of the award is preferable to the alternative suggested.[26]

47. The history of the making of the Enclosed Water Award demonstrates that it was the intention of the Full Bench in making that Award that it would only cover employers and employees if one of the other maritime awards did not. So much is clear from the use of the words in clause 4.1 of the Enclosed Water Award (emphasis added):

> "*The award does not cover employers and employees wholly or substantially covered by the following awards: … (b) the Seagoing Industry Award 2010.";* ***and***
>
> *"on activities not covered by the above awards" at the end of the definition of the industry.*

48. It is in that context that the Full Bench came to consider the case advanced for change by Sea Swift in the current proceedings, and the appropriate way to fashion the coverage of the Towage Award, the Seagoing Award, and the Enclosed Waters Award.

SUBSTANTIALLY DIFFERENT CONDITIONS – PRODUCT OF HISTORY

49. Watson VP's observation about the Seagoing Award, the Towage Award and the Enclosed Waters Award containing *significant differences in* [their] *terms …reflecting the different nature of the operations and the different requirements of employees* has not been doubted in these proceedings (indeed, it was the entire premise of Sea Swift's case for change and the finding of the Full Bench that gives rise to the current drafting exercise, as discussed below), and so it is unnecessary to examine them in detail in these submissions. A schedule highlighting many of those differences in detail is attached to this submission and marked Schedule B.

50. It is sufficient for present purposes to observe that there are fundamental differences in the remuneration mechanisms, the ordinary hours of work, and in particular in the leave arrangements, across the 3 awards. Any amalgamation of these three modern awards would need to ensure the confined operation of each of these to the current industry sectors.

THE SUBSTANTIVE ISSUE TO BE ADDRESSED

51. As Watson VP noted in his decision published earlier this year in these modern award review proceedings ([2017] FWCFB 1138 at [15]: MUA Bundle Tab 1), the genesis of the drafting issues now being grappled with was a decision of another Full Bench *MUA & Ors v Sea Swift Pty Ltd T/A Sea Swift & Ors* [2016] FWCFB 651 (MUA Bundle Tab 2).

52. That decision determined an appeal by the MUA and AIMPE from a decision of Commissioner Simpson approving the *Sea Swift Pty Ltd Employee Enterprise Agreement*. In particular, Commissioner Simpson's conclusion that the appropriate modern award for the application of the Better Off Overall Test was the Enclosed Waters Award rather than the Seagoing Award[27]. The contention of the MUA before Commissioner Simpson and on appeal was that the Seagoing Award was the proper comparator.

53. Between paragraphs [22] and [35], the Full Bench in the appeal from Commissioner Simpson's decision construed and then applied the coverage provisions in the Seagoing Award and the Enclosed Waters Award, to Sea Swift's operations, ultimately concluding that:

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[26] At [219].
[27] [2016] FWCFB 651 at [2], [6] and [7]

a. The reference to "sea" in the expression "proceed to sea" where used in the definition of seagoing industry in the Seagoing Award (at [29]):

> "*The term "sea" is commonly understood. It is essentially a continuous body of salt water that surrounds the Earth's land masses. Once the vessels leave the coastline and travel up the coast, they are essentially at sea within this normal conception. In our view, it is irrelevant that there may be reefs, islands or Australian territorial waters beyond the routes taken around the coastline."*

b. Sea Swift's operations did involve the operation of vessels trading as cargo vessels that proceeded to sea on voyages outside the limits of bays, harbours or rivers (at [29] – [30]), and so fell within the definition of seagoing industry and hence the coverage of the Seagoing Award.

c. Sea Swift's operations were not "wholly or substantially" within "a port, harbor or other body of water within the Australian coastline" (at [32]), which meant Sea Swift's operations were not within the ports, harbours and enclosed water industry and so not covered by the Enclosed Waters Award; and in any event

d. The exclusion of operations wholly or substantially covered by the Seagoing Award in cl 4.1 of the Enclosed Waters Award applied, confirming the Enclosed Waters award did not cover Sea Swift's operations: at [34].

54. It was in that way that Sea Swifts "unique" business (as it has itself styled its operations in these Award Review proceedings), that substantially involved the operation of line haul vessels at sea but to some extent involved the operation of smaller vessels within enclosed waters (that on occasion went to sea), was entirely covered by the Seagoing Award.

55. It was that situation, albeit only evidenced in the "unique" operations of Sea Swift, that lead the Full Bench in these Award Review proceedings to conclude change to the coverage provisions was warranted. Watson VP observed (footnotes omitted, emphasis added):

> ***"Coverage Issues***
>
> ***[15]*** *Sea Swift makes this application arising out of a Full Bench decision in MUA and others v Sea Swift Pty Ltd. It submits that the decision reveals a significant anomaly in the coverage provisions of the maritime awards. Sea Swift conducts various types of maritime activities under a single corporate umbrella. If the activities were carried out separately, they would be covered by the awards applicable to each type of operation. Because the predominant part of the business has been found by the Full Bench to be covered by the Seagoing Award, that award applies to all of its operations. Sea Swift submits that this outcome was not intended by the Full Bench in the award modernisation process and it places Sea Swift at a competitive disadvantage in conducting the operations other than seagoing operations.*
>
> ***…***
>
> ***[18]*** *The Full Bench decision in the Sea Swift case considered the legal effect of the various coverage clauses. It did not express a view as to the appropriateness of the outcome it held flowed from the wording of the provisions. There are significant differences in the terms of the various maritime awards reflecting the different nature of the operations and the different requirements of employees…*
>
> ***[19]*** *In my view, it is appropriate that an employer that conducts various types of maritime activities be covered by the award that is relevant to each of those maritime activities. If an employer conducts different types of operations, then different award safety nets*

> *should apply to each of those different operations. Reflecting that principle in the coverage clauses of the relevant awards is in my view consistent with the modern awards objective. I consider that the variations are necessary to achieve the modern awards objective."*

56. Deputy President Gooley and Commissioner Cambridge agreed with the Vice-President's conclusions with respect to alterations of the coverage scheme of the various awards, and (save in one presently irrelevant respect) with his Honour's reasons: [2017] FWCFB 1138 at [33].

57. The vice identified by the Full Bench earlier in this Award Review proceedings arose from the Seagoing Award, an award with conditions that were significantly different to those in both the Enclosed Waters Award and the Towage Award and reflecting "*the different nature of the operations and the different requirements of employees"* that applied to operations in the seagoing industry*,* being foisted upon those parts of Sea Swifts business that better reflected the ports, harbours and enclosed waters industry or the marine towage industry[28].

58. The vice identified by the Full Bench was that the predominant character of the employer's operations determined the exclusive operation of the relevant maritime award.

59. Simply amalgamating the three modern awards as proposed by the Full Bench in the Statement, does nothing to address the vice identified by the Full Bench (noting the Full Bench has not promulgated an exposure draft to which more specific submissions could be directed).

60. As had been contemplated by the parties in the Award Modernisation process when framing and consulting on the various drafts that are now reflected in the relevant awards and apply to the maritime sector (for example, as expressly contemplated in the written submissions of the MTEG in the Award Modernisation proceedings, extracted above), any amalgamated award would need to contain detailed schedules reflecting (to use Watson VP's general description) the *significant differences in the terms of the various maritime awards*.

61. Any such award would need to contain clear interaction rules to ensure the proper application of those various schedules of terms and conditions, and to avoid the inappropriate application of terms and conditions of a broad omnibus maritime instrument by what may be relatively unsophisticated industrial participants (for example, but not limited to, in an enterprise bargaining context).

62. The Full Bench in these Award Review proceedings has not crafted an exposure draft to give effect to its preliminary view on the amalgamation of these instruments, but the complexity of the drafting exercise required to ensure the disparate conditions applying to those currently within the seagoing industry, the ports harbours and enclosed waters industry, and the marine towage industry, apply when appropriate should not be underestimated.

63. By way of illustration, the delineation within an amalgamated award cannot simply be done by crafting appropriate classification descriptors (noting none presently exist in any of these three instruments). That is because the duties of the positions in each of these awards (ie those reflected by the titles of "Master", "Engineer", and integrated rating or general purpose hand etc), are broadly (but not entirely) determined by statutory instruments[29] made under one of the two detailed statutory regimes that regulate the operation of vessels in Australian waters, namely:

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[28] as defined in each of the respective awards

[29] for example, Marine Order 71 (Masters and deck officers) 2014 and Marine Order 73 (Ratings) 2014 made under the *Navigation Act* 2013

a. The Marine Safety (Domestic Commercial Vessel) National Law in Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act* 2012 (the National Law), which commenced on 1 July 2013[30]; and

b. That provided for by the Navigation Act 2012.

Examples of those instruments are in evidence before the Full Bench: see Exhibits K2, and A2 and A3. They are extremely broad in their reach and entirely unhelpful in framing descriptors for the purpose of wage fixation (noting there is no evidence, of a work value or any other kind, that would permit the use of those statutory instruments as classification descriptors). The Full Bench would note the classification descriptors contained in the initial exposure drafts of these instruments published by the Award Modernisation Full Bench were deliberately removed on application by the industrial parties.

64. Broadly described, it is the substantially different operating environments, and the differing nature of the vessels operated in those different environments, and the working conditions of workers on those differing vessels and in those differing environments, that has driven the evolution of the substantially different conditions that now appear in each of the relevant modern industry awards (originally through industrial disputation and/or settlement, and subsequently via the Award Modernisation process).

65. It is no doubt for that reason that the current pattern of coverage reflected in the industry descriptors in each of the Seagoing Award, the Enclosed Waters Award and the Towage Award:

a. Was arrived at by the Full Bench in the Award Modernisation proceedings based, fundamentally, on a consent position of the many industry participants who appeared in those proceedings;

b. Was not sought to be disturbed during the 2012 Transitional Review of modern awards by any industry participant; and

c. Has not generally sought to be disturbed by any industry participant even in these proceedings.

66. No party has advanced a contention that it is appropriate to amalgamate the three modern awards, let alone a merit argument addressing the various legislative provisions (critically in this context, s 163 of the FW Act), accompanied by probative evidence properly directed to demonstrating the facts supporting such a variation[31].

67. Disturbing the existing award coverage by amalgamating the 3 modern industry awards is anathema to at least one important aspect of the modern awards objective, namely: "*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards".*

68. The vice identified by the Full Bench earlier in these Award Review proceedings, namely ensuring that the appropriate safety net of wages and conditions can be applied to the appropriate parts of a diverse maritime business, is with respect not addressed by the amalgamation of the modern awards. It simply gives rise to a new and different and frankly more complex drafting exercise.

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[30] Which commenced operation on 1 July 2013: see item 3 in the table at s 2 of the *Marine Safety (Domestic Commercial Vessel) National Law Act* 2012, and s 4

[31] cf *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* (2014) 241 IR 189; [2014] FWCFB 1788) at [23]

69. Whilst it is no doubt desirable to minimise the areas of potential confusion in the coverage of modern awards, it is an entirely ordinary feature of the modern award system that more than one modern award will cover an employer's business. The ordinary interaction rule in each modern award, currently reflected in cl 4.5 of the Seagoing Award, cl 4.8 of the Enclosed Waters Award, and cl 4.8 of the Marine Towage Award, resolves any confusion by reference to "*the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work".*

70. There is no evidence before the Full Bench that:

    a. Any employer operating in any one or more of the seagoing industry, the ports harbours and enclosed waters industry, or the marine towage industry, has any individual vessel that operates across those industries; or

    b. Any employee of any employer operating in any one or more of the seagoing industry, the ports harbours and enclosed waters industry, or the marine towage industry, has any individual employee that works on vessels across those industries;

    so that the ordinary interaction rule could not comfortably and confidently be applied by industry participants.

71. To put it another way, the way these industries operate makes is relatively easy for industry participants to identify which award classification is the "*most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work".*

72. Even within Sea Swift's operations, there was no evidence any individual employee in its business on a day to day basis works across vessels that fit within the different industries (ie that they may work on a vessel that wholly or substantially operates in the seagoing industry one day, and a vessel that operates wholly or substantially on a vessel that operates in the ports harbours and enclosed waters industry or the marine towage industry the next).

ATTACHED DRAFT DETERMINATIONS

73. Attached to these submissions are the text of a draft determination for each of the Seagoing Award, and the Enclosed Waters Award, together with a 'marked up' form of the relevant coverage clause (with the associated definitions), for each of the Towage Award (in this instance, using the determination as published by the Full Bench on 30 June 2017, as it is consistent with the MUA's submission), based on the existing form of the relevant Award.

74. The only material difference between the MUA Draft Determinations and the Draft Determinations published by the Full Bench on 30 June 2017 for the Seagoing Award and the Enclosed Waters Award, is the removal of the newly fashioned exclusion clauses crafted by the Full Bench in proposed cl 4.5 of the Seagoing Award and cl 4.2 of the Enclosed Waters Award.

75. As described earlier in these submissions, the effect of the removal of those newly proposed exclusion clauses is to enable the ordinary interaction rule reflected in cl 4.5 of the Seagoing Award, cl 4.8 of the Enclosed Waters Award, and cl 4.8 of the Towage Award to operate.

76. To illustrate their operation it is convenient to take a general purpose hand employed to work on a tug and barge combination, carrying cargo of up to 2000 tonnes in inshore waters, between two Australian ports, that requires the tug and barge combination to travel outside the limits of bays, harbours or rivers:

a. The employer's business would be capable of falling within the definitions of both the seagoing industry in the Seagoing Award and the marine towage industry in the Towage Award. That is, the tug and barge combination, carrying cargo as described could be characterized as:

   i. being the operation of a "vessel" (broadly defined in cl 3.1 of the Seagoing Award), trading as a cargo vessel (noting cargo is also broadly defined in cl 3.1 of the Seagoing Award), which, in the course of such trade or operation, proceeds to sea on voyages outside the limits of bays, harbours or rivers; and

   ii. a tug and barge operation within the meaning of cl 4.3(b) of the marine towage industry, being the movement of contract cargo by combined tug and barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia.

   iii. Would *not* fit within the first part of the definition of the ports, harbours and enclosed water vessels industry, because it would be a vessel operated "*wholly or substantially within a port, harbour or other body of water within the Australian coastline…",* but *may* fall within the second limb of the definition of the ports, harbours and enclosed water vessels industry, being "*or at sea on activities not covered by the above awards",* noting the Seagoing Award and the Towage Award have been removed from the "above awards".

   iv. the removal of the exclusions ether the Seagoing could be understood as being engaged in

b. Because the operations of the employer could be characterized in any one of these three ways, and as such "*covered by the more than one award",* one must then look to the interaction rule (and in this connection it does not matter which of the three awards one looks to first as they are relevantly in the same terms), to identify what covers the work of the employee in the particular employment[32], the relevant question then being what is the *"award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work".*

c. In this example, the "award classification" will be of little assistance:

   i. the Seagoing Award does not contain a general purpose hand classification, but refers to an integrated rating and a Chief integrated rating;

   ii. the Towage Award refers to a "Rating and General Purpose Rating" in cl 13.1;

   iii. The Enclosed Waters Award has a broadly described classification including "*General Purpose Hand, Deckhand, Greaser, Passenger Attendant, Turnstile Attendant, Boating Attendant, Host, Fireman, Trimmer, Linesman, Cook, Sailor, Able Seaman, Leading Hand"*

d. However, the second limb of the ordinary interaction rule will be clearly decisive – the classification most appropriate to both the work performed and the environment in which the employee normally performs the work, would be that for a "Rating and General

[32] see s 48(5) of the FW Act

Purpose Rating" on a tug and barge combination carrying contract cargo, reflected in the industry definition in cl 4.3(b) of the Towage Award.

CONCLUSION

77. It is respectfully submitted the Full Bench ought not make a final determination in accordance with its preliminary view that the Seagoing Award, the Enclosed Waters Award, and the Towage Award be amalgamated.

78. The Full Bench should determine these proceedings by:

    a. Making the Towage Award determination in the form originally proposed by the Full Bench in the draft Determinations published 30 June 2017;

    b. Making the determinations for the Seagoing Award and the Enclosed Waters Award, in the terms of Schedule A to these submissions.

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SCHEDULE A

MUA DRAFT DETERMINATIONS

SEAGONG INDUSTRY AWARD 2010

A. Further to the Full Bench Decision [2017] FWCFB 1138 issued on 24 February 2017, the above award is varied as follows:

1. By deleting clause 4.4(d)(iii) and (vi).

2. By renumbering cl 4.4(d)(iv) as cl 4.4(d)(iii).

3. By renumbering cl 4.4(d)(vii) as cl 4.4(d)(v).

4. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(a).

5. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(a).

6. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(b).

7. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(b).

8. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(c).

9. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(c).

10. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(d).

11. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(d).

12. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(e).

13. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(e).

14. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(f).

15. By inserting the word "Electrician" after the words "Third mate/Third engineer" in the table in clause 13.1(f).

16. By inserting the words "Electro - technical officer" after the words "Second mate/Second engineer" in the table in clause 13.1(g).

17. By inserting the word “Electrician” after the words “Third mate/Third engineer” in the table in clause 13.1(g).

18. By deleting the words “Navigation Act 1912” in clause 13.2 and inserting the words “Navigation Act 2012”.

19. By deleting the words “Navigation Act 1912” in clause 14.6(b) and inserting the words “Navigation Act 2012”.

20. By deleting the words “Navigation Act 1912 ” in clause 14.8(a)(ii) and inserting the words “ Navigation Act 2012”.

21. By deleting the words “Navigation Act 1912 ” in clause 14.10 and inserting the words “ Navigation Act 2012”.

22. By deleting the words “Navigation Act 1912 ” in clause 18.5(a)(iii) and inserting the words “ Navigation Act 2012”.

23. By deleting the words “Navigation Act 1912 ” in clause 22.2 and inserting the words “Navigation Act 2012”.

24. By updating any cross-referencing accordingly.

B. This determination comes into operation from **[insert]** 2018. In accordance with s 165(3) of the *Fair Work Act* 2009 this determination does not take effect until the start of the first full pay period that starts on or after **[insert]** 2018.

PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010

A. Further to the Full Bench Decision [2017] FWCFB 1138 issued on 24 February 2017, the above award is varied as follows:

1. By deleting clause 4.4(d)(iii) and (vi);

2. By renumbering cl 4.4(d)(iv) as cl 4.4(d)(iii);

3. By renumbering cl 4.4(d)(vii) as cl 4.4(d)(v);

4. By updating any cross-referencing accordingly.

B. This determination comes into operation from **[insert]** 2018. In accordance with s 165(3) of the *Fair Work Act* 2009 this determination does not take effect until the start of the first full pay period that starts on or after **[insert]** 2018.

seagoing industry means the operation of vessels trading as cargo vessels, passenger vessels or operated as Research vessels which, in the course of such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers)

4. Coverage

[Varied by PR530596]

[4.1 substituted by PR530596 ppc 21Aug12]

4.1 This industry award covers employers which are engaged in the seagoing industry and their employees in the classification listed in clause1 13 and clause 25 — Classifications and minimum wage rates to the exclusion of any modern award.

4.2 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

4.3 This award covers employers which provide group training services for trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

4.4 Exclusions

This award does not cover:

(a) employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;

(b) employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;

(c) an employee excluded from award coverage by the Act;

(d) employers covered by the following awards:

(i) the *Coal Export Terminals Award 2010*;

(ii) the *Dredging Industry Award 2010*;

~~**(iii)** the *Marine Towage Award 2010;*~~

~~(iv)~~(iii) the *Maritime Offshore Oil and Gas Award 2010*;

~~(v)~~(iv) the *Port Authorities Award 2010*;

~~(vi) the *Ports, Harbours and Enclosed Water Vessels Award 2010;*~~

~~(vii)~~(v) the *Stevedoring Industry Award 2010*; or

(e) maintenance contractors covered by the *Manufacturing and Associated Industries and Occupations Award 2010.*

4.5 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

Marine Towage Award 2010

4. Coverage

[Varied by PR994461]

4.1 This industry award covers employers throughout Australia in the marine towage industry and their employees in the classifications listed in clause 13.1 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the *Maritime Offshore Oil and Gas Award 2010*;

~~**(b)** the *Ports, Harbours and Enclosed Water Vessels Award 2010;*~~

~~**(c)**~~**(b)** the *Dredging Industry Award 2010*; and

~~**(d)** the *Seagoing Industry Award 2010.*~~

4.2 The award does not cover maintenance contractors covered by the following awards:

(a) the *Manufacturing and Associated Industries and Occupations Award 2010*; or

(b) the *Electrical, Electronic and Communications Contracting Award 2010*.

4.3 Definition of marine towage industry

Marine towage industry means:

(a) any work on tug boats, in conjunction with ship-assist operations and voyages, at or about, or to or from, a port in Australia (**harbour towage operations**);

(b) movement of contract cargoes by combined tug and barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia (**tug and barge operations**).

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[New 4.6 inserted by PR994461 from 01Jan10]

4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[4.7 inserted by PR994461 from 01Jan10]

4.7 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered

by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

[4.6 renumbered as 4.8 by PR994461 from 01Jan10]

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

Ports, Harbours and Enclosed Water Vessels Award 2010

4. Coverage

[Varied by PR994513, PR529165]

[4.1 varied by PR529165 ppc 27Sep12]

4.1 This award covers employers throughout Australia in the ports, harbours and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the *Maritime Offshore Oil and Gas Award 2010*;

~~**(b)** the *Seagoing Industry Award 2010*;~~

~~(c)~~**(b)** the *Port Authorities Award 2010*;

~~(d)~~**(c)** the *Dredging Industry Award 2010*;

~~(e)~~**(d)** the *Stevedoring Industry Award 2010*; and

~~**(f)** the *Marine Towage Award 2010*; and~~

~~(g)~~**(e)** the *Marine Tourism and Charter Vessels Award 2010*.

For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means 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.

4.2 The award does not cover maintenance contractors covered by the following awards:

(a) the *Manufacturing and Associated Industries and Occupations Award 2010*; or

(b) the *Electrical, Electronic and Communications Contracting Award 2010*.

4.3 The award does not cover employees of a local government covered by another award.

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[New 4.6 and 4.7 inserted by PR994513 from 01Jan10]

4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

4.7 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

[4.6 renumbered as 4.8 by PR994513 from 01Jan10]

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Definitions – clause 3 (only different definitions are reproduced)	**AOV** means all other vessels **cargo** includes all freight carried in a ship but does not include bunker fuel and other articles carried for the vessel's use **day** means from 12 midnight to the following 12 midnight **home port** means the port at which the employee is originally engaged or the port which is agreed upon between the employer and employee concerned **repatriation** means the provision of transport to and from the home port of an employee at the employer's cost **research vessel** means fisheries research vessels and vessels used by the CSIRO, universities and similar institutions or governments for oceanographic research and which may carry non-maritime personnel engaged in research related activities including from time to time activities normally performed by maritime personnel **seagoing industry** means the operation of vessels trading as cargo vessels, passenger	**Standard rate** means the minimum weekly rate for a General Purpose Hand in clause 13	**contract towage** means when a tug is towing a vessel from one location to another location, where that tow or other services of a non-emergency nature has been contracted for and pre-planned by the employer **free running voyage** and **delivery voyage** means when a tug proceeds from one port to another either interstate or intrastate and is not engaged in towing between ports or on a nominated voyage. In addition, this definition will apply to a tug proceeding from its home port to another port to commence a contract tow or when returning to its home port on completion of a contract tow **hourly rate** means 1/35th of the minimum weekly rate **officer** means a master, a mate or engineer of a tug **outside work** means work on a tug which proceeds to sea on a special voyage outside the limits of bays, rivers or regulated port boundaries or limits but within Australian territorial waters

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
	vessels or operated as Research vessels which, in the course of such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers) **standard rate** means the aggregate annual salary for the Integrated rating classification for dry cargo vessels of up to 19 000 tonnes (AOV) in clause 13.1(a) divided by 52 **swing cycle work** (or work cycle) means a cycle made up of working and non-working days **vessel** means any kind of vessel used in navigation other than air navigation		**special voyage** means a voyage for which it is necessary to set watches and will include a free running voyage and delivery voyage, contract towage or emergency operations, but does not include a nominated voyage **standard rate** means the minimum weekly rate for the classification of Rating in clause 13.1 **tonnage/power units** means the sum of the gross registered tonnage figure of a tug and of the brake horse power figure of the main engine(s) only of the tug (including super charged power where applicable)
Full time employment	**Clause 10.2** A full-time employee is an employee who is engaged to work at least 38 ordinary hours per week, plus reasonable additional hours.	**Clause 10.2** An employer may employ an employee on a full-time basis of 38 hours per week.	**Clause 10.1** A full-time employee is an employee who is engaged to work an average of 35 ordinary hours per week.

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Part time employment	n/a	**Clause 10.4** **(a)** An employer may employ part-time employees in any classification in this award. **(b)** A part-time employee is an employee who: **(i)** has reasonably predictable hours of work; and **(ii)** receives on a pro rata basis equivalent pay and conditions to those of full-time employees who do the same kind of work. **(c)** At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day. **(d)** Any agreed variation to the regular pattern of work will be recorded in writing. **(e)** An employee is required to roster a regular part-time	**Clause 10.2** **(a)** A part-time employee is an employee who: **(i)** is engaged to work ordinary hours which are less than the average number of ordinary hours of a full-time employee; and **(ii)** receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. **(b)** For each ordinary hour worked, a part-time employee will be paid not less than the hourly rate of pay for the relevant classification in clause 13.1. **(c)** Before an employee commences part-time employment, an employer must inform the employee in writing of any rostered

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		employee for a minimum of two consecutive hours on any shift. **(f)** An employee who does not meet the definition of a regular part-time employee and who is not a full-time employee will be paid as a casual employee. **(g)** All time worked in excess of the hours as mutually arranged, excluding any additional hours, will be overtime. **(h)** A regular part-time employee employed under the provisions of this clause must be paid for ordinary hours worked on a pro rata basis of the full-time employee at the full-time employee rate. **(i)** All leave accruals and separation entitlements of part-time employees will be calculated and paid on a pro rata basis of the full-time employee at the full-time rate of pay. **(j)** Where an employee and their employer agree in	periods of duty to be worked by the employee. **(d)** Any agreed variation of the rostered periods of duty must be recorded in writing.

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		writing, part-time employment may be converted to full-time and vice versa. If such an employee transfers from full-time to part-time (or vice versa), all accrued award and legislative entitlements will be maintained. Following transfer to part-time employment accrual will occur in accordance with the provisions relevant to part-time employment.	
Relief employment	**Clause 10.3** A relief employee is an employee who is specifically engaged as such and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees.	**n/a**	**n/a**
Casual employment		**Clause 10.3** **(a)** A casual employee is an employee engaged as such. **(b)** A casual employee working within the ordinary hours of work pursuant to clause 18 will be paid per hour for the	**Clause 10.3** A casual employee is one engaged and paid as such.

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		work performed plus 25% loading which incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances. **(c)** Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly. **(d)** On each occasion a casual employee is required to attend work they are entitled to a minimum payment for three hours work.	
Termination (only additional provisions are reproduced)		**Clause 11.4** **Return to place of engagement** If the employment of any employee is terminated by the employer elsewhere than at the place of engagement, for any reason other than misconduct, the employer will be responsible for conveying the employee to the place of engagement.	**Clause 11** **11.1** Notice of termination is provided for in the NES. **11.2** **Notice of termination by employer—permanent employees** **(a)** Notwithstanding the terms of the NES, in order to

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
			terminate the employment of an officer the employer must give to the employee the following written notice: **Period of continuo** 1 year or less More than 1 year bu More than 4 years **(b)** Payment instead of the notice prescribed in clause 11.2 may be made. **(c)** An employer may terminate an employee's employment by giving part of the notice prescribed in clause 11.2 and part payment instead thereof. **(d)** In calculating any payment instead of notice, the wages an employee would

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
			have received in respect of ordinary time the employee would have worked during the period of notice if the employee's employment had not been terminated must be used. **11.3 Job search entitlement** Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer. **11.4 Return to place of engagement** If the employment of an employee is terminated

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
			by the employer elsewhere than at the employee's home port or place of engagement for any reason other than misconduct, the employer will be responsible for conveying the employee to the employee's home port or place of engagement. **11.5 Termination without notice** Despite the above provisions, an employer may terminate an employee's employment without notice, or payment instead of notice, for serious misconduct. **11.6 Notice of termination—permanent employees** **(a)** An employee may terminate their employment by giving the employer the

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
			following notice in writing: **(i)** in the case of officers, two week's notice; or **(ii)** in the case of ratings, one week's notice. **(b)** If an employee fails to give the required notice, the employer may withhold money due to the employee an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee. **11.7 Casual employees**

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
			The employment of a casual employee terminates at the end of each period of duty.
Redundancy (only additional provisions are reproduced)		**Clause 12.4** Job Search entitlement	**Clause 12.4** Job Search entitlement
Wages	**Clause 13** Aggregate annual salary that includes aggregate overtime component. **Clause 13.3** The annual salaries have been fixed on an aggregate basis taking into account all aspects and conditions of employment. The aggregate salaries are based on work for 10 hours per day (70 hours per week) for 27 weeks per year over seven days a week with: **(a)** eight hours per day at ordinary time; **(b)** two hours per day at double time; and **(c)** the balance of hours above 38 ordinary hours per week (56 hours less 38 ordinary hours) at double time.	**Clause 13** Minimum weekly rates	**Clause 13.1** Minimum daily and weekly rates **Clause 13.2** Option for aggregate or annual salary **Clause 13.3** Special voyage rates set per voyage

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Allowances	**Clause 14.1** Tanker allowance **Clause 14.2** Handing/securing cargo allowance **Clause 14.3** Disturbance of sleep allowance **Clause 14.4** Vessels wrecked or stranded allowance **Clause 14.5** Personal effect allowance **Clause 14.6** Study allowance **Clause 14.7** Meal and accommodation allowance **Clause 14.8** Travel expenses **Clause 14.9** Conveyance **Clause 14.10** Medical expenses	**Clause 14.1** Bedding and other utensils **Clause 14.2** Charge hands **Clause 14.3** Distant work **Clause 14.4** Dual capacity allowance **Clause 14.5** Protective clothing **Clause 14.6** Uniforms **Clause 14.7** Compensation for loss of personal effects **Clause 14.8** Dirty work **Clause 14.9** Wet work **Clause 14.10** Unloading and loading garbage allowance	**Harbour towage allowances** **clause 14.1 (a)** Nominated voyages allowance **Clause 14.1 (b)** Cyclone (ship keeping) allowance **Clause 14.1 (c)** emergency maintenance allowance **clause 14.1 (d)** Area import-based allowances **Clause 14.2** industrial protective clothing allowance, meal allowance, telephone allowance, loss of personal effects allowance, insurance allowance, the chilling and accommodation allowance in out ports, travel allowance, Port based travel allowances, and expenses **Tug and Barge allowances** **Clause 16.1**-multiple toll allowance, cooking allowance, get additional skills allowance

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
	Clause 14.11 Passport/travel documents expenses **Clause 14.12** Reimbursement of expenses **Clause 14.13** Industrial clothing	**clause 14.11** Slipway allowance **Clause 14.12** Bilge allowance **clause 14.13** chipping hammers **clause 14.14** Expenses **Clause 14.15** First-aid **Clause 14.16** Loading and discharge of cargo and supplies **Clause 14.17** Meal allowances **Clause 14.18** Waiting orders **Clause 14.19** Tools **Clause 14.20** Towing	**Clause 16.2** industrial protective clothing, loss of personal effects, meals and accommodation, travelling, expenses, medicals and passport

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		Clause 14.21 Ship stranded or wrecked or on fire **Clause 14.22** Transport **Clause 14.23** Travelling to another port **Clause 14.24** Travelling expenses **Clause 14.25** Loading for duties outside normal work **Clause 14.26** living away from home **Clause 14.27** Higher duties	
Accident pay	**n/a**	**n/a**	**Clause 17** Up to 52 weeks
Payment of wages	**Clause 15** No less frequently than monthly	**Clause 16** Weekly or fortnightly	**Clause 18** Fortnightly
National training wage	**Clause 16 and schedule E** Model clause	**n/a**	**n/a**

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Superannuation	**Clause 17.1** **Superannuation contributions for defined benefit members** An employer is permitted to make superannuation contributions to a superannuation fund or scheme in relation to a default fund employee who is a defined benefit member of the fund or scheme.	**Clause 17** Model clause	**Clause 19** Model clause
Ordinary hours of work	**Clause 18.2** 8 hours a day, each day of the week **Clause 18.5** Minimum hours of rest – 10 in any 24 hours, 77 hours in any seven days	**Clause 18.2** Span – 6am to 6pm 8 hours a day Monday to Friday **Clause 18.3** 2 consecutive days off each week **Clause 18.4** 10 hours off after 18 hours of work else paid double time	**Clause 20.1** 35 hours per week **Clause 20.2** Span - 7am to 5pm **Clause 20.3** 10 hours off after 16 hours of work
Breaks	**Clause 19.1** 60 minutes for each meal **Clause 19.2** No more than 6 hours work without a meal break **Clause 19.3** Breakfast between 7am and 9am	**Clause 19.1** No more than 5 hours work without a meal break **(a)** Breakfast Breakfast is the hour preceding the usual starting time. The breakfast break will not be taken when	**Clause 21.1** **(a)** An employee is entitled to a meal break of not less than 30 minutes after every five hours worked. **(b)** Breaks will be scheduled by the employee's supervisor based upon

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
	Lunch between 12noon and 2pm Dinner between 5pm and 7pm	employees are required to commence at 7.00 am or after, and preceding the usual starting time. **(i)** By mutual agreement between the employer and employees concerned, a 20 minutes rest period may be taken without deduction of pay instead of the prescribed hour for breakfast. This rest period will commence 20 minutes before the usual starting time unless otherwise mutually agreed. **(ii)** Employees ordered in to dock or shift a vessel at 7.00 am will not be entitled to a meal break before noon, but if ordered in at any time before 7.00 am they will have an hour for breakfast not later than 8.00 am or a rest	operational requirements so as to ensure continuity of operations. The employer will not require an employee to work more than five hours before the first meal is taken or between subsequent meal breaks if any. **Clause 21.2 Minimum breaks** **(a)** No break in duty will be of less than six hours duration from the time the employee is relieved from work. In computing a break of duty in relation to this subclause time off duty before the ordinary finishing time of the day up to 1600 hours will not count except on Saturdays, Sunday and public holidays. **(b)** An employee who is required to resume duty after the ordinary finishing time of the day, when possible, will be given details of the work expected to be done up to

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		period of 20 minutes as provided above. **(b) Lunch** Lunch is from noon to 12.45 pm or such period as is the usual custom of the establishment at which the employees are employed. **(c) Tea** **(i)** Tea is from 5.00 pm to 6.00 pm or according to the usual custom of the establishment at which the employees are employed. Provided that by mutual agreement between the employer and employee concerned a rest period may be taken. **(ii)** The times prescribed above may be altered by mutual agreement between the employer	and including the ordinary starting time the next day.

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		and employee concerned. 19.2 Double time will be paid for all work done during the breakfast, lunch and tea breaks specified above, such double time to continue until the employees are granted a meal break or are released from duty. This provision has no application to establishments or jobs where, in accordance with this clause, it is customary for paid rest periods to be taken instead of the breakfast and or tea breaks, and such rest periods are allowed and taken.	
Overtime	**n/a see wages**	**Clause 20** Time and a half for first 3 hours, double time thereafter Time and a half on Saturday Double time on Sunday	**Clause 22** Time and a half for first 2 hours, double time thereafter Time and a half on Saturday for first 2 hours, double time

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
		Double time and a half on Public holidays Minimum payment for 4 hours work Time in lieu of overtime can be agreed	thereafter with a minimum payment for 4 hours work Double time on Sunday with a minimum payment for 4 hours work If exceed 16 hours paid double time thereafter. Minimum 4 hour payment on resumption
Shift work	**n/a**	**Clause 21** Afternoon shifts finish after 6pm and before midnight. Paid 15% loading Night shifts start after midnight and before 8am. Paid 15% loading. Permanent night shift. Paid 30% loading	**n/a**
Leave	**Clause 20** Leave factor or 0.926 of a day's leave for each day of duty	**n/a**	**Clause 23** 168 days free of duty in each year Model clauses for leave in advance and cashing out annual leave

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Annual leave	**Clause 21** Included in leave factor Model clauses for leave in advance and cashing out annual leave	**Clause 22** NES 17.5% loading Model clauses for leave in advance cashing out annual leave, and excessive leave	**See leave**
Personal/carer's leave and compassionate leave	**Clause 22** Included in leave factor Arrangements for taking personal leave are governed by the *Navigation Act 1912*	**Clause 23** NES	**Clause 24** NES
Community service leave	**Clause 23** NES	**Clause 24** NES	**Clause 25** NES
Public Holidays	**Clause 24** Included in leave factor Schedule C is the model part day public holiday schedule	**Clause 25** NES Paid double time and a half	**Clause 26** NES
Special provisions of vessels granted a temporary licence			
Wages	**Clause 25** Minimum weekly rates	**n/a**	**n/a**
Allowances	**Clause 26** Loss of personal effects	**n/a**	**n/a**

Schedule B
MUA Comparison of modern award conditions

Entitlement	Seagoing Industry Award 2010	Port, Harbours and Enclosed Water Vessels Award 2010	Marine Towage Award 2010
Ordinary hours of work	**Clause 27** 8 hours a day Monday to Friday All hours in excess and hours on Saturday, Sunday and public holidays are paid as overtime	**n/a**	**n/a**
Overtime	**Clause 28** Time and a quarter	**n/a**	**n/a**
Rest periods	**Clause 29** Minimum hours of rest – 10 in any 24 hours, 77 hours in any seven days.	**n/a**	**n/a**
Leave	**Clause 30** 8 days for each completed month, pro rata for shorter periods	**n/a**	**n/a**
Public holidays	**Clause 31** Days as per NES, where on a Saturday or a Sunday the following working day will be observed as the public holiday.	**n/a**	**n/a**

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

BUNDLE OF DOCUMENTS IN SUPPORT OF SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

TAB	DESCRIPTION
1	Decision of the Full Bench in [2017] FWCFB 1138
2	Decision of the Full Bench in [2016] FWCFB 651
3	6 March 2009 Submission of MUA and AIMPE to Award Modernisation Full Bench, seeking a new modern award to be known as the Ports, Harbours and Enclosed Waters Award
4	6 March 2009 Submission of MUA and AIMPE to Award Modernisation Full Bench, seeking a new modern award to be known as the Marine Towage Award
5	6 March 2009 Submission of MUA and AIMPE to Award Modernisation Full Bench, seeking a new modern award to be known as the Seagoing Award
6	6 March 2009 Submission of CSL to the Award Modernisation Full Bench
7	6 March 2009 Submission of Australian Mines and Metal Association and the Australian Ship Owners Association to the Award Modernisation Full Bench
8	6 March 2009 Submission of the Marine Towage Employers Group to the Award Modernisation Full Bench
9	Transcript of the first listing of the Ports and Harbour Services Award Modernisation proceedings before Vice President Watson on 27 March 2009.
10	22 April 2009 Supplementary Submission of the Marine Towage Employers Group to the Award Modernisation Full Bench.
11	12 June 2009 Supplementary Submission of MUA and AIMPE in relation to the Ports Harbour and Enclosed Waters exposure draft
12	30 June 2009 transcript of proceedings before Award Modernisation Full Bench
13	*Re Request from the Minister for Employment and Workplace Relations – 28 March 2008* (2009) 182 IR 413; [2009] AIRCFB 450
14	*Re Request from the Minister for Employment and Workplace Relations – 28 March 2008* (2009) 187 IR 192; [2009] AIRCFB 826
15	*Re Request from the Minister for Employment and Workplace Relations – 28 March 2008* (2009) 186 IR 14; [2009] AIRCFB 765 and (2009) 187 IR 192; [2009] AIRCFB 826

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 1

DECISION

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

PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010
SEAGOING INDUSTRY AWARD 2010
MARINE TOWAGE AWARD 2010
(AM2016/5)

Port authorities

VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER CAMBRIDGE MELBOURNE, 24 FEBRUARY 2017

Four yearly review of modern awards – Ports, Harbours and Enclosed Water Vessels Award 2010 – Seagoing Industry Award 2010 – Marine Towage Award 2010 – Coverage of Award – Changes to classifications – Fair Work Act 2009, ss. 134, 138, 156 and 163.

Decision of Vice President Watson

Introduction

[1] On 23 March 2016 the President directed that a Full Bench hear and determine the substantive issues raised during the 4 yearly review of modern awards in respect of the *Ports, Harbours and Enclosed Water Vessels Award 2010* (the PHEWV Award) and the *Seagoing Industry Award* 2010 (the Seagoing Award).

[2] On 26 April 2016 the President issued directions that the Full Bench also hear and finalise the substantive issues raised in correspondence from Sea Swift Pty Ltd (Sea Swift) on 15 April 2016 in relation to the PHEWV Award, the Seagoing Award and the *Marine Towage Award 2010* (the Towage Award). A hearing on these matters was held on 24 & 25 October 2016 in Sydney.

[3] On 21 October 2016 The Australian Institute of Marine and Power Engineers (AIMPE), The Australian Maritime Officers' Union (AMOU) and Sea Swift consented to CSL Australia Pty Ltd's (CSL) proposal to refer AIMPE's application to add the Electrician/Electro Technical Officer classification at the Second Mate/Second Engineer grading in Part A of the Seagoing Award to a conference before Commissioner Cambridge sitting as a single member. That conference was convened on 29 November 2016. The Commissioner subsequently provided a report on those matters to the Full Bench.

[4] Other claims originally made by AIMPE by email of 2 March 2015 were not pursued. These included a claim for parity between the Engineer Classification at 100% relativity to the Master under the PHEWV Award, the inclusion of two Passenger Vessel schedules of classifications into the Seagoing Award and the inclusion of classifications for Fitters and Boilermakers in the Dry Cargo schedules of the Seagoing Award.

[5] An initial draft of this decision was provided to the other members of the Full Bench in early December 2016. As at the date of publishing this decision the other members have not provided their decision to me for publication or advised me of when they will be able to publish their decision.

[6] The award review is required to be conducted in accordance with s.156 of the *Fair Work Act 2009* (the Act). Other provisions of the Act are also relevant including s.138 and the modern awards objective in s.134.

[7] A number of Full Benches have set out the approach to matters of this type in relation to the 4 yearly review.[1] I apply the approach outlined in those decisions to the determination of the issues in relation to this Award.

[8] In reviewing each award the Commission must have regard to the modern awards objective in s.134 of the Act. The modern awards objective is to "ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions", taking into account the particular considerations identified in ss.134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.

[9] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[10] Section 138 of the Act emphasises the importance of the modern awards objective in these terms:

> "A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[11] What is "necessary" in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the submissions and evidence directed to those considerations.

Issues to be determined

[12] The issues that the Bench has been directed to determine concern the following:

1. Coverage Issues

Sea Swift's Proposed Amendments to the PHEWV Award

(a) Clause 3.2

Delete: "above" and insert "following".

(b) Clause 3.3

Delete "(f) the Seagoing Industry Award 2016; and",

and re-number "(g)" as "(f)".

(c) Insert new clause 3.3A:

"3.3A The Award does not cover employees engaged in the operation of

(a) vessels as described in clause 3.2 of the Seagoing Industry Award 2016, and who are employed in the classifications in clause 10 and clause A.1.1 of that Award;

(b) vessels engaged in operations as described in clause 3.2(b) of the Marine Towage Award 2016".

Sea Swift's Proposed Amendments to the Seagoing Award

(a) Clause 3.5(d)

Delete:

"(iii) the Marine Towage Award 2016;"

and:

"(vi) the Ports Harbours and Enclosed Water Vessels Award 2016".

and re-number Clause 3.5(d) accordingly.

(b) Insert new Clause 3.5A:

"3.5A This Award does not cover the operation of:

(a) vessels as described in clause 3.2 of the Ports, Harbours and Enclosed Water Vessels Award 2016;

(b) vessels engaged in operations as described in clause 3.2(b) of the Marine Towage Award 2016."

Sea Swift's Proposed Amendments to the Towage Award

Clause 3.3(a)

Delete:

"(iii) the Ports Harbours and Enclosed Water Vessels Award 2016; (iv) the Seagoing Industry Award 2016; "

2. Small ship classification under the Seagoing Award

Sea Swift's Proposed Amendments

(a) Clause 10.1(a)

Delete "(a) Dry cargo vessels of up to 19,000 tonnes (D.C. Cat 1)"

Insert: "(a) Dry cargo vessels of up to 5,000 tonnes

Classification	Minimum salary	Aggregate overtime component	Aggregate annual salary
Master	46,587	17,630	64,217
Engineer	44,372	16,792	61,164
Mate	44,372	16,792	61,164
General Purpose Hand, Deckhand, Greaser, Passenger Attendant, Turnstile Attendant, Boating Attendant, Host, Fireman, Trimmer, Linesman, Cook, Sailor, Able Seaman, Leading Hand	41,990	15,890	57,880

Insert "(b) Dry cargo vessels of between 5,000 and 19,000 tonnes (D.C. Cat 1)" and re-number subclauses (b) to (g) accordingly.

AIMPE's Proposed Amendments

(a) Clause 10.1(a)

Insert:

"(a) Dry Cargo Vessels of up to 6000 tonnes

Classification	Manning	Minimum salary	Aggregate overtime component	Aggregate annual salary
Master				
Chief Engineer				
First mate/First engineer				
Second				

mate/Second engineer				

3. Casual classification under the Seagoing Award

Sea Swift's Proposed Amendments

(a) Clause 7.1(a)

Insert "(iii) Casual employment".

Clause 7.1(b)

Delete "or relief" and insert "relief or casual".

Clause 7.4

Insert:

"7.4 Casual Employees

(a) A casual employee is an employee specifically engaged as such.

(b) A casual employee receives, on a pro-rata basis, equivalent pay and conditions to those of full time employees.

(c) Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

(d) On each occasion a casual is required to attend work they are entitled to a minimum payment for three hours' work."

4. Electrician/Electro Technical Officer classifications

AIMPE proposes the insertion of two additional classifications. The Electrician is proposed to be equated with the rate for Third Mate/Third Engineer and an appropriate definition is proposed. The level and definition are agreed by employer representatives. The Electro Technical Officer is proposed to be set at the same level as the Second Mate/Second Engineer level. The rate and definition is also agreed with employer representatives.

[13] Evidence was led by the following persons:

- Stephen Bradley Ainscough (Director – MER Solutions Australia Pty Ltd)
- Ben Cooper (Associate Director – Livingstones Australia)
- Lino Bruno (Chief Operating Officer – Sea Swift)
- Henning Christiansen (Director of Professional Development – AIMPE)
- Ian Ives (Director, Transhipping & New Business Development – CSL)

[14] I consider each of the above matters in turn.

Coverage Issues

[15] Sea Swift makes this application arising out of a Full Bench decision in *MUA and others v Sea Swift Pty Ltd*.[2] It submits that the decision reveals a significant anomaly in the coverage provisions of the maritime awards. Sea Swift conducts various types of maritime activities under a single corporate umbrella. If the activities were carried out separately, they would be covered by the awards applicable to each type of operation. Because the predominant part of the business has been found by the Full Bench to be covered by the Seagoing Award, that award applies to all of its operations. Sea Swift submits that this outcome was not intended by the Full Bench in the award modernisation process and it places Sea Swift at a competitive disadvantage in conducting the operations other than seagoing operations.

[16] Other employers support these variations. They submit that where an employer conducts an operation that falls within a particular award, that award should apply to the employees in that operation regardless of whether other awards may apply to different parts of the employer's operations.

[17] The maritime unions oppose the variations and submit that the outcome of the Full Bench decision is not illogical, unfair, nor contrary to the modern awards objective.

[18] The Full Bench decision in the Sea Swift case considered the legal effect of the various coverage clauses. It did not express a view as to the appropriateness of the outcome it held flowed from the wording of the provisions. There are significant differences in the terms of the various maritime awards reflecting the different nature of the operations and the different requirements of employees. For example, the Seagoing Award is premised on lengthy voyages. Employees under that award do not operate from a port and return to the port and their homes each day.

[19] In my view, it is appropriate that an employer that conducts various types of maritime activities be covered by the award that is relevant to each of those maritime activities. If an employer conducts different types of operations, then different award safety nets should apply to each of those different operations. Reflecting that principle in the coverage clauses of the relevant awards is in my view consistent with the modern awards objective. I consider that the variations are necessary to achieve the modern awards objective.

Small Ships Schedule

[20] Sea Swift and AIMPE seek variations to the classification structure of the Seagoing Award to provide for a different schedule of wage rates for vessels below a certain level of tonnage. Currently the lowest schedule is for ships of less than 19,000 tonnes.

[21] Sea Swift submits that prior to the introduction of modern awards, a previous award, known as the *Self-propelled Barge and Small Ships Industry Award* (Small Ships Award) covered a company that operated small vessels of this type and other operators, such as Sea Swift, operated within State jurisdictions. Sea Swift led evidence to the effect that it operates small vessels involved in local cargo transport to various small ports that do not have

maritime infrastructure or shore-based maritime employees. The duties of its employees are different to other maritime employees and the qualifications such employees are required to hold are different to those required to be held by seagoing maritime employees. It currently operates 12 vessels ranging from 50 tonnes to 3200 tonnes.

[22] AIMPE submits that the termination of the small ships award and the resultant lowest category of vessels of up to 19,000 tonnes have resulted in an anomaly for vessels which are much smaller. These include ferries that perform cargo operations between the Australian mainland and islands and trans-shipment vessels operating in the Gulf of Carpentaria and Spencer Gulf. AIMPE submits that now the coverage of the Seagoing Award is clarified for such small vessels, the inclusion of a small ships schedule would rectify the anomaly arising from the establishment of modern awards.

[23] Other employers support the inclusion of a schedule that more properly reflects the different characteristics of ship operations and the duties and responsibilities of employees engaged on such vessels.

[24] The MUA and the AMOU oppose the variations. They submit that:

- Sea Swift has sought to avoid coverage under the Seagoing Award and the Small Ships Award;
- the award modernisation Full Bench was aware of the Small Ships Award when it settled the scope of the Seagoing Award; and
- the schedule now sought differs from that previously reflected in the Small Ships Award and there is no work value basis for justifying a lesser level of minimum salaries.

[25] Supplementary submissions were filed by Sea Swift and the MUA on the history of the wage levels in the Small Ships Award. That history reveals at least two substantial reviews of wage rates in the award. In 1991, arising from several conferences before Commissioner Fogarty, revised wage rates were struck by agreement with the express intention of severing any nexus with the *Maritime Industry Seagoing Award*. In 2001, when required to ensure that the rates in the award were properly fixed minimum rates, Commissioner Eames approved the agreed wage rates that were lower than the rates in the *Maritime Industry Seagoing Award*. It appears that at all relevant times the award only applied to named respondents which were companies within the Perkins Shipping Group.

[26] As most issues regarding the scope and classifications under this award were subject to widespread agreement during the award modernisation stage, and small ship operators such as Sea Swift did not participate in the proceedings, the appropriateness of the under 19,000 schedule for much smaller vessels was not considered by the Full Bench. The review provides a basis for a consideration of that issue.

[27] In my view the different nature of operations such as those dealt with in evidence and the different qualifications required to work on such vessels provide a justification for a separate schedule for small ships in the Seagoing Award. There is a history of lower minimum rates for smaller ships based on agreed work value comparisons. In my view, the justification for lower rates still exists, and there is no case to alter the recognition of the lower work value. Although agreement on the lower rates is now confined to one of the maritime unions, it is appropriate that the historical position be continued.

[28] For these reasons I consider that the variations are necessary to achieve the modern awards objective. I would grant the applications in principle and require further submissions as to the details of the small ships schedule including the setting of wage rates on work value grounds. If the other members of the Full Bench do not agree with my conclusion such a process would have no utility.

Casual Employees

[29] Sea Swift seeks the insertion of a classification for casual employees in addition to the relief classification rate in the award. It submits that under previous award coverage the classification was described as "casual/relief employees" and it seeks to employ persons as casuals who operate towage or prawn trawler mother ship activities on a seasonal basis. The variation is generally supported by employers and opposed by the unions. However the unions acknowledge that employment of persons on a seasonal or other temporary basis is able to occur under the award.

[30] In my view a case for the amendments has not been made out. The intentions of the company can be fulfilled under the current award provisions. The variation is not necessary to achieve the modern awards objective.

New Classifications

[31] I agree that the new classifications, as agreed between the parties, are necessary to achieve the modern awards objective and should be reflected in the award.

Orders

[32] Orders reflecting the conclusions of the Full Bench should be made by Commissioner Cambridge.

Decision of Deputy President Gooley and Commissioner Cambridge

Coverage, Casual Employees and New Classifications

[33] We agree with the conclusions reached by Vice President Watson in relation to the coverage of the awards, casual employees and the new classifications. We agree with the reasons for his conclusions except that we do not accept his assumption that the *Seagoing Industry Award 2010*[3] was premised on lengthy voyages. This part of his reasoning is not supported by the evidence before the Full Bench nor the history of the award. However this difference in reasoning does not impact on our conclusions.

Small Ships Schedule

[34] Vice President Watson in his decision has set out the details of the applications by Sea Swift and AIMPE to vary the *Seagoing Award* to incorporate a small ships schedule for dry cargo vessels and we do not repeat those details here.

[35] Sea Swift's proposed rates are derived from the rates in the *Ports, Harbours and Enclosed Water Vessels Award 2010* as they were at the date of the application. AIMPE does not propose specific rates but seeks rates based on the *Self-propelled Barges and Small Ships Award 2001*[4] adjusted in accordance with the relevant national wage adjustments.

[36] Currently employees engaged on vessels in the proposed small ships schedule would be classified and paid in accordance with clause 13.1(a) of the *Seagoing Award*.

[37] Sea Swift is proposing that employees' rates of pay be significantly reduced. For example a master excluding the overtime component would have his or her base rate reduced from $65,576 per year to $46,587 per year. Sea Swift submitted that if there were any employees affected by the change then transitional arrangements can be put in place.

Legislative Framework

[38] In addition to the general principles[5] applying to the 4 yearly review, s.156(3) of the Act provides that in the 4 yearly review of modern awards the Commission may only vary minimum rates of pay if the Commission is satisfied that the variation is justified by work value reasons.

[39] Work value reasons are reasons related to any of the following:

(a) The nature of the work;
(b) The level of skill and responsibility involved in doing the work;
(c) The conditions under which work is done.

Sea Swift's Evidence

[40] In support of its submissions Sea Swift relied upon the evidence of Mr Lino Bruno the Chief Operating Officer of Sea Swift, Mr Stephen Ainscough the Director of MER Solutions Australia Pty Ltd and Mr Ben Cooper Associate Director of Livingstones Australia.

Mr Lino Bruno

[41] Mr Bruno gave evidence that the qualification of a master can vary depending on the area the vessel operates in.[6] It was his evidence that the National Standards for Commercial Vehicles determines the qualifications required to be held by crew based on length, tonnage and location of operations of the vessel.[7] He said that a key factor in determining the level of qualifications in parts B and D of the National Standards is whether the vessel is engaged in "inshore operations" which allows for a lower level of qualifications.[8] He said all Sea Swift's seagoing cargo operations are conducted as "inshore operations." It was his evidence that the qualifications required for the self-propelled barges was a Master Class 4 and for the chief engineer a Marine Engine Driver 3.[9]

[42] Mr Bruno said that the nature of "the work undertaken by Sea Swift marine staff is different to that of other marine employees (particularly sea-going marine employees), due principally to the nature of [their] operations, which require employees to perform a wide range of shore-based duties in the loading and unloading of vessels in port, and the delivery of goods and services to the small outlying communities upon arrival at those locations."[10]

[43] Mr Bruno said that the deckhands are required to hold any of the following: "forklift ticket, doggers' ticket and/or crane driver's ticket."[11] Typical duties can included "customer service functions, forklift operation, handling frozen goods, freight handling and consolidation, including required documentation, operation of a crane, re-packing of freight, handing of live seafood (fish and crayfish), delivery of sea freight on shore by forklift from a barge and handling of bulk liquids using hoses and cargo pumps."[12] Crew may also be required to drive a fuel truck or a truck or all terrain forklifts.[13] In addition two of the cargo vessels carry passengers and all employees are required to perform a multitude of tasks.[14]

[44] Mr Bruno said that the vessels operated by Sea Swift require smaller crews; lower crew qualifications; duties for masters and engineers are less onerous; duties for deckhands include shore side duties; the locality and sea conditions encountered differ to larger vessels as they are inshore and near-coastal at all time; crew spend less time away from the home port; and the vessels have lower cargo carrying capacity and hence lower income generating capacity.

Mr Stephen Ainscough

[45] Mr Ainscough is the Director of a multidisciplinary maritime consultancy and specialised maritime law firm. He gave evidence about the training and certification of seafarers.[15]

[46] It was his evidence that the "qualification requirements for seafarers are characterised by increasingly difficult training, experience and examination requirements for seafarers to comply with as vessels increase in size, complexity and operational area."[16] It was his evidence "the larger the ship and the further the ship is from shore, the greater the risk to life and property.[17] This means that skill levels increase. It was his evidence that there are different requirements for commercial seafarers engaged on international voyages and those engaged on domestic commercial vessels.[18]

[47] The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) sets the minimum standards relating to training, certification and watchkeeping for seafarers on merchant ships. Australia has given effect to this convention by the *Navigation Act 2012* (Cth.). The certification of Domestic Commercial Vessels is given effect to by the *Maritime Safety (Domestic Commercial Vessels) National Law Act 2012* (Cth).[19]

[48] Both systems follow a similar process. Seafarers must meet medical and educational requirements, have practical experience and pass an oral examination.[20] However the qualification requirements may vary. Mr Ainscough gave evidence that DCV certificate holders are awarded a certificate 3 or 4 level qualification whereas STCW Class 1 certificate of competency holders are awarded a degree or advance diploma qualification.[21] Holders of STCW qualifications can be engaged on vessels that trade internationally, in contrast those who hold DVC qualifications can only crew vessels that operate in Australia territorial waters.[22] It was his evidence that the *Seagoing Award* classification class of 0-19,000 tonnes is "an extremely wide class which would encompass a large range of vessels as well as vessel types."[23] It was his evidence that as a guide[24], domestic vessels up to 5000 tonnes excluding small gas and chemical tankers "could be considered as ships that trade exclusively in Australian waters" and could be managed and operated by officers with DCV qualifications.[25] He accepted that this was a guide and "although there is no clear line based purely on

tonnage, once the size of the vessel exceeds that level, the complexity and size of the vessel and other factors [he has] identified render it unlikely that a DCV qualified seafarer would be able to operate such a vessel, even if it were legal to do so."[26]

[49] In cross examination Mr Ainscough accepted that under the *Navigation Act 2012* for Ratings the certification requirements are independent of the size of the ship and the area of operation of the ship.[27]

[50] He further accepted that general purpose hands are able to work on deck or in the engine room if the vessel is less than 80 metres long in waters to the outer limits of the Exclusive Economic Zone (EEZ) which is approximately 200 nautical miles from the coast and in the engine room only if the propulsion power is less than 3000 kW.[28] Further for all classifications up to Master there is no linkage to tonnage as the link is to engine power.[29] Mr Ainscough argued that engine capacity is correlated with length of the ship.[30]

[51] It was his evidence that the 5000 tonne cut off was "a reasonable guide depending on what's been carried on the ship and where it's going."[31]

[52] The certificates required of masters are determined by the length of the vessel except for those vessels operating on inland waters. The lengths are less than 24 metres, less than 35 metres, less than 80 metres.[32]

[53] Those vessels operate near coastal, which is defined as being within the EEZ.[33] Mr Ainscough did not consider this definition when preparing his evidence and only had regard to vessels which operate within 12 miles of the shore.[34] Similarly while Mr Ainscough uses dead tonne weight as his discriminator the certification requirements under the *Navigation Act 2012* uses gross tonnage which Mr Ainscough accepted is not a measure of weight but a measure of volume.[35] However it was Mr Ainscough's evidence that these measures correlate.[36]

[54] Mr Ainscough was asked to prepare a list of cargo vessels currently trading on the Australian coast which are under 5000 DWT excluding those operated by Sea Swift.[37] No list was provided to the Full Bench. It was his evidence that there were a "few hundred" such ships but if certain vessels were excluded, like barges, then there were less than 20 such vessels.[38] For the purpose of this exercise Mr Ainscough only considered vessels operating within 12 miles of the coast.[39]

Mr Ben Cooper

[55] Mr Cooper exhibited a number of documents and provided a comparison of the salaries paid under the *Small Ships Award* and the *Seagoing Award*.[40]

Sea Swift's submissions

[56] Sea Swift submitted that prior to the making of the *Seagoing Award* work of the kind performed on its vessels was within the scope of the *Small Ships Award*. At the time of the making of modern award only Perkins Shipping Group, which was subsequently taken over by Toll, was a respondent to the *Small Ships Award*. Sea Swift submitted that it operated barges and small ships in many of the same areas as Sea Swift and in very similar vessels.[41]

[57] The *Small Ships Award* applied "in or in connection with the operation of self-propelled barges and small ships, which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers)."[42]

[58] For ships of less than 500 tonnes dead weight the classifications included Master, Chief Officer, Chief Engineer and AB. For ships of more than 500 tonnes the classifications were Master, Chief Officer, Second Officer, Chief Engineer, Second Engineer, Bosun, AB, Ordinary Seaman and Seaman/Cook.

[59] Sea Swift was not covered by the *Small Ships Award*.[43] It submitted that at the time of award modernisation and the making of the *Seagoing Award* the Full Bench was not informed that there was a fleet of ships operating in Northern Australia outside of federal award coverage.

[60] Sea Swift has two line haul vessels of 3,200 tonnes and 2768 tonnes respectively and a small vessel of 50 tonnes engaged in regular cargo. It has self-propelled barges of between 230 to 608 tonnes and one barge of 1284 tonnes. It has fishery support vessels which are 884 and 1208 tonnes respectively.[44]

[61] It submitted that the vessels operate in in-shore and inter-island seas and that the nature of its employees' work is significantly different to other marine employees on significantly larger vessels. Sea Swift staff are required to perform shore based duties such as loading and unloading vessels in part and the delivery of goods and services to small outlying communities.[45]

[62] Sea Swift submitted that the qualifications required of crew members varies significantly as the vessel size reduces. It submitted that a Master for a 19,000 tonne vessel requires a Master Class 1 qualification whereas for its vessels the highest qualification it requires is a Master Class 3.[46]

[63] It submitted that there was a similar reduction in qualifications for engineers and other crew by reference to the size of the vessel.[47]

[64] It submitted that the *Seagoing Award* recognised the differences in salary levels by reference to tonnage of the vessels and it is appropriate to restore a category for small ships for salary purposes. This it says would accommodate the existence of ships which are dramatically smaller and less productive than the lowest category in the current award.[48]

[65] It submitted that scope of the classification structure in the *Seagoing Award* covers a "massive range of actual experience, knowledge, experience, training and responsibility and a massive range of localities and dangers."[49] It was submitted that the current award either grossly undervalues the work of people at the top end of the scale or it grossly overvalues the work of people who are at the bottom end of the scale.[50]

[66] It was submitted that there is a significant difference between those who are required to have DCV qualifications and those who are required to have STCW qualifications and that the cut off point for this difference was 5000 tonnes.[51]

[67] It was submitted that the current classifications which are independent of the qualifications required by DCV or the STCW cannot meet the requirements of a modern award.[52]

[68] It submitted that the award modernisation process saw a significant increase in the rates payable to those employed on small ships and that increase was not arbitrated. There was, it said, no assessment of appropriate work values at that time.[53] It relied on this submission to submit that a less onerous burden was placed on Sea Swift to support the change it proposed as it was seeking to reverse a change that should not have been made in the first place.[54]

[69] The salary rates proposed by Sea Swift are drawn from the minimum rates in the *PHEWV Award* which it submitted also applies to passenger vessels that go to sea in the course of their operations.[55] It submitted that it was also appropriate to include, in addition to the proposed minimum rates, an aggregate overtime component.

[70] In its oral submissions, Sea Swift proposed that the Full Bench could make an in principle decision as to whether a small ships classification should be included in the *Seagoing Award* and then permit the parties to have discussions to see if there could be an agreement about the appropriate rates.[56]

[71] In its supplementary submissions Sea Swift noted that, in 1991, the maritime unions applied for and were granted the second structural efficiency increase[57] arising from the August 1989 National Wage Case for the *Small Ships Award*.[58] The parties at that time advised that they were in negotiations for a new award.

[72] At this time the *Small Ships Award* named specific ships and the rates applying to those ships varied. [59]

[73] It submitted that a clause in the *Small Ships Award* which required a review of wage rates on the same basis as applied under the *Maritime Industry Seagoing Award* and an application of any variation to the *Maritime Industry Seagoing Award* to the *Small Ships Award* was deleted.[60] These changes were made by consent.

[74] It was submitted that the wage rates were required to be determined by reference to work value criteria applying to the work undertaken by employees. It said that by breaking the nexus with the *Maritime Industry Seagoing Award* from 1991, the *Small Ships Award* "assumed the standing of a properly fixed minimum rates award applicable to a range of small self-propelled barges and vessels trading in the same waters and in some cases applying to the same ships as are currently in contention in these proceedings."[61]

[75] It submitted that "there was no ongoing relativity as between those wage rates and the *Maritime Industry Seagoing Award*."[62]

[76] The 1991 *Small Ships Award* was said to be an industry award which remained in force until it was rescinded under the award modernisation process.

[77] Sea Swift submitted that the decision of the award modernisation Full Bench decision to not include a small ships reference in the *Seagoing Award* was both erroneous and anomalous.[63] It therefore submitted that in contrast the circumstances considered by the Full

Bench[64] when reviewing the *Vehicle Manufacturing Award*, this case does not involve a mere disagreement as to a previous decision but "rather the erroneous presumption on the part of the Full Bench that for the purposes of a safety net modern award for all vessels engaged in sea-going activities as defined, the lowest level of classification in the *Maritime Industry Seagoing Award* as it then stood was sufficient and appropriate."[65]

[78] Sea Swift's submissions in respect of the modern award objective focused on the coverage of the Awards and did not address how its proposal in relation to the small ships schedule was necessary to meet the modern award objective. [66]

AIMPE's submissions

[79] It submitted that its application differed from Sea Swift's in relation to tonnage and proposed wages. It submitted that Sea Swift's proposal was not accurate for engineers. It submitted that engineering qualifications are based on propulsion power of the vessel rather than size of the vessel. It rejected Sea Swifts submission about the passenger vessels and the *PHEWV Award*. Sea Swift had submitted that the *PHEWV Award* applied to Australian passenger vessels which nonetheless go to sea to support its application that the rates drawn from the *PHEWV Award* are the appropriate rates for the small ships category.[67] AIMPE submitted that the *Seagoing Award* applied to vessels of similar size to that operated by Sea Swift performing similar functions. The Sealink ferries operating between Kangaroo Island and the mainland was an example given by AIMPE.[68]

Martime Industry of Australia Ltd's submissions

[80] Marine Industry Australia Ltd supported the inclusion of small ships schedule in the *Seagoing Award*.[69] It submitted that it was anomalous that the smallest category of seagoing dry cargo vessels was up to 19,000 tonnes. It submitted that the decision of the Full Bench in *Maritime Union of Australia and ors v Sea Swift*[70] had altered a previous industry understanding about the interaction of the *PHEWV Award* and the *Seagoing Award*. It submitted that the proposed variations would satisfy the modern award objective in particular it would impact on productivity, employment costs and the regulatory burden. It relied on the submissions of Sea Swift and AIMPEE. In its oral submissions MIA submitted that reliance on the technical details in the AMSA NSCV Part D may not be of much assistance. It said that "the small ships award is a really good reflection of the wage rates in the industry and levels of different qualifications and skills that are required at different sized ships." MIA called no evidence to support is submissions

The Maritime Union of Australia's submissions

[81] The MUA opposed both applications.[71] It submitted that the Full Bench was aware of the *Small Ships Award* during the award modernisation process.[72] At that time the *Small Ships Award* had one respondent.[73] It submitted that Toll, which took over the business of that respondent, had made enterprise agreements and the award used for the BOOT assessment was the *Seagoing Award*.[74]

[82] It further submitted that the *Small Ships Award* applied to vessels of less than 500 tonnes dead weight and over 500 tonnes dead weight. It submitted that the new classification structure applies to very different vessels. It submitted that that the category of up to 500 tonnes was used in the *Small Ships Award* because these vessels did not need safe manning

certificates if they operated with 30 nautical miles of a designated port. This, it said, did not describe the work of Sea Swift's line haul vessels which carry the majority of Sea Swift's marine freight.[75]

[83] It further submitted that Sea Swift had not provided any work value reasons as to why the minimum rate for this work should be reduced.[76] It submitted that the evidence of Mr Bruno was that employees in the classification GPH in fact performed a greater range of duties.[77]

[84] It submitted Sea Swift had not provided evidence that compared the work performed on vessels of up to 5000 tonnes and those between 5000 and 19000 tonnes. It submitted that there was no different marine qualification for IRs/GPHs when working on these vessels.[78] It submitted that AIMPE's application was premised on the existence of the *Small Ships Award* and was not supported by any evidence of a work value nature as required by the Act.[79]

[85] In its supplementary submissions in reply to the final submissions of Sea Swift, it rejected the submission that the rates were properly fixed minimum rates in 1991. It submitted that the *Small Ships Award* was converted from a paid rates award to a minimum rates award in 2001 and at that time it only applied to Perkins Shipping.[80]

[86] It rejected the submission that the use of the term industry in the award title converted the award into an industry award.[81]

[87] It relied upon the decision of the Full Bench in the 4 yearly review of the *Vehicle Manufacturing Award* and submitted that Sea Swift had not "placed before the FWC anything that suggests that the AIRC did not intend the SPB Award to be terminated and for employees to be covered by the *Seagoing Award*."[82] It submitted that there was no evidence of a mistake by the AIRC.

The Maritime Officers' Union's submissions

[88] The AMOU opposed both applications.[83]

[89] It submitted that the award modernisation Full Bench was aware of the *Small Ships Award*.[84] It submitted that there was no work value evidence about Masters. Further it submitted that neither Sea Swift or AMPIE have provided work value evidence that justifies the gross delineations in the pay rates below and above 5000 tonnes or 6000 tonnes.[85] It submitted that there was no evidence to show how the proposed new classification structure would meet the modern award objective. It submitted that the evidence of a single employer does not support a variation to an industry award. [86]

CSL Australia Pty Ltd's submissions

[90] CSL did not oppose either application.[87]

The history of award regulation.

[91] The Award Modernisation process which commenced in 2008 saw the creation of 5 maritime industry awards, including the *Seagoing Award*. Prior to the making of this award relevantly for this part of the decision there were 2 federal awards regulating commercial

shipping namely the *Maritime Industry Seagoing Award 1999*[88] and the *Self-propelled Barge and Small Ships Industry Award 2001*[89].

[92] Both Awards were binding on named respondents with the *Small Ships Award* having one respondent namely Perkins Shipping Group.

[93] The early maritime industry seagoing awards provided for rates of pay for employees based on the category of vessels on which work was performed. The awards, until the making of the *Maritime Industry Modern Award 1989*, provided that named vessels were in particular categories. The awards provided for a process to be followed if new vessels owned by the respondents to the Award commenced operating.

[94] The 1989 Award provided for the first time for classifications for dry cargo vessels based on the ship tonnage namely up to 1900 tonnes, over 1900 tonnes and up to 39,000 tonnes and over 39000 tonnes.

[95] As a result of the review of Awards conducted under Item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth.), the Commission made the *Maritime Industry Seagoing (Interim) Award 1998* which replaced the *Modern Ships Award* and the *Maritime Industry Seagoing Award 1983*. The Interim Award continued to provide for classifications for dry cargo vessels based on tonnage.

[96] As part of that process the Commission was required to review the rates of pay because the predecessor awards had been paid rates awards. The parties to the Interim Award put a joint submission to the Commission about the appropriateness of the rates.[90]

[97] In the Paid Rates Review decision[91] the Full Bench said:

> "We have decided that in principle all awards which provide for rates of pay which are not operating, or not intended to operate, as minimum rates and which do not bear a proper work value relationship to award rates which are properly fixed minima, should be subject to a conversion process so that they do contain properly fixed minimum rates of pay."

[98] The parties jointly submitted that the starting point was the decision of the Commission in the review of the *TugBoat Industry (Consolidated) Award 1990* where Commissioner Wilks determined that for that award the rating classification was 92.5% of the *Metal, Engineering and Associated Industries Award 1998* C10 classification.[92] This was increased to 97.5% having regard to the nature of the industry. The Paid Rates Review then required internal relativities to remain unchanged.

[99] In his decision reviewing the *Masters and Deckhands Award 1992*, Vice President Ross, as he was then, accepted that the general purpose rating was the appropriate classification and it had been properly set at 92.5%. He then accepted that a general purpose rating in Freemantle was entitled to a loading of 5% for the nature of the industry while a general purpose rating in Port Hedland was entitled to 10% loading for the nature of the industry.[93]

[100] The parties in their submissions in relation to the relativities in the Interim Award took the Commission to the relevant Marine Orders and the additional qualifications required of a

rating on a vessel covered by the Interim Award, compared to the rating on a tug boat, to justify a higher relativity and those submissions were accepted by the Commission. The end result was that the Commission accepted that the appropriate relativity was 97.5% with an additional 10% having regard to the nature of the industry.

[101] The *Small Ships Award* was a paid rates awards and the award was also converted to a minimum rates award in 2001. We do not accept the submissions of Sea Swift that because structural efficiency increases flowed to the predecessor awards arising from the 1989 National Wage Case[1] that the rates were properly fixed minimum rates at that time. The principles established at the time set out how the structural efficiency principle applied to paid rates awards.[2] There is nothing in the *Small Ships Award* files that would support Sea Swift's submissions.

[102] Further while we accept that at this time the clause requiring a nexus with the other maritime awards was removed, it should be noted that when this occurred the following statement was made by Mr Saundry from the Northern Territory Confederation of Industry and Commerce:

> "and then, finally, at the last paragraph of clause 7, which refers to the relationship with the maritime industry, "Seagoing Award" is deleted. However I should place on the record that it is the agreement of the parties that the normal equation for adapting national wage increases to the unique structure of calculation of wages and allowances within the seagoing industry, is not opposed by the employers, and will be utilised for those purposes."[3]

[103] The *Self-Propelled Barge and Small Ships Award 1991* was reviewed by the Commission as part of the Award Simplification decision. The 1991 award provided for annualised salaries for particular ships and applied to named ships. For certain ships the rates incorporated an allowance for working cargo.[4]

[104] The 2001 decision of the Commission records that the position put by the parties was agreed. There is no reference in the decision to the relativities adopted in the award and no submissions were put to this Full Bench about this matter.[5] An examination of the file does not shed any light on what the agreed relativities were.

[105] Correspondence from the AMOU on the file advised that the unions and Perkins would prepare a draft version of the simplified Award "in line with the simplification of the "parent" Award the Maritime Industry Seagoing Award, which was approved by Comm Wilks".[6]

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[1] 30 IR 81

[2] Ibid at p105-106

[3] C No 20701 of 1991 Application by the AIMPE and others to vary re National Wage August 1989 – second increase - Transcript25/9/91 at page 18

[4] S0013

[5] PR908398

[6] Letter to the Commission dated 21 August 2000 from the AMOU.

[106] The AMOU then advised that it had prepared draft submissions re the correct salary for the key classification to all the parties.[94]

[107] The MUA sent an email in which Mr Giddins advised that he had not "formed any decided view concerning the application of the Minimum Rates Adjustment process other than [he agreed] to the calculation of the overtime component and [he] would not oppose the suggested relativity of 107.5%." [95]

[108] In further correspondence to the Commission, Mr Giddins said "[he had] applied the minimum rates adjustment at clause 14 consistent with the methodology used in other Maritime Awards. [He had] also applied the reasoning from the Clerks Breweries Decision of VP Ross, this has resulted in a compression of relativities. [He had] also included certain notations with respect to the Wage Rates." [96]

[109] The reference to the Clerks Breweries Decision is a reference to the award simplification decision of Vice President Ross.[97] In that decision he set out the principles set by the Full Bench in the "Paid Rates Review decision."[98] The Commission was required to fix appropriate minimum rates by making a comparison between the rate for the key classification within the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach. The starting point was the relationship between the key classification in the award and the metal industry fitter and internal award relativities established, agreed or determined should be maintained. If there was any residual component above the identified minimum rate it was required to be identified and would not be subject to any further increases.

[110] On 31 July 2001 Mr Giddins provided to the Commission and the parties with a final draft of the simplified award which provided that "the wage rates have had the overtime component removed and included into the minimum rate as in the other maritime awards."[99] Perkins Shipping advised that they agreed with the proposed draft.[100] In transcript on 5 July 2001 Perkins Shipping made reference to the fact that Mr Giddins had provided a conversion to minimum rates.

[111] The final simplified award provided for a minimum salary for employees which included an overtime component. No residual amount was identified.[101]

[112] It is not possible to determine from the simplification review the overtime component of the wages in the simplified award; the key classification; what its relativity was; or what amount was determined, if any, to have regard to the nature of the industry.

Consideration

[113] It is clear the *Small Ships Award* and the *Seagoing Award* always had the potential for overlapping coverage. Despite the submissions of Sea Swift the predecessors to the *Seagoing Award* has since 1989 specifically covered vessels of less than 19000 tonnes.

[114] Sea Swift submitted that the rates of pay in the *Small Ships Award* were properly fixed minimum rates. However it is clear from the transcript of the proceedings before Commissioner Wilks in the 1999 review of the *Maritime Industry Seagoing Award 1983* that the conversion of the rates of pay in that award from paid rates to minimum rates also

involved the proper fixing of minimum rates. It is also clear that at all times that award applied to vessels of less than 19000 tonnes.

[115] The Full Bench in the award modernisation process had before it the *Small Ships Award*. Just because no party made submissions that the award continues it cannot be presumed that the Full Bench did not have regard to it. Further the Full Bench had before it detailed submissions from CSL Australia Pty Ltd[102] about the appropriateness of the relativities in the *Seagoing Award.*

[116] The Full Bench when publishing its exposure draft said as follows:

> "[117] CSL Australia Pty Ltd (CSL), submitted that some key features of the current pre-reform award are inappropriate. These include annualised rates comprehensive of overtime, certain penalties and the leave factor. The current award reflects the outcome of the award simplification process and includes features of predecessor awards that have applied in this industry for many decades. Annualised salaries comprehending a range of components and the lengthy periods of leave recognise the nature of an industry where seagoing employees are required to remain on a vessel even when they are not physically working. It is a unique working environment and these award provisions reflect that fact. At this stage we are not persuaded that we ought to depart from current provisions."[103]

[117] In response CSL filed additional submissions[104] in which it made detailed submissions about the appropriateness of the calculation of the aggregate rates of pay. There was no change to the position adopted by the Full Bench.

[118] Because of our decision in relation to the scope of the awards, these reasons only deals with the application to vary the *Seagoing Award* to include an additional classification for vessels under 5000 tonnes.

[119] The impact of our decision on the coverage of the awards means that some of the Sea Swift vessels will be covered by the *Marine Towing Award* 2010 or the *PHEWV Award*.

[120] We do not accept the submission that the decision of the Full Bench which made the *Seagoing Award* was in error in not including a small ships classification in the Award.

[121] We are satisfied that that Full Bench had before it not just the relevant federal awards but the state awards and state enterprise awards including the *Sea Swift Pty Ltd Enterprise Award – State 2005*.[105]

[122] We are satisfied that the starting point of our consideration is that the *Seagoing Award* met the modern award objective at the time it was made. We accept the submissions of Sea Swift that this is the prima facie position and it can be displaced. However, in addition to Sea Swift and AIMPE being required to satisfy us that the proposal meets the modern award objective, they must satisfy us that there are work value reasons for making the change proposed.

[123] We do not consider the submissions and evidence about Sea Swift's failure to engage in the award modernisation process or the two yearly review or the steps it took to avoid

federal award coverage are relevant to this application. This application must be determined on the merits of the case based on the evidence before the Commission.

[124] What is being sought in this application is a significant reduction in the minimum wages paid to employees who are engaged on vessels of less than 5000 tonnes. All employees engaged on the Sea Swift vessels that would remain covered by the *Seagoing Award* would be within the scope of the new proposed classification as all the vessels are less than 5000 dead tonne weight.[106]

[125] There is evidence before the Commission that the qualification requirements of employees except for general purpose hands varies depending on either the length of ship, the gross weight of the ship or the size of the engine.

[126] There is insufficient evidence before the Commission to support the proposition that those qualifications are different for a vessel below 5000 dead tonne weight and vessels over 5000 dead tonne weight but below 19,000 tonnes. For example a number of the Sea Swift vessels are over 24 metres in length but have a dead tonne weight below 5000 tonnes. It is clear that the qualifications for masters will be different for these vessels compared with a vessel of less than 24 metres. Further in relation to engineers no information about engine size is provided so it is not possible to make an assessment of the qualifications required of engineers.

[127] Further we do not accept the submission that the award modernisation process provided a substantial increase in wages for employees who worked on vessels of less than 5,000 dead weight tonnage. The predecessor awards to the *Seagoing Award* always applied for vessels operated by respondents to the award that were less than 19000 tonnes. To the extent that the making of the award increased the rates of pay for employees previously covered by transitional instruments this was addressed through the transitional provisions in the award.

[128] Further there were no submissions or evidence that the relativities fixed for the predecessor awards to the *Seagoing Award* were inappropriate. There was no evidence before us that the additional 10% applied having regard to the nature of the industry was no longer appropriate or not appropriate for vessels of less than 5000 dead tonne weight. Further there was no evidence about the amount of overtime worked such as to make the overtime component inappropriate.

[129] Despite the submissions before us in relation to the *Small Ships Award*, Sea Swift is not proposing a classification structure based on that award. Sea Swift propose that the new classification is up to 5000 dead weight tonnes and AIMPE is up to 6000 tonnes. This was not the delineation in the *Small Ships Award*.

[130] Sea Swift proposes rates from the *PHEWV Award* with no explanation as to why these are appropriate rates. We note that Sea Swift propose that if we agree that there should be a small ships classification we should ask the parties to confer for the purpose of reaching an agreed position. However we are unable to agree that this is the appropriate outcome as we are not satisfied on the evidence before us that the current classification structure is not appropriate. We do so, noting that the submissions of the Unions that despite the classification structure of the *Seagoing Award* being based on tonnage, the qualifications are not so simply categorised.

[131] We are unable, on the basis of the evidence before us, to conclude that there are work value considerations which mean that the rates of pay for persons who work on vessels of less than 5000 tonnes should be reduced. Insufficient evidence was put before us about the nature of the work; the level of skill and responsibility involved in doing the work; or the conditions under which the work is done to support on work value grounds a reduction in the minimum rate of pay. Further we are not satisfied that the current classification structure prevents the *Sea Going Award* from meeting the modern award objective.

[132] As such we dismiss the applications by Sea Swift and AIMPE to include a small ships schedule in the *Seagoing Award*.

VICE PRESIDENT

Hearing details:

2016.

Sydney.

24, 25 October.

Final written submissions

CSL Australia Pty Ltd on 10 June 2016

The Australian Institute of Marine and Power Engineers on 10 June 2016.

The Australian Maritime Officers' Union on 14 June 2016.

Sea Swift Pty Ltd on 12 December 2016.

The Maritime Union of Australia on 22 December 2016.

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[1] See [2015] FWCFB 620, [2014] FWCFB 1788, [2015] FWCFB 616, [2016] FWCFB 8025.
[2] [2016] FWCFB 651.
[3] MA000122.
[4] AP810149.
[5] *4 Yearly Review of Modern Awards; Preliminary Jurisdictional Issues* [2014] FWCFB 1788.
[6] Exhibit H6 at [17].
[7] Ibid at [18].
[8] Ibid.
[9] Ibid at [19].
[10] Ibid at [20].
[11] Ibid at [21].
[12] Ibid.
[13] Ibid at [22].
[14] Ibid at [23].
[15] Exhibit H3.
[16] Ibid at [6].
[17] Ibid.
[18] Ibid at [9].
[19] Ibid at [6].
[20] Ibid at [16].
[21] Ibid at [22].
[22] Ibid at [31]-[32].
[23] Ibid at [38].
[24] Transcript PN 76.
[25] Exhibit H3 at [43].
[26] Ibid.
[27] Exhibit K2 and Transcript PN 104-109.
[28] Exhibit K3 and Transcript PN120-121.
[29] Exhibit K3 and Transcript PN 126.
[30] Transcript PN 133-137.
[31] Ibid PN 173.
[32] Exhibit K3.
[33] Exhibit A4.
[34] Transcript PN 247.
[35] Ibid at PN 306 -308.
[36] Ibid PN 310.
[37] Exhibit K1.
[38] Transcript PN 144.
[39] Ibid at PN159.
[40] Exhibit H5 at BC4(A).
[41] Exhibit H2 at [52].
[42] Ibid at [9].
[43] Ibid at [53].
[44] Ibid at [54].
[45] Ibid at [55].
[46] Ibid at [56].

[47] Ibid.
[48] Ibid at [58].
[49] Ibid at PN 900.
[50] Ibid at PN 904.
[51] Ibid at PN 907.
[52] Ibid at PN 923.
[53] Transcript at PN 977.
[54] Ibid at PN 1063.
[55] Exhibit H2 at [59].
[56] Transcript PN 39-40.
[57] Submissions of Sea Swift 12 December 2016 at [9].
[58] [1989] 30 IR 81.
[59] Submissions of Sea Swift 12 December 2016 at [11]-[12].
[60] Ibid at [13].
[61] Ibid at [17].
[62] Ibid at [23].
[63] Ibid at [20].
[64] [2016] FWCFB 4418.
[65] Submissions of Sea Swift 12 December 2016 at [21].
[66] Exhibit H2 at [69]-[84] and PN 1058-1071.
[67] Exhibit N3 at [17].
[68] Ibid.
[69] Exhibit G1 at [6].
[70] [2016] FWCFB 651.
[71] Exhibit K4.
[72] Ibid at [24].
[73] Ibid.
[74] Ibid at [25].
[75] Ibid at [26].
[76] Ibid at [27]-[28].
[77] Ibid at [29].
[78] Ibid at [30]-[31].
[79] Ibid at [32].
[80] Supplementary submissions for the MUA 22 December 2016 at [2].
[81] Ibid at [3].
[82] Ibid [7].
[83] Exhibit A5.
[84] Ibid at [36].
[85] Ibid at [38].
[86] Ibid at [40].
[87] Exhibit F1 at [17]-[20].
[88] AP788080.
[89] AP8100149.
[90] Transcript 19 August 1999 C No. 00107 of 1998.
[91] Q7661.
[92] Print R1723.
[93] S9495 at [8]-[12].

[94] Letter to the Commission dated 14 September 2000.

[95] Email to the parties from MUA dated 4 December 2000.

[96] Letter to the Commission dated 7 June 2001.

[97] R9120.

[98] Ibid at [28]-[29].

[99] Email to the Commission from MUA dated 30 July 2001.

[100] Email to the Commission from Perkins Shipping dated 31 July 2001.

[101] PR908400.

[102] Submissions of CSL dated 6 March 2009 in AM2008/41.

[103] [2009] AIRCFB 450 at [117].

[104] Supplementary submissions of CSL 15 June 2009.

[105] [2009] AIRCFB 100 Award Modernisation Attachment A.

[106] Transcript PN 878-881.

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 2

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Maritime Union of Australia, The
v
Sea Swift Pty Ltd T/A Sea Swift; Australian Workers' Union, The; Transport Workers' Union of Australia; Australian Institute of Marine and Power Engineers, The; Australian Maritime Officers' Union, The
(C2015/6667)

Australian Maritime Officers' Union, The
v
Maritime Union of Australia, The; Sea Swift Pty Ltd T/A Sea Swift; Australian Workers' Union, The; Transport Workers' Union of Australia; Australian Institute of Marine and Power Engineers, The
(C2015/6668)

Australian Institute of Marine and Power Engineers, The
v
Sea Swift Pty Ltd T/A Sea Swift; Peter Domeneghini; Ramesh Bugatha; Nixon Pallon; Graham Stephens; Mike Dwyer; Don McAuley; Randy Manait; Kirby Canete; Bob O'Halloran; Lee Fitch; Brendan Jones; Jamie Leitner; Dave McCormack; Charlie Thomas; Gary Bowers; Australian Workers' Union, The; Australian Maritime Officers' Union, The; Maritime Union of Australia, The; Transport Workers' Union of Australia
(C2015/7388)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT SAMS
COMMISSIONER BOOTH

MELBOURNE, 8 FEBRUARY 2016

Appeal against decision [2015] FWC 6644 of Commissioner Simpson at Brisbane on 30 October 2015 in matter number AG2015/2789 – Whether in public interest to grant permission to appeal – Determination of the correct modern award for the purposes of the better off overall test – Genuineness of agreement reached – Fair Work Act, ss. 185, 186, 193, and 604 – Fair Work Regulations 2009, regulation 2.06.

Introduction

[1] This decision concerns an application by the Maritime Union of Australia (MUA), the Australian Maritime Officers' Union (AMOU), and the Australian Institute of Maritime and Power Engineers (AIMPE) for permission to appeal and an appeal against the decision of Commissioner Simpson handed down on 30 October 2015. The proceedings before the Commissioner related to an application by Sea Swift Pty Ltd (Sea Swift) for the approval of an enterprise agreement known as the *Sea Swift Pty Ltd Employee Enterprise Agreement* (the Agreement)

[2] A central issue in the matter before the Commissioner was the identification of the relevant modern award for the purposes of the Better Off Overall Test (BOOT) required to be applied by s.193 of the *Fair Work Act 2009* (the Act). The appeals lodged by the unions relate to a conclusion drawn by the Commissioner that the relevant modern award for the marine operations of Sea Swift was the *Ports, Harbours and Enclosed Water Vessels Award 2010* (the Ports and Harbours Award), rather than the *Seagoing Industry Award 2010* (the Seagoing Award).

[3] The unions also challenge the Commissioner's conclusion that the employees genuinely agreed to the Agreement in circumstances where senior management was appointed as an employee bargaining representative.

[4] At the hearing of the appeals on 12 January 2016, Mr S. Reidy of counsel appeared on behalf of the MUA and the AMOU, Mr N. Keats of counsel appeared on behalf of AIMPE, and Mr A. Herbert of counsel appeared on behalf of Sea Swift.

Background

[5] An application was made by Sea Swift for the approval of the Agreement on 22 May 2015. Five unions gave notice in accordance with s.183 of the Act that they wished to be covered by the Agreement. The AWU filed a statutory declaration in support of the approval of the Agreement. The MUA, the AMOU, and the TWU all opposed the approval of the Agreement, while the AIMPE filed a statutory declaration in relation to the Agreement in which it indicated that it supported its approval but raised significant concerns in relation to it.

[6] The appeals are confined to the following two issues in relation to the Commissioner's decision.

[7] The first issue in dispute between the parties was the application of the appropriate modern award to be applied for the purposes of the BOOT. Sea Swift submitted that the Ports and Harbours Award was the relevant award to be applied. The MUA, the AMOU, and the AIMPE contended that the Seagoing Award was the appropriate comparator award to be applied for the purposes of the BOOT.

[8] The unions submitted before the Commissioner that upon examination of the coverage clause of the Seagoing Award and its origins, and also in light of the class of vessels involved, the safety arrangements in place, the crewing structure and classifications specially provided for, the extensive open water operations, and the swing and living arrangements of its employees, it was evident that Sea Swift and its marine employees are involved in the

seagoing industry. The unions therefore contended that the Seagoing Award was the proper comparator award. Sea Swift submitted that applying a plain and objective meaning to the words actually used, in context, and having regard to the evident purpose of the Seagoing Award, it was clear that the unions' submissions in relation to the coverage of the Seagoing Award ought be rejected.

[9] In relation to this issue, the Commissioner concluded as follows:

"**Consideration**

[77] In determining the appropriate Award for the purposes of the BOOT, I am required to consider the ordinary meaning of the words used in the relevant awards, read as a whole and in context.

[78] Sea Swift is principally involved in the transport and distribution of freight and supplies to a number of destinations in Far North Queensland, Cape York Peninsula, the Gulf of Carpentaria and Torres Strait Island communities. The nature of its marine operations can be characterised as being relatively unique as it provides larger shipments of cargo from areas such as Cairns, to be distributed to relatively remote areas such as in North Queensland, the Northern Territory and Torres Strait. The nature of these operations is such that the Applicant utilises vessels of varying sizes and capacity, from long-haul ships to small self-propelled vessels. As the business operates vessels of all sizes and capacities, it would be inaccurate to describe the company as traditional 'blue water' or 'deep water' shipping company. It is worth noting approximately half the workforce is land based and are not engaged in marine based roles.

[79] On first glimpse the SGI Award's intended coverage is plainly stated in that it simply covers employers "*engaged in the operation of vessels… which, in the course of such trade or operation, proceed to sea on voyages outside the limits of bays, harbours or rivers"*.

[80] As pointed out by the Applicant, there is more to consider and it is a combination of the inclusive and exclusive provisions of the SGI Award (clause 4.4(d) that are instructive as to the intended coverage of the award. Upon reading clause 4.4 it is apparent that as only one of the Awards outlined in clause 4.4(d) of the SGI Award can potentially apply to Sea Swift the potential coverage of each ought to be considered. In the present case, it is a question of whether the PHEWV Award provides the appropriate coverage to Sea Swift's marine operations.

[81] It becomes necessary to consider whether the primary nature of Applicant's marine operations fall within or substantially within the coverage of the PHEWV Award.

[82] A key question that is in dispute is whether the Applicant's marine operations can be described as falling within the intended meaning of the 'the operation of vessels within a port harbour or <u>other body of water within the Australian coastline, or at sea on activities not covered by other awards</u>' [emphasis added].

[83] The evidence given by Mr O'Halloran in relation to the nature of the Applicant's marine operations was largely uncontested by the unions and I accept Mr O'Halloran's evidence in relation to the nature of Sea Swift's operations.

[84] Mr O'Halloran's evidence shows that a significant portion of the Applicant's marine operations are conducted within locations that are clearly intended to be covered by the PHEWV Award, being in ports and harbours. It is also apparent from the evidence that a significant portion of Sea Swifts vessels operate at times outside the confines of ports and harbours but inside the territorial baseline.

[85] I am persuaded by the Applicants argument that Australia's internal waters on the landward side of a territorial baseline, fall within what was intended by the Full Bench to be caught by the expression "or other body of water within the Australian coastline". The logic is compelling; given the territorial baseline is by force of law effectively the Australian coastline. The Applicant's marine vessels when operating within the territorial baseline are for much of the time in relatively shallow waters and within sight of the Australian coast.

[86] It is implicit in accepting that waters within the territorial baseline were intended by the Full Bench to be fall inside the definition of "or other body of water within the Australian coastline", that I do not accept the argument that the term "within" was intended by the Full Bench to simply mean within a "coastline", that being a point where lands meets water, and any water beyond that point (i.e internal waters) is the sea, and therefore is not an "other body of water within the Australian coastline".

[87] The Applicant has also argued that the bodies of water surrounding the islands of the Torres Strait are also intended to be included within the meaning of the expression "or other body of water within the Australian coastline". The Applicant set out that in the Torres Strait barges visit the islands in regular runs, land on a sheltered beach/and or within lagoons or fringing reefs, and often anchor nearby in the lee of such islands. It was said the territorial baseline does not commence at the shoreline, but at the closing line of the bay or lagoon or reef connected to the island.

[88] The evidence in Mr O'Halloran's statement demonstrates by reference to the operations that occur in internal waters alone (being ports, bays, harbours, and or behind straight baselines) all but one of the operating vessels of the employer spend either the whole, or at least the substantial majority, of their operating hours each week, in waters referred to in the PHEWV Award.

[89] The definition of the seagoing industry as set out in clause 3.1 of the SGI Award contains the phrase "proceeds to sea (on voyages outside the limits of bays, harbours or rivers)". [emphasis added] The term voyage is not contained in the PHEWV Award and the use of the term in the SGI Award provides assistance in the proper construction of the Award.

[90] The Oxford Dictionary within its definition of the word 'voyage' includes "a long journey involving travel by sea or in space". The Macquarie Dictionary definition of the term 'voyage' includes "a passage, or course of travel, by sea or water, especially to a distant place".

[91] The term 'voyage' does not sit neatly with the shorter relays that are part of the regular transhipping through a number of ports, harbours or locations of the like visited by the Applicants vessels. Further, the words "*(on voyages outside the limits of bays, harbours or rivers)*" which qualify the words "*proceed to sea*" indicate the substantial part of the voyage is '*at sea'*, until the voyages conclusion when it reaches its destination. The evidence of Mr O'Halloran demonstrates the clear majority of operational hours of the Applicants vessels are inside Australian internal waters, close to the coast or an island, and often involve movement in and out of waters described in the PHEWV Award. When considered in the full context of the SGI Award, the use of term 'voyage' supports the Applicant's view that the SGI Award is intended to cover vessels that (usually) embark on substantial, deep water journeys at sea and is not intended to cover a business of the nature of the Applicant.

[92] It was not intended by the Full Bench that the SGI Award cover any vessel that 'proceeds to sea' as a feature or part of its operation. The nature of that award is such that the provisions of the PHEWV Award must also be considered, and in the present circumstances, a significant portion of the Applicant's operation can be considered to fall within the coverage intended by the PHEWV Award. The Applicant's operations substantially or wholly fall within bays and other types of enclosed waters, and in circumstances where its vessels proceed outside of those enclosed waters, they for the main remain in waters that are within the meaning of 'other body of water within the Australian Coastline'.

[93] There are also circumstances where the Applicant's vessels do in fact venture into sea, and those circumstances were foreshadowed by the Full Bench in their inclusion of the phrase "or at sea on activities not covered by other awards". On the evidence, I am satisfied that the SGI Award does not cover the Applicant's marine operations, and on that basis, any instance that their vessels are at sea is still intended to be covered by the PHEWV Award.

[94] There was considerable material put before me, including in the evidence of Mr Farrelly in regard to the SGI Award previously being relied upon for the purpose of applying the BOOT as part of the approval process of previous enterprise agreements made with other employers since the commencement of Modern Awards. The Unions and the Applicant produced examples which they claimed supported their differing interpretations of the Awards. I have placed little weight on this material in arriving at my conclusions as firstly, in the examples referred to by both the Applicant and the Unions, the businesses of the particular employer are not directly comparable to that of the Applicant, which is a business that is quite unique given what it does and where it operates. Secondly, none of these matters involved a contested proceeding resulting in a decision issued by the Commission with reasons addressing the same matters as the nature of the matters before me.

[95] For all of the above reasons, I am satisfied that, in accordance with s.193 of the Act, the Ports, Harbours and Enclosed Water Vessels Award 2010 is the appropriate Award to be applied to the Applicant's marine operations for the purposes of the BOOT."

[10] The second issue in dispute between the parties was in relation to the role of Sea Swift senior managers as bargaining representatives for the Agreement. It was submitted by the

unions that managerial staff who acted as bargaining representatives could not be free from control by the employer or free from improper influence when acting in that capacity, as is required by regulation 2.06 of the *Fair Work Regulations 2009*. Sea Swift submitted that there was no evidence to support the unions' submission that this caused the Agreement not to be genuinely agreed. The Commissioner agreed with Sea Swift in this respect and he concluded that this contention provided no basis upon which to find that the Agreement was not genuinely agreed.

[11] The Commissioner addressed the other requirements for approval in a decision handed down on 30 October 2015.

Grounds of Appeal

[12] In relation to the issue concerning the application of the appropriate comparator award to the BOOT, the unions allege that the Commissioner erred in concluding that the Ports and Harbours Award was the relevant modern award for the purposes of the BOOT, and that the Seagoing Award does not cover Sea Swift's marine operations. The unions contend that the Commissioner erred in the following respects:

- concluding that the question of whether Ports and Harbours Award or the Seagoing Award was the relevant modern award came down to a consideration as to whether the Ports and Harbours Award provides for the appropriate coverage to Sea Swift marine operations when clause 4.1 of the award provided that it does not cover employers and employees wholly or substantially covered by the Seagoing Award when it was not disputed that the vessels of Sea Swift either entirely or almost entirely proceed to sea;
- concluding that the word "voyage" in the Seagoing Award does not sit neatly with the shorter relays that are part of the regular transhipping through a number of ports, harbours or locations visited by Sea Swift vessels;
- concluding that the words "proceed to sea" in the Seagoing Award are intended to cover vessels that embark on substantial, deep water journeys at sea;
- concluding that it was not intended by the Full Bench that the Seagoing Award cover any vessel that "proceeds to sea" as a feature of its operations when that is the clear and ordinary meaning of the words used in the Seagoing Award;
- concluding that evidence showed that a significant portion of Sea Swift's marine operations are conducted within locations that are clearly intended to be covered by the Ports and Harbours Award;
- concluding that Australian internal waters on the landward side of a territorial baseline fell within what was intended by the Full Bench to be caught by the expression "or other body of water within the Australian coastline" in the Ports and Harbours Award;
- concluding that the territorial baseline is by force of law effectively the Australian coastline;
- failing to give the word "coastline" in the Ports and Harbours Award its ordinary meaning; and
- failing to have regard to how the industry participants have considered the operation of the Seagoing Award in consent applications for the approval of agreements before the Commission and its predecessors.

[13] It was also submitted by the unions that the Commissioner erred in concluding that employees genuinely agreed to the Agreement in circumstances where senior management were appointed as bargaining representatives and therefore were not free from employer control influence or improper influence as required by regulation 2.06 of the *Fair Work Regulations 2009*.

The Nature of the Appeal

[14] One of the general approval requirements in s.186 of the Act is that the Commission is satisfied that the agreement passes the BOOT. Section 193 requires the BOOT to be applied by a comparison between the benefits under the agreement and those under the relevant award. The determination of the relevant award is not a discretionary decision. An appeal against such a decision requires the appeal bench to determine whether the Commissioner reached the right conclusion as to the relevant award that would apply to the employees if the agreement does not apply. The appeal bench cannot determine the appeal by simply considering whether the decision was reasonably open to the Commissioner.[1]

Permission to Appeal

[15] The unions submit that that it is the public interest for the Commission to grant permission to appeal as the appeal involves the determination of important questions of the construction of the Ports and Harbours Award and the Seagoing Award, and the conduct of future enterprise bargaining in the maritime industry. This includes questions about the coverage of the awards, their applicability to employees engaged in a particular type of seafaring work, and the application of the awards to the BOOT.

[16] The unions also submit that the appeal raises further questions about the application of regulation 2.06 contained in the *Fair Work Regulations 2009*.

[17] Sea Swift raised no submissions in relation to the question of permission to appeal in relation to the correct comparator award and BOOT issue. However, in relation to the issue concerning the alleged bargaining representative error it submitted that the public interest is not enlivened in any way. Sea Swift submitted that the issue turned entirely upon its own facts, that the decision based on the evidence available was open to the Commissioner, and there is no basis on which to assert that there is any reasonable suspicion that the clear discretion that the Commissioner had in that regard has miscarried or has otherwise been in error.

[18] In our view, it is in the public interest that permission to appeal be granted in relation to the BOOT grounds because the appeal raises a contentious issue of fundamental importance to the proper application of the statutory test. The grounds relating to bargaining representatives are also somewhat novel and the circumstances are quite unusual. We are prepared to grant permission to appeal on those grounds also as some clarification of the operation of the applicable provisions of the Act may be desirable.

The Relevant Award

[19] The determination of the relevant award for the purposes of the BOOT requires a consideration of the coverage clauses of the respective instruments applied to the relevant

evidence. As the awards are industry and not occupational awards the crucial evidence will be that concerning the operations of the employer.

[20] The principles for interpreting award provisions are not in dispute. The parties accepted that the following approach articulated by Madgwick J in *Kucks v CSR Limited*[2] applies:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind; they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.
>
> But the task remains on of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."

[21] In *Re Andrew John Short v FW Hercus Pty Ltd*[3] Burchett J said:

> "Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language. "Sometimes, McHugh J. said in *Saraswati v. R [1991] HCA 21; (1991) 172 CLR 1 at 21*, the purpose of legislation "can be discerned only by reference to the history of the legislation and the state of the law when it was enacted". Awards must be in the same position."

[22] The coverage clauses are supplemented by definitions. Each coverage clause contains exclusions. The entire clauses need to be considered. Clause 4 of the Seagoing Award provides:

> "**4. Coverage**
>
> **4.1** This industry award covers employers which are engaged in the seagoing industry and their employees in the classification listed in clause 13 and clause 25—Classifications and minimum wage rates to the exclusion of any modern award.
>
> **4.2** This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of

work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

4.3 This award covers employers which provide group training services for trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

4.4 Exclusions

This award does not cover:

(a) employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;

(b) employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;

(c) an employee excluded from award coverage by the Act;

(d) employers covered by the following awards:

(i) the *Coal Export Terminals Award 2010*;
(ii) the *Dredging Industry Award 2010*;
(iii) the *Marine Towage Award 2010*;
(iv) the *Maritime Offshore Oil and Gas Award 2010*;
(v) the *Port Authorities Award 2010*;
(vi) the *Ports, Harbours and Enclosed Water Vessels Award 2010*;
(vii) the *Stevedoring Industry Award 2010*; or

(e) maintenance contractors covered by the *Manufacturing and Associated Industries and Occupations Award 2010.*

4.5 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage."

[23] The term "seagoing industry" is defined in clause 3 as "the operation of vessels trading as cargo vessels, passenger vessels or operated as Research vessels which, in the course of

such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers)."

[24] In order to fall within the Seagoing Award, Sea Swift must be found to be engaged in the seagoing industry, as defined, and not covered, for relevant purposes, by the Ports and Harbours Award.

[25] The coverage clause of the Ports and Harbours Award is as follows:

"**4. Coverage**

4.1 This award covers employers throughout Australia in the ports, harbours and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the *Maritime Offshore Oil and Gas Award 2010*;
(b) the *Seagoing Industry Award 2010*;
(c) the *Port Authorities Award 2010*;
(d) the *Dredging Industry Award 2010*;
(e) the *Stevedoring Industry Award 2010*;
(f) the *Marine Towage Award 2010*; and
(g) the *Marine Tourism and Charter Vessels Award 2010*.

For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means 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.

4.2 The award does not cover maintenance contractors covered by the following awards:

(a) the *Manufacturing and Associated Industries and Occupations Award 2010*; or
(b) the *Electrical, Electronic and Communications Contracting Award 2010*.

4.3 The award does not cover employees of a local government covered by another award.

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[New 4.6 and 4.7 inserted by PR994513 from 01Jan10]

4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the

meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

4.7 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

[4.6 renumbered as 4.8 by PR994513 from 01Jan10]

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage."

[26] In order to fall within the scope of the Ports and Harbours Award, Sea Swift must be held to be involved in the operation of vessels 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 specified awards) and not wholly or substantially covered, relevantly, by the Seagoing Award.

[27] The task of interpreting the relevant award when the Seagoing Award and the Ports and Harbours Award are in contest requires a consideration of the substantive provisions and the exclusions in both awards. This essentially requires a consideration of four inter-related questions based on the evidence in the matter.

[28] The evidence concerning Sea Swift's operations is not in dispute. It is convenient that we refer to the following summary of that evidence in the Commissioner's decision:

"**Sea Swifts Marine Operations**

[16] Robert O'Halloran, Fleet Master of Sea Swift Pty Ltd, provided evidence in relation to the Applicant's operations. Much of Sea Swift's operations principally involve the transport and distribution of freight and supplies to a number of destinations in Far North Queensland, Cape York Peninsula, the Gulf of Carpentaria and Torres Strait Island communities. Sea Swift's Northern Territory operation based in Darwin service Gove, Groote Eylandt and remote Arnhem Land coastal communities. Many of the landing points in these remote communities are simply ramps or the nearby beach, where there is no dedicated wharf or jetty.[4]

[17] The Applicant submitted that Sea Swift has a diversified fleet of vessels comprising a number of barges (both self-propelled and non-self-propelled), tugs and lighters and larger freight/passenger vessels (line-haul).[5]

[18] The Applicant set out the various vessels in the fleet, their tonnage and speed. A summary of the fleet is as follows:

- 7 tugs
- 7 non-self-propelled barges (which are pushed or towed by tugs)
- 9 self-propelled barges (landing craft)
- 2 line-haul vessels ("MV Trinity Bay" and the "MV Newcastle Bay")
- 2 Fishery Support vessels (The "Endeavour Bay" and "Kestrel Bay") [6]

[19] The Applicant submitted that the two line haul vessels, the MV Trinity Bay and the MV Newcastle Bay are the principal freight/cargo vessels operating in and out of Cairns and distributing freight to Sea Swift facilities in Cape York and Port Kennedy, where Sea Swift tranship the freight onto landing barges which distribute freight and supplies to the outports throughout the Torres Strait.[7]

[20] Furthermore, the Endeavour Bay and Kestrel Bay vessels perform mother-shipping functions for the trawler prawn and fishing fleet in the Gulf of Carpentaria and from Cairns to York Island in the Torres Straits. These vessels generally anchor in quiet sheltered waters in bays or inlets or in the lee of islands, reefs, or headlands to rendezvous with the fishing vessels so as to provide smooth sea conditions for the transfer of the catch from the trawler to the mother-ship and for the replenishment of the trawlers with fuel and supplies.[8]

[21] MV Trinity Bay carries freight and cargo and up to 30 passengers and operates from Cairns to Horn Island, Thursday Island, Seisia and return.[9]

[22] Both Trinity Bay and Newcastle Bay travel for the whole of their operations either "inside" the Great Barrier Reef (between the reef and the Queensland Coast), or "inside" the Gulf of Carpentaria and Albatross Bay. A substantial part of the steaming distance travelled on their regular journeys is also within Australian internal waters (as defined in the *Sea and Submerged Lands Act 1973* as well as the United Nations Convention on the Laws of the Sea.[10]) in Albatross Bay, on the East Coast of Cape York and in Torres Strait waters.

[23] The Applicant provided a schedule setting out a breakdown of a typical week depicting the amount of time spent and distances travelled in performing various functions concerned with the operation of the vessels.[11] All loading and unloading and downtime during operational periods within those journeys[12] occurs in ports, harbours and/or internal waters, except in the case of the eastern route for the Torres Strait vessels, where the remote loading and unloading operations occur on a beach, ramp, or wharf at the island or community in question, which is invariably in a small bay or lagoon or other sheltered part of the coast of the island or community. In the case of down time on that route (e.g. overnight anchoring to allow for crew rest or to wait for tide or weather changes), this invariably occurs in closed and/or sheltered waters in small bays or lagoons very close by those settlements which may not be declared internal waters, but which are in the lee or the protection of Australian islands or reefs and in sheltered areas adjacent to Australian islands.[13]

[24] It was said that Sea Swift's marine operations are wholly conducted in what are regarded as "inshore waters" and in maritime terms the company is considered as a

> "non-blue water" shipping company. Furthermore, operations take place within sight of land up to a maximum of approximately 15 nautical miles off the coast of Queensland and/or Northern Territory. The journeys are either entirely or almost entirely within Australian Territorial waters (12 nautical miles from the territorial baseline) and most of them are wholly or substantially within Australian internal waters, that is, inside the Australian territorial baseline where that line crosses water. All of the ports visited are in Australia.[14]
>
> **[25]** The Applicant submitted that all of Sea Swift's vessels are of a small scale compared to vessels that would usually operate on a seagoing venture. None of the barges would be fit for an open ocean voyage, and even the line-haul vessels are very small by sea-going standards. This size restriction is a direct consequence of the nature of the sheltered, shallow and reef-strewn waters in which they must travel in some or all of their voyages."

[29] The first question is whether the operations fall within the substantive provision of the Seagoing Award. In our view, Sea Swift operates vessels trading as cargo vessels which in the course of their operation proceed to sea on voyages outside the limits of bays, harbours or rivers. The term "sea" is commonly understood. It is essentially a continuous body of salt water that surrounds the Earth's land masses. Once the vessels leave the coastline and travel up the coast, they are essentially at sea within this normal conception. In our view, it is irrelevant that there may be reefs, islands or Australian territorial waters beyond the routes taken around the coastline.

[30] It cannot be disputed that the voyages of the Sea Swift line haul vessels travel outside the limits of bays, harbours and rivers. Even though the line haul vessels travel near the coastline and there are some geographical parts of the coastline that have been termed bays, the voyages are not within such bays or harbours. In our view, they are properly described as voyages along the coastline in the open sea, or in the words of the definition, in the course of cargo vessel trade they proceed to sea.

[31] The second question is whether the exclusion to the Seagoing Award applies. The exclusion is of employers covered by the Ports and Harbours Award. The answer to this question depends on the combined answers to the third and fourth questions.

[32] The third question is whether the substantive definition of the Ports and Harbours Award applies. It is accepted by all parties that the activities of the line haul vessels cannot be said to be outside the coverage of the Seagoing Award. Therefore the single question is whether the Sea Swift operations are wholly or substantially within a port, harbour or other body of water within the Australian coastline. In our view, the operations of the line haul vessels cannot be so described. By travelling off the coast and delivering cargo to various ports along the coastline the vessels are not wholly within a port, harbour or other body of water within the coastline.

[33] In our view, it is not relevant whether the waters are Australian territorial waters, whether they are inside the Australian territorial baseline, that the vessels are not large seagoing vessels suitable for more lengthy blue water voyages or that the voyages take place within 15 nautical miles off the coast. Once the vessel leaves the coast it is by definition no longer in a port, harbour or body of water within the Australian coastline. We reject the argument advanced by Sea Swift that the nature of the waters near the coastline or their

categorisation in some respects as within the territorial baseline warrants these parts of the coastal waters to be treated as if they were waters within the coastline. We also reject the argument that evidence of time spent within certain types of waters, based on such expanded concepts advances the matter any further. In our view, the substantive definition of the industry covered by the Ports and Harbours Award does not apply.

[34] Although it is not strictly necessary to refer to the exclusion in the Ports and Harbours Award, we note that in any event it does apply because Sea Swift is wholly or substantially covered by the Seagoing Award.

[35] It follows from our conclusions on the third and fourth questions that the exclusion in the Seagoing Award does not apply. Putting these conclusions together, we find that the Seagoing Award is the relevant award for the application of the BOOT and the approval process for the Agreement.

[36] As we have reached a different conclusion to the Commissioner as to the relevant award for the purposes of the BOOT, we allow the appeal and quash the Commissioner's decision in this regard.

Genuine Agreement

[37] Regulation 2.06 of the *Fair Work Regulations 2009* requires that a bargaining representative of an employee should be "free from control by the employee's employer" and "free from improper influence from the employee's employer". The unions submit that the appointment of Lee Fitch, Northern Territory Marine Manager, as an employee bargaining representative lacks independence and casts doubt over whether the requirement that employees have genuinely agreed to the Agreement has been met. The unions refer to the fact that Mr Fitch conducted meetings with the employees to explain the terms of the Agreement as both the Northern Territory Marine Manager and an employee bargaining representative, prior to the vote. They also refer to minutes of the bargaining meetings which they allege demonstrate a lack of independence on Mr Fitch's behalf.

[38] The Commissioner concluded as follows in relation to this point:

> **"[146]** The context overall in this case is that five Unions were bargaining representatives and 23 individual employees were nominated as employee bargaining representatives. I am not satisfied the evidence on the particular facts of this case regarding the role of either Mr Fitch participating in the making of the Agreement as an employee bargaining representative whilst holding a management role, or the role played by Mr O'Halloran (albeit not as an appointed bargaining representative) is a basis to conclude the Agreement was not genuinely agreed."

[39] The unions submit that, once appointed as an employee bargaining representative, Mr Fitch was required to be genuinely independent regardless of his level of involvement in bargaining. They also submit that it is irrelevant that there is no evidence that any employee changed their vote as a result of Mr Fitch's role as employee bargaining representative.

[40] Sea Swift submits that that there is no evidence that any employee changed their vote as a result of Mr Fitch's role as employee bargaining representative. It contends that it is unreasonable to suggest that in the absence of any further or other evidence, the appointment

of Mr Fitch as an employee bargaining representative could have infected the results of the vote which was substantially in favour of the Agreement.

[41] The decision of the Commissioner in this respect was a discretionary decision. It appears to us that the Commissioner considered the relevant arguments, addressed the correct question and reached a conclusion based on all of the circumstances. He did not take into account any extraneous considerations or fail to consider relevant considerations. In our view, the unions have failed to establish any appealable error in the Commissioner's decision. We dismiss the appeal in respect of this ground.

Conclusions

[42] We grant permission to appeal with respect to the two aspects of the Commissioner's decision subject to this appeal. As to the determination of the relevant award for the purposes of the BOOT we allow the appeal, quash the decision of the Commissioner and remit the matter back to Commissioner Simpson to finalise the approval process on the basis of our decision in this appeal. As to the second challenge to the part of the decision concerning the genuineness of the agreement we dismiss the appeal.

VICE PRESIDENT

Appearances:

Mr S. Reidy of counsel on behalf of the MUA and the AMOU.
Mr N. Keats of counsel on behalf of AIMPE.
Mr A. Herbert of counsel on behalf of Sea Swift.

Hearing details:

2016.
Brisbane.
12 January.

Final written submissions:

MUA and the AMOU on 14 December 2015.
AIMPE on 14 December 2015.
Sea Swift on 8 January 2016.

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[1] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at 127 per Gummow J; *Pawel v Australian Industrial Relations Commission* [1999] FCA 1660 at 16.

[2] (1996) 66 IR 182.

[3] [1993] FCA 51.

[4] Exhibit 2 Statement of Robert O'Halloran at pp.3-5.

[5] Ibid.

[6] Ibid.

[7] Ibid at p.6.

[8] Ibid at p.7.

[9] Ibid at p.10.

[10] Ibid at p.12.

[11] Ibid attachment D.

[12] Exhibit 2 Statement of Robert O'Halloran Attachment D.

[13] Ibid at p.16.

[14] Ibid at p.19.

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 3

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6 March 2009 Our Ref:WGMc:NK:TM:901019

The Industrial Registrar
Australian Industrial Relations Commission
GPO Box 1994
MELBOURNE VIC 3000

By email: amod@air.gov.au

Dear Registrar,

RE: PORT HABOUR AND ENCLOSED WATER VESSELS AWARD 2010
AM2008/49 and AM2008/41

We are the lawyers for the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers.

We enclose our submissions for the making of a modern award known as the "Port Harbour and Enclosed Water Vessels Award 2010".

We will be attending the public consultations on 19 and 27 March 2009.

Yours faithfully,
W.G. McNALLY JONES STAFF

BILL McNALLY
E-mail: bill@mcnally.com.au

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation

Port and Harbour Services

(AM2008/49)

Maritime

(AM2008/41)

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

AND

THE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS

IN SUPPORT OF THE MAKING OF THE

PORT HARBOUR AND ENCLOSED WATER VESSELS AWARD 2010

Introduction

1. It is submitted that the Commission should make the Port Harbour and Enclosed Water Vessels Award 2010 in accordance with attachment "A" to these submissions. ("Modern Award")

2. **Coverage**

This Modern Award is expressed to cover employers in the Port, Harbour and Enclosed Water Vessels Industry and their employees. The industry is defined as "employers engaged in or in connection with vessels."

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REF: WGM:NK:TM:811066

3. The award replaces the following instruments:

AIRC Industry	Publication Title	Pub ID
Port and harbour services	Port Services Award 1998	AP792489
Maritime industry	Ketches & Schooners Award	AN150068
Maritime industry	Shipping Award	AN170095
Port and harbour services	Deckhands (Passenger Ferries, Launches and Barges) Award	AN160097
Port and harbour services	Masters, Mates and Engineers Passenger Ferries Award	AN160199
Port and harbour services	Marine Charter Vessels (State) Award	AN120330
Port and harbour services	Motor Boats and Small Tugs (State) Award	AN120350
Port and harbour services	Motor Ferries State Award	AN120351
Port and harbour services	Wire Drawn Ferries (State) Award	AN120650
Port and harbour services	Masters and Engineers' Award - Port of Brisbane 2003	AN140164
Port and harbour services	Masters, Mates and Engineers' Award, Motor Vessels 2500 B.H.P./1866 KW.B.P. and Under -	AN140165

	State (Excluding The Port of Brisbane) 2003	
Port and harbour services	Port Authorities Award - State 2003	AN140213
Public Transport Industry	Stradbroke Ferries Pty Ltd Enterprise Award 2005	AN140280
Tourism industry	Whitsunday Charter Boat Industry Interim Award - State 2005	AN140315
Maritime industry	Maritime Award - Brisbane River and Moreton Bay 2003	AN140163
Maritime industry	North Queensland Boating Operators Employees Award - State 2003	AN140190

4. We have not included in this modern award:

a. Provisions contained in pre-reform enterprise awards (including NAPSAs).

b. Provisions contained in long service leave awards;

c. Provisions contained in Victorian minimum wage orders;

d. Provisions contained in superannuation awards.

e. In AM2008/49 we have sought a modern award known as "Dredging Industry Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i) Dredging Industry (AWU) Award 1998 – AP778702

ii) Marine Engineers (Non Propelled) Dredge Award 1998 – AP788027

iii) Maritime Industry Dredging Award 1998 – AP787991

f. In AM2008/49 we have sought a modern award known as "Tug Industry Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i) Tug and Barge Industry (Interim) Award 2002 – AP824200

ii) Tug Boat Industry Award 1999 – AP799111

g. In AM2008/41 we have also sought a modern award known as "Seagoing Industry Award 2010" The provisions contained the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i) Maritime Industry Seagoing Award 1999 – AP788080

h. In AM2008/49 we have sought a modern award known as "Port Authorities and Port Construction Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i) Maritime Union of Australia (Ship Services) Award 2002 AP816677

ii) New South Wales Port Corporations Award 1999 AP791641

iii) Ports of Victoria Consolidated Administration Award 1998 - AP792487

iv) Queensland Regional Port Authorities and Corporations Employees Interim Award 2000 - AP794137

v) Regional Port Authority Officers' (Queensland) Award 1999 - AP794800

vi) Tasmanian Ports Corporations Award 2002 - AP819542

vii) Victorian Port and Harbour Services Consolidated Operational Award 1998 AP802100

i. In AM2008/49 we have sought a modern award known as "Stevedoring Industry Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i) Stevedoring Australian Vocational Training System Award 2000 - AP796383

ii) Stevedoring Industry Award 1999 - AP796113

j. In AM2008/49 we have sought a modern award known as "Port Authorities and Port Construction Award 20." The provisions in the following NAPSAs have been incorporated into that award rather than this modern award

i) Port Stanvac Award AN160199

ii) Marine Stores Award AN160199

5. We have not included the Self-Propelled Barge and Small Ships Industry Award 2001 which is referred to in the Full Bench Statement dated 30 January 2009 for the Maritime Industry. It only applies to Perkins Shipping Group;

6. We have not included the Bulk Terminals Award - State 2003 - AN140048 which is referred to in the Full Bench Statement dated 30 January 2009 for the Port and Harbour Services Industry as it only applies to Queensland Sugar Limited;

Terms of the Modern award

7. The table below sets out the source of each of the terms of the Modern Award.

Clause	**source**
Clause 1 – Title -	New
Clause 2 – Commencement date	AIRC template

Clause 3 – Definitions and interpretation	1. Definitions of Act, employee, employer, enterprise award and NES are from the AIRC template; 2. Definitions of Bunker Barge, Shipkeeper, Small Tug and Winch Driver are from clause 2 of the Motor Boats and Small Tugs(State) Award 3. Definitions of Ferry Engine Driver are from clause 2 of the Wire Drawn Ferries (State) Award. 4. Definitions of Non self-propelled bunker barge, and Self-propelled bunker barge are from clause 5 of the Port Services Award 1998 5. Definitions of Port and Vessel are from the Navigation Act 1912.
Clause 4-coverage of the award	New clause
Clause 5-access to the award and the NES	Model provision
Clause 6 – NES and this award	Model provision
Clause 7 – award flexibility	Model provision
Clause 8 – consultation	Model provision
Clause 9 – dispute resolution	Model provision
Clause 10 – types of employment	New clause with casual loading set at 25%.
Clause 11 – Employer and employee duties	New clause
Clause 12 – termination of employment	1. Used the model clause. 2. Return to place of engagement added from: a. Master and Engineers' Award - Port of Brisbane 2003 b. masters, Mates and Engineers' Award, Motor Vessels 2500 B.H.P./1866 KW.B.P. and Under - State (Excluding The Port of Brisbane) 2003
Clause 13 – redundancy	Model provision
Clause 14 – minimum	From Part B of Motor Boats and Small Tugs (State) Award except

wages	for the classification of master which is from the Port Services Award
Clause 16 – Allowances	1. Clause 16.1 is from clause 10.5 of Masters and Engineers' Award - Port of Brisbane 2003 2. Clause 16.2 is from clause 8.7.1 of Motor Boats and Small Tugs (State) Award 3. Clause 16.3 is from clause 14 of the Shipping Award 4. Clause 16.4 is from clause 11.4 of the Port Services Award 5. Clause 16.5 is from clause 15 of the Deckhands (Passenger Ferries, Launches and Barges) Award 6. Clause 16.6 is derived from clause 14 of Marine Charter Vessels (State) Award 7. Clause 16.7 is from clause 11.2 of Port Services Award 8. Clause 16.8 is from clause 4.1.1 of Part 5 of Port Services Award combined with clause 18.5 of Motor Boats and Small Tugs (State) Award 9. Clause 16.9 is from clause 9 of the Deckhands (Passenger Ferries, Launches and Barges) Award 10. Clause 16.10 is from clause 4(3) of the Deckhands (Passenger Ferries, Launches and Barges) Award 11. Clause 16.11 is from clause 4(4) of the Deckhands (Passenger Ferries, Launches and Barges) Award 12. Clause 16.12 is from clause 4(5) of the Deckhands (Passenger Ferries, Launches and Barges) Award 13. Clause 16.13 is from clause 34(a) of the Shipping Award 14. Clause 16.14 is from clause 15(1) of the Masters, Mates and Engineers Passenger Ferries Award 15. Clause 16.16 is from clause 8.2 of Part 2 of Port Services Award 16. Clause 16.16 is from clause 5.3.2 of Masters, Mates And Engineers' Award, Motor Vessels 2500 B.H.P./1866 kW.B.P. and under - State (Excluding the Port Of Brisbane) 2003 17. Clause 16.17 is from clause 9.2 of Wire Drawn Ferries Award 18. Clause 16.18 is from clause 13 of Motor Boats And Small Tugs (State) Award 19. Clause 16.19 is from clause 10.4 of North Queensland Boating Operators Employees Award - State 2003 20. Clause 16.20 is from clause 4.1 of Part 3 of Port Services Award 21. Clause 16.21 is from clause 48 of the Shipping Award 22. Clause 16.22 is from clause 4.6 of Part 3 of Port Services Award. 23. Clause 16.23 is from clause 4.7 of Part 3 of Port Services Award.

	24. Clause 16.24 is from clause 4.8 of Part 3 of Port Services Award. 25. Clause 16.25 is from clause 5.3 of North Queensland Boating Operators Employees Award - State 2003 26. Clause 16.26 is from clause 8.1 of North Queensland Boating Operators Employees Award - State 2003
Clause 16 – Mixed function	New
Clause 17 – Payment of wages	New
Clause 18 - Superannuation	Model clause
Clause 19 – ordinary hours of work and rostering	NES supplemented by 1. Clause 19.2 from clause 6.1 of Masters and Engineers' Award - Port of Brisbane 2003 – span on hours 2. Clause 19.4 is based on clause 6 of Deckhands (Passenger Ferries, Launches and Barges) Award – avoidance of physical exhaustion
Clause 20 - breaks	New clause
Clause 21 – Overtime and penalty rates	New Clause
Clause 22 - shiftwork	New Clause
Clause 23 – annual leave	NES supplemented by 1. Adding a loading of 17.5% except for shift workers (20%) from Motor Boats and Small Tugs (State) Award.
Clause 24 – Personal/carer's and compassionate leave	Cross references the relevant NES.
Clause 25 – Community Service leave	Cross references the relevant NES.
Clause 26 – public holidays	Cross references the relevant NES and inserted a rate of pay for work on public holidays.
Clause 27 – Accident pay	Model provision.

Conclusion

8. We submit that the Port Harbour and Enclosed Water Vessels Award 2010 should be made.

9. Bill McNally and Nathan Keats will attend the public consultations on 19 and 27 March 2009 to answer questions and make submissions in relation to draft awards proposed by other interested organisations.

Dated: 6 March 2009

.....
William Grant McNally
Solicitor for the Maritime Union of Australian

.....
Nathan Keats

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 4

W.G. McNALLY JONES STAFF

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6 March 2009 Our Ref:WGMc:NK:TM:902050

The Industrial Registrar
Australian Industrial Relations Commission
GPO Box 1994
MELBOURNE VIC 3000

By email: amod@air.gov.au

Dear Registrar,

RE: TUG INDUSTRY AWARD 2010
AM2008/49

We are the lawyers for the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers.

We enclose our submissions for the making of a modern award known as the "Tug Industry Award 2010".

We will be attending the public consultations on 27 March 2009.

Yours faithfully,
W.G. McNALLY JONES STAFF

BILL McNALLY
E-mail: bill@mcnally.com.au

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation

Port and Harbour Services

(AM2008/49)

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

AND

THE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS

IN SUPPORT OF THE MAKING OF THE TUG INDUSTRY AWARD 2010

Introduction

1. It is submitted that the Commission should make the Tug Industry Award 2010 which is attachment "A" to these submissions. ("Modern Award")

2. **Coverage**

2.1 This Modern Award is expressed to cover employers in the tug industry and their employees. The industry is defined as "

(a) Movement of contract cargos by combined Tug and Barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia; and

(b) work performed on tug boats in conjunction with operations and voyages at or about, or to or from, a port.

3. The award replaces the following instruments:

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REF: WGM:NK:TM:811066

AIRC Industry	Publication Title	Pub ID
Maritime industry	Tug and Barge Industry (Interim) Award 2002	AP824200
Port and harbour services	Tugboat Industry Award 1999	AP799111

4. We submit that the Tug Industry is a separate, stand alone industry.

Terms of the Modern award and their source

5. The table below sets out the source of each of the terms of the Modern Award.

Clause	source
Clause 1 – Title -	New
Clause 2 – Commencement date	Model provision.
Clause 3 – Definitions and interpretation	1. Definitions of Act, employee, employer, enterprise award and NES are from the AIRC template 2. Balance of the definitions are from the Tugboat Industry Award
Clause 4-coverage of the award	1. 4.5(a) is from Tug and Barge Industry Interim Award 2002 2. 4.5(b) is from Tugboat Industry Award
Clause 5-access to the award and the NES	Model provision.
Clause 6 – NES and this award	Model provision.
Clause 7 – award flexibility	Model provision.
Clause 8 – consultation	Model provision.
Clause 9 – dispute resolution	Model provision.
Clause 10 – types of employment	1. New clause 2. Casual clause was sourced from clause 11.2 of Tug and Barge Industry Interim Award 2002

Clause 11 – Employer and employee duties	Clauses 9.1 and 9.2 of Tugboat Industry Award 1999.
Clause 12 – termination of employment	Model provision.
Clause 13 – redundancy	Model provision.
Clause 14 – minimum wages	1. Updated to 2008 rates and sourced from Tugboat Industry Award 1999
Clause 15 - Allowances	2. Updated to 2008 and converted into percentages of the standard rate 3. Clause 15.1 is clause 6.9 of Tug and Barge Industry (Interim) Award 2002; 4. Clauses 15.2-15.10 are clauses 12.2-12.10 of the Tugboat Industry Award 1999 5. Clause 15.11 – 15.13 are clauses 6.1 – 6.3 of Tug and Barge Industry (Interim) Award 2002 6. Clause 15.14 is clause 7 of Tug and Barge Industry (Interim) Award 2002.
Clause 16 – Payment of wages	New clause based on clause 11 of Tugboat Industry award
Clause 17 - Superannuation	1. Model clause supplemented with the higher rate from clauses 12.1 and 12.2 of Tug and Barge Industry (Interim) Award 2002.
Clause 18 – ordinary hours of work and rostering	NES supplements by a. Span of hours from a combination of clause 9.1 of Tug and Barge Industry (Interim) Award 2002 and Table 1 of Tugboat Industry award 2. Clause 18.3 (maximum hours) is clause 9.3 of Tug and Barge Industry (Interim) Award 2002
Clause 19 - breaks	Combination of clause 9.2 of Tug and Barge Industry (Interim) Award 2002, and clause 10 of Tugboat Industry award including table 4/
Clause 20 – Overtime and penalty rates	Sourced from clause 11.3 of Tug and Barge Industry (Interim) Award 2002
Clause 21 – leave	1. The leave arrangements in this award have been a feature of the industry for decades. 2. clause 21.1(b) provides incidental detail in relation to the operation of entitlements under the NES so as to prevent duplication of entitlements
Clause 22 – Personal/carer's and compassionate leave	1. Cross references with relevant NES with the number of days for compassionate leave increased to 3.
Clause 23 – Community Service	Cross references with relevant NES

leave	
Clause 24 – public holidays	Cross references with relevant NES.
Schedule A	New clause

Conclusion

6. We submit that the Tug Industry Award 2010 should be made.

7. Bill McNally and Nathan Keats will attend the public consultations on 27 March 2009 to answer questions and make submissions in relation to draft awards proposed by other interested organisations.

Dated: 6 March 2009

.....

William Grant McNally
Solicitor for the Maritime Union of Australian and
The Australian Institute of Marine and Power Engineers

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 5

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6 March 2009 Our Ref:WGMc:NK:TM:811066

The Industrial Registrar
Australian Industrial Relations Commission
GPO Box 1994
MELBOURNE VIC 3000

By email: amod@air.gov.au

Dear Registrar,

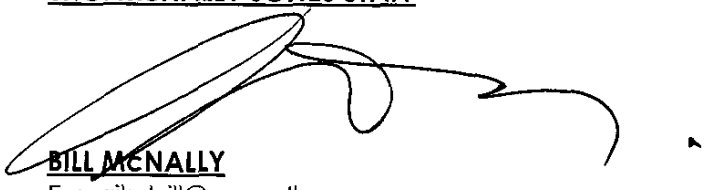
RE: SEAGOING INDUSTRY AWARD 2010
AM2008/41

We are the lawyers for the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers.

We enclose our submissions for the making of a modern award known as the "Seagoing Industry Award 2010".

We will be attending the public consultations on 19 March 2009.

Yours faithfully,
W.G. McNALLY JONES STAFF



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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation

Maritime Industry

(AM2008/41)

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

AND

THE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS

IN SUPPORT OF THE MAKING OF THE SEAGOING INDUSTRY AWARD 2010

Introduction

1. It is submitted that the Commission should make the Seagoing Industry Award 2010 in accordance with attachment "A" to these submissions ("modern award"). That modern award proscribed conditions that are substantially the same as those in the award which it replaces (the Maritime Industry Seagoing Award 1999 AP788080) ("MISA").

Coverage

2. This modern award is expressed to cover employers in the Seagoing Industry and their employees. The industry is defined as "employers engaged in or in connection with vessels trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers". The coverage of the Modern Award substantially reflects the coverage of MISA.

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3. The coverage of the modern award should be read in conjunction with the provisions of Chapter 1 Part 1-3 Division 3 - *Geographical application of this Act* of the *Fair Work Bill 2008*.

4. The Modern Award replaces the following instrument:

AIRC Industry	Publication Title	Pub ID	Common Rule	State
Maritime industry	Maritime Industry Seagoing Award 1999	AP788080		

5. We have not included in this Modern Award:

a. Provisions contained in pre-reform enterprise awards (including NAPSAs).

b. Provisions contained in long service leave awards;

c. In AM2008/49 we have sought a modern award known as "Port Harbour and Enclosed Waters Vessels Industry Award 2010." The provisions in the following NAPSAs have been incorporated into that award rather than this modern award:

i. Maritime Award - Brisbane River and Moreton Bay 2003 – AN140163

ii. North Queensland Boating Operators Employees Award - State 2003 – AN140190;

iii. Ketches & Schooners Award – AN150068;

iv. Shipping Award – AN170095

d. In AM2008/49 we have sought a modern award known as "Tug Industry Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i. Tug and Barge Industry (Interim) Award 2002 – AP824200

e. In AM2008/49 we have sought a modern award known as "Dredging Industry Award 2010." The provisions in the following pre-reform awards (non enterprise) have been incorporated into that award rather than this modern award:

i. Dredging Industry (AWU) Award 1998 – AP778702

ii. Marine Engineers (Non Propelled) Dredge Award 1998 – AP788027

iii. Maritime Industry Dredging Award 1998 – AP787991

6. We have not included the Self-Propelled Barge and Small Ships Industry Award 2001 which is referred to in the Full Bench Statement dated 30 January 2009 for the Maritime Industry. It only applies to Perkins Shipping Group.

7. We have not included the Shipping Industry Loss of Certificate of Competency Award 2003 as its provisions can not be included in a modern award.

Terms of the award and their source

8. The table below sets out the source of each of the terms of the award.

Clause	**Source**
Clause 1 – Title	New
Clause 2 – Commencement date	AIRC template
Clause 3 – Definitions and interpretation	1. Definitions of Act, employee, employer, enterprise award and NES are from the AIRC template 2. Definitions of Cargo, Day, Home port, month and vessel are from the *Maritime Industry Seagoing Award* 1999 ("MISA") 3. Definition of Chief Integrated Rating and Integrated Rating are new. 4. The standard rate has been set as the total rate for the

	integrated rating Dry Cargo Vessels of up to 19 000 tonnes (AOV). This classification was the key classification in MISA.
Clause 4 - coverage of the award	This is based on clause 4.2 of MISA.
Clause 5 - access to the award and the NES	Model provision.
Clause 6 – NES and this award	Model provision.
Clause 7 – award flexibility	Model provision.
Clause 8 – consultation	Model provision.
Clause 9 – dispute resolution	Model provision.
Clause 10 – types of employment	Clause 10 of MISA
Clause 11 – Employer and employee duties	Clause 9 of MISA without clause 9.2.3 which is a referencing clause.
Clause 12 – termination of employment	Clause 11 of MISA without clause 11.3. That clause related to redundancy and is replaced by clause 13.
Clause 13 – redundancy	This is a new clause that applies the NES.
Clause 14 – minimum wages	1. Clauses 14 and 12 of MISA updated to 2008 rates. 2. Aggregate wages have been a feature of this industry for decades.

Clause 15 – Superannuation	Model clause
Clause 16 – hours of work	Clause 32 of MISA
Clause 17 –leave	1. Clause 33 of MISA except for clause 17.2 which provides incidental detail in relation to the operation of entitlements under the NES so as to prevent duplication of entitlements. 2. Leave arrangements of this form have been a feature of this industry for decades.
Clause 18 – Personal/carer's leave and compassionate leave	This clause refers to clause 17.2
Clause 19 – Community Service leave	Cross references the relevant NES.
Clause 20 – public holidays	This clause refers to clause 17.2
Clause 21 – parental leave	Cross references the relevant NES.
Clause 22 – leave for consultation meetings	Clause 35 of MISA
Clause 23 – allowances	Clauses 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31 of MISA updated to 2008 amounts and then converted into percentages of the standard rate.

9. The provisions should not lightly be disturbed.

Conclusion

10. We submit that the Seagoing Industry Award 2010 should be made.

11. Bill McNally and Nathan Keats will attend the public consultations on 19 March 2009 to answer questions and make submissions in relation to draft awards proposed by other interested organisations.

Dated: 6 March 2009

.....
William Grant McNally
Solicitor for the Maritime Union of Australian and
The Australian Institute of Marine and Power Engineers

.....
Nathan Keats

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 6

Workplace Relations Act 1996

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

IN THE MATTER OF: **AWARD MODERNISATION FOR THE MARITIME INDUSTRY**

CONDUCTED UNDER SECTION 576E PROCEDURE FOR CARRYING OUT AWARD MODERNISATION PROCESS

AM2008/41

SUBMISSIONS OF CSL AUSTRALIA PTY LTD

Ministerial request

1. The Honourable Julia Gillard Minister of Employment and Workplace Relations has issued a request pursuant to s.576C(1) of the *Workplace Relations Act 1996 (Cth) ("*Act*")*. The terms of the Request incorporate (amongst other things) the following:

1.1 That modern award must be simple, easy to apply and provide a fair minimum safety net of enforceable terms and conditions of employment for employees (clause 1 (a) and (b).

1.2 That a modern award is not intended to extend award coverage to those classes of employees ... who ... have been traditionally award free (clause 2 (a)).

1.3 That a modern award is not intended to increase costs for employers (clause 2 (d)).

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1.4 That the National Employment Standard ("NES") is to operate in conjunction with a modern award cannot exclude the NES or any provision of the NES although it can provide ancillary or incidental detail in relation to the operation of an entitlement under the NES but only if the effect is not detrimental to an employee in any respect, when compared to the NES (cl.30).

1.5 That other than as expressly authorised under the Request, the Commission must not include a term in a modern award on the basis that it would be an allowable award matter where the substance of the matter is dealt with under the NES (Clause 35). The NES provides that particular types of provisions may be included in modern awards even where they are inconsistent with the NES in relation to the following matters (amongst other things) only:

1.5.1 Enabling the averaging of hours over work over a specified period.

1.5.2 Provide for cashing out of paid annual leave by an employee, provided that such terms require;

1.5.2.1 the retention of a minimum balance of 4 weeks' annual leave after the leave is cashed out;

1.5.2.2 the cashing out of each amount is subject to a separate agreement in writing between the employer and the employee;

1.5.2.3 require or allow employees to be required to take paid annual leave provided that the requirement is reasonable;

1.5.2.4 otherwise deal with the taking of paid annual leave;

1.5.2.5 provide for cashing out of paid personal leave provided a minimum balance of 15 days leave remains after the personal leave is cashed out;

1.5.2.6 the cashing out of each period of personal leave is subject to a separate written agreement between the employer and the employee;

1.5.2.7 provide for substitution of public holidays by agreement between an employer and employee;

1.5.2.8 specify the period of notice an employee may be required to give when terminating their employment.

1.5.3 Modern awards must specify the ordinary hours of work for each classification of employees covered by the modern award for the purpose of calculating entitlements under the NES (Clause 46).

2. The Full Bench of the Australian Industrial Relations Commission has issued two statements addressing matters arising in relation to the award modernisation process ([2008] AIRCFB 100, [2009] AIRCFB 50). The Commission has identified the following matters (amongst other things) as of significance in conducting the award modernisation process:

2.1 The desirability of reducing the number of awards in the workplace relations system and to minimising the number of awards applying to a particular employer or employee([2008] AIRCFB 100 at [27]). The Full Bench recognised that in some industries it is impractical to implement award rationalisation on the scale provided in the exposure drafts.

It is submitted that the unique nature of the maritime industry requires differentiation between its different areas of operation and that it is impractical to implement award rationalisation on the basis that a single modern award to the range of employers and employees covered by the

awards identified as being in the maritime industry for award modernisation purposes.

2.2 The provision of an individual flexibility agreement in a modern award must be in writing and must result in the employee being better off overall than the employee would otherwise have been.

3. The maritime industry and in particular the *Maritime Industry Seagoing Award 1999 (*"**MISA**") has a long and complex history derived from predominantly consent variations over several decades with a resulting inadequate, unenforceable and invalid provisions persisting to the present time. The history of MISA is set out in the affidavit and exhibits thereto of **DEANNA OBERDAN** filed in these proceedings.

4. The Commission has on a number of occasions recognised the difficulties with MISA most notably in:

4.1 *CSL Pacific Shipping Incorporated v Maritime Union of Australia* (2003) 127 IR 22. There, the Commission observed at paragraph 130 of the decision:

Given the above, many of what I have found to be substantial matters of concern to CSL would seem capable of being addressed by a more appropriate form of award prescription. An award applying to CSL which did not contain or encourage inappropriate provisions or work practices or impediments might very well:

(a) be in conformity with the Commission's Principles;

(b) not offend provisions of the Act;

(c) promote some and be neutral as to other objects of the Act;

(d) be consistent with recent approaches to award making as in Bengalla.

And at paragraph 132:

Any future award may also satisfy the Government's desire for increased efficiency and reduced unsatisfactory manning practices in this area.

4.2 *Maritime Union of Australia & Ors applications for variation and for an award [PR968570]* that sought to include as respondents to MISA Celtic Marine (Hong Kong) Pty Ltd and Dateline Shipping and Travel Ltd in respect of their employees on two vessels the MV Hakula and MV Ikuna the Commission found:

*"**[108]** There are three critical aspects of MISA and the proposed awards that need examination. Firstly, there are the classifications, their relativity to one another and their relationship with key classifications in what was seen as the benchmark award, the Metals Award. Secondly, there are the substantial periods of leave provided. Finally, we have the annualised salary comprising ordinary hours and overtime.*

***[109]** Up to 1998-99, MISA was a paid rates award. It was then necessary, because of legislative requirements, to convert it to an award containing properly fixed minimum rates.*

***[110]** In undertaking the process, the parties were guided by the minimum rates conversion process affecting the Tugboat Industry Award. In that process, the Commission accepted that the key classification in the Tugboat Industry Award was the "general purpose rating". It was further accepted by the Commission that the appropriate relativity between the general purpose rating and the Metals Award fitter was 92.5% based on skills and competency. The Commission also determined that the "nature of the industry" warranted an additional component of 5% resulting in a relativity to the fitter of 97.5%.*

***[111]** According to the evidence (Exhibit McN4/276) the parties decided to utilise the recently established relativity between the general purpose rating of the Tugboat Industry Award with the Metals Award fitter by focussing on the comparison between the general purpose rating in the Tugboat Industry Award and the integrated rating in MISA.*

***[112]** It was accepted that the integrated rating was the key classification in MISA and would be the benchmark whereby, once properly set, other classifications would be adjusted by maintaining existing internal relativities.*

***[113]** Both employers and union representatives submitted to the Commission that the skills and competency for an integrated rating involved*

greater statutory requirements and minimum qualifications than a general purpose rating in the tugboat industry. Those statutory requirements and minimum qualifications included the requirement of a Certificate of Proficiency, pursuant to the Marine Orders Part 3 (Seagoing Qualifications), which was made under the Navigation Act. The relativity ought be 97.5% of the fitter and not the 92.5% relativity which the general purpose rating had against the fitter.

[114] *In addition, it was submitted by consent that instead of the 5% allowance provided for in the Tugboat Industry Award for the "nature of the industry", there should be instead a 10% allowance in the maritime seagoing industry. This was due to factors such as the additional statutory medical requirements; responsibility to the job; unpredictable, irregular and prolonged periods of duty and leave; 24 hours availability of crew; and the social environment (the workplace is the home).*

[115] *The Commission accepted the parties' submissions that there should be a relativity against the fitter of 107.5%.*

[116] *The approach taken by the parties in aligning classifications in MISA against those in the Metals Award, including by utilising the Tugboat Industry Award experience, was not untoward. It was in fact a convenient and seemingly straightforward means of alignment. A wide range of employer interests were involved....*

[120] *As to leave, the entitlement in respect of the MUA award is relevantly as follows:*

> ***"30. LEAVE***
>
> ***30.1 Entitlement to leave***
>
> ***30.1.1*** *Subject to 30.1.2, for each day of duty on a vessel or a day during which the employee is necessarily involved in travelling to or from a vessel or place of work as required by the employer, an employee will accrue an entitlement to 0.926 of a days leave without loss of pay.*
> *. . .*
>
> ***30.2 Calculation of leave entitlement***
>
> *The leave entitlement in 30.1 gives effect to, amongst other things:*

- *leave with pay for weekends and public holidays worked*
- *annual leave with pay of five weeks per annum;*

- *sick leave;*
- *carer's leave;*
- *bereavement leave;*
- *a 35 hour working week.*

. . .

30.4 Payment of leave on termination of employment

Upon termination of employment, an employee's leave entitlement under this clause will be paid at the salary rate for the last position in which the employee served."

[121] *Those provisions are found also in the AIMPE Award and in MISA.*

[122] *There are some immediate difficulties with the provisions sought.*

[123] *Firstly, while it was said by the Unions that the leave (the leave factor of 0.926 provides for 25 weeks leave a year) is unpaid, this seems at odds with clause 30.2 where weekend, public holiday and annual leave is said to be paid. Moreover, clause 30.4 contemplates the payment of outstanding leave entitlements (presumably weekend, public holiday and annual leave accrued entitlements) on termination.*

[124] *The payment of such leave is of course not at odds with award or community standards. But in these proposed awards and MISA the annualised rate of pay (to which we will come in due course) is made up of payments at double time for 18 hours being the difference between the standard 38 hours and the working week on board vessels of 8 hours per day over 7 days (56 hours). Thus, weekend days worked have been paid for (possibly at double time). Why should such work on those days also be rewarded as paid leave?*

[125] *Further, it is not clear on what basis, even as unpaid leave, should there be built into the leave provisions sick leave, bereavement leave and carer's leave in the absence of specific events occurring. Those types of leave are not general entitlements provided to all employees. Rather, they are provisions triggered by actual events - illness of the employee and other circumstances related to an employee's family.*

[126] *Other than their appearance in MISA (and other associated awards), the provisions as to sick leave, bereavement leave and carer's leave unrelated to illness or other circumstances are at odds with the nature of*

such benefits and provisions found in other awards of the Commission and are contrary to Test Case determinations by the Commission.

[127] *The concerns that I have identified are so fundamental to the leave sought, that the awards, if made, could not contain such leave provisions, given accepted Commission principles and award standards.*

[128] *I finally turn to the annual salary and its components. According to the evidence (Exhibits McN4/276, McN19, McN20) concerning the MISA annualised rates, the starting point was the hourly rate for the Metal Award's fitter classification multiplied by 107.5%. It was then accepted that maritime employees work for 27 weeks per year and for 8 ordinary hours over 7 days per week.*

[129] *Given that, the hourly rate was payable at ordinary time for 38 hours and the balance of hours (56 less 38) was payable at double time.*

[130] *Additionally, there was a component of two hours overtime per day for hours worked over and above 8 hours per day. Ultimately, the parties and the Commission accepted that this was to be valued at two hours overtime per day payable at double time.*

[131] *All that, was applied to all classifications in MISA and used in developing the annual salary rates found in both the proposed MUA and AIMPE awards.*

[132] *That position as to overtime rates (all hours above 38 hours to be at double time) seems to have been reached and accepted by the Commission without much discussion or explanation.*

[133] *It seems at odds with the decision of a Full Bench of the Commission in dealing with leave in the maritime industry given on 18 June 1958 (Print A6412). It said at one point:*

> *"Men are entitled to additional remuneration at penalty rates for work done at week-ends but at lesser rates than ordinarily awarded to shore workers. For one thing, they are already on the job, for which they have been compensated. We suggest as a maximum, time and a quarter for Saturday work and time and a half for Sunday work."*

[134] *Although that decision is of many decades ago (and the penalties were later adjusted to time and a half for Saturday and double time for Sunday) the principles established (including applying lesser penalties than is enjoyed by shore workers) do not seem to have been subsequently revisited.*

[135] *Given that Celtic and Dateline do not consent to the provisions, I do not propose to apply such to non-consenting parties in circumstances where the method of arriving at the annual salaries was only briefly dealt with and seemingly at odds with previous Commission decisions as to overtime penalties.*

[136] *Moreover, it seems that the payment of the two hours overtime each day is not predicated on the actual workings of such additional hours. Even if it could be seen as periods reasonably averaging the additional necessities of working the ship as it enters or leaves port or completes discharge, it is inappropriate to fit such averaged outcome to an employer, if that employer does not accept such average. Neither Celtic or Dateline have indicated that such overtime is worked. It should therefore not be contemplated in any salary.*

[137] *On the material before me I am not prepared to make provision for the annual salaries sought given my disquiet as to the basis for the overtime component and particularly given the absence of consent in this instance. Moreover, I have already noted the apparent double counting with the provision of leave with pay for weekends worked while also making payments for those days in the annualised salary.*

[138] *Because the annualised salaries and leave are such a significant part of MISA and the proposed awards, I consider that this tells against the making of such instruments or binding the employers to MISA*

[139] *Additionally, given the intrinsic nature of the annualised salaries and leave to the overall conditions of employment sought, it is unclear how the Commission could easily make awards that might meet Commission concerns and still provide the broad type of awards sought by the Unions.*

[140] *I have decided to not exercise my discretion to make the orders as sought."*

4.3 *The Australian Institute of Marine and Power Engineers application for an award (PR966979)* in which application was made for a *Maritime Industry Dry Bulk Cargo Foreign Vessels Award 2003* in which the Commission found:

[153] *There are three critical aspects of MISA and the proposed awards that need examination. Firstly, there are the classifications (in both the AIMPE and MUA areas), their relativity to one another and their relationship with key classifications in what was seen as the benchmark award, the Metal Industry Award. Secondly, there are the substantial periods of leave*

provided. Finally, we have the annualised salary comprising ordinary hours and overtime.

[154] *Up to 1998-99, MISA was a paid rates award. It was then necessary, because of legislative requirements, to convert it to an award containing properly fixed minimum rates.*

[155] *In undertaking the process, the parties were guided by the minimum rates conversion process affecting the Tugboat Industry Award 1990 (T0051) (Tugboat Industry Award). In that process, the Commission accepted that the key classification in the Tugboat Industry Award was the "general purpose rating". It was further accepted by the Commission that the appropriate relativity between the general purpose rating and the Metal Industry Award fitter was 92.5% based on skills and competency. The Commission also determined that the "nature of the industry" warranted an additional component of 5% resulting in a relativity to the fitter of 97.5%.*

[156] *According to the evidence of Mr Umansky (Exhibits H13 and H14) who led the employer group in the MISA minimum rates process, it was decided to utilise the recently established relativity between the general purpose rating of the Tugboat Industry Award with the Metal Industry Award fitter by focussing on the comparison between the general purpose rating in the Tugboat Industry Award and the integrated rating in MISA.*

[157] *It was accepted that the integrated rating was the key classification in MISA and would be the benchmark whereby, once properly set, other classifications would be adjusted by maintaining existing internal relativities.*

[158] *Both employers and union representatives submitted to the Commission that the skills and competency for an integrated rating involved greater statutory requirements and minimum qualifications than a general purpose rating in the tugboat industry. Those statutory requirements and minimum qualifications included the requirement of a Certificate of Proficiency, pursuant to the Marine Orders Part 3 (Seagoing Qualifications), which was made under the Navigation Act. The relativity ought be 97.5% of the fitter and not the 92.5% relativity which the general purpose rating had against the fitter.*

[159] *In addition, it was submitted by consent that instead of the 5% allowance provided for in the Tugboat Industry Award for the "nature of the industry", there should be instead a 10% allowance in the maritime seagoing industry. This was due to factors such as the additional statutory medical requirements; responsibility to the job; unpredictable, irregular and prolonged periods of duty and leave; 24 hours availability of crew; and the social environment (the workplace is the home).*

[160] *The Commission accepted the parties' submissions that there should be a relativity against the fitter of 107.5%.*

[161] *The approach taken by the parties in aligning classifications in MISA against those in the Metal Industry Award, including by utilising the Tugboat Industry Award experience, was not untoward. It was in fact a convenient and seemingly straightforward means of alignment. A wide range of employer interests were involved.*

[162] *The presence of consent, in my view, does not invalidate the process. On its face, there seems no reason why the rates found in MISA ought not be applied in these two awards and be applicable to a new employer respondent.*

[163] *True it is, that some of the factors of the "nature of the industry" component might better have been reflected as allowances. But that is a minor shortcoming.*

[164] *Of more significance (and this only affects the MUA award) is the fact that CSL does not utilise the MISA classifications of chief integrated rating and integrated rating. I am not satisfied, on the material before me, that there is a basis for applying the MISA rates of pay for chief integrated rating to bosun on CSL ships or that of integrated rating to those of able seaman or greaser/motorman found on the CSL ships.*

[165] *I am not dismissive of Mr Newlyn's evidence as to the similarity between the chief integrated rating and the bosun and between the integrated rating and the able-seaman and motorman/greaser. However, I consider that a more thorough examination of the work performed by crew, including tradesperson, on the CSL ships would need to be undertaken..*

[166] *Overall, the application of the proposed rates in the AIMPE Award and (after some further examination) of those proposed for the MUA Award would seem capable of application to CSL.*

[167] *As to leave, the entitlement in respect of the MUA award is relevantly as follows:*

> *"30. LEAVE*
>
> *30.1 Entitlement to leave*
>
> *30.1.1 Subject to 30.1.2, for each day of duty on a vessel or a day during which the employee is necessarily involved in travelling to or from a vessel or place of work as required by*

the employer, an employee will accrue an entitlement to 0.926 of a days leave without loss of pay.

. . .

30.2 Calculation of leave entitlement

The leave entitlement in 30.1 gives effect to, amongst other things:

- *leave with pay for weekends and public holidays worked*
- *annual leave with pay of five weeks per annum;*
- *sick leave;*
- *carer's leave;*
- *bereavement leave;*
- *a 35 hour working week.*

. . .

30.4 Payment of leave on termination of employment

Upon termination of employment, an employee's leave entitlement under this clause will be paid at the salary rate for the last position in which the employee served."

[168] *Those provisions are found also in the AIMPE Award and reflect provisions in MISA.*

[169] *There are some immediate difficulties with the provisions sought.*

[170] *Firstly, while it was said by the Unions that the leave (the leave factor of 0.926 provides for 25 weeks leave a year) is unpaid, this seems at odds with clause 30.2 where weekend, public holiday and annual leave is said to be paid. Moreover, clause 30.4 contemplates the payment of outstanding leave entitlements (presumably weekend, public holiday and annual leave accrued entitlements) on termination.*

[171] *The payment of such leave is of course not at odds with award or community standards. But in these awards and MISA the annualised rate of pay (to which we will come in due course) is made up of payments at double time for 18 hours being the difference between the standard 38 hours and the working week on board vessels of 8 hours per day over 7 days (56 hours). Thus, weekend days worked have been paid for (possibly at double time). Why should such work on those days also be rewarded as paid leave?*

[172] *Further, it is not clear on what basis, even as unpaid leave, should there be built into the leave provisions sick leave, bereavement leave and*

carer's leave in the absence of specific events occurring. Those types of leave are not general entitlements provided to all employees. Rather, they are provisions triggered by actual events - illness of the employee and other circumstances related to an employee's family.

[173] *Other than their appearance in MISA (and other associated awards), the provisions as to sick leave, bereavement leave and carer's leave unrelated to illness or other circumstances are at odds with the nature of such benefits and provisions found in other awards of the Commission and are contrary to Test Case determinations of the Commission.*

[174] *The concerns that I have identified are so fundamental to the leave sought, that the awards, if made, could not contain such leave provisions, given accepted Commission principles and award standards.*

[175] *I finally turn to the annual salary and its components. According to the evidence of Mr Umansky (Exhibit H13) concerning the MISA annualised rates, the starting point was the hourly rate for the Metal Industry Award's fitter classification multiplied by 107.5%. It was then accepted that maritime employees work for 27 weeks per year and for 8 ordinary hours over 7 days per week.*

[176] *Given that, the hourly rate was payable at ordinary time for 38 hours and the balance of hours (56 less 38) was payable at double time.*

[177] *Additionally, there was a component of two hours per day payable as what is termed "intrinsic overtime". Ultimately, the parties and the Commission accepted that this was to be valued at two hours overtime per day payable at double time.*

[178] *All that, was applied to all classifications in MISA and used in developing the annual salary rates found in both the proposed MUA and AIMPE awards.*

[179] *According to the evidence of Ms Jewell (Exhibit H11) it seems that the joint submissions of the parties had initially allocated a penalty for hours beyond 38 per week at lesser penalties such as the Metal Industry Award standard of time and one half for the first 3 hours and double time thereafter. However, this was altered to being all at double time.*

[180] *That final position (all hours above 38 hours to be at double time including for intrinsic overtime) seems to have been reached and accepted by the Commission without much discussion or explanation.*

[181] *It seems at odds with the decision of a Full Bench of the Commission in dealing with leave in the maritime industry given on 18 June 1958 (Print A6412). It said at one point:*

> *"Men are entitled to additional remuneration at penalty rates for work done at week-ends but at lesser rates than ordinarily awarded to shore workers. For one thing, they are already on the job, for which they have been compensated. We suggest as a maximum, time and a quarter for Saturday work and time and a half for Sunday work."*

[182] *Although that decision is of many decades ago (and the penalties were later adjusted in some cases to time and a half for Saturdays and double time for Sundays) the principles established (including applying lesser penalties than is enjoyed by shore workers) do not seem to have been subsequently revisited.*

[183] *Given that CSL do not consent to the provisions, I do not propose to apply such to a non-consenting party in circumstances where the method of arriving at the annual salaries was only briefly dealt with and seemingly at odds with previous Commission decisions as to overtime penalties.*

[184] *Moreover, I am not prepared to apply the "intrinsic overtime" component to CSL, when according to the evidence of Mr Umansky, it seems it was a payment guaranteeing the availability of crew to work additional hours beyond 8 hours. Thus it was not predicated on the actual workings of such additional hours. Even if it could be seen as periods reasonably averaging the additional necessities of working the ship as it enters or leaves port or completes discharge, it is inappropriate to fit such averaged outcome to an employer, if that employer does not accept such average. In that regard, I have relied on the evidence of Mr Ives and Mr Sorenson that overtime cannot be readily estimated and ought not be averaged.*

[185] *On the material before me I am not prepared to make provision for the annual salaries sought in both awards, given my disquiet as to the basis for the overtime component and particularly given the absence of consent in this instance. Moreover, I have already noted the apparent double counting with the provision of leave with pay for weekends worked while also making payments through the annualised salary for those days.*

[186] *Because the annualised salaries and leave are such a significant part of the proposed awards, I consider that this tells against the making of such instruments.*

[187] *Additionally, given the intrinsic nature of the annualised salaries and leave to the overall conditions of employment sought, it is unclear how*

the Commission could easily make awards that might meet Commission concerns and still provide the broad type of awards sought by the Unions.

[188] *Finally, I note that MISA (the basis of the two awards) is not the instrument which determines wages and conditions in the Australian maritime industry. Such regulation is by agreements and/or employment contracts. The making of these two awards would make CSL bound to salaries and conditions not observed elsewhere in the industry. That weighs further against the application of these awards. That is particularly the case where, as here, there is no consent.*

[189] *I conclude that even if jurisdiction existed (and it does not), I would not exercise my discretion to make the awards."*

5. These cases involved the Commission conducting a close examination of MISA and the conclusions reached in those cases are relevant and applicable to the conduct of the current award modernisation process..

6. The industry should be regulated by an award that is properly reflective of Australian conditions, rather than an award that has been obtained, by and large, by consent, and which has not been subject to arbitral review by this Commission, and which does not reflect the standards that have been set by this Commission as appropriate for Australian workers.

7. Further MISA is inconsistent with and in many instances invalid as a consequence of the application of the Australian Fair Pay and Conditions Standards ("**AFPCS**") and the NES. Included with this submission is an affidavit of and exhibit thereto of **CHARLOTTE OPPY** that provides a comparative analysis of the provisions of MISA against the AFPCS and the NES.

8. This submission does not ask the Commission to embark upon a major departure from award or statutory standards. Rather they invite the Commission to bring MISA into accord with the award and statutory standards that have been developed through the arbitral jurisprudence of the Commission in recent decades.

9. There are essentially two elements to these submissions. These are firstly that it is inappropriate to continue to maintain provisions of MISA that are not valid or enforceable.

10. The second element follows as a consequence of accepting the first proposition. In the event that the Commission concludes that provisions of MISA are invalid or unenforceable or inconsistent with award or statutory provision must be made for award terms that are consistent with the Commission's standards and the NES.

11. This submission traces the history of the MISA and sets out those provisions that is contends are invalid, unenforceable or inconsistent with award standards of the Commission.

SCOPE OF MODERN MARITIME AWARD

12. The scope of the modern award is relevant in the current context. Awards identified by the Commission as being in the maritime industry are:

12.1 ***Pre-reform awards (non-enterprise)***

12.1.1 Dredging Industry (AWU) Award 1998 AP778702

12.1.2 Marine Engineers (Non Propelled) Dredge Award 1998 AP788027

12.1.3 Marine Engineers (Seagoing and Offshore Industries) Long Service Leave Award 1993 AP788173

12.1.4 Maritime Industry (Seamen, Cooks and Stewards) Long Service Leave Award 1995 AP788677

12.1.5 Maritime Industry Dredging Award 1998 AP787991

12.1.6 Maritime Industry Seagoing Award 1999 AP788080

12.1.7 Maritime Officers (Seagoing and Offshore Industries) Long Service Leave Award 1993 AP788130

12.1.8 Self-propelled Barge and Small Ships Industry Award 2001 NT AP810149

12.1.9 Shipping Industry Loss of Certificate of Competency Award 2003 AP825628

NAPSAs (non-enterprise)

12.1.10 Maritime Award - Brisbane River and Moreton Bay 2003 QLD AN140163

12.1.11 North Queensland Boating Operators Employees Award - State 2003 QLD AN140190

12.1.12 Ketches & Schooners Award - SA AN150068

12.1.13 Shipping Award - WA AN170095

Pre-reform enterprise awards

12.1.14 Collier Trade (Masters, Mates and Engineers) Award 2000 AP772153

12.1.15 Fremantle Port Authority Administrative Award 2002 AP819279

12.1.16 Gladstone Ship Bunkering Operation Award, 1998 AP782231

12.1.17 Inner Barrier Reef Cruise Vessel Award 1999 AP785133

12.1.18 Maritime Industry Research Vessels Award 2000 AP788085

12.1.19 Maritime Industry - Sydney Sea Pilots Pty Ltd - Launch Crews Award 1998 AP788895

12.1.20 P&O Swire Containers Ltd Officers Seagoing Award 1999 AP793689

12.1.21 Port and Harbour Services (Stirling Marine Services - Western Australia) Award 2001 AP810584

12.1.22 Port Phillip Sea Pilots Queenscliff Launch Crew Award 2000 AP807140

12.1.23 Research & Supply Vessel (Aurora Australis) Award 1998 AP794771

NAPSAs derived from state enterprise awards (preliminary classification)

Private transport industries

12.1.24 Sea Swift Pty Ltd Enterprise Award - State 2005 QLD AN140268

12.2 The maritime industry was defined as a sector in the Independent Review of Australian Shipping "A Blueprint for Australian Shipping" September 2003("**IRAS Report**") in which it stated:

"THE MARITIME SECTOR

41. As mentioned above, it became apparent to the Review at a very early stage that it needed to concern itself with the wider maritime sector as well as the more narrowly defined Australian shipping Industry.

42. The narrower definition includes both owners of Australian-flagged ships and time charter operators. The number of companies active in the latter market segment varies between 30 and 40, depending on the state of the market. They take foreign ships on time charter (rather than investing in and owning ships) and operate their own voyages as though they were owner.

43. The wider sector includes a number of maritime related activities including those summarised below.

Ship brokers.

44. In Australia, ship brokers generally act as chartering agents/brokers for the industrial and trading companies that have cargoes to be moved. Ship brokers are also involved in ship sale and purchase activities, and in representing overseas ship yards in marketing their services and negotiating dockings and ship repairs. There are three major foreign owned and a number of smaller Australian owned broking houses, spread between Perth, Melbourne, Sydney, Brisbane and Townsville, and all have networks of correspondent brokers and ship owner contacts worldwide.

Port agents.

45. These fall into two categories—liner agents and tramp agents. The liner agents commercially represent liner companies trading to and from Australia, marketing their services among the trading houses, importers and exporters and collecting freight on owner's behalf and issuing Bills of Lading, as well as operationally handling the ships whilst they are in port, acting as the interface between the cargo interests, the port authority, the stevedores and other service providers.

Ship managers.

46. These companies act as crewing agents and technical managers of the ships themselves, whether they trade internationally or domestically in circumstances where the ship-operator contracts these services out. They variously employ the crews, arrange repairs and organise maintenance schedules, provide lube oils and provisions, arrange insurance cover for crew and hull and machinery, work closely with statutory authorities and classification societies, and general ensure that the ship gets from load port to discharge port safely and efficiently.

Port service companies

47. These include the port authorities, privatised and publicly owned, and those companies which provide services essential to getting into and out of ports, such as towage and pilotage companies.

Stevedores and terminal operators.
48. Apart from the two major container terminal operators/stevedores, there are many other private terminals specialising in certain types of bulk, bulk liquids and breakbulk cargoes, spread around the country's 100+ ports. Some stevedoring companies and terminals are owned and operated by cargo interests, some by port authorities, and many are small entrepreneurial organisations with one or two clients only.

Ship service companies.

49. These include ship repair yards, labour contractors working in the ship repair field, provedores, ship chandlers, marine equipment manufacturers and service technicians attending to various specialised pieces of shipboard equipment.

Marine insurance, classification societies and marine surveyors.

50. This group varies from the large Australian and internationally owned marine underwriting companies, to the insurance broking houses, local representative offices of the international classification societies, and the small independent ship and cargo surveying companies, who are spread around every port in Australia.

Maritime financiers.

51. Whilst the big local banks finance ships for trading within Australia (from container ships down to trawlers and port service boats—tugs, launches), there is a general reluctance for them to finance ships that trade internationally, primarily as they do not fully understand the business and their prudent nature

deems international shipping too risky, a view not shared by financial institutions outside Australia. Therefore, there is a secondary market serviced by maritime finance brokers, who act as intermediaries between ship owners and the major specialist international ship finance banks. These maritime finance brokers also arrange trade finance for cargo interests/trading houses, and for local time charter operators.

Freight forwarders and customs brokers.

52. In the liner container trades and specialist project cargo/break bulk field, freight forwarders play an important role. Effectively, they act as logistics providers to the cargo interests, taking the cargo from the warehouse door and delivering it to the site at the other end. This includes arranging the land and sea freight, packaging, documentation, customs clearance, insurance, cargo surveys, and stevedoring."

12.3 The awards referred to in 12.1 fall into a number of categories in the maritime sector. These are the off-shore operations; vessels engaged in the shipping industry; the tug and port operations; and dredging and bunkering operations. It is submitted that the nature of each category is sufficiently diverse to warrant separate modern awards. Different terms and conditions of employment apply to employees in each of these categories. For example:

12.3.1 Employees in the blue water seagoing industry for example are required to work on a roster of swing arrangements whereby they remain on a vessel for periods of several weeks at a time followed periods of accrued paid leave.

12.3.2 Employees engaged on tugs and towing vessels are generally not required to be absent from their homes overnight for extended periods but rather work roster systems and hours in response to the arrival and departure of vessels from ports.

12.3.3 Employees engaged on dredges or barges may be required to work long hours or remain on vessels overnight but are not required to reside on than in response to vessel loading and unloading patterns.

12.4 This submission is primarily concerned with blue water seagoing vessels operating under the provisions of the *Navigation Act 1912(Cth)* which also makes provision for certain terms and conditions of employment applicable to employees on vessels. We note that the Request makes no reference to the application of provisions of the *Navigation Act 1912 (Cth)* or the effect of those provisions on the application of the NES.

12.5 The MISA currently applies to named respondents. Modern awards are to apply to various sectors. The scope of the MISA should not extend beyond its current application.

13. The terms and conditions of MISA have been improperly set, and result from a history of consent positions between Australian ship owners and the Australian maritime unions during times when cabotage was in place and protecting the Australian shipping industry from international competition.

14. In particular, the simplification of MISA occurred by consent of the Australian Shipowners' Association ("**ASA**") (on behalf of the Australian shipowners), and each of the MUA, the AIMPE and the AMOU (Jewell Affidavit [328]). These parties also reached a consent position in relation to the conversion of the award from paid to minimum rates (Jewell Affidavit [337]).

15. The incongruity of the current provisions of MISA is best illustrated in the provisions relating to overtime, leave entitlements, the classification structure and the cargo handling allowance. The effect of the incongruous provisions has been exacerbated by the paid rates conversion and award simplification processes.

16. Overtime was included as part of an aggregate wage by consent in the paid rates conversion process in August 1999 (Jewell Affidavit [330]). This is no longer valid or sustainable under current and proposed statutory standards.

17. The inclusion of overtime in the aggregate wage was used as justification for an annual wage which would be significantly higher than an employee, of an

equivalent work value covered by the Metal, Engineering and Associated Industries Award ("the **Metal Industry Award**"), who worked a greater number of weeks per year. This consent position failed to take account of the historical trade off between leave and overtime. It created a wages relativity between a C10 in the Metal Industry Award and an Integrated Rating covered by MISA that was not adequately based on skill, responsibility and the conditions under which work is performed and continues to support an anomalous and flawed approach to determining appropriate minimum rates of pay and terms and conditions of employment.

18. The provisions of MISA that deal with leave are another area where it is difficult to understand how the provisions of the Act have been complied with. Further, it is unlikely that the provisions in their current form are valid and enforceable since the introduction of the AFPCS and the proposed NES.

19. MISA does not act as a safety net of fair minimum conditions of employment nor provide enforceable minimum standards that protect employees. In particular, the leave provisions are greater than a safety net of fair minimum conditions of employment and inconsistent with Commission standards. Further, the leave provision incorporates double counting and provides for matters other than allowable awards matters, in that it provides for "*other things*" (undefined).

20. Further employees covered by MISA are effectively paid in two forms for cargo handling in that it is part of the ordinary duties of their employment and there is also an allowance included in the award. This is inconsistent with current standards as they apply to the determination of appropriate allowances and when they may be payable.

Award Simplification

21. The process of award simplification occurred by consent, with only minor amendments being sought by the Commission. In order to complete the award

simplification process, the rates of pay in MISA needed to be converted from paid rates to properly fixed minimum rates pursuant to the Full Bench Paid Rates decision.

22. Once again, the position of employers and unions was even when the 18 hours per week overtime that had been calculated at a rate of time and a half was increased to 24 hours at time and a half by consent which had the effect of removing the supplementary component arising from the minimum rates conversion exercising and transferring a substantial component of the differential into the overtime component creating and perpetuating an ongoing flaw in the wages calculations. This overlooked and did not address that past decisions of the Commission which said that overtime on ships "*should in fact be less than the communities and the shore standard*".

23. Overtime was included as part of an aggregate wage by consent in the paid rates conversion process in August 1999 (Jewell Affidavit [330]). The inclusion of overtime in the aggregate wage was used as justification for an annual wage which would be significantly higher than an employee, of an equivalent work value covered by the Metal Industry Award, who worked a greater number of weeks per year. This consent position failed to take account of the historical trade off between leave and overtime.

24. It also created a wages relativity between a C10 in the Metal Industry Award and an Integrated Rating covered by MISA that was not adequately based on skill, responsibility and the conditions under which work is performed. Rather, it arose from an agreement reached in relation to tugs as a result of which the rating classification was increased by consent from a relativity of 97.5% of the C10 rate to 105% of the C10 rate to reflect "industry conditions". By consent the blue water integrated rating classification was then increased to 107.5% from 97.5% to apparently reflect the unique nature of the industry. This approach appears flawed as the terms and conditions of employment as it was inconsistent with Commission wage fixing principles in relation to which it was the work that was valued and was to bear relativity as to skills, qualifications

and expertise to the C10 fitter rate and the conditions under which the work was to be performed was to be separately addressed. This did not occur in this award.

25. Clear double counting involving in the inclusion and calculation of benefits, especially overtime for the performance of work on weekends. The Joint Written Submissions presented during the Award Simplification and Paid Rates Conversion involved calculating overtime on the basis of the following assumptions:

- the Integrated Rating worked 8 hours per day, 7 days per week, equalling 56 hours (including weekends);
- calculating overtime for any work greater than 38 hours per week at double time (based on the overtime rate for shift workers); and
- determining the annual salary over 27 weeks per annum (based on a leave ratio of 0.926 days' leave for each day worked).

26. As the calculation of the aggregate salary is based on employees working 7 days per week, it clearly included the payment of overtime for performing work on weekends. However, MISA also provides that the leave factor also comprises leave in lieu of working weekends and public holidays.

27. MISA provides for a leave entitlement of 0.926 of a day of leave for every day worked, which is equivalent to 27 weeks of duty and 25 weeks off duty each year. This leave entitlement, "*gives effect to, among other things*":

- Leave with pay for weekends and public holidays worked;
- Annual leave with pay of 5 weeks per annum;
- Sick leave;
- Carer's leave;

- Bereavement leave; and
- A 35 hour working week (Jewell Affidavit [217], clause 33.2 MISA 1999)

This effectively means that workers in the maritime seagoing industry receive:

- time off in lieu for sick leave, even if they are not sick;
- time off in lieu for carer's leave, even if they do not need to care for anyone;
- time off in lieu for bereavement leave, even if it is not required; and
- a 35 hour working week, which other industries are not entitled to receive.

These aggregate benefits are in addition to annual leave with pay of 5 weeks, instead of 4 weeks per annum, and leave with pay for weekends and public holidays worked. Notwithstanding this generous provision, where an employee who is sick, or needs to attend a funeral or care for an ill loved one cannot, even with the best will in the world, organise these exigencies during the 25 rostered weeks of leave. If they occur during working time an employee inevitably enjoys a further double counting. These aggregate benefits are inconsistent with the NES.

28. Further, the leave provision provides for matters other than allowable awards matters, in that it provides for "*other things*".

29. To the extent that the leave ratio is provided in lieu of sick leave, carer's leave and bereavement leave, it does not comply with the AFPCS nor the NES. The entitlement to use personal leave for the purposes of carer's or bereavement leave is subject to the employee being absent due to a number of factors requiring leave to be taken. Each of these categories of leave is therefore conditional on an event, such as illness or the death of immediate family or a household member, occurring.

30. Further, to the extent that the leave factor provides for a 35 hour week, the award does not provide for a safety net award. The Commission was required to fix a minimum safety net for the working of ordinary hours in the award under review. The minimum is the AFPCS and NES standard of 38 hours per week. The ordinary hours of 35 week is not a minimum safety net provision and should not be included in MISA as the working pattern does not reflect 35 ordinary hours at all. The establishment of 35 ordinary hours as a working work merely had the effect of increasing the number of hours determined to be overtime hours for the purpose of establishing the annualised salary rate with leave being used to compensate for the three hours.

31. The part of the leave entitlement relating to the 35 hour week was originally argued for in 1973. It was inserted into the leave provision in 1981 as part of a compromise reached between the unions and the employers. The Australian maritime unions' log of claims at that time sought the insertion of a 35 hour week in light of a 35 hour week being generally applied at that time (Jewell Affidavit [277 - 289]). The test case standard for awards in 1998 and 1999 was 38 hours per week.

32. Given employees covered by MISA are effectively paid in two forms for cargo handling, MISA 1999 is not a "foundation of minimum standards" and does not provide for "minimum wages and conditions of employment".

33. The Shipping Reform Taskforce Report (**"SRTF**") acknowledged in April 1989 that conditions of employment for Australian seafarers had often been criticised for being overgenerous by community standards and significantly better than those which apply in the shipping industries of other developed countries (Jewell Affidavit [130**).** Australian seafarer's practices were found to be unproductive.

Leave

34. MISA provides that leave accrues at a rate of 0.926 of a day for each day served at sea, approximating six months leave in every twelve months.

35. Under MISA, employees are entitled to 0.926 days of leave for every day worked – equivalent to 175 days of leave per annum. The leave ratio of 0.926 was introduced by the 1981 Terms of Settlement between the Australian maritime unions and the Australian ship owners. The Terms of Settlement provided that the increase to 0.926 intervals of leave would be deemed to give effect to, amongst other things:

(a) leave with pay for weekends and public holidays worked;

(b) annual leave with pay of 5 weeks per annum;

(c) sick leave; and

(d) subject to paragraph 11 of the Terms of Settlement, compassionate leave and leave in lieu of a 35-hour week.

What comprised "other things" was not explained (Jewell Affidavit [263]).

36. The leave factor that was included in Maritime Industry Modern Ships Award 1989 ("**MIMSA 1989**"), at Clause 26(a), was in similar terms to the clause in the log of claims served by the employers, and the leave clauses included in MISA 1981 and MISA 1983. Just as in Clause 9(a)(ii) of MISA 1981, Clause 26.2 of MIMSA 1989 provided that the 0.926 intervals of leave factor provided were to give effect to, amongst other things, those things set out in the Terms of Settlement. Again, what the "other things" were is not explained in the Terms of Settlement or MIMSA 1989 (Jewell Affidavit [272]).

37. The SRTF Report considered the "leave ratio" and acknowledged that:

(a) many participants in the Australian shipping industry have suggested that the leave entitlement to seafarers of 0.926 of a day leave for every day

on board should be brought into line with overseas practice (typically 0.5 to 0.7 of a day per day on board in OECD countries);

(b) historically there has been a trade-off between leave entitlements and pay rates, with parts of some pay increases being forgone for increased leave; and

(c) the leave entitlement compensates for weekends and public holidays spent at sea, rather than through overtime payments (unlike some other countries), at page 13 of the SRTF Report (Jewell Affidavit [274] and Exhibit EJ32).

38. The IRAS identified leave entitlements as one of the major problems in MISA and is significantly higher than the leave entitlements offered to seafarers in both developing and developed nations

Overtime

39. In order for a vessel to operate efficiently, the Applicants submit that overtime should be paid on a 'time worked' basis. This is consistent with the requirements of the AFPCS and the NES. The reason for this is because the amount of overtime required to unload vessels varies and depends on factors such as the length of each voyage (and thus the frequency of arrival/departure in port and discharge of cargo), available equipment and the level of mechanical breakdown.

40. Working overtime stands in stark contrast to the observation of Justice Foster in May, 1962, when he observed that at sea:

> "o*vertime must be worked and at sea overtime is far easier to perform than in almost any other industry - it is expected, understood and sought after. At sea the men are on the job; there is no travel time, no travel expense, less wear and tear on clothes, no domestic difficulties; at sea there is 8 hours of work and assuming 8 hours sleep; there is 8 hours of leisure in which*

overtime is worked. So that in these circumstances it is not hard to understand that overtime is, as I have said, sought by all personnel." (Jewell Affidavit [145]).

41. The Modern Award that complies with the NES will address this existing problem by disaggregating wages and overtime, and ensuring that overtime is only paid for time worked.

42. As part of the intensification on competition, the cabotage policy has not formally been abolished but its impact has been diluted through the use of SVPs or CVPs that allow foreign flagged and foreign crewed ships to provide coastal services. SVPs are used by ships coming to Australia from overseas which pick up local cargo on their way around the coast before heading overseas again. They are issued for a single voyage between dedicated ports for the carriage of a specified cargo. CVPs are used for ships that remain on the coast; they are issued for up to three months (prior to 2003 it was up to six months) to allow a ship to carry specified cargo between specified ports (ACIL Tasman Report Page 6.3).

43. A number of amendments were made to the Ministerial Guidelines by the Minister for Shipping, the Honourable Peter Reith. These amendments included:

(a) the abolition of the requirement that the Australian maritime unions and the ASA be given notice of an application for a permit;

(b) the liberalisation of the granting of CVPs which, under the Willis Ministerial Guidelines (in operation prior), were only issued if they were in the long term interest of the Australian shipping industry, which resulted in essentially the same criteria applying to the granting of either a SVP or a CVP;

(c) extension of the exemptions for most territorial trades to include the trade between Christmas Island and the Australian Mainland;

(d) exemptions for large passenger ships operating in coastal passenger trades, other than those between Victoria and Tasmania; and

(e) a decrease in the cost of SVP and CVP application fees.

The Reith Ministerial Guidelines did not involve substantive changes to the Willis Ministerial Guidelines; but changes to reflect the Coalition Government's different emphasis in shipping policy

44. The current Ministerial Guidelines were introduced by the Honourable Anthony Albanese MP and came into effect on 1 August 2008. The current Ministerial Guidelines contain considerations at 32 – 36 to take into account when assessing the "adequacy" or "availability" of a licensed vessel and clarify further how the delegate should satisfy himself/herself that a licensed vessel is unavailable or inadequate and whether it is in the public interest to grant a permit. The current Ministerial Guidelines, at paragraphs 40- 42, require the assessment of public interest includes having regard to a requirement for maintenance of supplies, production or service that could not be met by the use of licensed ships, and whether the unlicensed vessel involved would pose an additional risk to Australia's marine environment.

45. The current Ministerial Guidelines also reflect recent Federal Government consideration of the interaction between the granting of permits and migration policy. All permits for unlicensed ships are granted on the condition that the ship leaves Australia for an overseas port at least once in any 3-month period (paragraphs 52 and 68).

46. The current Ministerial Guidelines also make provision for the licensing of vessels pursuant to s.288 of the *Navigation Act 1912* on condition that seafarers employed on the vessels are paid at least Australian wage rates and, if applicable, have access to the passengers' library (paragraph 20) and licence applicants must give an undertaking to pay Australian rates of wages in accordance with Part VI of the *Navigation Act 1912. (our emphasis)*

47. These Ministerial Guidelines were issued by the current government with effect from 1 August 2008 and do not purport to express any policy nor do they extend the operation of modern awards to licensed ships except as to wages as required by the *Navigation Act 1912 (Cth)* or to ships operating under Continuous or Single Voyage Permits. There is no mandate in the Request nor in the Ministerial Guidelines to extend the coverage of modern awards to ships operating under licences granted under s.288 of the *Navigation Act 1912* or permits granted under s.289 of the *Navigation Act 1912.* The scope of the modern award should not exceed the current coverage of the MISA.

48. The IRAS Report also estimated the additional costs as being AUD $2 to 2.5 million per vessel, per year difference between operating Australian vessels and operating vessels in comparable international shipping fleets (IRAS paragraph 82).

The Basis of the Provisions Proposed

49. The principal source awards chosen in the development of the proposed modern award applicable to the blue water seagoing shipping industry are the

- Black Coal Mining Industry Award 2010 (MA000001);
- Mining Industry Award 2010 (M000011)

These awards were selected because they are the most recently-prepared or drafted modern awards that include a number of the test case standards and that take into account and accommodate working patterns and rosters similar to those experienced in the blue water shipping industry. These industries employ on the basis of fly in and fly out rosters of work and most closely reflect the swing arrangements currently applying to seagoing vessels.

50. The making of a Modern Award in terms of the proposal would have the immediate practical effect of the introduction of more classifications on the vessels including classifications with recognised trade classifications,

introduction of junior rates of pay and getting younger people back to sea. These matters should not be contentious.

51. Where practical and consistent with the Request and the award modernisation process, existing provisions of MISA have been maintained. Variations and amendments proposed are intended to ensure that the modern award complies with the NES and incorporates enforceable terms and conditions. Text appearing in italics and underlined reflects the provisions of MISA with appropriate amendments while text appearing in italics is drawn from the model clauses in existing modern awards.

52. The Applicants submit that each provision of the proposed Schedule to the Award is soundly based, and consistent with the AFPCS, NES and the Request. .

Clause 1 - Title

53. This award is the Maritime Industry Seagoing Modern Award 2010.

Clause 2 – Commencement Date

54. This award commences on 1 January 2010

Clause 3 – Definitions and Interpretation

3.1 In this Award, unless the contrary intention appears:

Act means the *Workplace Relations Act 1996 (Cth).*

Annual rate of pay means the annual salary set out in clause ### - classifications and minimum wage rates

Base rate of pay has the meaning in the NES

Commission means the Australian Industrial Relations Commission or its successor

Daily rate of pay *means the daily rate payable to a reliever (as defined)*

Employee has the meaning in the Act

Employer has the meaning in the Act

Enterprise award has the meaning in the Act

Full rate of pay has the meaning in the NES

Minimum weekly rate means the minimum weekly rate of pay set out in clause 16- classifications and minimum wage rates

NAPSA means a notional agreement preserving a State award and has the meaning in the Act

NES means National Employment Standard

On swing/off swing *means the working arrangements where work is required to be performed by the continuous attendance of the employee on board ship for a period of weeks followed by a period of weeks during which the employee is absent from work the whole or part of which absence is paid and which is part of a work cycle.*

Permanent employee *means an employee engaged in classification under this award who is appointed as a permanent employee.*

Reliever *means an employee engaged for part or whole of a swing roster who is not a permanent employee*

Watchkeeping duty *means the duties and hours of work undertaken in compliance with International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.*

Work cycle means a roster cycle made up of working and non working days.

Where this Award refers to a condition of employment provided by the NES, the NES definition applies.

55. Clause 4 Coverage

Current: This award applies in or in connection with vessels trading as cargo or passenger vessel which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers), but does not apply to tug boats, pilot vessels, dredges, off-shore oil rig supply vessels, or vessels engaged in the intrastate colliery trade.

Proposed*: This industry award covers vessels registered in Australia under the Shipping Registration Act 1981 (Cth) that are engaged in the coasting trade as defined by s.7 of the Navigation Act 1912 (Cth) in respect of persons whose classifications are set out in clause ### of this award. This award does not cover an employer bound by an enterprise award with respect to an employee who is covered by the enterprise award.*

56. Clause 5: Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard or in the officers' or crews' common rooms on board ship or through electronic means, whichever makes them more accessible.

57. Clause 6 The National Employment Standards and this award

The NES and this Award contain the minimum conditions of employment for employees covered by this award.

58. Clause 7: Award Flexibility

7.1 *Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual*

employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

7.1.1 *arrangements for when work is performed;*

7.1.2 *overtime rates;*

7.1.3 *penalty rates;*

7.1.4 *allowances;*

7.1.5 *leave loading.*

7.2 *The employer and the individual employee must have genuinely made the agreement without coercion or duress.*

7.3 *The agreement between the employer and the individual employee must:*

7.3.1 *be confined to a variation in the application of one or more of the terms listed in clause 7.1; and*

7.3.2 *not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.*

7.4 *For the purpose of clause 7.3.2 the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:*

7.4.1 *the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Act, as those instruments applied as at the date the agreement commences to operate; and*

7.4.2 *the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any*

other relevant laws of the Commonwealth or any relevant laws of a State or Territory.

7.5 *The agreement between the employer and the individual employee must also:*

7.5.1 *be in writing, name the parties to the agreement and be signed by the employer and the individual employee; (NB: reference to persons under 18 years of age not included as they are not employed on seagoing vessels. See Marine Orders Part 3 - Seagoing Qualifications)*

7.5.2 *state each term of this award that the employer and the individual employee have agreed to vary;*

7.5.3 *detail how the application of each term has been varied by agreement between the employer and the individual employee;*

7.5.4 *detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and* conditions of employment; and

7.5.5 *state the date the agreement commences to operate.*

7.6 *The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.*

7.7 *An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure that the employee understands the proposal.*

7.8 *The agreement may be terminated:*

7.8.1 *by the employer or the individual employee giving notice equivalent to the period of the on swing remaining to be worked or four weeks' notice (whichever is the greater) of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or*

7.8.2 *at any time, by written agreement between the employer and the individual employee.*

7.9 *The right to make an agreement pursuant to this clause is in addition to and not intended to otherwise effect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.*

59. Clause 8. Consultation regarding major workplace change

8.1 Employer to notify

8.1.1*Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.*

8.1.2 Significant effects *include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.*

8.2 Employer to discuss change

8.2.1 *The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in*

clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give representatives in relation to the changes.

8.2.2 *The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.*

8.2.3 *For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees, provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.*

60. Clause 9 Dispute Settlement Procedure

9.1 *An employee on a vessel who is duly appointed, or ceases to be duly appointed, as an employee representative, must advise the master accordingly.*

9.2 *Where a grievance, complaint, claim or any matter under this award, or a dispute in relation to the NES (other than an operational matter)* ~~*which is likely to result in an industrial dispute*~~ *arises between the employer and an employee or group of employees the following procedure will be applied:*

9.2.1 *The employee/s concerned will first meet and confer with the Master of the vessel (or in the absence of the Master, the employer's next most senior shipboard representative) to communicate the specific nature of the problem or request. The employee/s may appoint another person to act on their behalf,* ~~*including a duly appointed delegate of their union*~~*.*

9.2.2 *If the matter is unable to be resolved by discussion at shipboard level, then the Master will expeditiously refer the matter to company management and/or the employee representative (if any)* ~~*may refer the matter to a relevant union official.*~~

9.2.3 *Should the above process be unsuccessful, or a matter arises of significant importance to the operation of the employer's fleet as a whole, senior management and ~~the relevant union Federal/National Secretary (or~~ his/her or their respective authorised representatives or other employee representative will confer as expeditiously as possible, and will attempt to settle the matter.*

9.3 *If any matter cannot be settled at senior level under 9.2~~, it will be referred to the Australian Industrial Relations Commission for conciliation and, if appropriate, determination.~~ a party to the dispute may refer the dispute to the Commission.*

9.4 *The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.*

9.5 *Where the matter in dispute remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.*

9.6 *An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.*

9.6 *While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.*

Current: ~~Employees will continue to work in accordance with this award, whilst the matters in dispute are resolved or determined in accordance with the above procedures.~~

9.7 Current: ~~These provisions will not affect in any way any other rights and duties of either party pursuant to the Workplace Relations Act or any other Act or at common law in relation to any matter~~

~~***9.1*** *An employee will be required to carry out all duties which are within the employee's skills, certification, competence, training and applicable legislation.*~~

~~***9.2 Pilotage Duties - Masters***~~

~~***9.2.1*** *An employer may require a Master to acquire and keep valid a pilotage exemption certificate for use in any port on the Australian coast for which such a certificate is required in order to navigate or shift a vessel.*~~

~~***9.2.2*** *A master will pilot and navigate their vessel in and out of such port and shift the vessel within such ports without employing a licensed pilot unless in the master's reasonable discretion the safety of the vessel would be endangered by the failure to employ a licensed pilot.*~~

~~***9.2.3*** *Reimbursement of costs incurred in acquiring certificate - see 30.2.*~~

61. Clause 10. Types of employment

Employees under this award may be employed under one of the categories described below:

10.1 Probationary employees

10.1.1 *A probationary employee is a full-time employee who is engaged or employed for a probationary period for the purpose of determining the employee's suitability for permanent employment.*

10.1.2 *The employee must be advised in advance that the employment is probationary and the duration of the probation which can be up to three months (excluding periods of leave).*

10.1.3 *Probationary employment forms part of an employee's period of continuous service for all purposes of the award.*

10.2 Permanent employees

For all purposes of this award, a permanent employee is an employee not specifically engaged as a relief employee.

10.3 Relief employees

10.3.1 *A relief employee is an employee specifically engaged as such.*

10.3.2 *Where the employer specifically engages an employee as a relief employee, such employee will, if their employment is terminated (other than through summary dismissal) at any time prior to the expiration of a period of fifteen months continuous service from the date of such engagement, be paid upon termination the sum of 5% of the salary earned during such period of employment.* ***Salary earned*** *will include any payment for leave taken by the employee during the period of employment, but will not include any payment in lieu of leave on termination of employment. (****NB.*** *Incorporates clause 11.1.2)*

62. Clause 11 – School Based Apprentices

~~***11.1*** *The terms of this award apply pro rata to school-based apprentices, except where otherwise stated. A* ***school-based apprentice*** *is a person who is undertaking an apprenticeship in accordance with this clause while also undertaking a course of secondary education.*~~

~~***11.2*** *The minimum hourly wages for full-time apprentices as set out in this award apply to school-based apprentices for total hours worked including time deemed to be spent in off-the-job training.*~~

~~***11.3*** *For the purposes of clause 11.2, where a school-based apprentice is a full-time school student, the time spent in off-the-job training for which the apprentice is paid is deemed to be 25% of the actual hours each week worked on-the-job. The wages paid for training time may be averaged over the semester or year.*~~

~~***11.4*** *A school-based apprentice is allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.*~~

~~***11.5*** *For the purposes of clause 11.4, off-the-job training is structured training delivered by a registered training organisation as specified in the training plan associated with the training agreement which is separate from normal work duties or general supervised practice undertaken on-the-job.*~~

~~***11.6*** *The duration of the apprenticeship is as specified in the training agreement. The period so specified to which apprentice wages apply must not exceed six years.*~~

~~***11.7*** *A school-based apprentice progresses through the wage scale at the rate of 12 months' progression for each two years of employment as an apprentice.*~~

~~***11.8*** *The wage scale is based on a standard apprenticeship of four years. The rate of progression reflects the average rate of skill acquisition expected from the typical combination of work and training for a school-based apprentice undertaking the applicable apprenticeship.*~~

~~***11.9*** *Where an apprentice converts from a school-based to a full-time apprenticeship, all time spent as a full-time apprentice counts for the purposes of progression through the wage scale. This progression applies in addition to the progression achieved as a school-based apprentice.*~~

63. Clause 12: Employer and employee duties

12.1 *An employee:*

(a) *must perform work as reasonably required by the employer; and*

(b) *must undertake training that the employer reasonably requires (which may include training to maintain their classification or acquire new competencies).*

12.2 *Where an employee does not perform work or undertake training in accordance with clause 12.1 the employee is not entitled to payment for that period.*

12.3 *An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the respective classification structures of this award provided that such duties are not designed to promote deskilling and provided that the duties are within safe working practices and statutory requirements.*

Current: ~~**9.1** An employee will be required to carry out all duties which are within the employee's skills, certification, competence, training and applicable legislation.~~

~~**9.2 Pilotage Duties – Masters**~~

~~**9.2.1** An employer may require a Master to acquire and keep valid a pilotage exemption certificate for use in any port on the Australian coast for which such a certificate is required in order to navigate or shift a vessel.~~

~~**9.2.2** A master will pilot and navigate their vessel in and out of such port and shift the vessel within such ports without employing a licensed pilot unless in the master's reasonable discretion the safety~~

~~of the vessel would be endangered by the failure to employ a licensed pilot.~~

~~**9.2.3** Reimbursement of costs incurred in acquiring certificate - see 30.2.~~

64. Clause 13: Termination of employment

13.1 Notice of termination is provided for in the NES. This clause supplements the entitlement to notice of termination in the NES and provides industry specific detail

13.2 Termination by employee

~~*An employee must give one week's notice to terminate employment, or forfeit to the employer one week's pay instead of giving notice.*~~

An employee who desires to terminate his/her employment will unless the employer otherwise agrees:

***13.2.1(a)** where he/she has had not more than three months continuous service, give the employer one week's notice in writing;*

***13.2.1(b)** where he/she has had more than three months continuous service, give the employer four weeks notice in writing.*

13.3 Termination by employer

This clause does not affect the right of the employer to dismiss an employee without notice for:

13.3.1 *serious misconduct and in such cases the wages will be payable up to the time of dismissal only; or*

13.3.2 *where an employee has deserted the vessel on which the employee was employed (the absence of the employee's belongings on board will be prima facie evidence of desertion).*

A permanent employee whose employment is to be terminated will be given in writing the period of notice specified below, or in lieu of such notice will be paid the appropriate amount of the employee's prescribed salary specified below, and employment will terminate on expiration of the notice or the making of the payment.

Continuous period of service with employer	***Notice***	***Payment in lieu of notice***
Less than 3 months	*7 days*	*5% of salary earned during employment**
3 months and less than 1 year	*20 days*	*11 days*
1 year and less than 4 years	*60 days*	*28 days*
Four years or more	*90 days*	*46 days*

** Includes payment for leave taken but not payment in lieu of leave on termination.*

11.1.1(b) *The provisions of 11.1.1(a) will in no case be applied cumulatively.*

11.1.1(c) *Despite 11.1.1(a), a maximum 28 days notice applies in all cases if an employee is terminated arising from the decommissioning of a vessel owing to any strike, ban, limitation, or restriction upon the performance of work.*

11.1.1(d) *An employee may be given notice pursuant to this clause at any time, including when the employee is on or is about to go on leave of any kind, and the period of notice will in such case run during the period of leave.*

11.1.1(e) *The period of notice in this clause will not apply in the case of:*

13.4 Notice of termination—redundancy

Where termination occurs due to redundancy as defined in clause 14.2 the employee whose employment is terminated is entitled to a minimum of four weeks' notice of termination.

13.5 Payments on termination

In the case of termination of employment, and in addition to any other amounts payable pursuant to this award to an employee on termination, the employee must be paid for all annual leave entitlements, and annual leave accrued in accordance with clause 24.3, at the employee's base rate of pay.

13.6 Repatriation to home port after termination

Except in cases of summary dismissal, termination of employment elsewhere than at the home port will be subject to the following conditions:

13.6.1 *Conveyance to Home Port - See clause 26 - Travel Expenses.*

13.6.2 *Provision of keep and meals and accommodation before arrival in home port - see clause 25 - Meal and accommodation allowance.*

65. Clause 14: Redundancy

The redundancy arrangements in this award are an industry-specific redundancy scheme and, as such, Subdivision B of Division 10 of the NES does not apply.

An employee:

14.3.1(a) *whose services are terminated because of the decommissioning and sale off the coast of a vessel; and*

14.3.1(b) *who is not offered reasonably suitable alternative employment by the employer, will be paid one and a half weeks salary at the rate to which the employee was entitled at the time of termination for each completed year of continuous service and pro rata for completed months with the employer.*

14.3.2 *Continuous service will not, in the case of a rating employee, include any service between 31 August 1977 and 28 August 1998.*

MINIMUM WAGES AND RELATED MATTERS

66. Clause 15: Classifications

Subject to compliance with the Navigation Act 1912 (Cth) and Marine Orders made under it, persons employed under this Award may be employed in the classifications of:

15.1 *Master;*

15.2 *Chief Engineer, First Engineer, Second Engineer, Third Engineer;*

15.3 *First Mate, Second Mate, Third Mate*

15.4 *Chief Integrated Rating, Integrated Rating*

15.5 *Chief Cook, Second Cook*

15.6 *Chief Steward, Assistant Steward, Catering Attendant*

67. Clause 16: Minimum wages and allowances

16.1 *The minimum wages and allowances which an employee must be paid are specified in the tables below.*

NB: Hourly rate calculated by dividing minimum rate by 26 then be 14 then by 8 (see clause 15 of MISA). See attachment to affidavit of CHARLOTTE OPPY for alternative calculations.

Annual salary Dry Cargo Vessels

16.1.1 Dry Cargo Vessels of up to 19 000 tonnes (D.C. Cat 1)

Classification	Rates of pay*	Minimum rate $	~~Overtime Component~~	Hourly rate of pay
Master	18	52460	~~19851~~	18.01
	AOV	51100	~~19336~~	17.54
Chief Engineer	18	51526	~~19497~~	17.69
	AOV	50193	~~18993~~	17.23
1st Mate/1st Engineer	18	44056	~~16671~~	15.13
	AOV	42941	~~16249~~	14.75
2nd Mate/2nd Engineer	18	40425	~~15297~~	13.88
	AOV	39419	~~14916~~	13.54
3rd Mate/3rd Engineer	18	38557	~~14590~~	13.24
	AOV	37605	~~14230~~	12.91
Chief Integrated Rating/Chief Cook/Chief Steward	18	36223	~~13707~~	12.44
	AOV	35339	~~13372~~	12.14
2nd Cook	AOV	32969	~~12475~~	11.32
Integrated Rating/Asst. Steward/Catering Attendant	18	32851	~~12431~~	11.28
	AOV	32062	~~12132~~	11.01

16.1.2 Dry Cargo Vessels of between 19 000 and 39 000 tonnes (D.C. Cat 2)

Classification	Rates of pay	Minimum rate $	Overtime Component $	Hourly rate of pay $
Master	18	54210	~~20513~~	18.62
	AOV	52800	~~19980~~	18.13
Chief Engineer	18	53242	~~20147~~	18.28
	AOV	51859	~~19623~~	17.81
1st Mate/1st Engineer	18	45491	~~17214~~	15.62
	AOV	44334	~~16776~~	15.22
2nd Mate/2nd Engineer	18	41616	~~15747~~	14.29
	AOV	40677	~~15392~~	13.97
3rd Mate/3rd Engineer	18	39783	~~15054~~	13.66
	AOV	38795	~~14680~~	13.22
Chief Integrated Rating/Chief Cook /Chief Steward	18	36877	~~13954~~	12.66
	AOV	35974	~~13613~~	12.35
2nd Cook	AOV	33518	~~12683~~	11.51
Integrated Rating/ Asst. Steward/ Catering Attendant	18	33382	~~12632~~	11.46
	AOV	32578	~~12328~~	11.19

* Vessels manned at 18 or below (18); All other vessels (AOV)

16.1.3 Dry Cargo Vessels over 39 000 tonnes (D.C. Cat 3)

Classification	Rates of pay	Minimum rate $	Overtime Component $	Hourly Rate $
Master	18	56269	~~21292~~	19.32
	AOV	54799	~~20736~~	18.82
Chief Engineer	18	55259	~~20910~~	18.98
	AOV	53818	~~20365~~	18.48
1st Mate/1st Engineer	18	47179	~~17853~~	16.20
	AOV	45973	~~17396~~	15.79
2nd Mate/2nd Engineer	18	43140	~~16324~~	14.81
	AOV	42051	~~15912~~	14.44
3rd Mate/3rd Engineer	18	40719	~~15408~~	13.98
	AOV	39704	~~15024~~	13.63
Chief Integrated Rating/Chief Cook /Chief Steward	18	37184	~~14070~~	12.77
	AOV	36272	~~13725~~	12.46
2nd Cook	AOV	34207	~~12944~~	11.75
Integrated Rating/ Asst. Steward/ Catering Attendant	18	33545	~~12693~~	11.52
	AOV	32736	~~12387~~	11.24

16.2 Annual Salary Tankers and Gas Carriers

16.2.1 Crude Tankers

Classification	Rates of pay*	Minimum rate $	~~Overtime Component $~~	Total Hourly Rate $
			-	
Master	18	64359	~~24353~~	22.10
	AOV	62105	~~23501~~	21.33
Chief Engineer	18	63189	~~23911~~	21.70
	AOV	60980	~~23075~~	20.94
1st Mate/1st Engineer	18	53229	~~20142~~	18.28
	AOV	51404	~~19451~~	17.65
2nd Mate/2nd Engineer	18	49127	~~18590~~	16.87
	AOV	47460	~~17959~~	16.30
3rd Mate/3rd Engineer	18	45613	~~17260~~	15.66
	AOV	44080	~~16680~~	15.14
Chief Integrated Rating/Chief Cook /Chief Steward	18	40433	~~15304~~	13.88
	AOV	39114	~~14801~~	13.43
2nd Cook	AOV	36296	~~13734~~	12.46
Integrated Rating/ Asst. Steward/ Catering Attendant	18	35756	~~13530~~	12.28

	AOV	34503	~~13056~~	11.85

16.2.2 Other (Product) Tankers

Classification	Rates of pay*	Minimum rate $	Overtime Component $	Total Hourly Rate $
Master	18	67043	~~25369~~	23.02
	AOV	64125	~~24265~~	22.02
Chief Engineer	18	65816	~~24905~~	22.60
	AOV	62957	~~23823~~	21.62
1st Mate/1st Engineer	18	54789	~~20732~~	18.81
	AOV	52455	~~19849~~	18.01
2nd Mate/2nd Engineer	18	50499	~~19109~~	17.34
	AOV	48369	~~18303~~	16.61
3rd Mate/3rd Engineer	18	47436	~~17950~~	16.29
	AOV	45452	~~17199~~	15.61
Chief Integrated Rating/Chief Cook /Chief Steward	18	41921	~~15863~~	14.40
	AOV	40304	~~15251~~	13.84
2nd Cook	AOV	37387	~~14147~~	12.84

Integrated Rating/ Asst. Steward/ Catering Attendant	18	37736	~~14279~~	12.96
	AOV	36219	~~13705~~	12.44

16.2.3 Gas Carriers

Classification	**Rates of pay***	**Minimum rate $**	**Overtime component $**	**Total Hourly Rate $**
Master	18	66342	~~25104~~	22.78
	AOV	64577	~~24436~~	22.18
Chief Engineer	18	65131	~~24646~~	22.37
	AOV	63402	~~23991~~	21.77
1st Mate/1st Engineer	18	54228	~~20520~~	18.62
	AOV	52817	~~19986~~	18.14
2nd Mate/2nd Engineer	18	49989	~~18916~~	17.17
	AOV	48701	~~18428~~	16.72
3rd Mate/3rd Engineer	18	47868	~~18113~~	16.44
	AOV	46642	~~17649~~	16.02
Chief Integrated Rating/Chief Cook /Chief Steward	18	43325	~~16394~~	14.88
	AOV	42231	~~15980~~	14.50

2nd Cook	AOV	39984	~~15130~~	13.73
Integrated Rating/ Asst. Steward/ Catering Attendant	18	39189	~~14829~~	13.46
	AOV	38219	~~14462~~	13.12

NB: Vessels manned at 18 or below (18); All other vessels (AOV)

16.3 *An employee absent from work is not entitled to payment for the period of absence unless paid absence is agreed by the employer, or permitted by this award or the law.*

16.4 *Unless otherwise agreed between the employer and the majority of employees, wages will be paid fortnightly.*

16.5 *Wages will be paid by ~~cheque or~~ electronic funds transfer.*

16.6 *Subject to the operation of swing arrangements and leave being given or taken in advance of accrual in the absence of agreement to the contrary, not more than one week's pay will be kept in hand by the employer.*

16.7 *Upon termination of employment, wages due to an employee will be paid on the day of such termination ~~forwarded by~~ ~~post~~, within 72 hours, to the last address notified in writing by the employee or by electronic funds transfer.*

16.8 *Subject to all relevant laws, an employer and an individual employee may agree to a salary sacrifice arrangement. The obligations of the employer in respect of payment of remuneration will be satisfied by the employer complying with such an arrangement provided that the salary sacrificed amount and the residual wages combined are not less than the classification rate otherwise payable.*

16.9 Supported wage system

N/A

16.10 National training wage

N/A

16.11 Deductions of wages and allowances

16.1 Deductions for keep

16.1.1 *This clause will apply where the employer accommodates and keeps the employee in the vessel.*

16.1.2 *From the payments due under clause 14 - Table of salaries, the employer will deduct an amount of $12.93 for each week of seven days when either:*

16.1.2(a) *keep and accommodation are provided or*

16.1.2(b) *any allowance under 25.1 or 25.2 is paid to an employee.*

16.1.3 *This allowance will be reviewed on and from 1 January in each year by one quarter of the total percentage movement in the consumer price index for the preceding four quarters.*

16.2 Deductions for refusal to carry out duties

An employee will not be entitled to payment of any wages or salary or any other allowance or payment for any period during which a refusal or failure to work as required continues. The non-entitlement will be at the hourly rate of each hour or part of an hour that the employee so refuses or fails to work. The hourly rate for the purposes of this clause will be l/24th of the appropriate daily rate.

Clause 16.3: Allowances

At the time of any adjustment to the standard rate, each expense related allowance will be increased by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.

16.3.1 Tanker Allowance

An employee will receive a tanker allowance of $7.02 for each day of duty on a tanker. This payment includes a travelling allowance and is in lieu of any other such allowance.

16.3.4 Vessels wrecked or stranded allowance

If a vessel in the course of a voyage becomes wrecked or stranded and an employee is called upon for special efforts while the vessel is still wrecked or stranded, the employee will for the time during which the employee so assists be paid at the rate of $10.89 per hour in addition to any other entitlement under this award.

16.3.5 Personal effects allowance

If by fire, explosion, foundering, shipwreck, collision or stranding, an employee should sustain damage to or loss of his/her personal effects or equipment, the employer will compensate him/her for such damage or loss by a payment equivalent to the value thereof not exceeding $3316.60.

16.3.6 Study allowance

16.3.6.1 Eligible employees

16.3.6.1 (a) *An employee Deck Officer who goes ashore to study and sit for an approved course of study qualifying such employee as a First Mate (Chief Deck Officer) or Master of a ship.*

16.3.6.1(b) *An employee Marine Engineer, Engineering Officer or Electrical Engineer Officer (Electrician), who goes ashore to study and sit for an approved course of study of Marine Engineering.*

16.3.6.2 *An* ***approved course of study*** *is a Certificate of Competency, including an Endorsement, as prescribed by the Navigation Act or*

regulations made thereunder, conducted by the Australian Maritime College or an approved technical institution or academy.

16.3.6.3 Conditions for accessing entitlement

The entitlements prescribed in 16.3.6.4 will only be payable by the employer if the following conditions are met:

(a) *an application in writing has been made by the employee and has been approved in writing by the employer; and*

(b) *the Officer has been in the employment of the employer for the twelve months prior to commencing the period of study; and*

(c) *if the employer so desires, the Officer will enter into a written undertaking that the employee will remain in its employment for a period of at least twelve months after sitting for the certificate in question. This arrangement will not prevent an employer from terminating an Officer, however an Officer may only terminate their employment during this twelve month period:*

- *with the employer's consent, or*
- *with the approval of the Commission; and*

(d) *the entitlement will be confined to the first attempt to obtain the certificate in question; and*

(e) *the Officer provides the employer with reasonable proof of satisfactory attendance at the course of study and examination.*

16.3.6.4 Entitlement

(a) *For approved study outside period of accrued leave - 75% of the eligible employee's salary or wages for the authorised period of study.*

(b) *For approved study during period of accrued leave - A period of additional leave (immediately following the sitting for each certificate), equal to three quarters of the authorised period of study.*

(c) *An employer and an Officer may agree to grant the additional leave under (b) as payment in lieu of leave.*

16.3.6.5 Living away from home allowance

(a) *When it is necessary for an Officer to take up temporary residence away from their home port to undertake the approved study, the Officer will be entitled to the following* ***living away from home*** *allowance, during the authorised period of study:*

- *$88.80 per week, or*
- *$125.21 per week, (if the officer has a spouse and/or dependant children)*

(b) ~~*The allowances set out in 24.5.1 will be reviewed on or from 1st January each year by the total percentage movement in the consumer price index for the preceding four quarters.*~~

16.3.6.6 Authorised period of study

The ***authorised period of study*** *for eligible employees under this clause will consist of:*

(a) *the period of their attendance at the course of study for each such certificate;*

(b) *the prescribed examination times and*

(c) *vacation times or holidays of not more than seven consecutive days (including Saturdays, Sundays and holidays).*

16.3.6.7 *Where an application by an Officer to undertake an approved course of study has been approved by the employer, and the Officer is subsequently retrenched, the Officer will be entitled to payment in accordance with 16.3.6.(a). For these purposes, the Officer's salary rate will be that rate applicable at the date of termination.*

16.4 Meal and accommodation allowance

16.4.1 *An employee will be entitled to the relevant meal or accommodation allowance set out in 16.4.4, in the following circumstances:*

(a) *where an employee in a vessel is required by the employer to take a meal ashore and/or be accommodated ashore at a port other than at the employee's home port; or*

(b) *subject to 16.4.3, where an employee is directly travelling to their home port at the employer's expense pursuant to 16.5 or any applicable legislation.*

16.4.2 Employees in their home port

Employees in a vessel in their home port will only be entitled to the accommodation allowance set out in 16.4.4 when:

(a) *their usual place of residence is not actually located in their home port, and*

(b) *accommodation is not provided, and*

(c) *they produce evidence to the reasonable satisfaction of the employer that they properly incurred the particular expenditure.*

16.4.3 Meals whilst travelling by air

An employee will only be entitled to payment of the respective meal allowance set out in 16.4.4 when:

(a) *the employee is travelling at the employer's expense in accordance with 16.4.1, and*

(b) *an in-flight airline meal is not available to the employee whilst travelling during breakfast hours (0700-0900) and/or lunch hours (1200-1400) and/or dinner hours (1700-1900).*

16.4.4 Entitlement

An employee's entitlement under the above clauses will be as follows:

Daily rates	***Entitlement $***
Breakfast Meal	*14.71*
Lunch Meal	*17.74*
Dinner Meal	*29.39*
Accommodation	*104.48*
Accommodation and all meals	*166.33*
Weekly Rates	
Meals	*309.19*
Accommodation	*522.40*

16.4.5 *This clause will not apply where the employer provides meals and accommodation.*

16.5 Travel expenses

The employer will reimburse reasonable travel expenses of an employee, when the employee is travelling:

16.5.1 *as required by and for the purposes of the employer;*

16.5.2 *to and/or from the employee's home port in the following circumstances:*

(a) incidentally to the taking of leave as required by the employer;

(b) pursuant to the application of the Navigation Act.

(c) when the employee's employment is terminated by the employer, except where the employee is dismissed for misconduct and the dismissal is not subsequently overturned; or

(d) when the employee terminates their employment at the same time that articles of agreement expire through effluxion of time at any port other than at the employee's home port.

16.5.3 *This clause will not apply where the employer provides free travel.*

16.5.4 *Meals and accommodation during Travel: See clause 16.4 – Meal and accommodation allowance.*

16.5.5 *In order to claim an entitlement under this clause, an employee will produce evidence to the reasonable satisfaction of the employer that the expenditure claimed was properly incurred by the employee.*

16.6 Conveyance

Unless the master considers it unreasonable in the circumstances at the time, where a vessel lies at anchorage or at any buoy within port limits and is not duly treated as being at sea whilst there, the employer will reimburse to the employee the cost of conveyance between the vessel and a safe landing place. This clause will not apply where the employer provides the conveyance.

16.7 Medical expenses

An employee who undergoes a medical examination by a medical inspector of seamen, at the requirement of the employer, or pursuant to requirements under the Navigation Act, and relevant Marine Orders, will be reimbursed for the cost of the prescribed fees by the employer.

16.8 Passport/travel document expenses

An employee who is required by the employer to have and maintain:

- *a valid passport*
- *any necessary visas and*
- *necessary vaccinations*

will be reimbursed by the employer for all reasonable charges, fees and expenses incurred by the employee in this respect.

16.9 Reimbursement of expenses

The employer will reimburse an employee any expenses reasonably incurred by the employee in the performance of their duties and on behalf of the employer.

The entitlement under this clause will extend to:

(a) *expenses in respect of fees incurred by a Master or Deck Officer in obtaining or renewing a pilotage exemption certificate in the course of his/her service with the employer,*

(b) *expenses associated with enquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations,*

(c) *reimbursement of reasonable legal costs incurred or fines imposed by a competent tribunal under any applicable environmental legislation. provided that the expenses incurred were not due to, or arise from, the employee's personal default or misconduct.*

In order to claim a reimbursement under this clause, an employee will produce evidence to the reasonable satisfaction of the employer that the expenditure claimed was properly incurred by the employee.

16.10 Industrial Clothing

Uniforms

Where the employer requires an employee to wear a uniform, the employer must reimburse the employee for two-thirds of the cost of purchasing such clothing.

Trappings

Where an employer requires an employee to purchase any trappings, the employer must reimburse the employee for the full cost of purchasing such items. Any such items will remain the property of the employer.

Safety shoes, and protective clothing.

Where an employer requires an employee to purchase any safety shoes and protective clothing (including overalls), the employer must reimburse the employee for the full cost of purchasing such items. Any such clothing will remain the property of the employer.

This clause will have no application where the industrial clothing is supplied to the employee wholly at the employer's expense.

Overtime

68. The existing overtime provision of MISA is not a properly set minimum. Historically, the same aggregate wage rate has applied to day and night work, weekdays, weekends and public holidays for work done by employees covered by MISA and its predecessors. The generous leave entitlement included in MISA has compensated for weekends and public holidays spent at sea, instead of by way of traditional loadings and penalties. There has traditionally been a strong link between overtime and leave entitlements.

69. As early as 1955 the Courts took account of the different principles that applied to overtime for seafarers as compared to overtime for shore based employees. In the 8 principles established by the Full Bench [Jewell Affidavit] the Full Bench set out that the paid penalty rate for working on weekends should be lesser for seafarers than shore workers as seafarers were *"already "*on the job*", for which they have already been properly compensated"*.

70. It was in the application of these principles to the Seamen's Award 1955 that Justice Foster first used the concept of a *"leave ratio"* and *"leave intervals"*. Justice Foster varied the Seamen's Award 1955 to provide for a seaman working 242 days a year and receiving 123 days paid leave. Justice Foster made clear in his decision that because seafarers were now receiving leave in lieu of working weekends and public holidays, they should not expect to receive additional compensation or higher rates of pay for it.

71. Justice Foster again discussed overtime in the maritime seagoing industry in his decision on 8 May 1962 when discussing variations to the Marine Engineers Award 1962 and the Merchant Service Seagoing Award 1962. He stated that in the maritime industry:

> *"Overtime is essential, unavoidable, and inevitable, and all who enter it know that this is so; they are also aware from the beginning of their career, that it involves absence from home society and social living normal to shore workers"*

Justice Foster went on to say that at sea:

> *"Overtime must be worked and at sea overtime is far easier to perform that in almost any other industry - it is expected, understood and sought after. At sea the men are on the job; there is no travel time, no travel expense, less wear and tear on clothes, no domestic difficulties; at sea there is 8 hours of work and assuming 8 hours of sleep; there is 8 hours of leisure in which overtime is worked. So that in these circumstances it is not hard to understand that overtime is, as I have said, sought by all personnel."* (Jewell Affidavit).

72. Justice Gallagher referred to the decision of Justice Foster discussed above in a decision and order on 11 February 1969 following a maritime industry work value enquiry. Justice Gallagher acknowledged Justice Foster's comment that overtime was "*essential, unavoidable and inevitable"* (Jewell Affidavit [155]).

73. As part of that inquiry, the AIMPE sought that all marine engineers be put on a salary that would provide for working a certain amount of overtime. The question was not dealt with at that stage, was deferred for further inquiries and the right was reserved to the parties for them to confer. The parties exercised that right but no agreement was reached and the matter went to arbitration. In a decision on 10 December 1969 Justice Gallagher determined that:

> *"the best method for introducing salaries for deck officers and engineers would be one that enabled a separate salary for each ship. The salary would therefore take into consideration the particular features of the vessel, the task and service, the trade on which the vessel was engaged and all other circumstances."* (Jewell Affidavit [160**]**).

74. Wages were converted into annualised aggregate salaries for a majority of employees in the maritime seagoing industry by Justice Gallagher in his decision and order on 1 October 1970 (Jewell Affidavit [162]).

75. MISA 1973 consolidated the various maritime awards and provided an aggregate salary for all maritime employees. This salary took account of all aspects and conditions of employment and incorporated the Maritime Industry Allowances Order 1969 (Jewell Affidavit [170]).

76. Under MISA 1973 to MISA 1983 and under MIMSA 1989, the remuneration clause expressly provided that the salaries were fixed on the basis that, except where provided otherwise, they took into account all aspects and conditions of employment. No additional payments were payable in respect of overtime.

77. In 1981, major industrial disputation was settled by terms of settlement. The document "Terms of Settlement" was a statement of the agreed position of the parties to MISA 1981. The lifting of restrictive work practices and award limitations on work outside of hours (including weekends) was part of the bargain struck by the parties in the Terms of Settlement. Employees received significant benefits in return for these concessions. These benefits included the

staggered increase of the leave ratio in the award. That staggered increase has led to the leave benefits that are currently provided for in MISA 1999 (Jewell Affidavit [198]). Remuneration is discussed at clause 14 of the Terms of Settlement. This clause states that the increases in wages/salaries would be in satisfaction of all claims for increases in standards of penalty and/or shift rates applicable in comparative areas of work or industry generally (Jewell Affidavit [198 - 199]).

78. The link between overtime and leave was again explained in the SRTF Report. The SRTF Report stated that the conditions of employment for Australian maritime workers reflected a number of factors, including:

(a) there has, over time, been a trade off between pay rates and leave entitlements, with the result that parts of some pay increases were forgone for increased leave entitlements; and

(b) unlike some overseas countries, the leave entitlement compensates for weekends and public holidays spent at sea (rather than through penalties/loadings) (Jewell Affidavit [214]).

79. The situation referred to by Justice Ludeke in 1973 (see Jewell affidavit [184**]**), of increased remuneration (inclusive of overtime) in addition to shorter hours was the consent position arrived at in the award simplification and paid rates conversion process before Commissioner Wilks in 1998 and 1999. The parties agreed to a situation of *"leave in lieu of working weekends and public holidays worked"* as well as *"additional compensation or higher rates of pay for it"* (as discussed by Justice Foster in a decision on 4 December 1958 A6961 (Jewell Affidavit [226-233]).

80. This is, as was argued by the employers in the Full Bench hearing in relation to the Seaman's Award 1955 (see paragraphs 221 and 222, Jewell Affidavit) an *"unfair, unreasonable and undue impost on the industry…."*. Employees covered by MISA 1999 are effectively getting the benefit of leave in lieu of

overtime worked as well as overtime included in their aggregate wage, without being required to demonstrate that they do in fact work that overtime.

81. Surprisingly, there was little examination of overtime in the award simplification and paid rates conversion process. In effect, overtime was used to inflate the wage rate to the desired level. Even after, in the Joint Written Submissions, the 18 hours per week had been included in the wage rate for overtime at a rate of time and a half, it was belatedly, and by consent, increased to 24 hours.

82. The reconciliation of hours of work, overtime payment and leave accrual is a fundamental aspect of the award modernisation process and requires careful assessment to ensure that it accurately values each component of the work undertaken, remedies existing anomalies and double counting and complies with the NES.

83. The overtime provision set out below attempts to accommodate the requirements of the Act, the NES and the working pattern and arrangements currently applying in relation to which the leave factor fully compensates for overtime hours worked.

84. **Overtime/ Hours of work/ leave accrual**

The interaction of hours of work, swing arrangements, overtime and leave accrual suffers from:

- Lack of clarity in relation to the basis of calculations and the values assigned to the various factors making up the components of overtime and leave accrual;
- Double counting of some of the factors incorporated into calculations for leave accrual and overtime;
- Inconsistency with and potential unenforceability of wages provisions with respect to the overtime component and leave accruals with respect to annual, personal and compassionate leave;

- Inconsistency with model clauses determined by the Full Commission in the award modernisation process.

It is submitted that a thorough analysis needs to be undertaken of the component parts of the MISA in so far as they provide for overtime, leave accrual and overtime to ensure that the resultant modern award complies with the NES. An approach that accommodates existing working patterns and arrangements and takes into account the NES is required.

In recognition of the working patterns and operational requirements of this industry the salary arrangements should include provision for annualised/ aggregate salaries that incorporate accurately assessed factors defining hours of work relating to:

(a) operation of the vessel;

(b) maintenance of the vessel.

An example of an existing working pattern and salary arrangement as defined above is set out in the Intercontintal Ship Management (Iron Chieftain) maritime Union of Australia Agreement 2003.

85. Clause 18 Hours of work

It is not understood that the following provisions would be controversial.

18.3.1 Employees assigned to watchkeeping duties

18.3.1(a) *An employee who is assigned duty as officer in charge of a watch or as a rating forming part of a watch must be provided a minimum of ten hours of rest in any 24 hour period. The hours of rest may be divided into no more than two periods, one of which must be at least six hours in length.*

18.3.1(b) *The requirements for rest periods laid down in 18.3.1(a) need not be maintained in the case of an emergency or drill or in other overriding operational conditions.*

18.3.1(c) *Despite 18.3.1(a), the minimum period of ten hours may be reduced to not less than six consecutive hours provided that any such reduction must not extend beyond two days and not less than 70 hours of rest are provided each seven day period;*

183.2 Other employees

18.3.2(a) *An employee not covered by 18.3.1 must be provided a minimum of ten hours of rest in any 24 hour period. The hours of rest may be divided into no more than two periods, one of which must be at least six hours in length.*

18.3.2(b) *The requirements for rest periods laid down in 18.3.2(a) need not be maintained in the following circumstances:*

18.3.2(b) ***(i)*** *if the employee is required to carry out work necessary for the shifting , arrival or sailing of the ship and/or essential work which cannot be reasonably deferred; or*

18.3.2(b) ***(ii)*** *in the case of an emergency or drill or in other overriding operational conditions.*

18.3.2(c) *Despite 18.3.2(a) and 18.3.2(b), the minimum period of ten hours may be reduced to not less than six consecutive hours provided that any such reduction must not extend beyond two days and a compensatory rest period of not less than eight consecutive hours (exclusive of meal breaks) is provided to such employees as soon as reasonably practicable thereafter.*

18.3.3 *The terms of this clause will not affect the operation of applicable legislation and regulations.*

Leave Entitlements

86.1 **The history** of the leave ration is summarised below:

4 December 1958 - Seaman's Award 1955 varied and introduced leave ratio and leave intervals. Leave / intervals were made up of:

- 52 intervals in each six months (104 per year) [without reference to weekends *"worked"*
- 2 weeks paid annual leave; and
- 9 Public holidays per year.

This resulted in a total of 123 intervals (or days) of paid leave each year that equates to a leave ration of **0.3369.**

1962 The same provisions were extended to other Maritime Awards in operation at the time.

1 October 1970 – The leave ratio in the Marine Engineers Award increased to **0.625** and at the same time wage rates were converted to salaries.

4 May 1973 – The maritime awards were consolidated to create MISA 1973. The leave ratio went to **0.677** and thereafter to **0.7333**.

December 1977 - Leave ratio increased to **0.793** by consent as part of new MISA 1977

October 1981 - MISA 1981 created and included by consent of the parties an increase in leave ratio to **0.857**.

4 May 1982 - a further increase to **0.926.** The 1981 MISA stated that these increased leave ratios were to give effect to, *"amongst other things'*,- leave with pay for weekends and public holidays *"worked";* 5 weeks annual leave; sick leave, compassionate leave and 35 hour working week.

86.2 The analysis of the current leave ratio of 0.926:

- 0.926 results in 27 weeks [189 days] of work and 25 weeks [175 days] paid days off.
- The leave in clause 33.2 of the current MISA is said to cover "*amongst other things*",:
    1. annual leave [25 days] ;
    2. personal/carer's leave [10 days];
    3. public holidays "*worked"* [10 days - NB: Employees are not required to work each Public Holiday in order to entitled to payment for all 10 days as it is unlikely that each employee will work all public holidays in a calendar year on the basis of the current swing arrangements regardless of the split employees receive a benefit equal to double time for those public holidays worked and single time for days observed];
    4. weekends *"worked"* [27 x 2 = 54 days *"worked*"]. This adds up to a total of 99 days which increases to 144 days if the other 25 weekends not worked are included in the calculation.
- It can only be concluded from this analysis that the remaining 76 day of paid leave under the 0.926 ratio must be to cover the bereavement or Compassionate leave, the 35 hour week and the "*other things"* components referred to in clause 33.2. These 76 days reduce to 26 days only if it is accepted the other 25 weekends not worked are payable notwithstanding that the employee is not at work.

86.3 The analysis of the correct leave ratio based on actual working patterns is to avoid double counting by reducing the current 175 days off to 140 days and result in a reduction in the leave component from 0.926 to .74185. Any other forms of paid leave such as compassionate leave, given it is a form of leave

triggered by an actual event which may or may not occur, should be included in the balance of 76 days referred to above.

The inclusion of model clauses to address NES standards for annual leave, personal leave and compassionate leave will also impact the calculation of the leave accrual ratio.

86.4 ***Leave in advance***

Where the employee's leave has expired, they may take leave in advance or alternatively they may take leave without pay. All in leave in advance is recoverable and an employee who has or is about to incur a negative days leave balance will be queried to work of the negative leave balance at the first available opportunity nominated by the employer. The employer will consult with the employee and give the maximum possible notice of the time that the employee will be required to work off the negative leave.

Clause 20 : Annual Leave

The adoption of this provision requires further adjustment to the leave accrual calculation

20.1 *Annual leave entitlements are provided for in the NES. This clause supplements those entitlements and provides industry specific detail.*

20.2 Entitlement to annual leave

An employee is entitled to annual leave, in addition to the amount provided for in the NES, such that the employee's total entitlement to annual leave pursuant to the NES and this award for each year of employment is a cumulative total of 175 ordinary hours (five weeks).

20.3 Accrual of annual leave

Employees, other than relief employees, accrue annual leave at the rate of 3.3654 hours of annual leave for each completed week of employment.

20.4 When annual leave can be taken

(a) *An employee with an annual leave entitlement, who wishes to take all or part of that entitlement will, unless otherwise agreed between the employee and the employer, give the employer at least 28 days' notice in writing of the amount of leave to be taken. The employer will grant that leave unless, in the employer's opinion, the operations of the vessel will be affected. Generally annual leave will not be granted during a period when an employee is on swing. Unless otherwise agreed, annual leave will be taken within 12 months of the date the employee received the annual leave entitlement. Annual leave may be taken concurrently with a period off swing.*

(c) *The employer may direct an employee to take all or part of an entitlement provided at least 28 days' notice in writing is given to the employee including during a period immediately following a period of leave off swing.*

20.5 Deduction of annual leave

For each period of annual leave taken the ordinary hours of rostered shifts that would have been worked by an employee will be deducted from the employee's accrued annual leave entitlement.

20.6 Amount of annual leave to be taken

Unless otherwise agreed between the employer and employee, annual leave will be given and taken in not more than three periods, one of which will be of at least three weeks' duration.

20.7 Payment for annual leave

An employee taking annual leave must be paid the employee's full rate of pay (annual leave loading is incorporated in leave accrual pursuant to clause 19).

20.8 When payment will be made for annual leave

An employee will be paid for a period of annual leave in accordance with the employee's normal pay period(s), unless an employee requests that payment of the entire period of annual leave be made prior to the employee commencing leave.

20.9 Taking annual leave in advance

(a) *An employer may allow an employee to take annual leave in advance.*

(b) *Any annual leave which has been taken in accordance with clause 20.9(a) will be deducted from the employee's entitlement as it accrues.*

(c) *The employer may deduct from the employee's termination pay the payment for any annual leave taken in advance which the employee has not yet accrued in accordance with clause 20.3.*

86. ***Clause 21: Personal Leave***

<u>The adoption of this provision requires further adjustment to the leave accrual calculation</u>

21.1 *Personal/carer's leave entitlements are provided for in the NES. This clause supplements those entitlements and deals with evidence required to be provided by an employee when taking paid personal/carer's leave.*

21.2 Entitlement

A full-time employee is entitled to ***10 days*** *of personal/carer's leave (inclusive of the employee's NES entitlement) on commencing employment and on each anniversary of commencement. Any personal leave which is not taken by an employee must accumulate without limitation.*

21.3 Evidence required

(a) *If requested by the employer, the employee must provide a medical certificate or such other evidence as will prove to the employer's reasonable satisfaction that the absence from work was for the reasons set out in the NES.*

(b) *If the proof is disputed, such a dispute may be dealt with in accordance with the dispute resolution procedure.*

21.4 Deduction of personal leave

Any personal leave taken must be deducted from the employee's personal leave entitlement as follows:

(a) *where the absence is for fewer than half the ordinary hours component of the day, no deduction; or*

(b) *in all other cases, the full day's component of the roster will be deducted for each absence.*

87. Clause 22: Public Holidays

<u>The adoption of this provision requires further adjustment to the leave accrual calculation</u>

22.1 *Public holiday entitlements are provided for in Division 9 of the NES. The provisions of this clause will not apply to employee entitled to the leave accrual provide for by clause 19 of this award.*

22.2 Transfer of recognised public holidays

The employer and the majority of employees affected may agree to observe a holiday on a day other than the day prescribed. If this occurs, the day agreed upon is the award holiday and the actual holiday becomes an ordinary working day.

22.3 Employee not required to work on a public holiday

An employee who is not required to work on a holiday which would otherwise have been a working day for that employee will be paid for that day at the employee's classification rate unless the employee, without good and sufficient reason, fails to work on the employee's:

(a) *last working day immediately before the holiday; or*

(b) *first working day after the holiday;*

in which case the employee is not entitled to payment for such holiday.

22.4 Employee required to work on a recognised public holiday

An employee who is required to work on a holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed.

Conclusion

88. It is submitted that the approach set out above in the context of the history of this industry and the information provided represents a balanced and appropriate response to the Request and to the provisions of the NES while taking into account the working conditions and employment arrangements that have applied to persons engaged under the MISA or its predecessors for many decades.

Dated 6th March 2009

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 7

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.576E - Procedure for carrying out award modernisation process

Request from the Minister for Employment and Workplace Relations

(as revised 18 December 2008)

Award modernisation

Submission of the Australian Mines and Metals Association and the Australian Ship Owners Association regarding award modernisation for the Maritime Industry

March 2009

INTRODUCTION

1. The Australian Mines and Metals Association together with the Australian Ship Owners Association (AMMA and ASA) make this submission having regard to the Commission's obligations under:

   a. Part 10A of the *Workplace Relations Act 1996* (Cth) (**Act**);

   b. the Request from the Minister for Employment and Workplace Relations as revised (**Request**); and

   c. the National Employment Standards (**NES**).

2. AMMA has made a separate submission to in respect of the upstream hydrocarbons industry and remote vessel operators.

3. This submission is limited to the maritime industry operations in the seagoing and offshore oil and gas sectors of the maritime industry and addresses the

   a. principles relevant to the award modernisation process;

   b. appropriate award/s scope for the maritime industry;

   c. approach taken by the Employers to develop appropriate safety net content; and

   d. content of particular clauses.

Relevant principles

4. In performing its award modernisation functions, the Commission must have regard to the requirements outlined in Paragraph 1.

5. In addition, the following material provides guidance in relation to how these requirements should be met in this current exercise:

   a. Statements dated 30 January 2009; 23 January 2009; 12 September 2008; 3 September 2008 29 April 2008; and

   b. Decisions dated 19 December 2008; 20 June 2008.

6. AMMA and ASA have had regard to this material in developing their submission in respect of the issues outlined in Paragraph 3.

SCOPE OF THE MODERN AWARD

Coverage principles

7. Based on the requirements of the Act, the Request and relevant Statements and Decisions, AMMA and ASA submit that modern awards in the maritime industry should be established having regard to the following principles:

   Legislative objectives

   a. The Commission is obliged to have regard to the following legislative objectives:

      i. the relevant objects of Part 10A of the Act (including simplicity, reducing the regulatory burden and promoting flexible modern work practices and the efficient, productive performance of work, certainty and a fair safety net);

      ii. the matters the Commission must have regard to in s.576B of the Act;

      iii. the object of the Request (including avoiding extending coverage to employees who perform work that has historically not been regulated by awards and high income earners, not disadvantaging employees or increasing costs for employers, or altering enterprise awards); and

      iv. the desirability of reducing the number of awards (see clause 4B of the Request and s.576B(2)(d)).

The above objectives must be balanced having regard to the circumstances of the industry under consideration and its historical award regulation. A key focus of this process is to establish awards which together with the NES should form a true safety net that is appropriate for the circumstances of each industry.

Regulation of similar systems of work

b. In modernising awards regard should be had to whether the industries/sectors/branches in question to be covered by a modern award are similar in content and operation.

c. The award modernisation process should not introduce from one branch or sector of the industry to the other, particular terms and conditions which have a different background, form, content or structure or regulate different systems or methods of work. This could adversely affect cost structures leave arrangements, flexibilities etc, that have been specifically tailored for the industry. This would be contrary to the requirements of the s576A 2(c) and s2 (c) and (d) of the Request.

Historical award regulation

d. It is consistent with the objectives of the Request - to create a comprehensive set of modern awards and to reduce the number of awards - to recognise the historical boundaries of this industry and the peculiar circumstances of the sectors or branches within the maritime industry. Where an industry has been regulated by awards that have a particular history and regard to the specific needs of the sector or branch in the industry, it should remain so. This is consistent with section 576A (2)(c) of the Act in that do otherwise could result in an adverse economic impact.

e. The Full Bench accepted this approach in respect of the coal mining (see paragraphs [15] – [18] of the 20 June 08 Full Bench Decision).

Views of the parties

f. The views of industry participants on whether particular industries sectors or branches of an industry should be or not be part of the Maritime industry should be given weight. The Full Bench has previously found it appropriate to give weight to the views of the parties (see paragraphs [10], [13] and [95] of the Full Bench Decision 20 June 08.

g. The Commission is required to have regard to the desirability to reduce the number of awards in the workplace relations system and applying to employees and employers. This could be done by bringing sectors or branches of industries together into one award. In some industries this would be impractical (Paragraph 12 Full Bench Decision 19 December 2008).

h. In the retail industry the Commission decided there will be a number of modern wards covering separate sectors. The Commission placed significant reliance on not disadvantaging employees or leading to additional costs and that by making awards for sub-sectors it would not result in additional awards applying to a particular employer or employee (Paragraph 285 Full Bench Decision 19 December 2008).

Occupational Based Awards

i. Whilst modern awards will be made primarily along industry lines, the Commission has a discretion to make occupational awards as it considers appropriate (see paragraph 4 of the Request)

j. When considering its discretion to make a Clerical occupational award the Commission has indicated it is necessary to consider all classes of award covered employees and the extent to which it is appropriate to have those employees covered by an award with industry wide application. (See paragraph 220 19 December 08 Full Bench Decision)

k. In so doing issues of relevance should include the number of awards applying to an employer, cost impact and any disadvantage to employers and employees.

8. The scope provisions of the proposed modern maritime awards have been developed consistent with these principles.

Maritime Industry Award Coverage

9. AMMA and ASA contend that it is appropriate that the maritime industry have a number of modern awards covering separate sub-sectors of the industry. AMMA and ASA contend that the Maritime industry contained at least two sub-sectors in which maritime operations are conducted – Offshore Oil and Gas and Seagoing. These two sectors have different industrial and operational needs and have historically been regulated separately.

10. AMMA and ASA propose that this separation should be maintained and separate modern awards ought be made in order to meet the differing arrangements in each subsector. The reasons in support of this position include:

    a. The historical regulations of these sectors – separate regulation;

    b. The need to ensure that the modern award allows flexible work practices and promotes the productive and economically sustainable practises [s576A 2 (c)];

    c. The disparate nature of the sectors in terms of operation requirements and terms and conditions of employment (particularly wage levels and leave factors);

    d. The requirement not to disadvantage employees or increase employer costs; and

    e. views of the parties who support the separation of the two sub-sectors within the industry.

11. AMMA and ASA submit two awards for the Commission's consideration. These are found at Appendix 1 (Offshore Oil and Gas) and Appendix 2 (Seagoing). Two tables have been included in Appendix 3 and 4 which details the source of the proposed award content.

Proposed Scope of the Maritime Industry Awards

12. The proposed awards will apply to employers that meet the following requirements:

    a. the employer must be engaged in the maritime industry sectors (as defined), recognising that an employer can be engaged in more than one industry;

    b. the employer has employees engaged in or in connection with the maritime industry sector as defined; and

    c. the employees are engaged in a classification in the award.

13. The modern maritime awards will apply to employees of such employers provided that they are engaged in sectors of the maritime industry (as defined) and in a classification in the award.

Definition of the Maritime Industry Sectors

14. AMMA and ASA propose two separate awards to cover the seagoing and offshore sectors.

Offshore Oil and Gas Sector

a. The proposed Offshore Oil and Gas Sector award will apply to the operation of *offshore vessels* (as defined) engaged in connection with maritime offshore oil and gas operations.

15. The term *offshore vessels* include

a. a propelled or non-propelled vessel that may, but is not limited to, be used in navigation, construction or drilling and includes a ship, barge, drilling vessel or rig, crane vessel, floating production facility, tug boat, support vessel, supply vessel, standby/emergency vessel, pipe laying vessel, diving support vessel, lighter or like vessels, or any other vessel used in offshore oil and gas operations.

16. This approach maintains the approach used in the current *Maritime Offshore Oil and Gas Award 2003* in respect of coverage by reference to vessels.

Specific exclusions of industries

17. Based on the coverage principles set out above, there are various sectors or branches of the maritime industry that AMMA and ASA consider should be expressly excluded from the Offshore Oil and Gas - Maritime sector. These are:

a. seagoing vessels trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers);

b. tug boats;

c. barges, self-propelled dredges, tugs or other self-propelled vessels, used in connection with the dredging of ports, harbours, bays, estuaries, rivers and channels; and

d. near coastal or inshore operations covering such areas as ferries, water taxis, tourism charter vessels, coastal cargo vessels, surf and sea search rescue in coastal waters, water-borne police and emergency services vessels, port operations support vessels, marine environmental protection services vessels, and coastal commercial fishing.

Seagoing Sector

e. The proposed Seagoing Sector award will apply to *seagoing vessels* (as defined) trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers).

18. For the purposes of the proposed award the term *seagoing vessels* include:

a. passenger transport, cruise vessels, bulk cargo vessels, container ships, roll-on roll-off passenger/car ferries and tankers.

19. This approach maintains the approach used in the current *Maritime Industry Seagoing Award 1999* in respect of coverage by reference to vessels and trading.

Specific exclusions of industries

20. Based on the coverage principles set out above, there are various sectors or branches of the maritime industry, AMMA and ASA consider should be expressly excluded from the Seagoing - Maritime sector. These are:

a. propelled or non-propelled vessels that may, but are not limited to, be used in navigation, construction or drilling and includes ships, barges, drilling vessels or rigs, crane vessels, floating production facilities, tug boats, support vessels, supply vessels, standby/emergency vessels, pipe laying vessels, diving support vessels, lighter or like vessels, or any other vessels used in offshore and gas operations;

b. tug boats;

c. barges, self-propelled dredges, tugs or other self-propelled vessels, used in connection with the dredging of ports, harbours, bays, estuaries, rivers and channels; and

d. near coastal or inshore operations covering such areas as ferries, water taxis, tourism charter vessels, coastal cargo vessels, surf and sea search rescue in coastal waters, water-borne police and emergency services vessels, port operations support vessels, marine environmental protection services vessels, and coastal commercial fishing.

21. Overlap between these separate sectors proposed to be excluded in paragraphs 17 and 21, and the proposed awards, will be minimal; and to include the distinct industry needs of those industries would require unnecessary modification of the terms and conditions applying. The rationale for the exclusion of these industries is consistent with those outlined in Paragraph 10.

22. These sectors or branches would be better regulated by modern awards that are aligned to the particular work performed.

Other specific exclusions

23. Section 576V(3) states that a modern award must be expressed not to bind employers bound by enterprise awards in respect of employees to whom the award applies. The draft awards meets this requirement.

24. The Scope or coverage of the awards is a crucial issue in determine the appropriate content of the modern awards and the safety net of minimum terms and conditions for the industry to be covered. Should the scope provision alter, it may be necessary to revisit the content of the proposed modern awards.

APPROACH TO DEVELOPING SAFETY NET CONTENT

25. The development of safety net content for modern awards involves two phases:

a. the establishment of a new safety net of minimum terms and conditions of employment appropriate for the award coverage proposed; and

b. any transitional arrangements where the new safety net established by modern awards is different from the terms and conditions in existing awards and NAPSAs.

26. Both these tasks must be undertaken having regard to the requirements of the Act and the Request.

Principles for the new safety net

27. The maritime industry seagoing and maritime oil and gas sectors have principal federal awards to provide a starting point for drafting new award content. AMMA and ASA have used these principal federal awards as the starting point for drafting the modern maritime awards. Existing award regulation of the maritime industry in respect of the oil and gas and seagoing sectors is well understood.

28. The following principles should guide the development of award content for the modern maritime awards:

a. Current work arrangements and practices must not be adversely affected or altered as a result of the making of the new award. The new safety net should reflect and accommodate the current flexible work practices operating in the industry and its needs for the future.

b. The list of relevant awards published by the Commission is a starting point only;

c. From this list, the following instruments should be excluded from consideration:

i. awards that fall outside the scope of the proposed awards; and

ii. enterprise awards (both federal and NAPSAs).

d. Any awards should not adversely impact the ability of workplace arrangements at current operations to continue post 1 January 2010.

e. Minimum terms and conditions should then be identified to establish a true safety net for matters to be included in the modern award.

29. The award content for each clause of the proposed awards have been based on these principles.

REVIEW OF PROPOSED CONTENT

30. The content rationale of the proposed two awards is set out in Appendices 1 and 2.

OTHER MATTERS

Superannuation

31. The current Principle awards for seagoing and offshore do not prescribe a default superannuation fund. Accordingly the proposed awards also do not contain a Superannuation Clause. Superannuation is dealt with exhaustively by legislation and other instruments. It is not necessary that these awards regulate superannuation.

Tony Caccamo
Director – Operations
Australian Mines and Metals Association
6 March 2009

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 8

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation Request from the Minister for Employment and Workplace Relations as revised on 18 December 2008

Matter Number: AM 2008/49

SUBMISSION ON BEHALF OF MARITIME TOWAGE EMPLOYER GROUP

Introduction

1. This submission is made on behalf of:

   - Svitzer Australia Pty Ltd;
   - PB Maritime Towage (Australia) Pty Ltd;
   - North Western Shipping & Maritime Towage Co Pty Ltd;
   - Teekay Shipping (Australia) Pty Ltd;
   - Bowen Towage Services Pty Limited;
   - Port Lincoln Tugs Pty Ltd; and
   - Coastal Tug & Barge Pty Ltd.

   Each of these companies provides harbour towage services to commercial shipping. In this submission they are referred to collectively as the "maritime towage employer group".

2. The seven members of the maritime towage employer group represent, to the best of the group's knowledge, all of the employers bound by the Tugboat Industry Award 1999 (AP799111 – Fed), as named respondents or as the successors, assignees or transmittees of those named respondents. The two employer companies (or their successors) bound by the Tug and Barge Industry (Interim) Award 2002 (AP824200 – Fed) are related companies to members of the group.

3. The maritime towage employer group takes their operations to be included in the "Port and harbour services" industry in the Commission's list of industries and occupations included in Stage 3 of the award modernisation process and referred to in the Commission's Statement of 30 January 2009.

4. The maritime towage employer group has prepared and **attaches** to this submission its proposed draft modern Maritime Towage Award 2010 (**Maritime Towage Award**).

5. Some discussions have been held between representatives of the maritime towage employer group and a representative of the maritime unions (namely, the Maritime Union of Australia (MUA), the Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers Union (AMOU)). These representatives propose to hold further discussions with a view to clarifying or narrowing matters of difference between them, before the pre-drafting consultation hearing before the Commission listed for Friday, 27 March 2009. Subject to those discussions the group may lodge further submissions prior to the hearing.

6. This submission deals with the following matters:

   A. the principles and approach applied by the maritime towage employer group in preparing the Maritime Towage Award;

   B. the proposed award coverage for maritime towage operations;

   C. the approach to developing safety net provisions; and

   D. an explanation of each clause in the Maritime Towage Award.

A. The principles and approach applied by the maritime towage employer group in preparing the Maritime Towage Award

7. In preparing its Maritime Towage Award, the maritime towage employer group has had close regard to:

   - the principles explained and the other guidance provided by the Commission's Decision of 19 December 2008 and Statement of 23 January 2009 and the stage 1 priority awards published by the Commission with its 19 December 2008 Decision;
   - the requirements of Part 10A of the *Workplace Relations Act 1996* (**Act**);
   - the Award Modernisation Request of the Minister for Employment and Workplace Relations (as consolidated following the variation issued on 18 December 2008);
   - the National Employment Standards (**NES**);
   - the Commission's Guide to Format and Structure of Modern Awards; and
   - the Tugboat Industry Award 1999 (the **Tugboat Industry Award**) and the Tug and Barge Industry (Interim) Award 2002 (the **Tug and Barge Award**).

B. Award Coverage of Maritime Towage operations

8. The proposed Maritime Towage Award which the maritime towage employer group has prepared covers all harbour towage operations, and would cover the same ports as those covered by the Tugboat Industry Award, including:

Abbot Point	Townsville	Mourilyan
Cairns	Hay Point	Bundaberg
Mackay Harbour	Brisbane	Newcastle
Gladstone	Botany Bay	Port Kembla
Sydney	Melbourne	Geelong
Westernport	Albany	Lucinda
Portland	Fremantle	Port Hedland
Port Adelaide	Kwinana	Devonport
Port Pirie	Burnie	Port Latta
Whyalla	Hobart	Darwin
Launceston	Geraldton	Bunbury
Eden	Weipa	

(see clause 3.1, Tugboat Industry Award)

Other ports, if any, not presently specified in the Tugboat Industry Award, would also be covered by the proposed modern award.

The Maritime Towage Award would also cover certain combined tug and barge operations, presently covered by the Tug and Barge Award.

9. The making of a separate award covering maritime towage is justified on the following grounds:

(i) The maritime towage industry has been regulated by a separate and comprehensive industry award since 1974 when the Tugboat Industry Award 1974 (164 CAR 988) was made. That industry award replaced a number of federal and State awards that had previously applied to maritime towage employees (since about 1949).

(ii) Successive tugboat industry awards have been maintained since that time, with the Tugboat Industry (Consolidated) Award 1990 being the subject of full award simplification under the *Workplace Relations Act 1996* (Cth) in 1999 (see *re Tugboat Industry (Consolidated) Award 1990 ,* Wilks C, 8 February 1999, Print R1723; Tugboat Industry Award 1999 (AP799111 - Fed).

(iii) The maritime towage industry does not share award or NAPSA coverage with other sectors of the port and harbour services industry. The industry sectors of ports, port authorities, port corporations, stevedoring and the miscellaneous marine activities (which are included in the "Port and harbour services" industry in the Commission's list of industries and occupations) have been covered by separate industry and occupational awards (see *Adelaide Steamship Industries Pty Ltd & Ors and Merchant Service Guild of Australia & Ors* (Full Bench of the Conciliation and Arbitration Commission, C No. 344 of 1982, 18 November 1982, Print F1179) at 6, 11-12; *Re Merchant Service and Marine Engineers (Tug Boats) Awards* (1963) 111 CAR 597 at 603, 621(ff) per Gallagher J).

(iv) Since its inception in 1974, there has also been no history of any industrial nexus between the tugboat industry award(s) and other awards in the port and harbour services industry. In particular, there is no history of any nexus with stevedoring (eg. Stevedoring Industry Award 1999 (AP96113 – Fed)) or maritime operations sectors (eg. Port Services Award 1998 (AP792489 – Fed) or the awards or NAPSAs covering port authorities (eg. NSW Port Corporations Award 2001 (AN120376 - NSW); Port Authorities Award - State 2003 (AN140213 - Qld); Geraldton Port Authority Award 2001 (AP804691 - Fed)).

(v) The nature of the maritime towage industry and the working arrangements in a number of significant respects are substantially different from other sectors in the wider port and harbour services industry. For example, maritime towage operations are carried out 24 hours a day, 7 days a week, and work is performed at variable times, with employees (in some ports) being available for duty for 24 hours and required to perform their duties at unpredictable times as and when tug services are required. The Tug Boat Industry Award therefore provides an option for annual aggregate wages based on calculations of ordinary hours and overtime, weekend and public holiday penalties and leave related to the actual duty requirements in each port to accommodate these arrangements (see clause 9, Tugboat Industry Award 1999).

(vi) There is a relative absence of ready comparison or correspondence between the employment conditions and award standards of tugboat employees on the one hand and stevedoring, maritime operations and port authority workers on the other hand. These other sectors have well established histories of their own industry award or NAPSA coverage. Each of these other sectors has well evolved award regulation which recognises its own peculiar features.

(vii) An attempt to combine the Maritime Towage Award with a new modern award or awards for the other sectors in the port and harbour services industry, would appear only to be achievable by a very substantial reframing of standard conditions, or by a separate and comprehensive schedule to an award having wider application beyond the tugboat industry.

(viii) The maritime towage employer group and the maritime unions are in accord with the proposal that there remain a separate award specific to the maritime towage industry, and appear to have reached a consensus on the coverage of such an award.

(ix) The maintenance of a separate Maritime Towage Award is consistent with the position of employers and unions in the other sectors of the ports and harbour services industry.

(x) The maritime towage industry comprises a substantial industry sector, with employees working in more than 35 ports around Australia.

(xi) It is convenient, practicable and relatively straightforward to create a modern award for the maritime towage industry which satisfies the requirements of Part 10A of the Act and the Minister's Request.

(xii) By contrast, creating a single modern award covering both maritime towage service and other sectors in the port and harbour services industry would be problematic and would not readily satisfy the requirements of Part 10A of the Act and the Minister's Request that awards be simple to understand and easy to apply and not extend to classes of employees who have traditionally been award free.

(xiii) The maritime towage employer group has however proposed that the Maritime Towage Award also cover certain combined tug and barge operations which have since 2002 been subject to the Tug and Barge Award, on the footing that the only two employers bound by that consent award are related companies to employers bound by the Tugboat Industry Award and it appears to them practicable to accommodate these

combined tug and barge operations in the proposed Maritime Towage Award.

C. Approach to Developing Safety Net Provisions

10. There is presently an "industry award" for the maritime towage industry being the Tugboat Industry Award 1999, which is a pre-reform simplified federal system award. This has generally been used as a basis for the proposed modern award.

    To the limited extent which appears necessary, certain provisions found only in the Tug and Barge Award have been allowed for in the proposed modern award, where these form part of an appropriate safety net of award conditions.

11. The proposed Maritime Towage Award adopts where applicable the standard clauses which the Commission has included in its stage 1 priority modern awards.

12. The maritime towage employer group has also referred to the stage 1 priority modern awards as a starting point for a number of the other terms of the proposed Maritime Towage Award. This is on the basis that the terms contained in the stage 1 priority modern awards have been accepted by the Commission as being suitably drafted and appropriate.

13. The basis for each clause in the proposed Maritime Towage Award is explained in the next part of this Submission.

D. Explanation of Each Clause in the Proposed Maritime Towage Award

14. A brief explanation is provided in this part of the submission of each clause in the proposed Maritime Towage Award.

15. The maritime towage employer group is ready and willing to provide further submissions in relation to any matter associated with the Maritime Towage Award which may be raised by the Commission or arise in the consultation processes.

Clause 1 – Title

The Maritime Towage Award title is consistent with the approach of the Commission as adopted in relation to the stage 1 priority modern awards.

Clause 2 – Commencement Date

This clause is also consistent with the approach of the Commission as adopted in relation to the stage 1 priority modern awards.

Clause 3 – Definitions and interpretation

The definitions set out in the clause are consistent with the definitions adopted by the Commission for similar terms in the stage 1 priority modern awards.

This clause may need to be revised once the other provisions of the Maritime Towage Award are finalised.

Specific definitions relating to maritime towage have been generally replicated from the Tugboat Industry Award (for example, "contract voyage", "free running voyage and delivery voyage").

Clause 4 – Coverage

As explained in Part B of this submission, the Maritime Towage Award is confined in its coverage to employers in the maritime towage industry. The proposed modern award primarily applies to "harbour towage operations" meaning any work on tug boats, in conjunction with ship-assist operations and voyages, at or about, or to or from, the ports in Australia. It is not limited to work out of specified ports.

Like the Tugboat Industry Award and its predecessors, the draft modern award would also apply to certain other work performed by employers and their employees such as "free running" and "delivery voyages".

The clause also provides coverage for certain combined tug and barge operations in line with the coverage of the Tug and Barge Award.

The drafting of this clause has been guided by the content and style of the comparable stage 1 priority modern awards in the Commission's Decision of 19 December 2008.

Clause 5 – Access to the award

This clause adopts in full the standard provision from the Commission's Decision of 19 December 2008.

Clause 6 – The National Employment Standards and this award

This clause adopts in full the standard provision from the Commission's Decision of 19 December 2008.

Clause 7 – Award flexibility

This clause adopts in full the standard award flexibility clause from the Commission's stage 1 priority modern awards.

It is noted that this clause will need to be revised having regard to the general approach adopted by the Commission to take account of the additional requirements contained in the variation of the Request by the Minister for Employment and Workplace Relations issued on 18 December 2008.

Clause 8 – Consultation regarding major workplace change

This clause adopts in full the standard clause from the Commission's stage 1 priority modern awards.

Clause 9 – Dispute resolution

This clause adopts in full the standard dispute resolution clause from the Commission's stage 1 priority modern awards.

Clause 10 – Types of employment

Clause 10 makes provision for full-time, part-time and casual employment categories and states that the ordinary hours per week for a full-time employee are an average of 35 hours. This is consistent with the standards applying under the Tugboat Industry Award .

Clause 11 – Termination of employment

This clause adopts the termination clause from the Tugboat Industry Award .

The clause contains a provision which makes it clear that the clause does not affect the right of an employer to dismiss an employee without notice for serious misconduct. The inclusion of this sub-clause is appropriate given that the NES does not deal with dismissal without notice for serious misconduct.

Clause 12– Redundancy

This clause refers to the redundancy entitlement provided in the NES.

Clause 13 – Duties and Classifications

The duties and classifications are consistent with the provisions which apply under the Tugboat Industry Award.

Clause 14 – Wages

The wages are based upon the wages applying under the Tugboat Industry Award. The wages rates have been updated to reflect the increases in minimum wages from general Wage-Setting Decisions of the Australian Fair Pay Commission up to July 2008.

The clause also provides for wage rates which will apply, for "special voyages", on a daily basis, in lieu of the standard rates, based upon rates included in the Tugboat Industry Award.

Clause 15 – Allowances – Harbour Towage Operations

The maritime towage employer group has considered the variety of allowances applying to harbour towage operations, with a view to rationalising allowances. The proposed Maritime Towage Award includes allowances which apply commonly across the ports. This is consistent with the request of the Commission in its Statement of 23 January 2009 at paragraph 21 encouraging parties to consider rationalising allowances. The quantum of these allowances have generally not been specified. In some areas the employer group has adopted the Commission's approach of retaining certain port-specific allowances for a transitional period of 5 years.

Allowances for nominated voyages have been retained which are based upon those applying under the Tugboat Industry Award, and relate to the provisions for “special voyages” in clause 14.4.

A proposal for rationalising and simplifying certain allowances, by converting amounts to a percentage of the daily standard rate, has been drafted to enable further discussions between the parties.

A provision has also been included to allow for the adjustment of expense-related allowances with reference to a specified index in the terms adopted by the Commission in relation to the stage 1 priority modern awards.

Clause 16 – Allowances – Tug and Barge Operations

The maritime towage employer group has considered the variety of allowances applying to certain combined tug and barge operations. It has included certain allowances which apply under the Tug and Barge Award. Where possible, it has referred to allowances which are common to harbour towage operations and combined tug and barge operations with a view to rationalising allowances.

In the alternative, these allowance could be included in a schedule of allowances for combined tug and barge operations to the proposed modern award.

Clause 17 – Payment of wages

This clause adopts in full the standard provision from the Commission's Decision of 19 December 2008.

Clause 18 – Superannuation

This clause adopts in full the standard provision from the Commission's Decision of 19 December 2008, making relevant modifications in respect of the default superannuation funds.

Clause 19 – Ordinary hours of work and rostering

This clause is designed to give effect to the provisions of the Request concerning interaction with the NES. Clause 17 provides that the ordinary hours of work will be an average of 35 hours per week. The average hours of work were reduced from 40 to 35 hours per week, with the total days free of duty correspondingly being increased from 140 to 168 days per annum (see *Adelaide Steamship Industries Pty Ltd & Ors and Merchant Service Guild of Australia & Ors* (Full Bench of the Conciliation and Arbitration Commission, C No. 344 of 1982, 18 November 1982, Print F1179; *Adelaide Steamship Industries Pty Ltd & Ors and Merchant Service Guild of Australia & Ors* (Full Bench of the Conciliation and Arbitration Commission, C No. 344 of 1982, 24 December 1982; Print F1609).

Clause 19 also provides that the ordinary hours of work of an employee may be averaged over a period of up to 52 weeks. This is consistent with the clauses adopted by the

Commission in a number of the stage 1 priority modern awards, and reflect the particular circumstances of the maritime towage Industry.

It is noted that the NES provides at section 12(6) that modern awards may include provisions for averaging of hours over a specified period.

Clause 20 –Breaks

The inclusion of this clause in the Maritime Towage Award is appropriate to establish clear and simple principles which apply to meal breaks occurring during rostered hours of work.

Clause 21 – Overtime and penalty rates

Clause 21 is designed to give effect to the provisions of the Request concerning interaction with the NES. This clause is consistent with the general practices and standard provisions which apply under the Tugboat Industry Award.

Clause 22 – Leave

This clause is designed to give effect to the provisions of the Request concerning interaction with the NES, including paragraph 31 which allows a modern award to contain industry specific details about matters in the NES.

It is consistent with the decisions of the Commission concerning the reduction of ordinary hours and the increase of days free of duty, described in respect of clause 19.

Clause 23 – Personal/carers leave and compassionate leave

This clause is designed to give effect to the provisions of the Request concerning interaction with the NES.

Clause 24 – Community service leave

This clause is designed to give effect to the provisions of the Request concerning interaction with the NES.

Clause 25 – Public holidays

This clause is designed to give effect to the provisions of the Request concerning interaction with the NES.

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6 March 2009

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 9

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TRANSCRIPT OF PROCEEDINGS
Workplace Relations Act 1996 20003-1

VICE PRESIDENT WATSON

AM2008/49

s.576E - Award modernisation

Application by
(AM2008/49)

Melbourne

10.07AM, FRIDAY, 27 MARCH 2009

THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO CONFERENCE AND RECORDED IN MELBOURNE

PN1

MR A DOYLE: I appear on behalf of the Australian Federation of Employers and Industries.

PN2

MR S MCCARTHY: I seek leave to appear on behalf of the Commercial Vessels Association of New South Wales, and then separately in relation to the Tug Award matters for Stannard Marine Pty Ltd.

PN3

MS J GRAY: I appear on behalf of the CFMEU Mining and Energy Division. Your Honour, my colleague, MR S MAXWELL, will be appearing on behalf of the CFMEU Construction and General Division. He's currently in sugar. If he doesn't get back in time then I would be seeking to make a submission on behalf of that division of our union as well.

PN4

MR R BUNTING: I seek leave to appear on behalf of Patrick Stevedores Holdings Pty Ltd, a company which has an interest both in the container terminals and bulk and general stevedoring besides the stevedoring industry.

PN5

MR A MORRIS: I appear on behalf of the Coal Terminals Group and the Towage Employers apart from Stannards.

PN6

MR A ASPROMOURGOS: I appear on behalf of Gladstone Ports Corporation and also the Whitsunday Charter Boat Industry Association.

PN7

MR T WOODS: I appear on behalf of Ports Australia.

PN8

MR K HARVEY: I appear on behalf of the Australian Services Union.

PN9

THE VICE PRESIDENT: Thank you. Are there additional appearances in Sydney?

PN10

MR M FLEMING: I appear on behalf of the Australian Maritime Officers Union.

PN11

MR B MCNALLY: I seek leave to appear with MR N KEATES on behalf of the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers.

PN12

MR A KENTISH: I appear on behalf of the CEPU.

PN13

MS R BRADY: I appear on behalf of DP World Australia Ltd. We have an interest in the stevedoring industry.

PN14

THE VICE PRESIDENT: Thank you. Leave is granted to those seeking leave to appear. The purpose of these consultations, as I'm sure you'd all be aware, is to enable all of the parties to comment on the written material that's been filed by parties. Usually it is important at the commencement of these matters to get a clear picture as to the scope of proposed awards, and the parties have filed extensive material and draft awards in relation to that matter. I'd like to hear from the parties in relation to scope issues. Mr McNally, your client seemed to have probably the broadest interest of all of the parties here and you've also filed a document responding to other parties. Is it fair to call upon you initially in relation to scope issues?

PN15

MR MCNALLY: Yes, that's convenient. On 6 August this year we filed seven different submissions supporting the making of seven different awards reflecting the areas of our interest in the maritime industry, the oil and gas industry and the port and harbour services industries. Relevant to today's proceedings four of those awards were the Tug Industry Award which had coverage of employees in the tug industry, and we filed submissions and a draft Port and Harbour and Enclosed Waters Award which covered vessels that were not otherwise covered in the Tug Industry Award and Offshore and Gas Award, a Dredge Industry Award and a Seagoing Industry Award, and filed submissions in respect to the Port Authorities and Port Constructions which sought to have coverage of employees of port authorities and the port construction industry, and we filed a Stevedoring Industry Award which covered the stevedoring industry and their employees as best defined in the classification.

PN16

On 18 March, the first date being 6 March, on 18 March we filed submissions which in respect of each of those separate awards and four awards, including the four awards relevant to today, briefly commented upon submissions that have been made by other parties. What I seek to do is to briefly refer to the thoughts that are conveyed by that submission on 18 August in respect to the Tug Award and the Port, Harbour and Enclosed Water Award of Mr Keates, who has been closely involved in all negotiations but more particularly in the area covered by the Stevedoring Industry Award and the port services and construction area, to comment upon those matters.

PN17

The tug industry responses, I think there's no real issue between any parties that were represented in the tug area on the question of coverage. All submissions have supported the concept of separate Tug Industry Award. The submissions that were made were directed more to the award conditions. With the Marine Tug Employee group who have filed a submission we have had negotiations with Mr Morris and other interested parties. There's nine principal areas of disagreement as to what is in the award, and I think it's common ground that we will negotiate during the course of the next seven days in an attempt to reach complete agreement, if not complete, substantial agreement on the various conditions.

PN18

Consideration also is required of the port allowances which are reflected in the award. They vary from port to port because of the history of the way in which Tug Awards were made over the years, and we're conscious of the Commission's responsibility under section 576T, but we'll do the best we can. The Port and Harbour Enclosed Vessels Award, there's three areas of dispute I think it's fair to say in relation to coverage. The Commercial Vessels Association, which used to be known as the Charter Vessels Association until comparatively recently, wanted a stand alone - filed submissions supporting a stand alone award to cover the area previously covered by the Marine Charter Vessels State Award, a New South Wales award, now reflected in an appropriate federal instrument.

PN19

We oppose that course. Our submission supports the concept of including in the general Port, Harbour and Enclosed Water Vessels Award the area covered by the Marine Charter Vessels State Award. There's difficulties in hiving that area of award coverage off into a separate award for a number of reasons but, more particularly, the usage of the vessels whilst we concede are used for leisure activities, the very same vessels are used to convey passengers in the normal course. We could give some examples. The Magnetic Island to Townsville charter vessel or ferries - Mr Fleming informs me, and I thank him for that - they're called Sun Ferries, they convey tourists of course from time to time, well, pretty constantly. The constantly convey people going to and from work and school children going to and from school and families that live in the Magnetic Island area.

PN20

In Sydney, more particularly they're Capital Cruises, which took over Matilda Cruises, conveys passengers, and a passenger service, for example, runs from Circular Quay to Darling Harbour. So these vessels aren't stand alone and favoured to tourism, they also cover other areas. Admittedly there are charter vessels that are used solely for charter purposes and similar activities. Two of the unions that I represent, the area covered by the Marine Charter Vessels State Award falls very comfortably into the area contemplated by our coverage clause, the Bay, Harbour and Enclosed Water Vessels Award 2010.

PN21

Now, the Australian Federation of Employers and Industry are hand in hand with the Commercial Vessels Association and support the same concept in relation to the Marine Charter Vessels State Award, and we oppose that. There is a submission on behalf of Whitsunday Charter Boat Industry Association which supports the making of a separate award to cover the area previously covered by the Whitsunday Charter Boat Industry Interim Award, the state award of the state of Queensland which has been converted into the appropriate federal NAPSA. For the same reasons that we've expressed in relation to the Marine Charter Vessels State Award New South Wales NAPSA we oppose the making of a separate award to cover Whitsunday Charter Boat Industry Award.

PN22

The Local Governments Association want to include dredges which they operate. We oppose that. Sydney Ferries Corporation, I didn't see them appear in these proceedings but they did file a submission which suggests that the Sydney Ferries

be included in an award that covers government buses, light rail and trams. We see no logic in that enterprise. They claim, as I understand it, that they are part of the government transport system. As late as last night Sydney Ferries publicised the calling for tenders to completely privatise the Sydney ferries on Sydney Harbour. We oppose that award.

PN23

There are a number of awards that cover ferries. In Western Australia there's the Deckhand, Passenger Ferries and Launch and Barge Award. We've listed seven in the submission - I won't read them - seven awards, at least seven awards that cover ferries, and we submit that those ferries, all of those ferries including the New South Wales Government Agencies Sydney Ferries should be included in the general award. We oppose the submission of Stradbroke Ferries Pty Ltd that there should be a separate award governing their ferries which operate between Brisbane and Stradbroke Island for the same reasons as we oppose the making of a separate award for Sydney Ferries.

PN24

Which brings me to, so far as coverage is concerned, the Port Authorities and Corporations Construction Award, and Mr Keates can deal with that if that's all right with you.

PN25

THE VICE PRESIDENT: Yes, Mr Keates?

PN26

MR KEATES: Your Honour, the main issues are very common between stevedoring and the port authorities divide that we've created. The first large one is what to do with coal. We support, as you will see in our submissions of 18 March, the position of the CFMEU about how that divide is done. Coal ports are done mainly by way of dedicated ports, and we say the unloading and loading of coal can quite properly go into a separate instrument. There is one port, which is Gladstone Port, which had a bit of a mixed bag of functions, as you can see from their submissions, but their coal terminals are dedicated coal terminals and we can see no difficulty in those dedicated terminals being put in that instrument as well.

PN27

The rest of the work, as I understand it, at Gladstone is the movement of various bulk commodities like magnetite and the like. Now, they have proposed that there should be a separate Bulk Handling Award created. That is not something we're attracted to as you will see from our submissions. We see that in terms of main bulk commodities we already say that there should be an exclusion out of stevedoring for aluminium and sugar, and now we are saying coal as well. That doesn't leave much in the way of bulk commodities, and so we are therefore attracted to having all the rest of the unloading and loading of cargo in stevedoring.

PN28

The next main area of contention seems to be what to do with construction that's occurring at ports. We have placed that in our Port Authorities and Port Construction Award 2010. Our Ports Australia are the proponent suggesting that that should not happen. Traditionally that has been part of the industry. And if we look at awards such as the Queensland Regional Ports Authorities and

Corporation Employees Interim Award 2000, which is a Queensland federal instrument that operates mainly in Queensland, you will see the inclusion of all of construction. And the construction we're talking about here is construction, things like piers and the wharves and dykes. We say that is a normal activity that's taken out and carried out by port authorities and should remain in the Port Authorities Award.

PN29

THE VICE PRESIDENT: Do employees of port authorities carry out that construction or is it conducted by different employers?

PN30

MR KEATES: As I understand it it's carried out by the port authority employees. And you'll see in the regional - but there are also private operators that do that work. The next area is - and it's raised by Ports Australia, is the changing of the group classification system. They say that there is a traditional group of three groups, but they say it should be streamlined into one. No real reason for doing that is given. We say that the way it's currently broken up, that we have marine pilots as a stream, port officers as a stream, and what might be described as administrative and technical, as the stream should remain. And we don't fully understand but we'd like to hear more of why they want that turned into a single stream classification grouping. They're the main issues raised in my area, unless there's anything further.

PN31

MR MCNALLY: Thank you, sir.

PN32

THE VICE PRESIDENT: Thank you. Are there any other submissions in Sydney in relation to coverage issues?

PN33

MR M FLEMING: Yes, your Honour. If I may, I am Michael Fleming from Australian Maritime officers Union and I wish to do two things into day's hearing, first of all to support the submissions entirely of Mr McNally and Mr Keates on behalf of their clients and secondly, to give specific submissions in connection with the proposed coverage clause submitted by Ports Australia in their proposed Port Authorities Industry Award.

PN34

In particular, your Honour, I wish to refer to clause 4.3 in the proposed award from Ports Australia where it is asserted that this award not cover pilotage. In summary, my submissions are about the submission from Ports Australia that pilotage not be covered by a Port Authorities Industry Award or a Port Authorities and Construction Industry Award.

PN35

If your Honour pleases, I wish to make brief submissions about that now.

PN36

THE VICE PRESIDENT: Yes, thank you.

PN37

MR FLEMING: Can I make these points, your Honour, that the Australian Maritime Officers Union is a principal party to awards in the port and harbour services industries. We are party respondent to most of the awards in the industries. The Australian Maritime Officers Union has a substantial number of enterprise agreements covering members in theses industries.

PN38

Our principal submission concerns the matter of pilotage and our submission is that pilotage be included in a Port authorities and Construction Industry Award as proposed by the MUA and the AIMPE. Therefore, we oppose the submissions of Ports Australia and we oppose the submissions that have been put forward by the Port Phillip Sea Pilot Pty Ltd.

PN39

We have read the submissions of Ports Australia and in particular we do not agree with sections 3.3 and 3.4 of their submissions where they purport to describe core activities of port operators and incidental and ancillary activities to core activities of port operators. It is in our view and our reading of those sections of the submission that they have excluded pilotage, yet from our extensive knowledge in the industry, many of the port operators that are listed in the schedule to the submission in fact employ persons described as marine pilots and those operators are engaged in providing pilotage services in those ports and there are a significant number of port operators that do that.

PN40

Your Honour, we say that the following port operators employ marine pilots and provide pilotage services and these are employees described in clause 4.1 of the Ports Australia proposed award. Those port operators are, the Newcastle Port Corporation, the Port Kembla Port Corporation, the Sydney Ports Corporation, the Tasmanian Ports Corporation, the Albany Port Authority, the Bunbury Port Authority, the Darwin Port Corporation, the Esperance Port Authority, Flinders Port South Australia for all the ports in South Australia, the Geraldton Port Authority and the Broome Port Authority.

PN41

We would also submit that the marine authorities identified by Ports Australia, there are two that provide pilotage services and that is New South Wales Maritime and in particular Maritime Safety Queensland. Maritime Safety Queensland employs persons described as marine pilots in all ports in Queensland other than Brisbane and they are not employees of the state. They are not public servants.

PN42

Your Honour, the Australian Maritime Officers Union is a party to at least 10 enterprise agreements describing the salaries and employment arrangements for marine pilots for those ports that I've nominated and those agreements are current.

PN43

We would also submit that we do not agree with the Ports Australia submission in section 3.16 of their submission where they assert the following:

PN44

Though marine pilots are covered by some of the reference awards, within the industry pilots have traditionally been award free employees.

PN45

The AMOU submits that there is a substantial award history in this Commission of marine pilots commencing with the creation of Marine Pilots Awards in 1970 following a significant bench decision of this Commission. Those awards apply to marine pilots employed by the port operators that I have nominated and those that are covered by the Ports Australia submission. During the 1990s those awards were replaced by a Marine Pilots Award of this Commission. Further to that, your Honour, due to considerable structural changes in the port authority industry, the Marine Pilots Award was rescinded in 1990s and replaced by enterprise agreements and enterprise awards into general awards.

PN46

There are at least three awards of this Commission applying to marine pilots, that is the New South Wales Port Corporations Award that applies to marine pilots employed in the Sydney Ports Corporation, the Newcastle Port Corporation and Port Kembla Port Corporation. There is an enterprise based award which provides for marine pilots described as the Darwin Port Corporation Maritime Unions Award 2003 and there is an enterprise based award that includes marine pilots employed by Flinders Ports known as the Flinders Ports South Australia Award 2007.

PN47

Your Honour, there are a number of awards that have been described in the papers before but whilst they don't specifically include marine pilots, have been used by the port authorities and the port authority employers of marine pilots in submissions and applications in the past to underpin enterprise based agreements and they are in particular the awards described as the Regional Port Authorities Officers Award Queensland, the Queensland Regional Port Authorities Incorporations Employees Interim Award 2000 and the Tasmanian Ports Corporation Award 2007.

PN48

Your Honour, in summary, the AMOU submits that marine pilots who are employees of port authorities and marine authorities should not be excluded from coverage of any proposed Port Authority Industry Award or Port Authorities and Construction Industries Award.

PN49

As to the issue of high income threshold, this matter has been raised in the submissions of Ports Australia and their submission is that because of that point an award should not apply to marine pilots. We say this, your Honour, in addition to what we have already submitted, that marine pilots employed by port authorities have agreed salaries which are within the range of salaries contemplated to be included in the modernised awards described as the Seagoing Industry Award 2010 and the Maritime Industry Offshore Oil and Gas Award 2010. In other words, our salaries for marine pilots are within the ranges of the salaries in those awards and the point of high income threshold, as I understand it from my union, has not been raised in the Seagoing Industry Award or the proposed Maritime Industry Offshore Oil and Gas Industry Award.

PN50

Your Honour, finally, as to the submission put on behalf of behalf of the Port Phillip Sea Pilots, in summary may we say this, firstly, that the Port Phillip Sea Pilots is a private company owned by marine pilots. That company provides exclusive pilotage services to the Melbourne ports. The Port Phillip Sea Pilots Pty Ltd is not a port operator and therefore is not described in the coverage clause of either the unions' proposed award or the Ports Australia proposed award. Further to that, your Honour, we submit that the proposed unions' Port authority and Port Construction Industry Award filed by the MUA in these proceedings by Mr McNally and Mr Keates, and the proposed Port Authorities Industry Award filed by Ports Australia are not intended to apply to Port Phillip Sea Pilots.

PN51

THE VICE PRESIDENT: That's for the reason, Mr Fleming, of the exclusion of employers primarily engaged in pilotage, is it?

PN52

MR FLEMING: That is correct, your Honour, in my understanding, but I think it's also because Port Phillip Sea Pilots are not port operators. It's a private pilotage company outside the scope of the two proposed awards before you and there are a number of other private pilotage companies that are in the same position who realise that they are not covered by the proposed coverage clauses in the two awards and therefore, I understand, have not made submissions to this Commission. Only the Port Phillip Sea Pilots company has.

PN53

Lastly, your Honour, there is a part of the Port Phillip Sea Pilots' submission we wish to also comment on and that is that the pilot vessel crew members who are employed by the Port Phillip Sea Pilots, and maintenance employees, they are seeking that they be excluded from award coverage. We would oppose that. It is probably appropriate that the award coverage for those employees of that company and similar companies be described in the Port and Harbour Services Award that's been proposed by Mr McNally.

PN54

If the Commission please, in summary they are our submissions on coverage for the proposed Port Authorities Award and with the Commission's permission, within day we will lodge a written submission containing these submissions. If the Commission pleases.

PN55

THE VICE PRESIDENT: Thank you, Mr Fleming and yes, you may file further written submissions within that timetable. Anyone else in Sydney wish to address coverage issues?

PN56

MR KENTISH: Your Honour, the CEPU has gone to a number of coverage issues in the material which we filed with the Commission yesterday morning. I'm largely content to rely on that written material. I suppose it may not surprise the Commission that a common theme arising from our comments in relation to the material lodged, is that we are seeking an exclusion for electrical contractors from each of the awards. The reasons we are doing so the Commission would probably be familiar with. I won't repeat those now. We've been jumping up in

each industry in stage 1 and stage 2 and now stage 3 and we press again that contractors be excluded. If it pleases.

PN57

THE VICE PRESIDENT: Yes. Your jumping up is noted, Mr Kentish, and that written submission received yesterday, I believe, is loaded onto the website.

PN58

MS R BRADY: Your Honour, Brady, initial R, for DP World. We just wish to make some submissions in relation to the stevedoring industry. We refer to the draft award that was filed by the Maritime Union and the various submissions filed by other employer parties, and just note as indicated in our brief written submissions that we support the general intention to continue the Stevedoring Industry Specific Award.

PN59

In relation to coverage, I just note that the MUA's draft, in our view perhaps inadvertently extends beyond what we say should be covered in a Stevedoring Industry Specific Award. As a matter of practicality, the current Stevedoring Industry Award applies in essence to employees employed by stevedoring companies, that is companies whose core activities are stevedoring activities and it's our standing certainly that a Stevedoring Industry Award does not extend to incidental tasks such as cleaning, security, some maintenance, when those tasks are in fact done by companies that aren't stevedoring companies.

PN60

The MUA's draft, as I said, would, as it's drafted, purport I suppose to include those incidental activities within the coverage and we say that there should be some amendment made, and there's a few ways you could do it, to ensure that it's clear that it does extend to those areas for the purposes of award coverage moving forward. That's in essence the submission we have in relation to scope coverage.

PN61

We do have some submissions in relation to, I suppose, the substantive award clause but perhaps, your Honour, we prefer to refrain from putting those forward now, given the focus on scope and coverage.

PN62

THE VICE PRESIDENT: Yes, thank you. I'll give you an opportunity to address other content issues later. Ms Angus.

PN63

MS Z ANGUS: Your Honour, Angus, initial Z on behalf of the Australian Workers Union. I'm not sure I put in an appearance earlier. If it please the Commission we have five short points to make in relation to coverage. The first two go to the issue of in which industry awards that lie in your list should properly fall and there are two points in this respect.

PN64

Firstly, one of the awards identified in the Port and Harbour Services Awards list is the Dredging Industry AWU Award. We have made submissions before Commissioner Raffaelli earlier this week or perhaps last week in relation to matter 41 that the dredging industry should form a single industry and for that reason

therefore, the Dredging Industry AWU Award should form part of what is broadly referred to as the maritime industry.

PN65

There are three dredging awards, one I can't speak to, but certainly the MUA and the AWU Awards are substantially identical. they clearly have the same genesis. They are in significant proportion word for word identical and for that reason, and I understand that the MUA is of the same view, they effectively form part of the same industry and should result in a single Dredging Award. For that reason, your Honour, we respectfully suggest that the Dredging Industry AWU Award is not appropriately listed as belonging to port and harbour but should be referred to Commissioner Raffaelli.

PN66

I'd also say, to the extent that your Honour does retain carriage of the dredging industry, that unlike the MUA we are of the view that exclusion for employees of local authorities is proper. There is a Federal Court decision in Etheridge that essentially holds that depending on the nature of the trading activity of a local council, they may not be constitutional corporations and therefore fall outside of the Commission's jurisdiction. While we don't concede that a local government is within the federal jurisdiction, in an abundance of clarity to the extent that there may be local governments that do, we would accept that it is appropriate to include some exclusion to define the proper application of that award. Your Honour, I only make that point to the extent that you retain carriage of part of the dredging industry which we say should more properly fall within maritime operations.

PN67

The second point we make is in relation to charter boats. Unfortunately, your Honour, we had another matter before the Commission and hence we were late and we arrived only halfway through the MUA's submissions so I'm not entirely - I believe that we are speaking in accord but can I say, your Honour, that there is a Charter Boat Industry Award that at least operates in the Whitsunday Islands that is included within the list of tourism. Together with the Marine Charter Vessels State Award, which is the relevant industry award that applies to charter boats in New South Wales, in our submission they contain essentially maritime callings, they are very similar in their content to what the MUA has put forward as their Enclosed Vessels Award and should, in our submission form part of that industry or sector. So we just draw your attention, Commissioner, to, as it were, an absence. The Charter Boat Industry Award is listed as part of tourism and we say it should more appropriately form part of port and harbour services.

PN68

In terms of the remainder of the areas, the AWU in its written submissions has proposed that there be a Bulk Handling Award. We note that on behalf of the Coal Terminals Group that a draft has been provided to the Commissioner proposing a dedicated Coal Terminals Award. We have provided some provisional support for that proposal. Although we are a part in terms of its content it’s a difficult exercise to draft a Coal Export Terminals Award because the industry or sector is currently regulated by enterprise awards.

PN69

It may be that our position is revised in light of those discussions but at this stage we have given some cautious support to the notion that an award regulating dedicated coal terminals be appropriately issued. And I note the comments made by the MUA in relation to the Stevedoring Award that it should properly exclude the loading/unloading of aluminium, coal and sugar, or operations within the aluminium industry, the coal industry and the sugar industry. Those three areas have traditionally fallen outside of the stevedoring industry and we support their continued exclusion from a Stevedoring Award.

PN70

And finally I note, and in this respect we respectfully don't agree with the MUA's position in relation to Port Authority covering construction work. It may be that there is simply a disagreement about facts but from our understanding, at least in relation to Queensland, we have a number of agreements that regulate construction work on a port and the parent award of those agreements is in, to my knowledge, Construction Awards.

PN71

For that reason, we give a cautious position to the view of the MUA that a Port Authority Award extends to construction. We may wish to file further submissions on that matter as further facts emerge but, in essence, they are our submissions, your Honour.

PN72

THE VICE PRESIDENT: What about employees employed by port operators who were involved in construction? Why should they be covered by some separate award?

PN73

MS ANGUS: Your Honour, that ultimately, in our view, provisionally, that is what it will turn on. If they're direct employees it may be that there is sufficient scope within the award to - in fact, I'll say no more particularly about that and it may be that we will file written submissions. In our view, certainly from our knowledge of the industry so far, construction work is generally done under Construction Awards. It may be that it turns on who the employer is and the principal occupation of the employer.

PN74

THE VICE PRESIDENT: Yes. The approach of modern awards generally has been to define the nature of the industry by reference to the business of the employer, or the activities of the employer, business activities of the employer and then to endeavour as far as possible to cover all awards covered by employees of that employer and obviously a construction contractor is not a port operator. I take it that the MUA is not saying that a construction company would be covered by this award if it was involved in port construction activities.

PN75

MR MCNALLY: That's correct, sir.

PN76

MS ANGUS: Is it?

PN77

MR MCNALLY: Yes.

PN78

MS ANGUS: Well, then I apologise, your Honour. I had slightly misunderstood the MUA position. If it is a matter of whether the work is contracted out, as it were, then it may be that we are aligned.

PN79

MR MCNALLY: Yes.

PN80

MS ANGUS: Our concern was that construction work per se where that was the, as it were, principal occupation of - but just happened to occur at a port, be covered by the award and we say it shouldn't.

PN81

THE VICE PRESIDENT: Yes. And I think, and I'll make this comment generally, given the approach to modern awards of defining the scope clauses in the way I have indicated, is really an attempt to try to avoid a lot of the confusion that can arise in potentially overlapping scope clauses and many existing awards and proposed parties awards commence with a description of the activities of the employer but move to activities of employees and that does create some confusion.

PN82

I think it is important as far as possible, and the parties may wish to take this on notice and in particular Mr McNally and Mr Keates in relation to the scope of the Stevedoring Industry Award I note commences with descriptions of the employers activities, the employers business, but then moves to functions of employees employed by the relevant employer which really probably belongs more in the classification area rather than the description of the industry. Any further attention that the parties wish or are able to make in relation to the wording of coverage clauses would be of great assistance.

PN83

Can I move to parties in Melbourne who may wish to address coverage issues?

PN84

MR MCNALLY: Sir, can I just, on this historic occasion where the AWU and MUA have agreed on all points, remind the Commission that we, the MUA and the AIMPE did agree to the exclusion of local government.

PN85

MS ANGUS: You did?

PN86

MR MCNALLY: We'll supply hopefully a joint submission by the MUA and the AWU in respect of construction in ports, if the Commission pleases.

PN87

THE VICE PRESIDENT: Yes, thank you, Mr McNally. Mr McCarthy I think pipped you, Mr Morris.

PN88

MR MCCARTHY: Thank you, your Honour. Your Honour, in relation to the CVA, I think it would be safe to say that the issue of scope is fundamental to its submission to the Commission. As you can hear from the comments both of Mr McNally on behalf of the MUA and the AIMPE and Ms Angus on behalf of the AWU, all the unions are arguing here that the Port and Harbour and Enclosed Water Vessels Award 2010 draft presented by Jones ..... McNally ought to apply and cover the work of charter vessels.

PN89

Put simply, our submission is that the industrial instrument for the CVA members currently, that they employ their employees under, which is the NAPSA known as the Marine Charter Vessels New South Wales (State) Award has been, in our respectful view, wrongly grouped into the port and harbour services sector and it properly ought to be grouped into the tourism sector. We in fact would be here today asking the Commission to transfer effectively charter vessels industry from port and harbour services to tourism.

PN90

We would want your Honour to know that we have appeared and made submissions to that effect before Richards SDP last week in the tourism sector and, as I understand it, the Senior Deputy President does intend to confer with yourself after today's proceedings on that issue.

PN91

THE VICE PRESIDENT: Mr McCarthy, the identification of awards, the attachment of awards to the list of industries is really to assist the parties more as a guide as to the existing award coverage that might be relevant but we move very quickly into the area of developing awards as part of a comprehensive set of awards to apply to all areas of operation. It's not a matter of putting existing awards in one group or another. It's a matter of developing appropriate award coverage which will be determined by the Full Bench and published as exposure drafts initially.

PN92

So it's a matter of hearing from the parties as to what they say is the appropriate award coverage under the system of modern awards and I note your submissions to the effect that that should be a separate award and you certainly have the opportunity to respond to the union's position which is looking to include those operations within the enclosed orders proposed modern award.

PN93

MR MCCARTHY: Thank you, your Honour. I believe I understand and follow the process but I'm certainly here to learn. The AFEI who is represented today here by Mr Doyle, has already presented to the Commission as part of its written submission a draft Tourism and Leisure Charter Vessels Award 2010.

PN94

THE VICE PRESIDENT: Yes.

PN95

MR MCCARTHY: The CVA supports that working draft as a starting point for the development of a modern award in relation to the charter vessels industry. I suppose the issue really is that the charter vessels industry, both historically and

into the future, fundamentally sees itself and in fact is part of the tourist industry and not the mainstream maritime or seagoing or Ports Authority or commercial vessels activity within ports industries.

PN96

If one looks briefly at the activities of charter vessels, they are vessels used for purposes such as sightseeing, lunch time and dinner cruises, social function charters such as for weddings, birthdays and similar celebratory events, bare boat charters, dolphin and marine watching, fishing charters and other similar tourist and leisure activities. Perhaps the centre of that in Australia is Sydney Harbour but nonetheless another major area is of course the Whitsundays and the Great Barrier Reef and other areas around Australia.

PN97

There has always been an absolute nexus between the activities of charter vessels and the tourist industry and they see themselves as part of that tourist industry. So much so, if I could just briefly refer and note the fact that when, for example, the NAPSA that I have referred to, which is the common rule award covered currently the CVAs' members' employees. When it was originally made in 1987 the definition put into that first award reads - if I could read it:

PN98

"Charter vessel" means a vessel engaged wholly or principally within the limits of bays, harbours and rivers as a tourist, sightseeing or cruise vessel and/or as a place of or for entertainment functions or restaurant purposes.

PN99

And I finish the quote. That situation has not changed at all. Clearly, those tourist and leisure activities take the charter vessels industry into the tourist and leisure industries and, in our view, out of the mainstream maritime and port services, et cetera, industry sectors. Their terms and conditions apply to their employees reflect the flexibility required and the cost structures of the tourist industry. That situation must fundamentally be retained.

PN100

Perhaps the simplest example I could give you, but potent example I could give you of concern and contrast between what is being proposed by the unions by including charter vessels in port and harbour services compared to what has historically been the case and needs to continue to be the case into the future for the charter vessels industry as part of the larger tourist industry is the issue of ordinary hours of work and the prescribed spread of hours between the two parties' draft instruments.

PN101

In relation to the charter vessels industry, for example, in the New South Wales NAPSA, currently the hours, the spread of hours prescription is 40 hours per week on any day of the week worked between 7 am on one day and 2 pm on the next day, allowing for a significant degree of flexibility in hours, the majority of the employees employed in the industry sector are casual. The industry responds to the demands of tourists and leisure seekers. Most of the work is done in the latter half of the week and most of the work is done after starting on shifts and work performed after midday and often into the late evening or even into, as you can see from the spread of hours, early in the am of the following day.

PN102

If you compare that spread of hours, and ordinary hours' arrangement, of the charter vessels industry today - and by the way the arrangement for the Whitsundays is even more flexible than that. If you compare that to the proposition and proposal put forward by the union's draft award that they would have the charter vessels industry covered by which, as I understand it, reflects the current Port Services Award, its ordinary hours of work are between 6 am and 6 pm, Monday to Friday. It's effectively designed to cover work done typically for day work, typically on a Monday to Friday scenario.

PN103

That change alone, as you can see from the calculation set out in the Excel spreadsheet which is an attachment to the affidavit of the chairman of the CVA in our extended and further submissions lodged with the Commission yesterday, you will see, for example, in a typical arrangement of a general purpose hand working on a charter vessel in Sydney Harbour, say, went on shifts or worked from Wednesday night through to Sunday, would increase the labour cost component for ordinary hours of work currently by some more than 250 per cent.

PN104

THE VICE PRESIDENT: It's not possible to incorporate those flexibilities into the Inland Waters Award?

PN105

MR MCCARTHY: Into the Port Services Award?

PN106

THE VICE PRESIDENT: Yes.

PN107

MR MCCARTHY: Well, I suppose anything is possible, your Honour, but I suppose what - the way we see it, and I'm not talking here - and I know I'm stepping in front of other advocates here but we have spoken at great length about the charter vessels industry sector generally.

PN108

The way we see it is that it is an industry of its own directly linked to the tourist sector and for us to be elsewhere in port services, for example, is going to allow a philosophy of thinking and a degree of flexibility of approach and attitude of the unions so great that we suspect that - to put it perhaps one way - we're not always going to be swimming in friendly waters, and we would hate to suggest that the sharks would be surrounding us. It's a bit of a preoccupation in Sydney at the moment.

PN109

We would like to think that if we were dealt with in the sector that's concerned with tourism, there would be an ability for the parties to work through the award modernisation process for charter vessels in conjunction with the other tourist industry sectors in a cooperative way, in an environment where there is an understanding of what we're trying to do together before a tribunal who can assist us in getting a consensus outcome that's good for the Australian tourism and leisure sector. That would be a fundamentally helpful outcome.

PN110

An example of that might already be, for example, in the transcript of the proceedings last week before Richards SDP, the Senior Deputy President asked a question of several of the representatives of the charter vessels industry:

PN111

Is there a reason that you could not consider putting all of the charter vessels industry's activities together so that it could cater not only for day trips and charter work on a daily basis but also cater for the overnight stay work that is very typically part of the Great Barrier Reef and to a lesser extent that which occurs on Sydney Harbour?

PN112

To which the employer representatives were able to say:

PN113

No, we believe that could be done.

PN114

Richards SDP has now, as a consequence, invited the employers to resubmit their draft Charter Vessels Tourism Award with that flexibility in mind. I think it's perhaps a very practical demonstrative example of how things could work well if we are able to, with the support of yourself, in a sense, transfer our award modernisation process for charter vessels into that sector being dealt with by SDP Richards under the heading of tourism. It's difficult for me to really over emphasise how fundamentally important this is to the CVA members and, I'm sure, to the greater charter vessels sector. CVA membership is about 100 businesses, the vast majority of which would be small family companies, they would employ, those 100 businesses would employ about 2000 people at the peak of any tourist season, and it is seasonal. The CVA estimates the industry sector is probably made up of about 1500 operators which, at the peak of various tourist seasons, would employ up to about 20,000 employees, as I say, the vast majority being on a casual basis.

PN115

Everyone would be affected in a devastating cost outcome if we are not able to seek to maintain both the cost structures of our industry and the hours flexibility of our industry and the staffing flexibility arrangements of our industry, and as a consequence of which we are here today, as I've already said, with a submission that's fundamentally about scope asking that the Commission assist us in a re-allocation of the task of award modernisation for the charter vessels industry and, secondly, to accept that the charter vessels industry is a separate industry from that of the port and harbour services sector or industry that the unions would have you believe.

PN116

I note for example Mr McNally pointed that the reason that his clients would find it hard to hive off charter vessels was because they carried ferry passengers, and he gave two examples, on the Whitsundays I believe and one for Captain Cook Cruises going from Circular Quay to Darling Harbour in Sydney. If I could speak specifically to the Captain Cruises for example. The trip is less than two kilometres and that so called ferry passenger trip is in fact connecting two major tourist areas on the waterfront in the Sydney, that of Darling Harbour which is a

major tourist centre, and that of The Rocks and Circular Quay, which is another major tourist centre.

PN117

So even that example that has been given of passenger ferry services by Mr McNally is in fact only one example of the carriage of tourists, be they domestic or international, and leisure seeker customers. It's not an example of passenger ferry cartage.

PN118

THE VICE PRESIDENT: What about the Manly?

PN119

MR MCCARTHY: The Manly ferries situation, be it the more recently privatised activities or that of Sydney Harbour ferries, they are under a Ferries Award, ferry industrial instruments, and are not sought to be part of the industry sector that we're speaking of and wouldn't be covered by the modern award that we're speaking of.

PN120

THE VICE PRESIDENT: But as I understand that Captain Cook ferry that goes from Circular Quay to Darling Harbour operates under a timetable.

PN121

MR MCCARTHY: Yes, it does.

PN122

THE VICE PRESIDENT: And it may be to particular tourist destinations, but why is that different to the private operator that operates from Circular Quay to Manly?

PN123

MR MCCARTHY: Perhaps firstly because, as I understand it, that the private operator doing Circular Quay to Manly at the moment is doing a designated identified run that is part of the Sydney Ferries services for passenger vessels, and that is not, as I understand, part of what Captain Cook Cruises does, but I could stand corrected. But secondly, that it's simply been accepted that those, for want of a better expression, as opposed to some degree there is a major and substantial rule perhaps applied. There is some degree of latitude I suppose. No one can stop people who want to transfer from Darling Harbour to Circular Quay on a ferry that is functionally there for tourist purposes but on a timetable for using it for a short commuter hop I suppose. No one is trying to stop that happening and perhaps it even might financially help support the activity.

PN124

But my proposition to the Commission is even if you look in the definition for example of the current NAPSA in New South Wales it talks about principally for certain purposes, not saying it cannot ever carry passengers. But I believe that there is a general understanding that what happens is, and the activities of that employer being Captain Cook Cruises and part of it as Matilda Cruises, it is essentially a tourist company operating services for domestic and international tourists, and that's the core factor of determining where it lies, how it needs to have the minimum terms and conditions of employment to apply to its employees determined and assessed and factored and costed.

PN125

THE VICE PRESIDENT: The operation of the Manly ferry is primarily engaged in other charter activities is it not, including the vessels used for two purposes as well?

PN126

MR MCCARTHY: That's correct.

PN127

THE VICE PRESIDENT: So how does one develop an appropriate award coverage in that situation that is logical and sensible?

PN128

MR MCCARTHY: I can only make a suggestion. I suppose in the manner in which it has in fact set about to enter into an appropriate industrial instrument with the MUA to reflect those two activities. There is an industrial instrument being negotiated between those two parties about the ferry services activities between Circular Quay and Manly, excepting that the other activities it's involved with as a charter vessel outside of the peak hour services that's running as a ferry service, are then a separate engagement under a separate industry instrument and/or the award - sorry, the NAPSA. And so the parties themselves accept that they're two different activities with two different industry sectors.

PN129

THE VICE PRESIDENT: Well, ultimately if you're looking at the coverage clauses of modern awards, and I understand the point you're making and the general submission of how that differs from the Maritime Union's position as far as tourism and leisure charter vessels, and that position is not a matter that is being transferred from industry to industry. All these matters are before the Full Bench, consultations are occurring in a way that divides up industries broadly, but in a sense you've got two opportunities to put the same submission if you appear in two industries.

PN130

The critical task is to determine what award should be made and how the differentiation of the scope clauses should be drafted to affect the appropriate coverage. And the issues which arise are whether the needs of industries can be dealt with by aggregating awards or whether the difficulties created by attempting to do that are so great that it makes more sense to have separate award coverage for particular parts of the general port and harbour/tourism/coal industry et cetera industries that various activities touch upon. So, again, if there's any further assistance that you can provide in terms of discussions with the parties leading to any further agreement or clarification of the wording that you propose then the Commission would be assisted.

PN131

MR MCCARTHY: Thank you, your Honour. And we do appreciate that the task of the Commission is by no means a simple one, and it's reflected by the simple - perhaps in this area the simple example of the fact that we have our NAPSA for charter vessels here before yourself, and yet the Whitsundays matter award is before tourism, and I suppose that's a really good example of the difficulty. We'll take on board your comments and suggestions. We would like to re-observe the fact that we've been invited by Senior Deputy President Richards to prepare an

amended version of our initial draft proposed modernised award for our sector, which we are working on and do intend to lodge within the next week or two, and that will in fact be designed to go beyond the original scope of all submissions, and that is to try and bring together in one instrument the entire coverage of the charter vessels sector. We'd certainly of course be providing, you know, yourself with a copy of those details and those further submissions.

PN132

THE VICE PRESIDENT: Thank you, Mr McCarthy.

PN133

MR MCCARTHY: Thank you, your Honour.

PN134

THE VICE PRESIDENT: Mr Doyle, you have a similar interest. It might be sensible if you go next.

PN135

MR DOYLE: Yes, indeed, your Honour, and I just intend to make some brief submissions. Your Honour, we have filed written submissions in this matter and also in tourism, and we note also that further written submissions of the CVA in regard to this matter and which include an affidavit by Anthony Hawoth, the executive director of Captain Cook Cruises. Your Honour, we have of course filed a draft award relating to charter vessels described as the Tourism and Leisure Charter Vessels Award 2010, and that was - - -

PN136

THE VICE PRESIDENT: When was the affidavit filed?

PN137

MR MCCARTHY: Yesterday, your Honour. I do have copies of those submissions if you don't have them available.

PN138

THE VICE PRESIDENT: Yes. I don't have them. I'm not too sure whether it's been loaded onto the website and in which industry category, but I don't have a hard copy.

PN139

MR MCCARTHY: May I approach the Bench?

PN140

THE VICE PRESIDENT: Yes, my associate will take that.

PN141

MR MCCARTHY: I'm sorry to be interrupting, but just for the information of your Honour, I did by email provide a copy of this submission to Mr McNally yesterday afternoon.

PN142

THE VICE PRESIDENT: Thank you. Mr Doyle?

PN143

MR DOYLE: Your Honour, the draft award is principally based on the existing NAPSA, the Marine Charter Vessels Award which applies in New South Wales. That award was introduced following an application by the union. It was the same

union that has filed the draft awards in this matter and has operated since 1987 in quite a satisfactory manner for the operators in the charter boat industry in New South Wales. The Commission included for consideration in award modernisation a Whitsundays Charter Vessels Award in the tourism sector for the purposes of award modernisation.

PN144

Our submissions to the Commission propose that there was greater similarity between the Marine Charter Vessels NAPSA and the Whitsundays Charter NAPSA than with any other Port and Harbour Services Award or Ferry Award or Passenger Services Award. As the CVA has indicated, your Honour, the Senior Deputy President invited the parties following those submissions to meet and prepare one single draft award concerning charter vessels. Essentially, your Honour, the difference is that the New South Wales NAPSA is about in shore charter activities, and the Whitsundays is about offshore charter activities, and his Honour made the point of saying surely it would be possible to have one rather than two. And the parties agreed to give consideration to his suggestion and with a view to drafting an award.

PN145

Your Honour, we do not support the inclusion though of the charter vessels in the proposed MUA award. The MUAs submissions as we understand them are essentially that the services are interchangeable between the charter vessels activities as described in the definition of charter vessels in the Marine Charter Vessels NAPSA and passenger services. Your Honour, we say that that's not the case. That our members covered by the Charter Vessels Award operate in the tourism and leisure sector and, in fact, a charter vessel is clearly defined, as was indicated by the CVA, as one that's engaged wholly or principally within the limits - it's in shore but it's in regard to certain activities only, and those activities don't include passenger services.

PN146

It's not to say that there may be some passenger services that may be incidental. And perhaps that example of the passenger service from Circular Quay to Darling Harbour, which might be better described as a tourist shuttle service, of getting tourists either to or from the King Street wharf in Darling Harbour where they can choose between 10 and 20 cruises that operate on any one day, we say is not to be linked with the more standard passenger services such as the Manly ferry. The Manly ferry, your Honour, we submit simply wouldn't fall today within the scope of the Charter Vessels NAPSA.

PN147

Your Honour, the only other point that we wish to raise with you is some of the detail that's included in the affidavit that I referred to. The potential impact of the MUAs proposal in our assessment at this stage is not that there would be unintended costs increases as referred to in the Minister's Request, but would go significantly beyond that. The indications are that the wage cost increases would range, and particularly for the more typical days of the week in which the services are provided and over the more typical hours in which they're provided, with wage cost increases in the order of 100 to 250 per cent, the impact is not incidental or accidental because it's known and understood in terms of there are proposals and if they come into effect they will have impact, and whether they are immediate or

they're transitional the impact would be dramatic, and our members tell us would seriously be threatening the viability of the industry.

PN148

Your Honour, we urge the Commission to give serious consideration to the matters raised in those submissions, in our submissions, the submissions of the CVA and the additional material filed by the CVA. If the Commission pleases.

PN149

THE VICE PRESIDENT: Thank you, Ms Davey.

PN150

MS GRAY: Are we working our way down the table, your Honour?

PN151

MR ASPROMOURGOS: ..... deal with the charter issue, we'll deal with that first, your Honour?

PN152

THE VICE PRESIDENT: We'll deal with the charter issue, yes, Mr Aspromourgos?

PN153

MR ASPROMOURGOS: In relation to that I certainly repeat and rely on the submissions made by Mr Doyle and Mr McCarthy in relation to the appropriateness of award coverage within the charter boat industry. And while the function of moving passengers by vessel, be it ferry, is a similar function depending upon the purpose for it. Really the identity of the employers' operation has come from the fundamental purpose for which those people are being moved, and clearly the process here is about a focus on tourism and hence the NAPSA applying to the Whitsunday Charter Boat Industry Association being appropriately delineated in the tourism industry. And that's not to say that it doesn't have application for port and harbour services and maritime as well because it is an administrative exercise, as your Honour has indicated.

PN154

But the terms of the award which have been proposed by the MUA in relation to port, harbour and enclosed water vessels is so fundamentally different to the conditions which apply within the charter vessels industry. It's to highlight the fact that the industry is fundamentally different and that it is not possible to combine those quite disparate groups under one single modern award merely for the purposes of award rationalisation. And effectively that is one of the fundamental purposes of the process that we're going through but not to the extent that awards that are created which are inappropriate for particular operations and industries operating within it.

PN155

That's also highlighted by the classification structure in the award that's been proposed by the MUA to the extent that it does not include some fundamental roles that you would see in a tourism industry such as food and beverage, leisure attendants, those sorts of classifications of employees are not contemplated by the award as currently drafted. That's not to say that you can't bolt on a little bit to the end and bolt on a little bit more, but again that is fundamentally changing the scope of the award and the flexibilities that are necessary for charter vessels. So

we confirm that discussions are continuing between the employer parties consistent with the submissions made before Senior Deputy President Richards last week with a view to getting an agreed award for submission to the Commission, and I believe Senior Deputy President Richards gave a period of three weeks for that step to occur and we're certainly endeavouring to ensure that that occurs and we'll obviously file that in this matter and also in the tourism matter.

PN156

THE VICE PRESIDENT: Yes.

PN157

MR ASPROMOURGOS: If the Commission pleases.

PN158

THE VICE PRESIDENT: Ms Gray.

PN159

MS J GRAY: Your Honour, the CFMEU Mining and Energy Union put in a submission at the very beginning of the priority industry stage 1 seeking a broader coal industry which was inclusive of coal port terminals. Insofar as it outlines the operational distinctions of that work from other areas, we rely on paragraphs 15 to 21 of that initial submission.

PN160

We then, in respect to the coal treatment industry put in a proposed scope clause which included export coal terminals and during the conciliation before Lawler VP last Friday, we agreed with the coal terminals group of employers that it would be an area appropriately dealt with within ports and harbour services subject to an appropriate scope and content.

PN161

We now appear in this industry of ports and harbour services supporting a proposal of the CTG for a separate Export Coal Terminals Modern Award. We won't go into content other than to say that we certainly agree that it's appropriate to have a 35 hour week in that award as ordinary hours, but otherwise the CEPU has put in submissions yesterday which dealt with some of the difficulties that we share with content but it's early days, your Honour, and we are going to be having discussions both with the employers and with the other unions, those who are directly involved in export coal terminal work, but also those who have an interest in terms of overlapping and interface areas.

PN162

We've invited all of those unions for discussions and have had a date set of 17 April for interested unions and industry unions to sit down with the employers in coal terminals to progress discussion and seek to reduce areas of differences and see if we can come up with, as far as possible, a common position on an appropriate draft modern award to put to the Commission as a proposal for the Full Bench.

PN163

THE VICE PRESIDENT: Did you say that's a meeting of the unions or the unions and the employers?

PN164

MS GRAY: Unions and the employers, your Honour, with the exception so far of Gladstone Port Authority but the other employers in the export coal terminals area are meeting with all of the industry unions on 17 April. We understand that that's a fair way into the pre-drafting stage but we would seek the indulgence of the Commission to then put in further written submissions and hopefully draft awards or an award with a great deal of commonality which we say will then make the Commission's job as well as the parties' job much easier. We will seek to do so as soon as possible after the 17th, but realistically, would be at least a week afterwards.

PN165

THE VICE PRESIDENT: If it's not agreed, are the respective positions covered by the submissions that have been filed?

PN166

MS GRAY: They will be, your Honour, and so far it's a bit of a moving target in terms of where it should be and who is opposing and who is agreeing so rather than putting in sequential different submissions, we believe that the appropriate time to put in a submission would be about a week after that industry meeting.

PN167

THE VICE PRESIDENT: If something is agreed, I think that would be of great assistance but as you do observe it's a fair way into the process, not just the drafting but the consideration period before the Full Bench and there wouldn't be time to have any adequate opportunity for parties to put in competing positions and opportunities to respond and things of that nature if we're wading that long into the process. It may be only possible to deal with, to the extent that matters are not agreed, material that has been filed to date.

PN168

MS GRAY: Yes, your Honour, and in respect to that then we're generally supportive of the issues that have been raised by the CEPU in terms of content, but we are very optimistic that there will be agreement to a large measure on standard conditions for coal terminals across Australia and already, since the submissions of the CTG, have been lodged and the AMWU and the MUA positions have changed in that respect to reach commonality so we have grounds for being optimistic, your Honour.

PN169

If I can just briefly address the submissions on scope relevant to this area, which has been filed, your Honour. It's our understanding and Mr Morris is certainly here to say otherwise if we're incorrect, that the Coal Terminals Group is now longer pressing for an exclusion of coal export terminals at Gladstone Port Authority as appeared in its draft Export Coal Terminals Award at clause 4.2.

PN170

The AWU and the AWUQ's submissions sought a separate industry and bulk handling port facilities inclusive of coal but then seek exclusions for the industries that constitute essentially the remainder of bulk handling at ports, for example, that is sugar, aluminium, steel, oil and gas consistent with the bulk materials being included in the priority Modern Mining Award 2010. We welcome the submissions today of the AWU that they cautious support for a separate modern

award for export coal terminals and we are certainly hoping to have their active involvement in discussions and meeting which have been foreshadowed to the Commission.

PN171

The Gladstone Port Authority is not wishing to be included in an Export Coal Terminals Modern Award and to be specifically excluded. We believe that that's no longer supported by the remainder of the coal export terminal operators. The union will seek an exclusion of Gladstone Port Authority's export coal terminals operation from the proposed Ports Authority Modern Award but the GPA refers in its submissions to a potential for a change to the commodities that it may handle in the future. We say that if it ceases to operate its two and its planned third coal export terminals, it will not remain within the scope of a Modern Export Coal Terminals Award but it has not and is highly unlikely to stop being a major export coal terminals operator.

PN172

We take your Honour's point earlier about the industry of the employer, but we do say that it is quite possible for and it's consistent with authorities that an employer can be engaged in two industries. We say that's the case with Gladstone Port Authority and we're not seeking to have all of its operations holus bolus brought into coal export terminals only the work that it does in that industry, which is the two designated coal export terminals.

PN173

Your Honour, even back in 1993 a Full Bench of the Commission, following inspections and substantial evidence in relation to ports authorities around Australia, distinguished Gladstone from other Australian port authorities in a demarcation case which is print K8810 by reference to its substantial coal storage and coal loading facilities and that was at pages 45 to 46 of that Full Bench decision. It found that the employees involved in this work be easily distinguished from other employees of Gladstone Port Authority. In so doing the Full Bench held that a substantial number of Gladstone Port Authority employees involved in coal operations were members of the FEDFA and could be excluded from the section 118A order being sought in that particular matter.

PN174

There was no difficulty at that stage to segregate the employees of Gladstone port Authority to the separate areas of its operations. We say it's still the case today and that Gladstone Port Authority's submission supporting a Bulk Commodities Handling Terminals Modern Award suffer from the same flaw as that which we have raised in respect to the AWU and AWUQ similar submission.

PN175

We also note that employees at export coal terminals have 35 hour ordinary hour week which is not common across other industries dealing with bulk commodities and therefore employees would suffer a substantial detriment if the Commission was of a view of accepting GPA's submissions for a separate Bulk Commodities Handling Terminals Award should be made rather than an Export Coal Terminals Award.

PN176

We note that the MUA now supports an exclusion of export coal terminals fro, it's proposed Ports Authorities Award and supports a separate Export Coal Terminals Modern Award within ports and harbour services.

PN177

Your Honour, we regard the definition of port operator, which is contained in the proposed draft award lodged on the AIRC website yesterday by Ports Australia Limited as being too broad and we're concerned that it could pick up bulk terminal operators. We'd be seeking an exclusion from their definition of coal port services in paragraph (d) which is landside logistics including loading and unloading facilities, by adding, with the exclusion of export coal terminals for clarity. We also would seek in the coverage clause of 4.1 to that draft award where it states:

PN178

This industry award covers employers who are port operators and their employees in the classifications listed in clause 14.1.

PN179

We would seek that that be amended to read:

PN180

This industry award covers employers who are port operators with the exception of export coal terminal operators and their employees in the classifications listed in clause 14.1.

PN181

We also regard it as necessary to avoid overlap between proposed modern awards in ports and harbour services that the word "coal" should be deleted from subclause (b) of the definition of stevedoring operation in the MUA/AIMPE draft Stevedoring Modern Award lodged on 6 March and we would also seek an express exclusion in clause 4, coverage of that draft award by adding a new subclause (g) to read "export coal terminals".

PN182

Your Honour, that's all we have to say at this stage on the scope of all of the material that's been lodged on the AIRC website to date and we will keep the Commission apprised of developments between the parties in seeking to develop a proposed draft Export Coal Terminals Modern Award for consideration of the Full Bench and we will do so as early and as often as is of assistance to the Commission. May it please.

PN183

THE VICE PRESIDENT: Mr Bunting.

PN184

MR BUNTING: Your Honour ..... Steve Roberts.

PN185

THE VICE PRESIDENT: Is it more logical to hear from you, Mr Morris, on coal?

PN186

MR MORRIS: I'm happy to do that. If I could just follow on immediately from what Ms Gray said about the coal terminals, it appears now that all of the unions

that have a stake in the coal terminals either are clearly in support or cautiously in support of a separate Coal Terminals Award. We've filed a draft award back on 6 March. We've had some initial discussions of a very preliminary nature with Ms Gray and also with the AWU. We are, like Ms Gray, optimistic that we can settle both the coverage scope provisions of the award and also in terms of content. If we don't reach agreement we'll certainly narrow any areas of disagreement very considerably. The date that Ms Gray has indicated is a date, that's 17 April, as a date for a meeting between the employers group and the unions and we're grateful to Ms Gray for coordinating that. it's just not practical, unfortunately, to meet prior to that.

PN187

I also support what Ms Gray said about the expression in the Stevedoring Industry Modern Award and also the Ports Authorities Award, however they are finally named, of express exclusions for the coal terminals. I don't think that's opposed by the MUA, in fact I'm sure - certainly our understanding it's not and I don't believe it's opposed by Ports Australia and Mr Woods can confirm that. That will just be to make sure that the compendious definitions of the stevedoring industry on the one hand in that award and the port operators' definition in that award don't inadvertently leave some confusion.

PN188

I don't think there's anything else I need to say unless your Honour wishes to explore any aspects of it.

PN189

THE VICE PRESIDENT: Can you address Gladstone?

PN190

MR MORRIS: With Gladstone - yes, thank you - what we've provided for in our draft award filed on 6 March was an express exclusion of the Gladstone Port Corporation. That was done, if I can put it appropriately, responsibly rather than a settled or determined position on the part of the coal terminal operators. Frankly, we are neutral as to whether there is an exclusion or not. We appreciate that the Gladstone Port Corporation may have circumstances that distinguish it from the other coal terminals relevantly when one is turning to make a modern award. Whether it's appropriate to have that exclusion or not is really not something we want to argue, with respect. It's a matter, I think, for the Gladstone Port Corporation and the other interests in the port authorities industry.

PN191

THE VICE PRESIDENT: All of the other coal terminals are dedicated terminals, are they, although some of them occur within a general port.

PN192

MR MORRIS: That's correct. They are all dedicated coal export facilities. They have a separate corporate structure. They're not incorporated into a port authority or a port corporation. They operate as distinct entities. They typically own or lease the facility of the receival, stockpiling and loading facilities, the wharfage and so on but they don't administer ports, they're not part of the administration of a port.

PN193

Could I deal then with the maritime towage industry, which was the first industry to which Mr McNally referred. There appears to be full consensus between the relevant employers for whom I appear, other than Stannards for whom Mr McCarthy appears on the one hand and each of the three unions, that's the AMOU for whom Mr Fleming appears, and the AIMPE and MUA for whom Mr McNally appears.

PN194

THE VICE PRESIDENT: Apart from the title of the award.

PN195

MR A MORRIS: We haven't quite yet nailed the title. Is it the Tug Industry Award or is it the Maritime Towage Award? We have proposed the Maritime Towage Award. It would in fact absorb or cover the areas of industry that have been covered by the Tugboat Industry Award, the most recent one being the Tugboat Industry Award 1999, and also the Maritime Tug and Barge Industry Interim Award 2002. That's an award that has two named respondents and it seems convenient and we're content to take up the MUA's proposal which is that this new award would cover both the conventional and traditional Tug Boat Industry Award and the area in the tug and barge industry.

PN196

We are, on a reasonable estimate, about 90 per cent of the way to agreement on content. The area that is causing us some extra work at the moment is how to remove provisions that are port specific and that would appear to offend section 576T's requirements. As Mr McNally mentioned, the Tugboat Industry Award has a peculiar history where it had a general part, or general parts, and then it had these port schedules which embodied things like allowances and hours of work and other port specific regulation for ports or groups of ports.

PN197

Those schedules were removed when the award was admirably simplified by Commissioner Wilkes in about 1999 but there remain in the award allowances and other provisions that vary from port to port and we're working our way through rationalising those where appropriate transitioning allowed. There a few other issues that we're apart on at the moment. We do plan to meet next week to see if we can't either eliminate the differences or narrow them down very substantially. So we would be pretty optimistic that shortly after Easter we could file or lodge an amended draft or drafts and supporting submissions.

PN198

THE VICE PRESIDENT: Yes, thank you.

PN199

MR MORRIS: Thank you, your Honour.

PN200

THE VICE PRESIDENT: The parties to both of those awards are parties but interested in those awards have leave to file further material as soon as possible after Easter is a good description.

PN201

MR MORRIS: Yes.

PN202

THE VICE PRESIDENT: In relation to the coal ports that can't be till the following week then certainly as soon as that can be provided it would be of great assistance.

PN203

MR MORRIS: Yes, thank you, your Honour. Certainly if we find we're departing from that timetable perhaps we can let your Honour's associate know. If your Honour pleases.

PN204

THE VICE PRESIDENT: Yes. Thank you.

PN205

MS ANGUS: Your Honour, I'm sorry to interrupt. From the Sydney end it does sound like you just set some timetables for people to file submissions and we didn't hear in Sydney. Do you mind repeating those dates?

PN206

THE VICE PRESIDENT: Yes. What I indicated was that in relation to the coal terminals and the maritime towage areas where further discussions are proposed, leave is provided to the parties to file further material as soon as possible, as they are able to noting that it's unlikely to be before Easter. It really will be necessary for any contested material to be received prior to 17 April but agreed matters certainly can be received and would be of assistance by the following Friday, which I think might be the 26th - sorry, 24 April.

PN207

MS ANGUS: 24 April.

PN208

THE VICE PRESIDENT: Yes.

PN209

MR BUNTING: The choice, your Honour, of the stevedore or - - -

PN210

THE VICE PRESIDENT: Mr Bunting, you have been very patient.

PN211

MR BUNTING: Thank you, your Honour. As I mentioned, I am appearing for Patricks which has an interest in the stevedoring industry, both in terminal operation and bulk in general. We did file on 6 March some material which I know has been loaded on the website. I wish to just speak to some additional notes which have not previously filed but we will do what we can to provide a copy perhaps but could I hand up for the moment a document with some notes.

PN212

THE VICE PRESIDENT: Yes, certainly.

PN213

MR BUNTING: Your Honour, I have given these additional notes to the people at the Bar table anyway in Sydney and I will forward them to anyone who is interested in them but certainly Mr McNally and Mr Keates and also Ms Brady, and I'll take account of the fact that they don't have this document in front of them.

PN214

We refer to the earlier submission and the position which we advance, and I think it's an uncontroversial one that there should be a specific stevedoring industry modern award. That's certainly the view of the union parties. I haven't noticed anyone really depart from that view and it is the view of Patricks that there ought to be. I won't go over that ground.

PN215

But this, what we do here in these notes really is talk about the interface because the stevedoring industry will have an interface with other activities which happen in and around wharves. We refer in paragraph 3 to various landside activities which interface with stevedoring and then suggest in paragraph 4 that a stevedoring industry modern award should be drawn in a way that makes it clear that it is aimed at the loading and unloading of vessels at wharves. And the operations we're talking about are the activities conducted at the wharf in relation to loading and unloading of vessels.

PN216

We heard what your Honour said a little while ago about the employer's industry and that's certainly a matter which we would perhaps have some discussions with - or we plan to have some discussions with Mr McNally and Mr Keates to see whether we can come to a common approach on that and Ms Brady.

PN217

We then deal with specific areas where there is an interface. We mentioned security, first of all, which is an area now contracted out and it has been for quite some time. We wouldn't see it as coming under the Stevedoring Industry Award; essentially the same position that we may have with cleaning. Then in relation to maintenance we say that at Patricks' facilities maintenance is contracted out. That may not be the universal position in the industry. I'm not sure about that.

PN218

We say in paragraph 10 that the view we take is that maintenance should remain capable of being covered by the modern award applicable to the relevant calling such as, for example, the Manufacturing and Associated Industries Award where the employee is not employed by the stevedoring employer.

PN219

We then talk about clerical. There is of course a longstanding distinction in the industry between shipping clerks, who might be engaged at the wharf and were historically employed under stevedoring conditions - those on the one hand; and on the other shipping officers who are essentially clerical employees and perform work in an office environment for shipping companies and stevedoring companies. Those employees were never and are not covered by stevedoring award type conditions.

PN220

Then in paragraph 12 we say that clerical workers as a standalone function at the wharf performed under the Stevedoring Industry Award, the present award is a much diminished category and care needs to be taken with the interface between the clerical functions still performed on the wharf, technically as an adjunct to some other operational duty, and the shipping officer or other shipping clerical work that I referred to. And of course, as with others, we say that the award

should only apply to these activities where they are employed by the stevedoring employer and it's part of some integrated work being performed by that employer. So there is a delicate interface there, if I can put it that way.

PN221

Then there are interfaces with road transport operation and rail. There is longstanding application of Stevedoring Industry Award conditions to container and other cargo movements which people refer to "shed to ship" and "ship to shed" and we think that's no doubt something that we should continue. We don't argue the toss with that.

PN222

There are some minor exceptions to the position and I mention the Port of Newcastle. We think that that existing approach is satisfactory and should be retained. The current approach in relation to rail I think is that there is really no application of Stevedoring Industry Award conditions to rail operations per se even when they come on to a wharf and we would suggest that that should continue.

PN223

Another essentially road transport interface is in the area of container depots. There was a time when container depots did operate under Stevedoring Industry Award conditions and as your Honour would know there have been some quite celebrated demarcation cases in the container depot industry in the past. But the current reality is that market factors have long overtaken those earlier cases and decisions and circumstances and container depots have now, for quite some time, operated separate from wharf arrangements and under road transport industry conditions. That is the present circumstance and quite well established and we would say consistently with award modernisation principles that should not be disturbed.

PN224

Bulk is an important area and there is perhaps some - it might be the one area where there might be a little bit of controversy amongst the various parties. Stevedoring is of course loading and unloading of cargo and bulk cargoes are cargo just as much as non-bulk cargoes. They can be containerised, unitised, et cetera, break bulk, bulk or other special cargoes. These expressions are not terms of art, as we understand them. They are more industry usages.

PN225

When people refer to bulk cargo it would usually be understood, we think, as cargoes which flow and have no form, for example, coal, wheat, wood chips, fertiliser, sand, and that sort of thing. So loading and unloading of those cargoes is a matter which, to some extent, was covered by the Stevedoring Industry Award, is now and was historically but it was very often the subject of specific awards applying to particular industrial operations where the industrial operation was loading out or receiving its own cargoes or where there might have been something like a grain authority which was operating a major terminal and loading particular grains or whatever from that terminal where, typically, I think the Stevedoring Industry Award did not apply.

PN226

There are various parts of history to this. There are some exclusions in the definition of "waterside water" which still appears in the schedule to the Workplace Relations Act and derives from days where it was necessary to know whether you needed to have a registered waterside worker performing certain sorts of work or not. There was always an exclusion for this sort of loose bulk cargo and also the loading out of materials from say a mine operation or something like that, you did not require a waterside worker, a registered waterside worker, should I say.

PN227

But subsequently in perhaps the 70s, 80s and 90s there were various demarcation and other developments which demonstrated that, notwithstanding that circumstance, the MUA or its predecessors had some capacity to cover people involved in some of those activities. So there's a complicated history and we think that probably at this stage it's necessary to move past that and look to the present way that the industry operates.

PN228

There is still a capacity for stevedoring employers to do bulk loading and unloading and they do it and so we see that it's appropriate that that be able to be covered under the Stevedoring Industry Award. But at the same time there are particular industrial concerns like coal terminals, for example, and other no doubt grain operations where there are dedicated facilities which have long since operated under their own arrangements with their own sorts of awards and we see no difficulty about there being some specific separate award for those sorts of terminals. But we wouldn't wish to see a general exclusion of bulk handling from stevedoring because bulk handling is one of the things that stevedoring employers do do within the mix of their operations. That's certainly the case with Patricks, for example, on the bulk and general side.

PN229

Our final points on that matter are in paragraphs 20 and 21 where we note the coal terminal employers' position that there should be an award specifically for them and we have no objection to that. We note also the suggestion by the Gladstone Port Authority that there should be an award covering bulk stevedoring. We don't have an objection to there being an award applying to facilities privately owned and operated by bulk producers loading out their own products or something similarly constructed like that but we would not suggest or we do not think that there should be a general exclusion of bulk handling from the general Stevedoring Award where that type of stevedoring is being undertaken by a contract stevedore.

PN230

I think there is a great deal - - -

PN231

THE VICE PRESIDENT: What happens with, let's just say an iron ore export ports, what types of employers are involved in employing stevedoring people loading product on to ships for export?

PN232

MR BUNTING: Your Honour, I'm not sure that I know exactly but by and large that area I think would be covered under - or historically under the exclusion from

the definition of "waterside worker", (p), which is referred to in paragraph 18 of the document. That of course doesn't mean that particular companies can't be involved. It doesn't really exclude anyone from doing anything but I think that might reflect the historical situation. But I might have to take that question on notice about specific ports.

PN233

THE VICE PRESIDENT: Yes. And I note that Bill before Parliament proposes to include the recognition of the definition of "waterside worker" in the current Schedule 2 of the current Act.

PN234

MR BUNTING: Yes.

PN235

THE VICE PRESIDENT: But I don't think that is necessarily an appropriate means to define the scope of modern awards. One would hope one can read the award and see who it applies to.

PN236

MR BUNTING: Yes.

PN237

THE VICE PRESIDENT: And again, if one adopts the approach of describing the industry by reference to the employer it might be important to understand and make sure that what is intended to be covered is covered.

PN238

MR BUNTING: Yes.

PN239

THE VICE PRESIDENT: And there are no unintended consequences or any people who fall through the cracks as it were.

PN240

MR BUNTING: Yes. I think certainly where the mining - to take your Honour's example of an iron ore port, where the mining operator loads out vessels I think there's no doubt that it would not now be covered under the Stevedoring Industry Award, it would be covered under its own award or awards and probably would be covered by the Mining Industry Modern Award. But whether in fact there are particular contract stevedores like Patricks operating in those ports I am just not sure.

PN241

Your Honour, the only other point in our notes is about award content, and we had some very preliminary discussions with Mr Giddins from the MUA some time ago indicating a willingness to sit down and talk with the union about content matters, noting that the union has put forward a draft. That remains the position. We would intend to seek to have some discussions with Mr McNally and Mr Keates and appropriate union officers and certainly Ms Brady and any other people who wish to play a role in seeing what agreement can be reached on an appropriate stevedoring industry award, and we've taken note of those practical dates by when assistance might usefully be received.

PN242

We would be hopeful that there would be quite a high degree of commonality able to be reached with the union on many matters and there might be some matters where we would disagree and the Bench would need to make a decision.

PN243

THE VICE PRESIDENT: Yes, thank you, Mr Bunting. And we will download the additional notes document onto the website for the assistance of all parties.

PN244

MR BUNTING: Thank you.

PN245

THE VICE PRESIDENT: We won't mark it as an exhibit as such but we treat it as additional submission by your client.

PN246

MR BUNTING: Yes, thank you.

PN247

MR ASPROMOURGOS: Thank you, your Honour. The submission of Gladstone Ports Corporation of 6 March provides a good background and overview of the operation of Gladstone Port. As your Honour has indicated earlier today, that the award scope and coverage issue is bound largely to view what is the business of the employers. The application of the appropriate modern award to Gladstone Port Corporation is really about defining what is the business. And I guess throughout the process leading up to the award modernisation it's an issue which has posed concerns to Gladstone as an organisation because of its unique nature and operation.

PN248

It is the only port authority in Australia which is a major handler of cargo, so from that extent it is quite unique in its approach and application. That being said, Gladstone Ports Corporation sees itself essentially as an owner, developer and manager of port assets, and as part of that management process it operates some port facilities. It owns other port facilities which are contracted out and other stevedoring operations operate out of that or other industry participants operate those wharves. So from Gladstone's perspective the business that it's in is that of a port owner and manager, and from that perspective is more closely aligned to port authorities nationally.

PN249

And you will see in the submission put on behalf of Ports Australia, Gladstone is a member of that association, and that is the appropriate association for Gladstone to be a member of because of its close links and alignment with other port authority operations. That being said and looking at the appropriate submission to be made as part of this award modernisation process, it recognised the uniqueness of its operations and it presented a submission which tried to get the correct balance between the port and management operations, which are its fundamental obligation, and its quite significant operational elements in the cargo handling area, and put forward the proposal that in its circumstance the most appropriate form of award coverage would be a Bulk Commodity Handling Award.

PN250

Certainly as the submissions have transpired today there seems to be little support for that position. The difficulty that places Gladstone in is that it does have two port facilities currently that are involved predominantly in handling of coal. One of them is exclusive, one of them is not exclusive. It has other port facilities which are involved in the handling of a variety of other commodities and they are identified in our written submission. One of our port facilities is 100 kilometres away from the port of Gladstone, doesn't touch coal, doesn't smell coal, has never had coal dust kind of touch its wharf. So from that perspective the potential of an award applying, for coal export terminals applying to that operation doesn't make a lot of sense and doesn't have a lot of logic attached to it.

PN251

We understand the position that's been put today by the unions, it seems to be the general accepted position that an award for coal export terminals which would specifically cover Gladstone, the current draft having a specific exclusion, and the view of the coal terminals group is that they're ambivalent towards it, and that's fair enough. It doesn't have any direct impact on them at all in relation to that issue. But it does create a major operational and delineation issue for Gladstone Ports Corporation. We do have employees that work across the various ports, and while a number of the operational employees would be dedicated to a particular terminal there is a group that move across on a day to day basis because of the needs for flexibility across that area.

PN252

More importantly, in the maintenance area our maintenance crews are not committed to a particular port or wharf facility, they work across the various wharves. Some would be coal, some would be non coal. Obviously that location which is geographically 100 kilometres away from Gladstone, that core group is dedicated to that facility. So we have this issue where, if you accept the general submissions that are put, it poses significant problems for Gladstone to have a clear understanding of award coverage through this process. And while clearly the scope of any proposed modern awards needs to be, you know, clearly identified and defined, and no doubt we will be invited to participate in this meeting on 17 April, and we can make our positions clear prior to then but also reinforced at that meeting.

PN253

It does pose a significant issue for Gladstone just to understand where their various employees will be situated as a result of the award modernisation process. We currently have four or five different awards that apply to our operation, and over the years we've been able to clearly identify where those particular employees sit because that's generally along occupational lines and not industry lines. So it's fairly easy to delineate between a maintenance trades person, an operational staff member, a clerical staff member et cetera, but with the focus through the award modernisation process of an industry based award that provides much greater scope for uncertainty as to award application for employees of various classifications and occupations.

PN254

While we continue to promote the position of a Port Authorities Award and a Bulk Handling Commodities Award because that does fairly clearly delineate the

two core areas of Gladstone's operations, being the port and management aspects and the operational aspects, our fall back position would be that we ought to be excluded from the Coal Export Terminals Award and covered by the Port Authorities Award. And I understand that submission is consistent with the submission that's been put by Ports Australia. That would clearly establish with absolute certainty where the award coverage is. It would avoid future issues and potential disputation as to appropriate award coverage, and that essentially does suit the business of Gladstone Ports Corporation which, as I said, is an owner, developer and manager of port operations, and that would cover the scope of all of the various classifications of employees that would be within that award. So they are the submissions on behalf of Gladstone Ports Corporation.

PN255

THE VICE PRESIDENT: Thank you, Mr Aspromourgos. Mr Woods?

PN256

MR WOODS: Your Honour, yes, perhaps it's appropriate now that I come in across a range of topics. But if I pick up the one that's been the hottest of late in respect of coal. The position has clearly been identified in respect of Gladstone as its terminal. There is another port in Australia that is run by a port authority and also exports coal ultimately under the control of the Port of Fremantle. As I understand the Coal Terminals Group submission, it is a submission for an award that is essentially driven by employers whose sole activity is the operation of a coal terminal.

PN257

And to give a safe harbour to our friends at Gladstone, the appropriate - if the Coal Terminal Award structure was limited in that way to their sole business or even to allow some expansion to the future, possibly the future primary - words that limit it in that way, then there would be no cross over in that respect, and then we would see that that would create an appropriate distinction. Because then we turn to the broad scope of the port authorities, and we have in the coverage that we've provided driven down the path of the employers' activities in trying to establish the scope in that regard.

PN258

And to the extent that, to mirror the submission in respect of the Coal Terminals Award, that there would be a sole activity. If necessary we can put an exclusion into the coverage clause in the Ports Authority Award. While there are people who, in the coal terminals, had a contract for doing ports related activities, we can play with the words, but I think the submission in the coverage clause we have already, they would not be caught by the port authority definition. But that can be perhaps looked at as a wording issue.

PN259

So if we have the scope of the port authorities, there is, as we've identified in our submission, a range of activities across the range of ports and there are very large ports and there's much smaller ports, and typically when we come down to the smaller ports there are, quite apart from the Gladstone coal and other activities it's involved in, there are some ports where the ports authorities do stevedoring activities in assisting in the loading and unloading of cargo. Now, we would see that we should not be hit with a cross over as a mixture in terms of that and so it

should be outside the Stevedoring Award and providing a scope within the Port Authorities Award, which is what we've proposed, which covers all of our employees effectively whatever activity in which they are involved.

PN260

And while we're going a bit beyond scope and there's still some work to do in the classification structure that is what we have tried to do, to look at a structure that was all encompassing for all of employees and all activities, so it met many of the principles in terms of the approach of an award modernisation. So I suggest in terms of dealing with coal that is a way in which those issues can be addressed. The next issue that arises is in respect of construction. First of all can I say on my understanding from those who instruct me from the association is that we don't employ across our membership construction workers in the traditional construction sense.

PN261

We certainly do have maintenance employees, and to the extent that that might be brought within the general construction industry we certainly have those that do that. But in terms of the bulk building of a port or a break wall or a wharf, to the extent that its ever been part of the port operator and manager, it's not a part of that industry today. So it's for that reason we would see no need to bring in any idea in respect of construction. And in terms of - - -

PN262

THE VICE PRESIDENT: Let the work and let the contracts and those sort of things.

PN263

MR WOODS: That's right.

PN264

THE VICE PRESIDENT: But the actual employers would be in specialist - - -

PN265

MR WOODS: Specialist buildings, who will turn their minds to a port related construction activity. Now, it might be said, well, if you did employ anybody it won't hurt to have those award classifications in the award. Well, if they're not in there now, the real question in terms of approaching award modernisation, why clutter an award with an extract that has got no current relevance. If the industry changes in the future then that's something that no doubt could be addressed in the future. And to the extent that Mr Keates with McNally points to an award that already has it. They point to one award out of the variety of awards, state awards, so it's a NAPSA, that addresses construction, and my understanding is that the authorities that are covered by that haven't had construction employees for a long, long time, and it may be historically referenced back to when they were building the port but I can't say that with any certainty or clarity.

PN266

So in that respect that can deal with the issue of construction. I'll deal briefly then with the CEPU and electrical contractors, and if the Commission thinks it appropriate to put an exclusion in, in respect of contractors, that's fine, but by the nature of the fact that they're contractors they would not fit within the scope of our award as employees of a port authority in any event. To then turn to the issue of

the pilots which was raised by Mr Fleming, the force of Mr Fleming's submission starts in respect of the number of port authorities who employ pilots. And yes, we do have a number of port authorities who employ pilots. In his list he was incorrect in respect of Sydney Ports Corporation. That corporation does not employ pilots. It has a subsidiary corporation that is an employer of pilots, but it as a port corporation does not.

PN267

Then we turn to, in looking at the issue of traditional award coverage, that leaves us then with the New South Wales Ports Corporation Award, which has an unusual history of being both a state award and a federal award in virtually identical terms when it was created. But that does have reference to marine pilots, quite true, so it has a baseline for application in terms of current employment structure for Newcastle and Port Kembla, and if Sydney Ports Corporation had indeed employed pilots they would be referenced under that.

PN268

We then have two other awards which are enterprise awards which he points to as a reason to say is award coverage. We know of course that enterprise awards are to be left out of the scope of the application of a modern award, but be that as it may, as an exclusion from it, the rest of the businesses and port authorities that he's identified do not have pilot coverage under an award structure, and it's for that reason when you look at the 19 or so port authorities there are I think nine, so less than half that are identified as having pilots within their structure, and for that effectively only four have awards that touch on them.

PN269

And the fact that there was an award back in the 90s covering marine pilots and it was rescinded is part again of history in terms of traditional award coverage. So in terms of looking at the whole of the industry, and while there are a couple of members within the industry who have had pilot award coverage and still have pilot award coverage in the state or federal system, we still say that as a global for the purposes of the modern award we should look at on the basis of exclusion in respect of pilots in that way.

PN270

In respect of Mr Fleming raised the issue in terms of the high income threshold, and of course that sits outside the operation of the modern award because of the way the Act once finalised is going to apply, but the fact that some other modern awards might deem to incorporate particular occupations within it regardless of the notion of the high income threshold, as a principle in terms of approach the bulk of pilots employed in the industry around the country would be well above the threshold in any event. So they're two driving forces for why we would submit that they should be excluded. Notwithstanding the issue in terms of Port Phillip, that it is sitting - the Port Phillip sea pilots are sitting out there because it's not - it wouldn't be caught in our award in any event where we're identifying it just back to the port authorities and their employees.

PN271

The other issues that I'd deal with, there are other submissions in terms of the AMWU and the CEPU in terms of the classification structure and how the AMWU raised the question of its covered employees being caught within the Port

Authority Award and I would see that that is really ultimately an issue of classification and working in appropriate classification structures so that some of those issues could be addressed both in that case of the AMWU and the CEPU so that there would not be a need to go back to the Manufacturing Modern Award to try and deal with maintenance employees. It would be within the scope and the approach properly to be able to be caught within the Port Authorities Award. That's our submissions.

PN272

THE VICE PRESIDENT: I do propose to adjourn shortly and resume at 2 pm. Representatives of the parties in the sugar industry wish to address issues of scope of Ports and Harbour Awards in these proceedings at 2 pm. Who else wishes to be heard in relation to scope issues. Mr Maxwell?

PN273

MR MAXWELL: Your Honour, I have a very brief submission in regard to the issue of scope.

PN274

THE VICE PRESIDENT: Yes, and Mr Harvey?

PN275

MR HARVEY: And also the ASU, your Honour, briefly.

PN276

THE VICE PRESIDENT: We might have time to hear you both now before lunch if it is brief.

PN277

MR S MAXWELL: Your Honour, I didn't put in an appearance before, Maxwell, initial S for the Construction Forestry Mining and Energy Union, Construction and General Division. We appear in this matter due to our concerns over the scope issues and it's limited to the issue of the proposed coverage of construction and maintenance work. In the proposed Stevedoring Award, the definition of industry in clause 3.1 includes at (g) on page 5, and this is of the MUA's draft award:

PN278

The maintenance, construction and repair work, where such work is performed in relation to the stevedoring operations by maintenance tradespersons and maintenance tradespersons special class in relation to mechanical and/or electrical equipment, buildings, materials or facilities.

PN279

That definition is repeated in clause 4.5(g) of the MUA/AIMPE Award. Whilst we recognise that the definitions of maintenance tradespersons and maintenance tradespersons special class refers back to the Metal Engineering and Associated Industries Award, as far as we are aware they are only intended to cover metal tradespersons and electricians and that this award is only intended to cover stevedoring employers.

PN280

Even though we note that that's the intention, we would still, for absolute clarity, seek specific exclusions for employers covered by the Modern Building and

Construction General Onsite Award and the Modern Mobile Crane Hiring Awards, both of which are currently before the Full Bench in the stage 2 proceedings. Can I just say that in regard to the mobile cranes, there are a number of instances where mobile crane hiring companies are engaged when a ship is in dock to provide crane lifting activities where the cranes that are either on the vessels or the permanent cranes on the shore cannot provide certain lifting functions and so a specific mobile crane company will be engaged to provide additional lifting services but those employers are engaged in the mobile crane hiring industry.

PN281

THE VICE PRESIDENT: The Mobile Crane Hiring Award doesn't extent to the other mobile cranes that operate around terminals operated by the stevedoring company?

PN282

MR MAXWELL: That's correct. We're not seeking to disturb the direct engagement of people operating mobile cranes by the stevedoring companies. That will be covered by the Stevedoring Award.

PN283

We suggest that that exclusion could easily be inserted in the proposed clause 4.6 of the award to prevent any claims as to this award covering the activities of construction companies and we note your Honour's comments in regard to the industry of the employer discerning which is the appropriate award to cover the activities.

PN284

In regard to the Maritime Industry Port Authorities and Construction Award 2010, or the proposed award, we would perhaps suggest that any reference to construction be deleted from the title and that would perhaps clear up any misunderstanding of any coverage issues of the award. However, we note that in clause 3.1 and clause 4.4 of the MUA/AIMPE draft, that the drafters appear to intend the award to cover the construction, alteration, repair or demolition of breakwaters or sea walls, other than walls, piers or jetties, the maintenance construction, dredging ancillary services at ports and ship repair and maintenance work.

PN285

We say that the reality of the industry is that very few of the port authorities are still active in construction and maintenance as they've either sold off or privatised this area of work which is now carried out by construction companies that operate in the construction industry on conditions based on construction awards and I am aware of one significant employer that carries out that work, Waterways Constructions who clearly have all their conditions based on the Construction Awards. We note the position we have advanced is supported by the port authorities at paragraph 3.2.1 of their written submission.

PN286

We submit that we're not opposed to a Maritime Industry Port Authorities Award that applies only to port authorities and their direct employees covering maintenance activities of their direct employees but we do oppose any such award applying to construction and maintenance work engaged in by other employers.

Again, we therefore seek a similar exclusion in the award for the Modern Building and General Construction Industry Onsite Award and the Modern Mobile Crane Hiring Award.

PN287

Finally, your Honour, there is an issue in regard to ship repairing. We note that in the proposed Port Authorities and Construction Industry Award there's a reference to ship repairing. It is our understanding that very few port authorities are actually engaged in ship repairing. Ship repairing is more generally covered by the Modern Manufacturing and Associated Industries and Occupations Award. I refer to clause 4.3 at paragraph (e) or the coverage clause of that award which includes ship repairing so we therefore seek that either the references to ship maintenance and ship repairs be deleted or alternatively an exclusion for work covered by the Modern Manufacturing and Associated Industries and Occupations Award be inserted in clause 4.6.

PN288

Unless there are any questions, they are the submissions we wish to make this morning.

PN289

THE VICE PRESIDENT: Mr Harvey.

PN290

MR HARVEY: Do you still have time, your Honour?

PN291

THE VICE PRESIDENT: I've only got a couple of minutes.

PN292

MR HARVEY: I'm happy to do it more slowly after lunch if that suits your Honour.

PN293

THE VICE PRESIDENT: Yes, that would be more suitable.

PN294

MS BRADY: Sorry, your Honour, Ms Brady here just quickly in Sydney. I had indicated that I may make further submissions in relation to the content of the Sugar Industry Award but perhaps you can confirm whether you're happy with Mr Bunting's earlier suggestion that the parties be given some further time to meet to discuss the content issues and perhaps file further materials in light of the timetable you adopted for coal terminals and maritime towage. That may be a better use of the Commission's time than hearing my submissions today.

PN295

THE VICE PRESIDENT: It might be a better use for everyone's time if that course is followed that all the parties are free to file further written material in relation to content issues and to utilise the timetable deadlines that I've indicated earlier. This afternoon we will continue to hear parties in relation to scope issues. There should be an opportunity for the parties to respond to what other others have said so that they can say everything they wish to today with everyone present, will also have an opportunity for parties who wish to address content

issues this afternoon, but if parties believe they can just as easily put material in writing, then that's up to them. We'll adjourn till 2 pm.

<LUNCHEON ADJOURNMENT [12.38PM]

<RESUMED [2.00PM]

PN296

THE VICE PRESIDENT: There are some additional appearances this afternoon.

PN297

MR J SHARPE: Good afternoon, your Honour. I appear for and on behalf of Queensland Sugar Limited in the bulk sugar terminal industry in Queensland.

PN298

MR P WARREN: Your Honour, my name is Warren, initial P. I appear for the Australian Sugar Milling Council Pty Ltd on behalf of the sugar milling employers in the industry.

PN299

MR G TROST: Your Honour, my name Gregory Trost. I appear for the Queensland Canegrowers Association Union of Employers.

PN300

MR D BROANDA: Your Honour, my name is Broanda, initial D. I appear on behalf of the Australian Workers Union and the Australian Workers Union of Employees Queensland. Your Honour, just to explain, I understand Ms Angus from our national office has made an appearance this morning, My appearance is confined to any questions that may arise out of the sugar matter. I'm the advocate otherwise responsible for the sugar industry, may it please.

PN301

THE VICE PRESIDENT: Are the sugar consultations still occurring?

PN302

MR BROANDA: Your Honour, they've concluded for today. We have made a request that there be a further consultation before Commissioner Spencer in some weeks to come. I understand Commissioner Spencer needs to take that to the Bench, to the President. They are concluded for today's purposes though.

PN303

THE VICE PRESIDENT: Perhaps we'll hear from the sugar people shortly but, Mr Harvey, you've been waiting very patiently all morning. You have a short submission to make.

PN304

MR HARVEY: Your honour, the ASU has filed brief written submissions with regard to the ports and harbours sector principally dealing with our award coverage with respect to port authorities where we have a substantial number of members employed as salaried employees of port authorities around the country. Having read the submissions of the other organisations filed on or since 6 March and your Honour has listened to what has been put this morning, no other comments are required from the ASU as well with regard to scope of the proposed awards ..... award modernisation proceedings.

PN305

Firstly, your Honour, with regard to the Tug or the Towage Award as I think they're called ..... the ASU has some members employed in this industry as I understand in Queensland who are currently covered by the Clerks Shipping Officers Award. The MUA in their further submissions, I think filed on 18 March, in response to everybody's else's initial submissions, said that they don't propose to include clerical administrative employees in the proposed award and in fact they say they oppose the inclusion of such employees in Tug or the Towage Award and go on further to say that they say that the coverage of these employees should, in their words, I think remain with the Clerks Private Sector Award which just raises one little question, your Honour, and that is that the Clerks Shipping Officers Award was listed as one of the awards in the provisions list in the priority round when the clerical occupation was being considered. I think it's fair to say that nobody from the bar table made any submissions at all with regard to where the Clerks Shipping Officers Award should end up, either in an award of their own or be part of the Clerks Private Sector Modern Award.

PN306

I don't think the Full Bench, from memory, has said anything about that either so that's one of the issues that we will need to address at some point somehow during this year but at this stage it appears that the most likely outcome may well be that the Clerks Shipping Officers Award is one of those ones that is rolled up into the Clerks Private Sector Occupation Award. I haven't heard any other proposals and we haven't made any other proposals for dealing with it at this stage but I just flag it in these proceedings.

PN307

THE VICE PRESIDENT: In a general sense, as I recall it, you indicated that where there is existing industry clerical coverage, there may be a desire to continue that in one shape or form but that was a general proposition.

PN308

MR HARVEY: Yes, your Honour.

PN309

THE VICE PRESIDENT: I do recall some mention also of freight forwarders clerical people perhaps being considered in a similar manner as shipping clerks and are not necessarily the same thing, but they might be in similar circumstances in a sense.

PN310

MR HARVEY: Yes, your Honour, in fact I was just speculating on where the freight forwarders had gone to because I thought they were going to bob up again in stage 3 and they don't appear to have, you know, surfaced again in any of the stage 3 proceedings. I think initially your Honour is perfectly right. ASU generally said if there's clerical awards applying in particular industries then prima facie we think they should be rolled into the Clerks Private Sector Award but we pulled out a number of industry sectors where we said we didn't think that was appropriate, for example, as your Honour would know with regard to airlines, electrical industry, local government and other industries, rail is another. In some cases decision have been made by the Full Bench to put certain clerical employees in other awards or to continue to include them, such as hospitality or retail shops.

PN311

There's a variety of outcomes and my recollection is when we first looked at shipping officers, we thought we might combine them with the Travel Industry Award but we've pulled back from that proposal and proposed a Travel Agency Award in other proceedings in stage 3. I think somehow in this process there does need to be a bit of a revisiting and a tick-off to say well, we've dealt with that and it's here, or we haven't dealt with it and we'd better fix it up before the end of the year.

PN312

At the moment it seems there is no proposal to do anything with shipping officers, certainly in the context of the Tug and the Towage Award and I'll mention it again in terms of stevedoring so I still think that the most likely outcome is that we'll end up saying to Full Bench those clerks should be under the Clerks Private Sector Award.

PN313

Your Honour, with regard to the Port Harbour and Enclosed Vessels Award, the ASU supports the making of this award and the ASU supports the inclusion of ferries within this award, along with the other unions, and we've also made similar submissions with regard to that with respect to the public transport other than rail award modernisation proceedings in stage 3. I think that was on last week, where we're involved in that Public Transport Other Than Rail Award covering trams, light rail and buses and we've said ferries belong over here in this award.

PN314

We have one difference with the MUA on that because we don't support the extension of this proposed award to ferries where those ferries are operated by local government. In fact we'd specifically seek an exclusion from the terms of the proposed Port Harbour and Enclosed Vessels Award with regard to any ferries operated by or on behalf of local government authorities around the country where those employees in that particular ferry activity are currently covered by local government awards of various description.

PN315

THE VICE PRESIDENT: Things like local punts and things like that often are.

PN316

MR HARVEY: Yes, your Honour, and also I believe in Brisbane there's a fairly extensive or at least a ferry operation operated by the Brisbane City Council and my understanding is those employees work under the terms of Brisbane City Council awards. I mean, it's an enterprise award as we understand it, anyway and it's a question of whether local government is captured by the federal system or not, in any case but we would press our submission for an exclusion for employees where they're currently working under the terms of a local government award that they should continue to do so and not be hived off and put into a separate award. We think that would be inappropriate and would increase the regulatory burden on employers and employees, for that matter, by having another and a different safety net, a different set of terms and conditions to apply.

PN317

Your Honour, the third one is with regard to the Port Authorities and Port Construction Award. ASU strongly supports the making of a modern award in the

terms originally proposed. As I said, your Honour, this is where most of the ASU's members in this particular industry sector will be located and found since they work under a number of Port Authority Awards which are named in our written submissions.

PN318

The ASU's original submissions, your Honour, supported the making of a Port Authorities and Port Construction Award without distinction between ports. Note that there's been a recent swing away from that view and gathering support for a separate Coal Ports Award. The ASU has some reservations about the making of a Coal Port Award as a separate award, particularly in conjunction with others as spoken this morning, because of our interest in the Port Authority in Gladstone which is covered by an award of the ASU, and we're not sure whether our interests can be conveniently sort of disaggregated or split between the coal terminal there and the rest of it, but we're going to examine that further. So that's our reservation on that score as well and it's a reservation that's been well ventilated.

PN319

THE VICE PRESIDENT: Only in relation to Gladstone?

PN320

MR HARVEY: My advice from our branch, your Honour, is that's where the two things do come together and that's the basis of our reservation.

PN321

THE VICE PRESIDENT: Yes, that's where the Port Authority operates the coal terminal amongst other operations within - - -

PN322

MR HARVEY: Yes. I understand the coal part of it's big and I understood the submissions today to say there was one dedicated coal terminal and there was one where it was a joint coal and other products terminal. So, again, we just need to work out whether our interests can be disaggregated or not, and if the Commission is attracted to the idea of a separate Coal Ports Award we'll look at it in terms of the - - -

PN323

THE VICE PRESIDENT: Well, there doesn't seem to be any opposition to a general Coal Ports Award, but there's opposition to Gladstone being included within it.

PN324

MR HARVEY: Yes.

PN325

THE VICE PRESIDENT: And it appears you've got the same interest in relation to that second issue.

PN326

MR HARVEY: Yes, we have the same complication, yes, absolutely, your Honour, but that's the position.

PN327

THE VICE PRESIDENT: And finally, your Honour, with regard to stevedoring the MUA in their written response on 18 March seemed to interpret our submission as suggesting the clerical and administrative employees who are currently covered under the Stevedoring Industry Awards should be taken out and put into a general Clerical Award. In other words they were suggesting that it was the ASUs - if I could read between the lines - it was the ASUs suggestion that we should get back the teleclerks that were so rudely taken from the former Federated Clerks Union by the former Waterside Workers Union about 25 years ago. And I was really tempted to get up and make a submission along those lines but I've decided, your Honour, that perhaps the historic moment for getting the teleclerks back under the coverage of the now ASU as the successor to the Federated Clerks Union had possibly passed slightly, so I won't make that submission.

PN328

I did note with disappointment though, your Honour, that the representatives from Patricks this morning described the teleclerks function as a much diminished function currently. I have no information as to whether that is accurate. I'm just disappointed because when they were members of the Federated Clerks Union it was a very important function, very important to the members within our organisation and very key group within the industry as a whole.

PN329

THE VICE PRESIDENT: Maybe they do other important functions as well within the modern stevedoring operations.

PN330

MR HARVEY: Yes, I'm sure they do, your Honour, and I'm sure the MUA has been looking after them very well. However, the one serious submission I make on that is that we do support the distinction, and I think the representative from Patricks this morning did make a distinction between work performed in the stevedoring industry in a clerical and administrative capacity under the terms of the Stevedoring Industry Awards as currently applying and proposed to apply under the modern awards, and you made a distinction between that and work which is in fact performed either by stevedoring companies in head offices and other locations remote from the waterfront and also by shipping companies under the terms of the Clerks Shipping Officers Award, and we certainly support that distinction.

PN331

So we're not making a bid for the teleclerks, we're not intending to lose, you know, the head office clerks and stevedoring companies or shipping companies, and we understand that that distinction that was raised this morning still exists. Now, those are the submissions of the Australian Services Union, your Honour, with regard to scope. We have a couple of small matters to put with regard to content of the Port Authorities and Port Construction Award but we'll do that in writing on the timetable that your Honour has proposed this morning. If the Commission pleases.

PN332

THE VICE PRESIDENT: Thank you, Mr Harvey. Any other submissions in relation to scope of awards to apply in the port and harbours area?

PN333

MR MORRIS: Your Honour, might I just respond just to the points that have just been made in relation to clerical occupations in towage and in coal terminals?

PN334

THE VICE PRESIDENT: Yes, Mr Morris.

PN335

MR MORRIS: I can confirm that it's been no part of the proposal for a Maritime Towage Award that it would extend to clerical employees. The Tug Boat Industry Award and the Tug and Barge Award have been very much designed for and only apply to the crew manning the - that's the officers, ratings - on the tugs themselves.

PN336

THE VICE PRESIDENT: There's no clerks on a tug.

PN337

MR MORRIS: No. Well, not that they'd admit to. But we've assumed I must say, and I just want to make that clear, that the clerical employees who are employed by tug companies, whether in ports or head offices and so on, would be covered by an appropriate occupational award for clerks. And the same goes for the Coal Terminal Award that is proposed. It's not been the intention to cover clerical employees or administrative employees, and I don't think anyone has thus far proposed that that would be the case. The position, as I appreciate it, with the exception of Gladstone Port Corporation, has been that clerical employees in the dedicated coal terminals are covered by occupational awards if they're covered by awards. If the Commission pleases.

PN338

THE VICE PRESIDENT: Yes, thank you for that clarification, Mr Morris. Mr Sharpe?

PN339

MR SHARPE: Your Honour, could I firstly just inquire as to whether or not you've had an opportunity to see, firstly, see, and perhaps then consider the two previous submissions made by Queensland Sugar Limited, the first being on 1 August last year, your Honour, in regards to the status of Queensland Sugar Limited and Bulk Terminals that was in the round 1 of the award modernisation process. The second form of submission was made on 6 March in writing to this tribunal as well as a result of the 30 January 2009 statement made by this tribunal. Does your Honour - - -

PN340

THE VICE PRESIDENT: Yes, I have read those submissions.

PN341

MR SHARPE: Thank you, your Honour. Your Honour, I do have some written submissions prepared, and my apologies to the parties for not being able to distribute some copies prior to this afternoon. If I can hand up a copy of those written submissions, and I do have copies here for the parties.

PN342

THE VICE PRESIDENT: Mr Sharpe, I won't mark this as an exhibit as such but we'll load this onto the website in the same way as the other submissions, unless

it's already been loaded in relation to the sugar area, but we'll make sure it's loaded into this part of the website as well.

PN343

MR SHARPE: I will, your Honour, yes, I will, I'll undertake to do that post haste. Your Honour, the submissions that I have just tabled today I wasn't intending to verbalise, however perhaps for the purpose of the parties that are on video link we may need to, but essentially I was only going to talk to these submissions, your Honour. The introduction of the submissions simply deal with a couple of observations in terms of the results out of the Full Bench statement issued on 30 January 2009. We note that of course the Bulk Terminals Award state, which is a NAPSA derived from a state enterprise award, Queensland state enterprise award, had been classified, if I can use that term loosely, your Honour, classified within the ports and harbour services industry under that actual statement made in January.

PN344

The Bulk Terminals Award state, as I said, is an enterprise NAPSA, has, for a matter of information, not been determined as a relevant award for the purposes of establishing any comparative schedules as published by the tribunal under the ports and harbour services matter, your Honour. I've taken the liberty of expressing our assessment of the employer and union participant submissions, obviously with the exception of - I don't know what was submitted today or this morning to his Honour - but certainly as far as the ones that are posted on the website I have taken the liberty of expressing for his Honour in these submissions our assessment of the submissions of the positions put as we see it for the other parties.

PN345

I started in these submissions, your Honour, you will see by dealing with the employer participant submissions. In our reading it appeared that none of the employer parties in this matter are seeking to specifically include bulk sugar terminals into any of the operations of any modern award that may be created by this tribunal under this particular matter, under the matter of ports and harbour services. The Australian Sugar Milling Council, which are represented here today, supports the exclusion of bulk terminals from the port and harbour services as they are listed at the moment, your Honour.

PN346

In terms of the union participant submissions, our assessment you will see over the page at point 4 of the submissions dealing with the metal workers, APESMA, the ASU, the AWU and AWUEQ, the state registered union, CEPU, CFMEU and MUA, in our view all support either directly or indirectly the exclusion of Bulk Sugar Terminals from ports and harbour services. And then the submission deals with at point 5 through to about point 10 and 11, your Honour, in brief form what is a significant body of history in regards to the relationship of bulk terminals in Queensland, or sugar bulk terminals in Queensland in the stevedoring industry, okay. In fact it's extrication, so to speak, from at least 1956 in this country of stevedoring operations, and I deal with that in those submissions, like I said, from point 5 through to about point 11, right through to several submissions over the page.

PN347

Taking the Commission through that detail from about 1956 to the present legislation that we have whereby we would respectfully submit to the Commission bulk sugar terminals are in fact excluded from the definition of a maritime employee and a waterside worker under the current legislation, legislation that has provided that exclusion since the Arbitration and Conciliation Act of 1904. Your Honour, it wasn't my intention to regurgitate all of the submissions that have been made previously. I have dealt with, in the submissions on 6 March and also 1 August, your Honour, the more finite details of the corporate governance if you like of Queensland Sugar Limited, it's actual operations and the detail of its operations. And of course what we submit is the inextricable link to the other sectors that are contained within the sugar industry, your Honour, and they are dealt with in detail, like I said, within our submissions of 1 August, furnished again on 6 March of this year.

PN348

Your Honour, at the conclusion of our submissions we deal with, under the title of Enterprise Nature in the Award Modernisation Process, which is not new as far as a point raised before this tribunal. It certainly was raised in 1 August and 6 March. But if this tribunal was not persuaded to exclude the sugar terminals from port and harbour services and we are not found to be placed within the sugar industry then we would be seeking to put further extensive submissions to this tribunal in respect to the enterprise specific nature of the industrial arrangements and how that actually fits in terms of this award modernisation process and the legislation that deals with the exclusion of enterprise awards from the modernisation process.

PN349

Your Honour, we appeared before Commissioner Spencer this morning in regards to the sugar industry matter, and all parties in appearance there agreed for bulk sugar terminals to be included in the Sugar Industry Award. That's a matter of fact that can be found on the record. Has your Honour got any specific questions?

PN350

THE VICE PRESIDENT: No. Well, it appears to be generally agreed in these proceedings as well that bulk sugar terminals should be excluded from Port and Harbour Awards generally, so it's not a matter of any disagreement that I can see.

PN351

MR SHARPE: Thank you, your Honour.

PN352

THE VICE PRESIDENT: Yes, Mr Warren?

PN353

MR WARREN: Thank you, your Honour. Well, in view of your most recent comment, your Honour, without wanting to try and hammer and nail anything further home I'd make the point that we've made submissions about vertical integration industry on 1 August 08 and 29 August 08. They were in the more general award modernisation matters that was based on the thesis of representing a vertically integrated industry, and we've made similar submissions to Commissioner Spencer this morning in significant detail in relation to the Sugar Industry Award 2010 matter. In that draft award that we've put up your Honour

would notice that we have included in coverage of award bulk terminals. If your Honour pleases.

PN354

THE VICE PRESIDENT: Yes, thank you. Mr Trost?

PN355

MR TROST: Your Honour, firstly, thank you to your Honour and to the parties for allowing us to make this brief submission. Cane Growers supports the single Sugar Industry Award. We support the submissions that have been made on behalf of the bulk sugar terminals this afternoon by their advocate. We submit that there are important and unique features associated with the sugar industry which warrant a single Sugar Industry Award as part of the award modernisation process. We commend the proposed single Sugar Industry Award for the Commission's consideration. May it please the Commission.

PN356

THE VICE PRESIDENT: Thank you very much. Mr Broanda?

PN357

MR BROANDA: Thank you, your Honour. I'll be brief. In short, your Honour, it seems like there's furious agreement about the location of bulk sugar terminals in terms of these proceedings that are going on. I just wanted to comment briefly in relation to the ASU comments, mostly because I note Ms Angus is not in the room in Sydney so she may not have heard them. It's in relation to a discrete point that the ASU raised about the Brisbane City ferry service. The Brisbane city ferry service is actually operated by a company called Metro Link. Now, Metro Link are represented by Deacons solicitors. I don't know if Deacons are in the room, if there's Deacons' involvement in this industry, but certainly - - -

PN358

THE VICE PRESIDENT: There's no written submissions filed on their behalf or any other appearance in relation to this part of the process.

PN359

MR BROANDA: Your Honour, I only raise it because there was a reference by the ASU to the Brisbane City ferry service. The AWU has a single union agreement to cover the employees that actually perform that service. As I say, it's performed by an entity called Metro Link, which is a joint venture between a couple of other companies, Transfield and someone else, I forget exactly who, but nonetheless they are a trading corporation and they are covered by the current federal industrial legislation. A home needs to be found for them.

PN360

Certainly their terms and conditions of employment arise out of what is otherwise entitled to the Brisbane City Council, and there are historical reasons for that because the council actually used to perform this service, there was a transmission and there's arrangements in place to flow on the Brisbane City Council's terms to these employees. But I just wanted to make that clear, particularly for our membership within what is the city Cats and the ferry services operated on behalf of the Brisbane City Council, certainly terms and conditions need to be found for those employees of Metro Link within this process.

PN361

I won't make any further comment about that because I'm trying to be cautious not to contradict anything Ms Angus may have said this morning, but just in relation to those employees certainly they are covered by the federal legislation.

PN362

THE VICE PRESIDENT: I know you know everything about Queensland, Mr Broanda, but you don't know who operates the ferries in Perth do you?

PN363

MR BROANDA: Your Honour, I don't unfortunately. There was another matter in relation to Gladstone, but I note - I saw Mr Aspromourgos walking the corridors earlier. No doubt Mr Aspromourgos will address that issue in due course.

PN364

THE VICE PRESIDENT: He has already.

PN365

MR BROANDA: Thank you, your Honour.

PN366

THE VICE PRESIDENT: Thank you. Any other submissions in relation to coverage and scope of awards? Yes, Mr Warren?

PN367

MR WARREN: Sorry, your Honour, I was about to ask if I could be excused.

PN368

THE VICE PRESIDENT: Yes, any party not wishing to remain is free to go. I was then going to move to the issue of content of awards generally to be made arising from consultations in this part of the process in port and harbour services, and in the light of what I indicated earlier about the facility of parties to file further material in writing. It may not be that anyone wishes to say more, but does anyone wish to say something or respond to submissions in relation to content issues today? Not in Melbourne and not in Sydney?

PN369

MR FLEMING: No, your Honour.

PN370

THE VICE PRESIDENT: Well, I think therefore that we've gone as far as we can today, and I thank all the parties for those submissions. The assistance that the parties have provided and further assistance arising from further consultations will be very much appreciated by the Commission. The Commission will now adjourn.

<ADJOURNED INDEFINITELY [2.32PM]

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 10

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation Request from the Minister for Employment and Workplace Relations as revised on 18 December 2008

Matter Number: AM 2008/49

SUPPLEMENTARY SUBMISSION ON BEHALF OF MARITIME TOWAGE EMPLOYER GROUP

Introduction

1. This submission by the maritime towage employer group (the employers) supplements its submission dated and lodged on 6 March 2009 (note that the correct reference in the list of employer companies is PB Towage (Australia) Pty Limited and not PB Maritime Towage (Australia) Pty Limited).

2. Consultations between representatives of the employers and the MUA and AIMPE since 6 March 2009 have resulted in a substantial narrowing of the points of difference between their respective proposed draft awards.

3. **Attachment A** to this submission is the draft modern Marine Towage Award 2010 now proposed by the maritime towage employer group.

4. It is noted that *Attachment B* of the Further Submissions lodged on behalf of the MUA and AIMPE on 17 April 2009 is a composite document designed to show, side by side, where there are differences, the terms proposed in the employers' draft award (on the right) and the unions' draft award (on the left). That document has not been verified by the employers and, it is submitted, should be used with caution and subject to the contents of this supplementary submission and Attachment A.

Submissions on each clause of the proposed Marine Towage Award

5. These submissions are now made with reference to each provision in the proposed award. Where the parties are in agreement, this is noted. Where the proposals differ, these submissions outline the reasons the employer group submits that their version should be preferred by the Commission.

Clause 1 – Title

The parties agree on the award being entitled the "Marine Towage Award 2010", as more apt than the initially proposed title of "Maritime Towage Award 2010".

Clause 2 – Commencement Date

Agreed.

Clause 3 – Definitions and interpretation

This is agreed with the exception that the unions propose a definition of "shipkeeping". The employers submit that there is no need for a general definition of this term. Clause 15.1 is a provision for a "Cyclone (shipkeeping) allowance" and the application of that allowance is explained in the clause.

Clause 4 – Coverage

Agreed. It is noted that the detail of the exclusions in clause 4.3 will require revision to conform to the applicable industry designations as other modern awards are settled.

Clause 5 – Access to the award and National Employment Standards

Agreed.

Clause 6 – The National Employment Standards and this award

Agreed.

Clause 7 – Award flexibility

Agreed.

Clause 8 – Consultation regarding major workplace change

Agreed.

Clause 9 – Dispute resolution

Agreed.

Clause 10 – Types of employment

This clause is agreed except that the employers oppose the addition of the unions' proposed clause 10.3(a) concerning payment of casuals employed for 7 days or longer.

The unions' proposed clause 10.3(a) has no counterpart in the Tugboat Industry Award. The clause proposed by the unions is drawn from the Tug and Barge Award. Importing such a clause into the Marine Towage Award is opposed by the employer group for the following reasons:

- It has never applied in the Tugboat Industry Award, other than in the exceptional and distinguishable context of clause 14.3(vi), concerning special voyages.
- It only exists in the Tug and Barge Award which it will be recalled is an award applying to only two respondent employers. As such it would be a bad case of the tail wagging the dog for such a provision to now apply generally in the marine towage industry.

- Such a provision is unusual in awards of the Commission, forms no part of any general standard and is not appropriate as an industry safety net provision.
- The casual loading paid to casual employees, of 25%, has been determined by the Commission as a fair general standard which compensates for the absence of an entitlement to leave and other attributes of full time or part time employment.
- The prescription of a casual loading of 25% already represents an increase in the casual loading for marine towage employees as the current loading in the Tugboat Industry Award is 20%.
- Provisions such as the unions' proposed clause 10.3(a) are matters for collective bargaining, rather than a modern safety net award.

Clause 11 – Termination of employment

The employer and unions draft clauses are substantially agreed. However there are several differences in the ordering and numbering of the clause. Clause 11.4, Return to place of engagement, of the unions' draft is essentially accepted in the employers' draft clause 11.3 in **Attachment A**.

The Commission will note that the notice provisions in clause 11.1(b) for Ratings are as provided for in the NES. The parties have the view that this is convenient given that there is enhanced notice provided for in the case of Officers in clause 11.1(a).

Clause 12– Redundancy

Agreed.

Clause 13 – Duties and Classifications

The clause is agreed except for clause 13.2.

The employers propose the inclusion of clause 13.2 which carries into the proposed award the provisions in clause 9.2 of the Tugboat Industry Award. Those terms state in simple and well understood language the qualifications and duties of, respectively, a master, engineer and rating. They suffice, for the purposes of the award, as descriptors of the classifications to which the proposed award will apply.

The union's suggested Schedule A adds nothing to clarify the classifications of employees and would introduce new terms that have not been part of the current Tugboat Industry Award or Tug and Barge Award.

Clause 14 – Wages and Related Payments

Agreed.

Clause 15 – Allowances – Harbour Towage Operations

There are a number of aspects of the allowances provided for in this clause in respect of which the employers and unions do not agree.

Before dealing with the specific matters of difference, we make the following general submissions:

The employer group has sought and now proposes a substantial rationalising of the allowances that presently appear in the Tugboat Industry Award. A feature of the allowance provisions in the Tugboat Industry Award is the prescription of a myriad of port specific allowances and conditions for the payment of those allowances. This feature has its origins in the fact that, prior to the award simplification process and the Commission's simplification of the Tugboat Industry Award in 1999, the award contained a series of Schedules which applied to a particular port or ports. These schedules were negotiated at the port level. These Schedules, in turn, had their origins in the federal and State awards for tug employees which operated prior to the making of the first Tugboat Industry Award in 1974.

Some of the allowances in the Tugboat Industry Award have a relatively widespread application, for example, the allowances for free running voyages regularly undertaken (see clause 9.7.11 in the Tugboat Industry Award). However, the amounts and bases of calculation of the allowances, even where the allowance have a widespread application, vary substantially.

There are other allowances in the Tugboat Industry Award which only apply in a smaller number of ports. Here also, the amounts of the allowances vary from port to port.

The general approach of the employers has been to propose common standard allowances providing, where appropriate, for transition so that the greater of the current Tugboat Industry Award allowance or the new standard allowance would be payable until the end of the transition period; after which time only the standard allowance would apply.

The inclusion in the modern award of port specific allowances and conditions would appear to be contrary to the intention in section 576T of the Act.

Clause 15.1(a) – Nominated Voyages allowance

The employers propose a new general standard allowance for nominated voyages. The meaning of "Nominated Voyage" is defined in clause 15.1(a)(i) and is intended to embrace the category of free running voyages that are presently provided for in clause 9.7.11 of the Tugboat Industry Award (and which the unions have proposed in the table in their proposed clause). It will be noted that the allowances in the current Tugboat Industry Award provision, and the draft now proposed by the unions, are framed in various ways. Some are expressed as percentages of a daily rate of pay, others as a percentage of a weekly rate, others again as dollar amounts per day or per hour. The employer proposal

prescribes an allowance for each hour during which an employee is engaged on a Nominated Voyage and expresses the allowance as a percentage of the standard rate, which is in turn defined in clause 3. There is no established method for converting the current allowances into an hourly allowance. The method advanced by employers for calculating the allowance is as follows:

> *Step 1:* update the hourly allowance by the agreed proportional increase in the standard rate since the allowance was last adjusted by the Commission. (This incorporates increases to the minimum wage rates contained in the relevant decisions of the Australian Fair Pay Commission);
>
> *Step 2:* use the known distance in nautical miles between nominated ports and convert the current allowance into an hourly allowance (as a function of the estimated duration of the voyage);
>
> *Step 3:* determine the average hourly allowance based on the "sample" of the nominated "free running" voyages identified in clause 9.7.11 of the Tugboat Industry Award;
>
> *Step 4:* express the average hourly allowance as a percentage of the standard rate.
>
> Using the above method, for each hour during which an employee is engaged on any Nominated Voyage (as defined), the employee would be entitled to an allowance equal to 2.46% of the standard rate.

The employers submit that this approach achieves the award modernisation objectives of prescribing simple and easy to follow provisions which provide a fair safety net and rationalises the allowance to eliminate a host of port specific provisions which should not properly be preserved in a modern award.

Clause 15.1(b) – Cyclone (shipkeeping) allowance

The employers propose the inclusion of this clause in substitution for the provisions in clause 9.9 of the Tugboat Industry Award and the unions' draft clause providing for shipkeeping and firefighting payments. (See unions' proposed clause 15.1(c)). On analysis, the shipkeeping payments apply to cyclone shipkeeping, except in the port of Westernport. The prescription of shipkeeping for cyclone purposes appears to have a sufficiently generic character to justify a provision in the modern award. The allowances for this purpose presently vary from port to port and so the employers have proposed a common standard allowance expressed as 1.96% of the standard rate. The basis for this calculation is as follows:

The proposed allowance incorporates the agreed proportional increase in the standard rate since 2007 when the allowance was last adjusted by the Commission. The agreed proportional increase is a multiplier of 1.036029. (This multiplier recognises the minimum wage rate that would have applied as the standard rate had the Tugboat Industry Award been varied for minimum wage increases under the relevant decisions of the Australian

Fair Pay Commission). The proposed Cyclone (shipkeeping) allowance is expressed as a percentage of the standard rate.

The shipkeeping payment for Westernport is a matter for collective bargaining rather than inclusion in a modern award.

The firefighting payment proposed by the unions only applies at the port of Bunbury and, for this reason, should not appear in a safety net award.

Unions' Proposed Clause 15.1(b)

The unions have proposed a clause providing for payments for work outside port limits. This clause is derived from clause 9.8 of the Tugboat Industry Award. On analysis, those provisions in the current award and the provisions now proposed by the unions have a distinctly port specific character and are matters for collective bargaining rather than a safety net award.

Clause 15.1(c) – Emergency maintenance allowance

This clause corresponds substantially to the unions' proposed clause 15.1(e) Maintenance. The employer draft is preferable as it defines emergency maintenance and specifies when the allowance is payable.

Unions' Proposed Clause 15.1(d) – Miscellaneous payments

The unions propose the inclusion of this provision. It is derived from clause 9.10 of the Tugboat Industry Award. On analysis, the clause is distinctly port specific and the employers oppose inclusion of the provision on the grounds that it is properly a matter for collective bargaining rather than a safety net award.

Clause 15.1(d) – Area and port based allowances

The employers propose their clause 15.1(d) as a transitional provision in respect of payments for work outside port limits, area and port allowances and resumption of duty allowance, presently prescribed by the Tugboat Industry Award in clause 9.5, 9.8, 12.10 and 12.11. The unions propose the retention of these allowances in their draft clause 15.1(f). On analysis, each of the allowances or provisions concerned is distinctly port specific and should not be included in a modern safety net award.

Clause 15.2 – Reimbursement and expense related allowances

The employers' draft modern award does not update the current allowance rates, pending release of the relevant Consumer Price Index indices. Certain expense-related allowances in the Tugboat Industry Award were varied by the Commission and commenced on 5 October 2007 (PR979226). However the CPI changes for the period October 2008 – October 2009 (which would appear to be the relevant period for calculating new expense-

related amounts) will not be available until late 2009. Accordingly there are minor discrepancies in clause 15.2 in relation to the amounts for the following allowances:

- Industrial and protective clothing;
- Meals;
- Telephone;
- Loss of personal effects;
- Victualling and accommodation in out-ports.

Clause 15.2(a) – Industrial and protective clothing

Agreed.

Clause 15.2(b) – Meal allowance

The employers propose a rationalising of meal allowances to prescribe a general allowance of $11.10 for each day worked.

The employers oppose the retention of the port specific allowances contained in the unions' draft. On analysis, these allowances are port specific and matters for collective bargaining rather than inclusion in a modern award.

Clause 15.2(c) – Telephone allowance

The employers propose a clause which prescribes a general allowance in line with the general allowance contained in clause 12.3 of the Tugboat Industry Award. The amount of the allowance is specified.

The employers oppose the unions' draft which, as well as providing a general allowance, retains the port specific allowances in the current Tugboat Industry Award (clause 12.3.1). The port specific allowances should not be prescribed in a safety net award.

Clause 15.2(d) – Loss of personal effects allowance

Agreed, subject to verifying and applying the relevant CPI adjustment.

Clause 15.2(e) – Insurance allowance

The unions' draft clause 15.2(e)(iii.) retains the terms of clause 12.6.4 of the Tugboat Industry Award 1999 dealing with employee indemnity. The employers have not included this clause in their draft pending consideration by the Commission as to whether the provision is one that may be included in a modern award under Part 10A of the Act.

Clause 15.2(f) – Victualling and accommodation allowance in out-ports

Agreed, subject to verifying and applying the relevant CPI adjustment.

Clause 15.2(g) – Travelling allowance

The employers propose a general provision which provides for the transport of employees by or at the cost of the employer or for reimbursement of the employee. It also provides for payment for travelling time except where an aggregate wage is paid.

The employers oppose the inclusion of port specific conditions which are proposed by the unions and derived from clause 12.8.7 of the Tugboat Industry Award. The port specific provisions are just that and should not appear in a modern safety net award. They can if the parties agree, be included in collective agreements.

Clause 15.2(h) – Port-based travel allowances – transitional arrangements

The employers have proposed, in lieu of retaining the multitude of port specific travelling allowances, a transitional provision set out their clause 15.2(h).

Clause 15.2(i) – Expenses

This is agreed (see unions' draft clause 15.2(h)) except that the employers would apply the reimbursement provision to all employee classifications under the modern award.

Clause 15.3 – Method of adjusting expense related allowances

Agreed subject to verifying and applying the relevant CPI categories.

Clause 16 – Allowances – Tug and Barge Operations

This clause is agreed except in relation to meal allowances. The employers propose that meal allowances for employees in tug and barge operations should be the same as for employees in harbour towage operations. The unions propose retention of different allowances for tug and barge employees. It is preferable in the context of a safety net award to maintain common standard allowances for this subject matter.

Clause 17 – Payment of wages

Agreed.

Clause 18 – Superannuation

This clause is agreed except that the unions propose, for tug and barge employees, an employer superannuation contribution of 13% of the employee's rate of pay rather than applying the standard superannuation legislation level of contribution (of 9%).

The employers submit that it is appropriate that the modern award prescribe the Commission's general standard provision and not apply, even confined to tug and barge operations employees, a higher level of superannuation contribution. It needs to be borne in mind that there are only two named employer respondents to the Tug and Barge Award

and the consent of two employers at the time of making that award should not form the basis of a general award safety net standard.

Clause 19 – Accident Pay

Agreed.

Clause 20 – Ordinary hours of work and rostering

The employers and unions disagree on the content of clause 20.2. The employers propose a general prescription for the span of ordinary hours of 0700 to 1700, but providing for agreement between an employer and the majority of employees to alter this spread of hours.

The employers oppose the unions' draft which retains a multitude of port specific spans of hours. There is no need for the port specific provisions to be included in the modern award and it is inappropriate to include them.

Clause 20.3 is agreed (subject to corrected cross-referencing in the unions' document).

Clause 21 –Breaks

The employers propose a general standard provision for a meal break of not less than 30 minutes for every five hours worked. Such a provision is consistent with the Commission's general standards and is otherwise appropriate for inclusion in a modern award.

The employers oppose the retention of a long catalogue of port specific provisions which have no common thread. Such port specific provisions are matters for collective bargaining rather than a modern safety net award.

Clause 22 – Overtime and penalty rates

The employers propose a standard provision and oppose the unions' proposal to retain a number of port specific prescriptions. The employers' proposed clauses 22.1 to 22.5 provide a fair safety net standard.

Clause 23 – Leave

The provisions of this clause proposed by the employers are drawn from clause 13 of the Tugboat Industry Award and make appropriate reference to the NES. (It is noted the employers' clause 23.1 and cross-referencing, is not reproduced accurately in the further submissions lodged on behalf of the unions.)

The employers oppose the unions' proposed clause 23.5 which provides for a higher leave accrual rate for employees of employers engaged in tug and barge operations, for the following reasons:

- The provisions of the Tug and Barge Award which the unions would propose to retain in their clause 23.5, do not make clear how the extra leave entitlement is arrived at.

- Again, it needs to be borne in mind that the Tug and Barge Award has two named respondents and their consent when that award was made should not bind other employers and now apply in a modern safety net award.

- The leave prescription for harbour towage employees is consistent with the Commission's general standards, long standing and has a wide application. It is consistent with the NES.

- The current Tugboat Industry Award provision provides a fair safety net standard.

Clause 24 – Personal/Carer's Leave and Compassionate Leave

The employers propose that both forms of leave be as provided for in the NES.

The employers oppose the unions' proposal for three days of compassionate leave. There is no basis in the modern award to depart from the NES which, in turn, is consistent with the Commission's general standard.

Clause 25 – Community service leave

The only difference between the employers and unions is in the unions' reference to "Division 7" of the NES. It is unnecessary and probably inappropriate to refer to a Division of the current NES.

Clause 26 – Public holidays

Agreed.

Unions' proposed Schedule A

See the employer group's earlier submissions in relation to clause 13.

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Marine Towage Award 2010

Table of Contents

Part 1—Application and Operation

1. Title

This award is the *Marine Towage Award 2010*.

2. Commencement date

This award commences on 1 January 2010.

3. Definitions and interpretation

3.1 In this award, unless the contrary intention appears:

Act means the *Workplace Relations Act 1996* (Cth)

Commission means the Australian Industrial Relations Commission or its successor

contract towage means when a tug is towing a vessel from one location to another location, where that tow or other services of a non-emergency nature has been contracted for and pre-planned by the employer

daily rate means 1/7th of the weekly rate

day means 24 hours from midnight to midnight

emergency operations means when a tug is called on at short notice to leave a port to assist a vessel broken down or in distress

employee has the meaning in the Act

employer has the meaning in the Act

enterprise award has the meaning in the Act

firefighting means work performed on a tug which is attending a fire within or outside of port limits

free running voyage and **delivery voyage** means when a tug proceeds from one port to another either interstate or intrastate and is not engaged in towing between ports or on a Nominated Voyage. In addition, this definition will apply to a tug proceeding from its home port to another port to commence a contract tow or when returning to its home port on completion of a contract tow

Harbour Towage Operations is defined in clause 4.2(a)

hourly rate means 1/40th of the weekly minimum rate

month means a calendar month

NAPSA means notional agreement preserving a State award and has the meaning in the Act

NES means National Employment Standards

Nominated Voyage is defined in clause 15.1(a)

Officer means a master, a mate or engineer of a tug

Outside work means work on a tug which proceeds to sea on a special voyage outside the limits of bays, rivers or regulated port boundaries/limits but within Australian Territorial Waters

rating means an employee of a tug other than an officer, and includes a general purpose hand

special voyage means a voyage for which it is necessary to set watches and will include a free running voyage and delivery voyage, contract towage or emergency operations, but does not include a Nominated Voyage

standard rate means the minimum weekly wage rate for the classification of Rating in clause 14.1

tonnage/power units means the sum of the gross registered tonnage figure of a tug and of the brake horse power figure of the main engine/s only of the tug (including super charged power where applicable)

Tug and Barge Operations is defined in clause 4.2(b)

weekly rate means the minimum wage rate for the relevant classification which appears in clause 14.1(a)

3.2 Where this award refers to a condition of employment provided for in the NES the reference is to the condition as defined in the NES.

4. Coverage

4.1 This industry award covers employers in the Marine Towage Industry and their employees in the classifications listed in clause 14.1(a) to the exclusion of any other modern award.

4.2 Definition of Marine Towage Industry

For the purposes of clause 4.1, **Marine Towage Industry** means:

(a) any work on tug boats, in conjunction with ship-assist operations and voyages, at or about, or to or from, a port in Australia ("**Harbour Towage Operations**");

(b) movement of contract cargoes by combined Tug and Barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia ("**Tug and Barge Operations**").

4.3 Exclusions

This award does not cover:

(a) employers in respect of their operations or activities covered by another award that operates in the following industries or sectors:

(i) maritime industry - offshore oil and gas;

(ii) Port, Harbour and Enclosed Waters;

(iii) Port Authorities;

(iv) Dredging; and

(v) Seagoing;

(b) an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award.

(c) an employee excluded from award coverage by the Act.

5. Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

6. The National Employment Standards and this award

The NES and this award combine to form the minimum conditions of employment for employees to whom this award applies.

7. Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) Allowances (clause 15);

(b) Ordinary hours of work and rostering (clause 20);

(c) Breaks (clause 21);

(d) Overtime and penalty rates (clause 22);

(e) Public Holidays (clause 26);

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and

(b) result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

7.9 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

Part 2—Consultation and Dispute Resolution

8. Consultation regarding major workplace change

8.1 Employer to notify

(a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.

(b) Significant effects include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills

required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

8.2 Employer to discuss change

(a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1(b), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1(b) of this award.

8.3 For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.

9. Dispute resolution

9.1 In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.

9.2 If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to the Commission.

9.3 The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

9.4 Where the matter in dispute remains unresolved the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

9.5 An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

9.6 While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a

direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

Part 3—Types of Employment and Termination of Employment

10. Types of employment

An employee may be engaged on a full-time, part-time or casual basis.

10.1 Full-time employment

A full-time employee is an employee who is engaged to work an average of 35 ordinary hours per week.

10.2 Part-time employment

(a) A part-time employee is an employee who:

(i) is engaged to work ordinary hours which are less than the average number of ordinary hours of a full time employee; and

(ii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

(b) For each ordinary hour worked, a part-time employee will be paid not less than the hourly rate of pay for the relevant classification in clause 14.1(a).

(c) Before an employee commences part-time employment, an employer must inform the employee in writing of any rostered periods of duty to be worked by the employee.

(d) Any agreed variation of the rostered periods of duty must be recorded in writing.

10.3 Casual employment

A casual employee is one engaged and paid as such.

10.4 Probation period

An employer may initially engage a full-time or part-time employee for a period of probationary employment for the purpose of determining the employee's suitability for ongoing employment. The employee must be advised in advance that the employment is probationary and of the duration of the probation which is to be either:

(a) three months or less; or

(b) more than three months and is reasonable, having regard to the nature and circumstances of the employment.

11. Termination of employment

11.1 Notice of termination by employer - Permanent Employees

(a) Officers

In order to terminate the employment of an officer the employer must give to the employee the following written notice:

Period of continuous service	Period of notice
1 year or less	2 weeks
More than 1 year but less than 4 years	6 weeks
More than 4 years	8 weeks

(b) Ratings

In order to terminate the employment of a rating the employer must give to the employee the following written notice:

Period of continuous service	Period of notice
1 year or less	1 weeks
1 year up to the completion of 3 years	2 weeks
3 year up to the completion of 5 years	3 weeks
5 years and over	4 weeks

In addition to the notice in clause 11.1(b) ratings over 45 years of age at the time of the giving of the notice, with not less than two years continuous service, will be entitled to an additional week's notice.

(c) Payment in lieu of the notice prescribed in clause 11.1 may be made.

(d) An employer may terminate an employee's employment by giving part of the notice prescribed in clause 11.1 and part payment in lieu thereof.

(e) In calculating any payment in lieu of notice, the wages an employee would have received in respect of ordinary time the employee would have worked during the period of notice if the employee's employment had not been terminated must be used.

11.2 Job search entitlement

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day’s time off without loss of pay for the purpose of

seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.

11.3 Return to place of engagement

If the employment of an employee is terminated by the employer elsewhere than at the employee's home port or place of engagement, for any reason other than misconduct, the employer shall be responsible for conveying the employee to the employee's home port or place of engagement.

11.4 Termination without notice

Despite the above provisions, an employer may terminate an employee's employment without notice, or payment in lieu of notice, for misconduct.

11.5 Notice of termination – permanent employees

(a) An employee may terminate his/her employment by giving the employer the following notice in writing:

(i) in the case of officers, two weeks' notice;

(ii) in the case of ratings, one week's notice.

(b) If an employee fails to give the required notice, the employer may withhold moneys due to the employee an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

11.6 Casual employees

The employment of a casual employee terminates at the end of each period of duty.

12. Redundancy

12.1 Redundancy pay is provided for in the NES.

12.2 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

12.3 Employee leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under clause 12-Redundancy had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

12.4 Job search entitlement

(a) An employee given notice of termination in circumstances of redundancy must be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient.

(c) This entitlement applies instead of clause 11.2.

Part 4—Minimum Wages and Related Matters

13. Duties and Classifications

13.1 Duties

(a) All employees will perform any duties within their skills competence and training, as the employer may require and in the manner and at the time required by the employer.

(b) These duties include the following:

(i) working inside combustion chambers or casings of internal combustion engines or ballast or oil tanks;

(ii) working under engine-room plates including bilges;

(iii) cleaning bilges (including rose boxes) and coffer dams;

(iv) using mechanical chippers, grinders, wire brushes or spray painting.

13.2 Duties and classifications

(a) A master must be duly certificated under the relevant legislation. A master will at all times be responsible for and be in charge of the operation of the tug.

(b) An engineer must be duly certificated under the relevant legislation. An engineer will be responsible for performing engineering operations and repairs and engineering maintenance in relation to the tug.

(c) A rating must follow the direction of the master, or engineer where such a direction relates to the performance of the engineer's duties.

14. Wages and related payments

14.1 Minimum wages

(a) The minimum wage rates for each classification will be as follows:

Classification	Minimum wage rate	
	daily	weekly
Rating / General Purpose Hand	$89.14	$624.00
Category 1 (0-1850 tonnage/power units)		
Master and Engineer	$122.93	$860.50
Mate	$101.80	$712.60
Category 2 (more the 1851 tonnage/power units)		
Master and Engineer	$129.77	$908.40
Mate	$106.53	$745.70

(b) The minimum wage rates include payment for the performance of all duties and work that the employer may request the employee to perform in accordance with clause 13, unless otherwise specified in this award.

(c) Option for Aggregate Wage or Annual Salary – Permanent Employees

(i) As an alternative to being paid the minimum wage rate plus overtime and penalty payments (in accordance with clause 22 and clause 26.2), an employer may agree to pay an aggregate wage or annual salary provided the employer obtains the agreement of a majority of its employees who are covered by this award.

(ii) The aggregate wage or annual salary paid by the employer to employees must be based on a rate equivalent to an aggregate wage or annual salary of at least 40% above the minimum wage rate prescribed in clause 14.1.

(iii) An employer will not be required to pay overtime and penalty payments provided that the aggregate wage or annual salary paid over the year was sufficient to cover what the employee would have been entitled to if the minimum wage rate plus overtime and penalty payments (as identified above) had been paid in that year.

(iv) Where payment is adopted in accordance with this clause 14.1(c), the employer will keep a daily record of the hours worked by the employees which will show the daily date and start and finishing times of the employees. The record will be countersigned by the employee fortnightly, and will be kept at the place of employment for six (6) years.

14.2 Casual rates of pay

(a) For each hour worked, a casual employee will be paid no less than the hourly rate of pay for his or her classification in clause 14.1(a), plus a casual loading of 25%.

(b) The casual loading is paid in lieu of leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

14.3 Special Voyages in Harbour Towage Operations - Rates of Pay

(a) Application

(i) This clause 14.3 applies to employers operating in, and employees working in, Harbour Towage Operations.

(ii) This clause 14.3 does not apply to an employee who is regularly or continuously engaged on outside work.

(iii) The payments in clause 14.3(b) are payable in lieu of the daily minimum wage rate specified in clause 14.1 (including clause 14.1(c)), and the payments and penalties for working overtime under clause 20.2;

(iv) The payments in clause 14.3(b) do not apply to employees on a Nominated Voyage.

(b) Payment for Special Voyages

(i) For any day (including Saturdays, Sundays and Public holidays) on which an employee is engaged on outside work an employee will be entitled to the amount set out in the table below for his/her classification.

Special Voyages	Minimum	Residual	Total rate
Voyage/Rank	**$**	**$**	**$**
Free Running Voyage and Delivery Voyage			
Master and Chief Engineer	$559.00	$0.00	$559.00
Mate (Permanent Tug Master) and Engineer	$526.80	$0.00	$526.80
Mate (Casual or Tug Mate)	$430.00	$0.00	$430.00
General Purpose Rating	$359.50	$0.00	$359.50
Contract Towage			
Master and Chief Engineer	$679.70	$6.40	$686.10
Mate (Permanent Tug Master) and Engineer	$650.40	$4.70	$655.10
Mate (Casual or Tug Mate)	$553.80	$0.00	$553.80
General Purpose Rating	$483.20	$0.00	$483.20
Emergency Towage Operations			
Master and Chief Engineer	$810.80	$14.20	$825.00

Special Voyages	Minimum	Residual	Total rate
Mate (Permanent Tug Master) and Engineer	$774.90	$11.30	$786.20
Mate (Casual or Tug Mate)	$677.70	$6.30	$684.00
General Purpose Rating	$606.90	$2.10	$609.00

(ii) The amounts contained in clause 14.3(b)(i) will only be payable from the time that the tug leaves the wharf to proceed to sea on any special voyage until it ties up at the wharf at the termination of such special voyage.

(iii) The amounts contained in clause 14.3(b)(i) are all inclusive and the total amount payable to an employee for all outside work performed in each 24 hours (midnight to midnight) or part thereof.

(iv) Free running and Contract voyages rates of pay will apply to each leg. The calculation for the first day's pay will commence when the vessel departs the wharf. The daily rate of pay will apply for the first day. If the voyage exceeds 24 hours, employees will be entitled to 8 hours pay, at the hourly rate, for each period or part period of 8 hours worked.

(v) On any day on which an employee is put ashore sick or injured, he/she is entitled to the employee's daily minimum wage rate, for each period or part period of eight hours worked on that day.

(vi) A casual employee engaged on a special voyage will be paid the higher of:

- the casual rate of pay under clause 14.2 or
- the rate of pay payable to other employees of the same classification in respect of the special voyage, including any entitlement to proportionate leave. (In this latter case, casual loading will be absorbed in the payment.)

(vii) A rest period may be given in the out-port depending on the circumstances of the voyage. In the case of a voyage of seven (7) days or more, the maximum rest period will be 24 hours. In the case of a voyage of less than seven (7) days, the rest period will be determined by the circumstances of the voyage and by discussion between the employer and employees.

15. Allowances – Harbour Towage Operations

The allowances in this clause 15 only apply to employers operating in, and employees working in, Harbour Towage Operations.

15.1 Allowances for disabilities associated with the performance of particular tasks or work in particular conditions or locations

(a) Nominated voyages allowance

(i) A Nominated Voyage means an intrastate tug voyage from one port to another that is undertaken for operational reasons, to cover towage requirements in the other port.

(ii) For each hour during which an employee is engaged on a Nominated Voyage, the employee will be paid an allowance equal to 2.46% of the standard rate.

(b) Cyclone (shipkeeping) allowance

For each hour (including during Saturdays, Sundays and Public holidays) on which an employee is on board a tug in port and available for the performance of any duty during a cyclone or cyclone alert an employee will be paid an allowance equal to 1.96% of the standard rate.

(c) Emergency maintenance allowance

(i) In this clause 15.1(c), emergency maintenance means work which is necessary to reinstate into service a tug which would otherwise be out of service.

(ii) An employee who at the request of the employer is required to perform emergency maintenance work on board a tug outside the span of ordinary hours, will be paid an allowance as set out in the table below:

Category	**Percentage of Standard Rate (SR) per hour**
Category 2 Master/Engineer	10.96%
Category 2 Mate	7.60%
Category 1 Master/Engineer	10.51%
Category 1 Mate	8.25%
General Purpose Rating	6.62%

(d) Area and port-based allowances

(i) In this clause 15.1(d), an Area and Port-based Allowance refers to the following allowances prescribed in the Tugboat Industry Award 1999, made under the Workplace Relations Act 1996 (Cth):

- Payments for work outside port limits;
- Area and Port Allowances;
- Resumption of duty allowance;

(ii) An employee is entitled to payment of an Area and Port-based Allowance in accordance with the terms of the Tugboat Industry Award 1999, made under the Workplace Relations Act 1996 (Cth):

- that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement made under that Act had applied to the employee; and
- that would have entitled the employee to payment of the Area and Port-based allowance under clauses 9.5, 9.8, 12.10 and 12.11 of that award.

(iii) This clause 15.1(d) ceases to operate on 31 December 2014.

15.2 Reimbursement and expense related allowances

(a) Industrial and protective clothing

(i) For each employee covered by this award who is required to wear industrial or protective clothing and equipment as stipulated by a relevant law or by the employer, the employer must reimburse the employee for the full cost of purchasing the industrial or protective clothing and equipment. The provisions of this subclause do not apply where the industrial or protective clothing and equipment is, or has been, paid for or provided by the employer and the employer replaces items on a fair wear and tear basis.

(ii) Employees will be paid an allowance of $51.60 per annum towards the purchase of sunglasses for use during work.

(iii) Employees are responsible for the safekeeping on board the vessel of each item of protective clothing.

(iv) An employer may require an employee to sign a receipt for the issue of such clothing and equipment.

(b) Meal allowance

Each employee will receive a meal allowance of $11.10 for each day worked, provided that an allowance is not required to be paid if the employer provides a meal or meal-making facilities.

(c) Telephone allowance

(i) An employee who is required by their employer to telephone for orders will be entitled to be reimbursed an amount of $158.30 per annum.

(ii) The employer will reimburse full installation costs of a new service and pay transfer costs on one occasion during an employee's period of service.

(d) Loss of personal effects allowance

If by fire, explosion, foundering, shipwreck, collision or stranding, an employee sustains damage to or loss of his/her personal effects or equipment, the employer will compensate the employee for such damage or loss by a

payment equivalent to the value thereof to a maximum of $1754.00 (or $2799 if the damage or loss occurs on outside work). The maximum payable for any one article is limited to $466.80.

(e) Insurance allowance

(i) Outside work

An employee who is engaged on outside work by an employer (other than an employee regularly or continuously engaged on outside work) is entitled to be paid by the employer an annual allowance equal to the annual premium paid by the employee to obtain a policy of insurance, approved in advance by the employer, which provides a benefit to the employee of $100,000 upon his/her death whilst engaged on outside work.

This clause does not apply where the employee's employer maintains an insurance policy, or self-insures, in order to provide a benefit to the employee of $100,000 upon his/her death whilst engaged on outside work.

(ii) Firefighting insurance

In this clause 15.2(e)(ii), total and permanent disability means incapacitation to the following extent:

- the loss of two limbs (where limbs include the whole of one hand or the whole of one foot) or the sight of both eyes or the loss of one limb and the sight of one eye; or

- after a period of six consecutive months continuous absence from his/her employment on account of injury which is proved to the satisfaction of the insurer (after considering such medical or other evidence or advice as they may require from time to time) the employee is unable or unlikely ever again to be able to undertake any form of remunerative work for which he/she is reasonably fitted by education or training or experience.

An employee who is engaged in firefighting by an employer is entitled to be paid by the employer an allowance equal to the annual premium paid by the employee to obtain a policy of insurance, approved in advance by the employer, which provides a benefit to the employee of $130,000 in the case of death or total and permanent disability caused by bodily injury of the employee whilst engaged in firefighting. This subclause does not apply if the employee's employer maintains an insurance policy, or self-insures, in order to provide a benefit to the employee of $130,000 in the case of death or total and permanent disability caused by bodily injury of the employee whilst engaged in firefighting.

(f) Victualling and accommodation allowance in out-ports

(i) Where an employee is not at his/her home port and is required to eat ashore and or sleep ashore the following allowances will be payable:

	Allowance ($)
Breakfast	12.30
Lunch	14.40
Dinner	23.20
Accommodation (per day)	69.70
Total daily allowance	119.40

(ii) An employee will only be entitled to the accommodation allowance if:

- the place at which the employee sleeps is not his/her usual place of residence; and
- the employee produces evidence to the reasonable satisfaction of the employer that the employee has properly incurred expenditure on the provision of accommodation for him or her self for the night or nights in question.

(iii) In the case of casual employees, the provisions of this clause only apply if the casual employee is engaged to perform work on a vessel at a port which is not the home port of the permanent employees in the vessel's crew.

(g) Travelling allowance

(i) Application of clause 15.2(g)

This clause applies where an employee is either travelling from his/her home port to another port at the direction of the employer or travelling to his/her home port from another port at the direction of the employer.

This clause 15.2(g) does not apply if the employer provides and/or pays for the cost of transport.

(ii) The employer will reimburse the employee for the reasonable cost of the transport required by the employer to be used.

(iii) Unless the employee is in receipt of an aggregate wage or annual salary pursuant to clause 14.1(c), time spent travelling under this clause 15.2(g) will be consider as time worked. (In the case of an employee who is in receipt of an aggregate wage or annual salary pursuant to clause 14.1(c), no additional payment is payable for time spent travelling.)

(h) Port-based travel allowances – transitional arrangements

(i) An employee is entitled to payment of a port-based travelling allowance in accordance with the terms of the Tugboat Industry Award 1999, made under the Workplace Relations Act 1996 (Cth):

- that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement made under that Act had applied to the employee; and

- that would have entitled the employee to payment of the port-based travelling allowance under clauses 9.5 and 12.8 and Table 2 of that award.

(ii) This clause 15.2(h)(i) ceases to operate on 31 December 2014.

(iii) During this transitional period an employee is not entitled to payment of both the port-based travelling allowance and the Travelling allowance under clause 15.2(g). The employee must be paid whichever allowance is the greater.

(i) Expenses

(i) The employer will reimburse an employee for any expenses reasonably incurred by the employee in the performance of his/her duties on behalf of the employer. Wherever possible, in order to be reimbursed the employee must seek the pre-approval of the employer to undertake the expense.

(ii) As well as to other matters, this clause will apply to enquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations, unless the authority conducting the enquiry or proceedings finds that such enquiry or proceedings have been occasioned by the default or misconduct of the employee or, in the event of an appeal therefrom, the appellate tribunal finds that such enquiry or proceedings have been occasioned by the default or misconduct of the employee.

(iii) If the employer disputes his/her liability under this clause the question will be referred to the Commission for resolution in accordance with the dispute resolution procedure in clause 9 of the Award.

15.3 Method of adjusting expense related allowances

(a) At the time of any adjustment to the standard rate, each expense related allowance in clause 15.2 will be increased by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.

(b) The applicable index figure is the index figure published by the Australian Bureau of Statistics for the Eight Capitals Consumer Price Index (Cat No. 6401.0), as follows:

Allowance	**CPI Index**
Industrial and protective clothing	Clothing and footwear group
Meal allowance	Take away and fast foods sub-group
Telephone Allowance	Telecommunication sub-group
Loss of personal effects allowance	Household supplies sub-group
Victualling and accommodation allowance in out-ports	Domestic holiday travel and accommodation sub-group

16. Allowances – Tug and Barge Operations

The allowances in this clause 16 only apply to employers operating in, and employees working in, Tug and Barge Operations.

16.1 Allowances for disabilities associated with the performance of particular tasks or work in particular conditions or locations

(a) Multiple tow allowance

(i) The following allowances will be paid where a vessel engages in a multiple tow for each day the vessel is at sea, in port or anchored from the time the tow is assigned until the time the vessel is berthed at its final destination.

	Percentage of Standard Rate per day
Master/Chief Engineer	11.69%
Engineer/Mate/General Purpose Hand.	5.91%

(ii) On a changeover day the employees joining the vessel will be entitled to this allowance, which will not be payable to employees proceeding on leave.

(b) Cooking allowance

	Percentage of Standard Rate per week
Rating / General Purpose Hand acting as Cook	4.17%

(c) Additional skills allowance

	Percentage of Standard Rate per week
Rating / General Purpose Hand. holding qualifications as a crane driver, Able Seaman, or offshore watch-keeper	12.51%

16.2 Reimbursement and expense related allowances

(a) Meals and accommodation

Clause 15.2(f) applies.

(b) Travelling allowance

Clause 15.2(g) applies.

(c) Expenses

Clause 15.2(i) applies.

(d) Loss of personal effects allowance

Clause 15.2(d) applies.

(e) Industrial and protective clothing

Clause 15.2(a) applies.

(f) Medicals and Passport

The employer will pay an allowance to the employee equal to the cost of any medical examination, eyesight or hearing test, passport (with associated vaccinations), visas, etc., required for the purposes of revalidation of certificates of competency or as required by the employer.

16.3 Method of adjusting expense related allowances

Clause 15.3 applies in relation to the allowances under clause 16.2.

17. Payment of wages

17.1 The employer will pay the employees wages, penalties and allowances fortnightly in arrears by electronic funds transfer into the employee's bank (or other recognised financial institution) nominated by the employee.

17.2 An employer may deduct from any amount required to be paid to an employee under this clause the amount of any overpayment of wages or allowances.

18. Superannuation

18.1 Superannuation legislation

(a) Superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, any superannuation fund nominated in the award covering the employee applies.

(b) The rights and obligations in these clauses supplement those in superannuation legislation.

18.2 Employer contributions

(a) An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

18.3 Voluntary employee contributions

(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause 18.2.

(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of three months' written notice to their employer.

(c) The employer must pay the amount authorised under clauses 18.3(a) or (b) no later than 28 days after the end of the month in which the deduction authorised under clauses 18.3(a) or (b) was made.

18.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 18.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 18.2 and pay the amount authorised under clauses 18.3 (a) or (b) to one of the following superannuation funds:

(a) Maritime Super; or

(b) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund.

18.5 Absence from work

Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 18.2 and pay the amount authorised under clauses 18.3(a) or (b):

(a) **Paid leave**—while the employee is on any paid leave;

(b) **Work-related injury or illness**—for the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that:

(i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements; and

(ii) the employee remains employed by the employer.

19. Accident pay

19.1 An employee is entitled to accident pay in accordance with the terms of:

(a) The Tugboat Industry Award 1999 (clause 16) or a NAPSA that would have applied to the employee immediately prior to 1 January 2010 under the *Workplace Relations Act 1996* (Cth) that would have applied to the employee immediately prior to 27 March 2006, if the employee had at that time been in their current circumstances of employment and no agreement made under the *Workplace Relations Act 1996* (Cth) had applied to the employee; and

(b) that would have entitled the employee to accident pay in excess of the employee's entitlement to accident pay, if any, under any other instrument.

19.2 The employee's entitlement to accident pay under the Tugboat Industry Award 1999 is limited to the amount of accident pay which exceeds the employee's entitlement to accident pay, if any, under any other instrument.

19.3 This clause does not operate to diminish an employee's entitlement to accident pay under any other instrument.

19.4 This clause 19 ceases to operate on 31 December 2014.

Part 5—Hours of Work and Related Matters

20. Hours of work and rostering

20.1 Ordinary hours of work

For the purposes of the NES, the ordinary hours of work for full time employees will be 35 hours per week, which may be averaged over a period of up to one year, and are given effect to in the manner provided under clause 23.2(c)(iv).

20.2 Span of hours

The span of hours in which ordinary hours may be worked will be between the hours of 0700 and 1700. An employer may agree with a majority of affected employees in a port to alter this spread of hours.

20.3 Maximum Hours of Work

(a) No employee will be required to perform work continuously in excess of 16 hours, except as provided in clause 20.3(b). An employee's continuity of work is not broken by meal breaks taken pursuant to clause 21 and any other authorised period off duty of less than 4 hours duration.

(b) An employer may require an employee to perform work continuously in excess of 16 hours ("extended hours") where:

(i) it is reasonably necessary to meet operational requirements;

(ii) the employer endeavours to terminate the period of continuous work as soon as practicable; and

(iii) the employer grants the employee a rest period of no less than 10 hours before requiring the employee to resume duty.

21. Breaks

21.1 Meal breaks

(a) An employee is entitled to a meal break of not less than 30 minutes after every five hours worked.

(b) Breaks will be scheduled by the employee's supervisor based upon operational requirements so as to ensure continuity of operations. The employer will not require an employee to work more than five hours before the first meal is taken or between subsequent meal breaks if any.

21.2 Minimum breaks

(a) No break in duty will be of less than six hours duration from the time the employee is relieved from work. In computing a break of duty in relation to this subclause time off duty before the ordinary finishing time of the day up to 1600 hours will not count except on Saturdays, Sunday and public holidays.

(b) An employee who is required to resume duty after the ordinary finishing time of the day, when possible, will be given details of the work expected to be done up to and including the ordinary starting time the next day.

22. Overtime and penalty rates

22.1 Requirement to work overtime and reasonable additional hours

An employee must work ordinary hours of work and reasonable additional hours as directed by their employer.

22.2 Payment for working overtime

(a) Subject to any agreement pursuant to clause 14.1(c), the following payments will be made for working overtime:

(i) All time worked:

- in excess of the ordinary hours of duty, as specified in clause 20.1, or
- beyond the applicable span of hours under 20.2,

must be paid for at the rate of time and one half for the first two hours and double time thereafter Monday to Friday.

(ii) on Saturday the rate of time and one half for the first two hours and double time thereafter with a minimum of four hours payment; and

(iii) on a Sunday the rate of double time with a minimum of four hours payment.

22.3 Penalty rates – extended hours

Subject to any agreement pursuant to clause 14.1(c), an employee who is required to perform work pursuant to clause 20.3(b) must be paid for such work at the rate of double the employee's hourly rate.

22.4 Calculating overtime and penalty rates

(a) In calculating overtime payments under clause 22.2, and penalty rates under clause 22.3, any period:

(i) less than half an hour will be counted as half an hour; and

(ii) greater than half an hour but less than an hour must be counted as an hour.

(b) An employee who may have an entitlement under both subclause 22.2 and subclause 22.3 will be paid whichever is the higher payment.

22.5 Resumption of duty

(a) This clause 22.5 does not apply in any case where an employee is subject to an agreement in accordance with clause 14.1(c).

(b) When an employee who has ceased duty on any day is required thereafter to resume duty otherwise than in a consecutive extension before or after ordinary duty for the day, the employee will be entitled to a minimum payment of four (4) hours for each resumption but, if the employee has to resume duty on two (2) occasions during the hours between 1800 hours on the one day and 0500 hours on the following day will be entitled to a payment for the whole of the time from the commencement of the first to the termination of the last resumption.

(c) For each resumption of duty on any day under this clause 22.5, otherwise than in a consecutive extension before or after ordinary duty for the day, travelling time of up to one (1) hour will be considered as time worked.

Part 6—Leave and Public Holidays

23. Leave

23.1 This clause 23 operates in conjunction with the NES. The provisions of this clause are intended to satisfy the provisions in the NES concerning maximum weekly hours of work, annual leave and public holidays.

23.2 Entitlement to leave

(a) A permanent full-time employee shall be entitled to 168 days free of duty in each year, or to proportionate leave for any continuous service of less than a year.

(b) A part-time employee's entitlement to days free of duty will be determined in accordance with clause 10.2.

(c) The leave prescribed in clause 23.2(a) above includes:

(i) 104 days of leave, being in lieu of weekends;

(ii) 5 weeks of paid annual leave for shiftworkers under the NES. (Employees under this award are considered to be shiftworkers for the purposes of the NES.)

(iii) public holiday entitlements under the NES; and

(iv) an additional 28 days leave, to give effect to a 35 hour week.

23.3 Employees will not be entitled to leave from duty under this clause 23 in relation to a period of absence from service on account of workers compensation, or leave without pay. An employee's leave entitlement under clause 23.1will be debited by 0.857 of a day for each day of absence referred to in this clause.

23.4 Employers will consult with their employees and prepare a roster providing for the taking of leave from duty. Where practicable, the roster should provide for predictability to the taking of 140 days of leave from duty in each year (or the proportion of the employee's entitlement to rostered leave days in a year that 140 bears to 168).

23.5 Despite the provisions of this clause, the value of any leave given to the employee in advance shall be deducted, upon termination of employment, from any monies owing to an employee.

23.6 Continuous service

For the purposes of clause 23 a permanent employee shall be deemed to have served continuously for the aggregate of his/her service although the service may have been temporarily interrupted (by up to 21 days) by transfer to some other work of his/her employer, or for the convenience of the employer, or by suspension of operations, or the need to carry out repairs or maintenance on a tug that the employee is rostered to work on.

24. Personal/carer's leave and compassionate leave

24.1 Personal/carer's leave and compassionate leave are provided for in the NES.

25. Community service leave

25.1 Community service leave is provided for in the NES.

26. Public holidays

26.1 Employees are entitled to public holidays in accordance with the NES.

26.2 In ports where clause 14.1(c) is not invoked, employees required to work on any of the days specified in the NES will be paid:

(a) for all hours worked within ordinary hours at the rate of time and one half of the minimum wage for their classification; and

(b) outside ordinary hours at the rate of double time and one half of the minimum wage for their classification, with a minimum payment of four hours.

26.3 In ports where clause 14.1(c) is invoked, an agreement under clause 14.1(c) recognises that Harbour Towage operations require tugs to be available on any day of the year. Entitlements to public holidays under the NES are incorporated in the applicable port rosters developed under clause 23.4 and the aggregated entitlements to leave from duty.

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 11

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Award Modernisation

Port and Harbour Service

(AM2008/49)

Re: PORT HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010

EXPOSURE DRAFT

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

AND

THE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS

1. We rely upon our earlier submissions lodged on 6 March 2009, and18 March 2009.

2. We make the following additional submissions.

Coverage

3. We attached to the MUA/AIMPE submissions dated 6 March 2009 a draft Ports Harbour and Enclosed Water Vessels Award 2010 which was expressed to cover the Port, Harbour and Enclosed Water Vessels Industry. That industry was defined as meaning "employers engaged in or in connection with vessels." Vessel was broadly defined.

4. Upon reflection, we now realise that both the name for the award that we selected and the manner in which we defined the relevant industry, has failed to convey our real intention. That intention was to have created an award with coverage of the operation of all maritime vessels which were not covered by four other modern awards which we had sought. We sought separate coverage of the seagoing, dredging, maritime offshore oil and gas and the marine towage industries. Schedule 'A' to these submissions conveniently sets out the definitions of those industries as contained in the relevant exposure drafts. It

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also contains the definition of Marine Tourism and Charter Vessel Industry which is contained in the exposure draft of that industry. We had opposed the making of that separate award.

5. In the result the award contained in the exposure draft of the modern award in the industry addressed by these submissions has been confined to vessels operating within ports, harbours or other bodies of water **within** the Australian coastline.

6. The operators of vessels not covered by the four other awards that we sought will be award free once they proceed to sea. That is not consistent with the intention of the award modernisation process which is to have all industries covered by modern awards. The issue should be addressed by the Commission.

7. In order to remedy that defect, it is submitted that, the name of the modern award should be altered to **Maritime Industry (General) Award 2010** and the industries which the award covers should be **"the operation of any type of vessel used for navigating by water"**.

8. An amended sub-clause 4.1 of the exposure draft to give effect to this submissionis as follows:

> **"4.1** This award covers employers throughout Australia in the maritime industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:
>
> *(a) the Maritime Offshore Oil and Gas Award 2010;*
>
> *(b) the Seagoing Industry Award 2010;*
>
> *(c) the Port Authorities Award 2010;*
>
> *(d) the Dredging Industry Award 2010;*
>
> *(e) the Stevedoring Industry Award 2010;* and
>
> (f) *the Marine Towage Award 2010;*

For the purpose of clause 4.1, **maritime industry** means the operation of any type of vessel used for navigating by water."

Towing allowance

9. In clause 14.20(c) the relevant percentage should be 25% not 0.25%. This appears to be a typographical error for 25%. The source provision is found at clause 4.1.2 of Part 3 of the Port Services Award 1998 (AP 792489).

Classification Descriptors

10. We initially attempted to create classification descriptions by reference to the Marine Orders, the Navigation Act and relevant flagged state requirements. Two difficulties arise from this approach. Firstly the Marine Orders do not differentiate between all the classifications – for example between a second and third engineer. Secondly the Marine Orders essentially only set out qualification requirements. There is no impediment for an employer employing a person who holds a Chief Engineer's certificate of competency as a third engineer. In those circumstances we are instructed to seek:

    a. Deletion of clause 13.2

    b. Deletion of schedule "A"

Dated: 12 June 2009

.....
William Grant McNally
Solicitor for the Maritime Union of Australian and
The Australian Institute of Marine and Power Engineers

.....
Nathan Keats

Schedule A

Seagoing Award 2010

maritime seagoing industry means the operation of vessels trading as cargo or passenger vessels which, in the course of such trade, proceed to sea (on voyages outside the limits of bays, harbours or rivers)

Dredge Industry Award 2010

dredging industry means:

(a) the operation of vessels in dredging or sluicing work generally and including such work in relation to land reclamation, metalliferous and other mining, and oil and gas projects; and

(b) the operation of vessels, barges, self-propelled dredges, tugs or other self-propelled vessels, used in the dredging of ports, harbours, bays, estuaries, rivers and channels requiring travelling to or from a dumping area, or whilst moving from port to port

Maritime Offshore Oil and Gas Industry Award 2010

maritime offshore oil and gas industry means the operation, utilisation, control, maintenance, repair, and service of vessels (as defined) in or in connection with offshore oil and gas operations

vessel means a propelled or non-propelled vessel that may, but is not limited, to be used in navigation, construction or drilling and includes a ship, barge, drilling vessel or rig, crane vessel, floating production facility, tug boat, support vessel, supply vessel, standby/emergency vessel, pipe laying vessel, diving support vessel, lighter or like vessels, or any other vessel used in offshore and gas operations

Marine Towage Award 2010

Marine towage industry means:

(a) any work on tug boats, in conjunction with ship-assist operations and voyages, at or about, or to or from, a port in Australia **(harbour towage operations)**;

(b) movement of contract cargoes by combined tug and barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia **(tug and barge operations)**.

Marine Tourism and Charter Vessels Award 2001

Marine Tourism and Charter Vessel Industry means the operation of vessels engaged wholly or principally as a tourist, sightseeing, sailing or cruise vessel and/or as a place of or for entertainment, functions, restaurant/food and beverage purposes engaged in the provision of water orientated tourism, leisure and/or recreational activities but does not include the operation of ferries engaged in regular scheduled passenger and/or commuter transport.

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 12

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TRANSCRIPT OF PROCEEDINGS
Workplace Relations Act 1996 20479-1

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT LAWLER
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER SMITH

AM2008/25, 26, 27, 28, 29, 30,31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63

s.576E - Award modernisation

Sydney

10.17AM, TUESDAY, 30 JUNE 2009

Continued from 29/06/2009

THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO CONFERENCE AND RECORDED IN SYDNEY

Hearing continuing

PN3408
JUSTICE GIUDICE: The first industry that we will deal with is maritime and we will take appearances in relation to that industry.

PN3409
MR W MCNALLY: I appear on behalf of the Maritime Union Australia and the Australian Institute of Marine and Power Engineers. With me MR N KEATS.

PN3410
MR G HATCHER: I seek leave to appear with my learned friend MR SIQH for CSL Australia Pty Ltd.

PN3411
MR K BROTHERSON: I seek leave to appear for the National Bulk Commodities Group Incorporated.

PN3412
MR C PLATT: I appear on behalf of the Australian Mines and Metals Association and the Australian Ship Owners' Association.

PN3413
MR R WARREN: I appear by leave for the Australian Federation of Employers and Industries.

PN3414
JUSTICE GIUDICE: Thank you. Any other appearances?

PN3415
MS Z ANGUS: I appear on behalf of the Australian Workers' Union.

PN3416
JUSTICE GIUDICE: Thank you. Where leave is sought, it's granted. Now, we have a number of awards in this area. Has there been any discussion between the parties as to how to deal with these? Normally I think we would take them award by award.

PN3417
MR K HARVEY: Your Honour, Keith Harvey in Melbourne. We can see, but we can't hear anything in Melbourne. We're not sure what's happening.

PN3418
MR L MALONEY: Your Honour, from Brisbane, I have the same problem. We can see, but can't hear.

PN3419
JUSTICE GIUDICE: Can you hear now?

PN3420
MR HARVEY: We can in Melbourne, yes, your Honour.

PN3421
JUSTICE GIUDICE: Can you hear us, Mr Maloney?

PN3422
MR MALONEY: I can now, your Honour. Thank you.

PN3423
JUSTICE GIUDICE: Very well. Who are you appearing for, Mr Maloney?

PN3424
MR L MALONEY: I appear on behalf of the Whitsunday Charter Boat Industry Association and the Association of Marine Park Tourism Operators for Livingstones Australia in matter AM2008/59. That's the tourism matter.

PN3425
JUSTICE GIUDICE: We haven't got to that yet. We're dealing with maritime at the moment, but we should get to tourism some time today.

PN3426
MR MALONEY: Thank you. Yes.

PN3427
JUSTICE GIUDICE: Mr Harvey, can you hear us?

PN3428
MR HARVEY: Sorry, your Honour, I can hear you, but I forgot to take mute off at this end. Your Honour, I appear on behalf of the Australian Services Union with regard to the maritime industry matter. The ASU filed a late submission in this matter yesterday which has been listed on the Commission's website which when it comes to my turn I will explain to the Commission the reason for it. If the Commission pleases.

PN3429
JUSTICE GIUDICE: Yes, and Ms Oppy, are you appearing in this matter?

PN3430
MS OPPY: No, your Honour, funnily enough not this matter, but I will be in the last one.

PN3431
JUSTICE GIUDICE: Very well.

PN3432
MR WOODS: I appear on behalf of Ports Australia in respect of this area, in respect to dredging only.

PN3433
JUSTICE GIUDICE: I am sorry, Mr Woods was it?

PN3434
MR WOODS: Yes.

PN3435
JUSTICE GIUDICE: Thank you. Are there any other appearances? Very well, as I was saying, it's a question of how we deal with this. Has there been any discussion about the order or the manner in which we should deal with these exposure drafts? Mr Hatcher?

PN3436
MR HATCHER: Yes, if it please the Commission, the Commission will have received some correspondence from our client. We would wish to move for an adjournment in relation to the Maritime Industry Seagoing Award 2008/41 and it

would seem convenient if that could be dealt with first subject to any other parties' views.

PN3437
JUSTICE GIUDICE: Yes. Well, do the other parties have notice of this?

PN3438
MR PLATT: …….

PN3439
MR WOODS: AMMA and ASA would support the proposition for an adjournment, your Honour.

PN3440
JUSTICE GIUDICE: Yes. Well, we will hear you on it, Mr Hatcher.

PN3441
MR HATCHER: May it please the Commission, the Commission will have received the correspondence that our clients received from the Minister's office. The correspondence indicates an intention or foreshadows an intention by the Minister to extend the operation of the Fair Work Act.

PN3442
JUSTICE GIUDICE: Mr Hatcher, I am not quite sure what you meant when you said the Commission would have received it.

PN3443
MR HATCHER: The letter that our client received from the Minister was attached to the correspondence.

PN3444
JUSTICE GIUDICE: Yes, that's right. We received it from you?

PN3445
MR HATCHER: That's so, yes. I'm sorry, your Honour.

PN3446
JUSTICE GIUDICE: It's all right. I'm just making sure there wasn't some other communication that you were referring to.

PN3447
MR HATCHER: No. It may be appropriate if I formally tender - - -

PN3448
JUSTICE GIUDICE: We haven't been marking these documents. There are too many of them, but we will ensure that these documents go onto the website and are part of the proceedings.

PN3449
MR HATCHER: Thank you, your Honour.

PN3450
JUSTICE GIUDICE: In fact, already on the website, I suspect.

PN3451
MR HATCHER: If I can briefly summarise and hopefully not do an injustice to the Minister's correspondence, the Minister indicates an intention to extend the

operation of Fair Work Australia, presumably some time after that legislation comes in to force, to cover permit and licensed vessels wherever and however they may be operated within the economic zone of Australia.

PN3452

The award modernisation proposal seems to have gone forward upon an assumption that the Act presently extends that far. Presumably the Minister has a different view and sees the necessity to extend the operation or perhaps there are other classes of vessels that it's thought the Act presently doesn't extend to and it's sought to extend to.

PN3453

More importantly perhaps for present purposes the Minister foreshadows an intention and I say foreshadows an intention because we had rather thought the way it was foreshadowed that it may have actually come to fruition by today to amend the award modernisation Request of the Commission in relation to the Maritime Industry Seagoing Award so that it might distinguish the situation of permit vessels, that is appropriate conditions for permit vessels might be separately determined.

PN3454

At least that's as we understand the Minister's intention both from the correspondence and from discussions that have been had with our client. Now, the Commission will have seen from our submission in relation to the exposure draft that whilst there are a number of general submissions, there are a number of very specific submissions directed to the conditions that apply on permit vessels, drawing particularly upon decisions of the Commission, that is the Australian Industrial Relations Commission, dealing with the conditions that might prospectively apply on those vessels.

PN3455

Given that the Minister has foreshadowed an intention to amend the Request to deal particularly with conditions on those vessels and given the historical situation of the operation of the Maritime Industry Seagoing Award, the fact that the award has as we apprehend it no direct application to any employers at the moment, in our respectful submission it would be the appropriate step to see exactly what the Minister envisages the Commission will be asked to do in terms of reviewing conditions to apply to permit vessels, how that Request might impact upon the present Request in relation to the maritime industry more generally and allow the parties to consider the way in which the two proceedings might go forward.

PN3456

We had been told and I should say that the Minister intended appearing today to inform the Commission of the amended award modernisation Request. I don't know whether there's been some miscommunication, some misunderstanding or some delay in the appearance, but that was certainly the information we were provided with. That is in short the basis for the application for adjournment. I've taken the opportunity of raising the matter with my learned friend, Mr Keats, and whilst I don't think the application for adjournment is supported and I wouldn't suggest that Mr Keats would go close to that, I don't know that he wishes to be heard in opposition.

PN3457
That's my understanding of the position, but I will allow him to speak for himself, obviously. If the adjournment is opposed, then I would seek to rather embellish the submissions, but that's the substance of the application for adjournment and to the extent that there's no direct opposition, in our respectful submission there's sufficient material for the Commission to accede to it.

PN3458
JUSTICE GIUDICE: Any other views about this application?

PN3459
MR WOODS: Your Honour, my client would support the submissions made by Mr Hatcher on behalf of his client.

PN3460
MR PLATT: We support the application.

PN3461
JUSTICE GIUDICE: Yes. No other views? Mr McNally?

PN3462
MR MCNALLY: The Maritime Union and the Institute regard it as a matter for the Commission. We are concerned that the direction may take some weeks.

PN3463
JUSTICE GIUDICE: Mr Hatcher, I suppose the question that poses itself is why could not the award be progressed, leaving the question of conditions on licensed and permit ships to be dealt with in due course?

PN3464
MR HATCHER: Well, your Honour, if the award had direct application to a known body of vessels, that would clearly be an attractive course, but at this stage the very basis of licences and permits are under review as we understand it. That may or may not be clarified in the way the Minister approaches this. That's in the province of another Minister. The award presently as Commissioner Raffaelli found in earlier proceedings has no direct application to any employers by reason of agreements being in place and so forth.

PN3465
JUSTICE GIUDICE: That is so in many areas.

PN3466
MR HATCHER: Well, our submission would be that this is a rather unusual circumstances in this industry.

PN3467
JUSTICE GIUDICE: Well, it's the maritime industry. Yes, well, we will have to consider it, Mr Hatcher. What we might do, Mr Hatcher, is just reserve our ruling on that, but we will deal with the other awards first and presumably the people who are here for the Seagoing Award will be happy to stay a little bit longer until they get the answer. We want to confer about the matter, but we don't think it's worth adjourning at this stage, but we will deal with it during the morning.

PN3468
MR HATCHER: May it please. If we could then withdraw perhaps while the Commission deals with those other matters?

PN3469
JUSTICE GIUDICE: You don't have any interest in the other matters?

PN3470
MR HATCHER: No.

PN3471
MR BROTHERSON: Nor do I, your Honour.

PN3472
JUSTICE GIUDICE: I think the easiest course might be if we adjourn straight away and we will give you a response.

<SHORT ADJOURNMENT [10.31AM]

<RESUMED [10.35AM]

PN3473
JUSTICE GIUDICE: Mr Hatcher, we have decided to grant the adjournment. We're obviously concerned about the overall timetable and the potential jeopardy to the completion of the modernisation of this area but it seems that there's not much that we can do at this stage until the Request is amended, as it has been indicated it will be.

PN3474
MR HATCHER: Yes.

PN3475
JUSTICE GIUDICE: So what we intend to do is to issue some directions once the Amended Request and those directions will deal with the manner in which the modernisation of this area can be dealt with, consistent with the timetable we have already announced.

PN3476
MR HATCHER: I think we will be on notice, your Honour, that our client ought to have its skates on, your Honours.

PN3477
JUSTICE GIUDICE: Yes. Well, as I say, we'd like to maintain the timetable.

PN3478
MR HATCHER: Yes.

PN3479
JUSTICE GIUDICE: Very well. We shall move to the Dredging Industry Award. Who would like to commence?

PN3480
MR W MCNALLY: I will volunteer, your Honour.

PN3481
JUSTICE GIUDICE: Yes, Mr McNally.

PN3482
MR MCNALLY: What the unions did, that's the Maritime Union and the institute did, in each of the awards with which they're concerned today was to file a submission and then to file a further submission in reply to those submissions

that have been filed by other parties. We rely upon those submissions and have little to say to add to that. In the dredging industry at 123 of the statement of the Commission dealing with the dredging industry on 22 May, at paragraph 23 the Commission raised concern as to the inclusion of the average weekly wage. We've addressed that in our submission.

PN3483

At paragraph 124 the Commission raised concern as to the meaning of remote and less remote. We've addressed that in our written submission and we've raised a difficulty that we found in all the Maritime Awards and indeed the Port Services Award where we have endeavoured to define the classifications by reference to qualifications that were necessary to perform certain functions. We came to a dead end on that in a number of respects, not the least of which was firstly that people were performing functions below their qualifications under the award. We had to recognise that and some of the qualification descriptors didn't adequately address the concerns.

PN3484

So what we have done in all the awards including the Dredging Award is to abandon that attempt, delete schedule A and proceed with the descriptions of the classifications as they are contained in mostly clause 13. There's other less significant matters raised in the written submissions we've put in and we rely upon those, if the Commission pleases.

PN3485

JUSTICE GIUDICE: Thanks, Mr McNally. Yes, Ms Angus.

PN3486

MS Z ANGUS: Yours Honours and Commissioner, there's two primary awards that form the basis of the modern Dredging Award, the AWU Dredging and the Maritime Dredging Awards. Aside from the classification structure in both of those awards they are almost word for word identical so in this industry the award modernisation process has been largely uncontroversial. The Commission's exposure draft reflects the position advanced by both the AWU and the MUA in the filed draft and we are for that reason content with the draft in all respects bar one.

PN3487

The parties didn't seek to insert a part timer's clause for provision for part time employment in the award on the basis largely that it's not current practice in the industry and a part time employment clause has been inserted by the Commission but it is not the standard part time employment clause. In our submission if the Commission is inclined to insert the provision for part time employment in the award and we'd certainly live with that, then it should be the terms and conditions appropriate for part timers in this industry should be consistent with the majority provisions, the majority terms and conditions for part timers in the modern awards that the Full Bench issue.

PN3488

So in our submission the only concern we have with the Dredging Award is that the provisions covering part time should reflect the standard terms and conditions for part time as across the awards. If it pleases the Commission.

PN3489
JUSTICE GIUDICE: Thank you, Ms Angus.

PN3490
MR A WOODS: Yes, your Honour, just in relation to the coverage, Mr McNally on behalf of his clients raised in the submission that it's directed more in terms of the Port Authorities Award a proposition that the employers and employees covered by that award should not be included in the exclusion in 4.2 of the Dredging Industry Award. We maintain the exclusion should stand. The practical position in respect of dredging in the port authority industry is that there are at the moment two ports that undertake that. One of those is the Port of Brisbane to which Mr McNally refers in his submission.

PN3491
The Port of Brisbane is a NAPSA enterprise award so it would fall within that exclusion in any event and the other dredge is operated by the Port of Newcastle which is covered by the New South Wales Ports Corporation Award and has general application and there's no particular provisions in that award that single out dredge operating staff for many other staff and they are dealt with as port officers. So when approaching the principle in terms of drafting the Port Authorities Award we maintain that approach should be consistently followed and would maintain the exclusion that's contained in the Dredging Industry Award.

PN3492
JUSTICE GIUDICE: Thank you. Any other submissions in relation to dredging? Very well. We shall now deal with the maritime offshore oil and gas draft. Yes, Ms Angus, thank you, are there any submissions in relation to that draft? Mr McNally?

PN3493
MR MCNALLY: The Maritime Union and the Australian Institute of Marine Power Engineers filed written submissions on 12 June dealing with the Maritime Offshore Industry Oil and Gas Award. The principal feature of that written submission was that we abandon our search to define classifications by reference to qualifications and the reasons for that are set out in the submissions and there are more minor matters raised in the written submissions and we rely upon those submissions, if the Commission pleases.

PN3494
JUSTICE GIUDICE: Thanks, Mr McNally. Yes.

PN3495
MR C PLATT: If your Honour pleases, in relation to the submission by the CEPU concerning award coverage we would say that it's not necessary to exert a change to the scope clause as a result of clause 4.3 which obviously deals with the interaction of awards. The Full Bench made some comments in relation to embedded employers I think in its decision on 22 May and the CEPU's position has been replicated in a number of awards including the modern Mining Industry Award and in respect of submissions in relation to the Hydrocarbons Award we would say that it's quite clear that where the employer is engaged in the industry, in this case of that covered by the Maritime Offshore Oil and Gas Award, then persons who perform electrical duties that are covered in the classification structure would quite clearly be working under this award.

PN3496

Obviously someone who is coming on in a true contractor arrangement for a short duration and are not working in this industry would be covered by the Electrical Contracting Award or its modern equivalent. So we would say that as a consequence there's no need to insert the provisions to which the CEPU propose and a similar response in relation to the Australian Industry Group proposal in respect of its award. If the Commission pleases.

PN3497

JUSTICE GIUDICE: Thank you. Are there any other submissions?

PN3498

MR K HARVEY: I have a final submission about maritime if everybody else has completed theirs on those particular awards.

PN3499

JUSTICE GIUDICE: Yes, Mr Harvey.

PN3500

MR HARVEY: Yes, thank you, your Honour. Your Honour, with regard to the maritime industry as such the ASU did not make a written submission with regard to any of the proposed published maritime exposure draft awards and we have no submissions to make about those. They don't propose to cover any employees who are members or eligible to be members of the Australian Services Union. However, your Honours and Commissioner, the ASU did file a late submission yesterday which is on the Commission's website in the context of this industry regarding the position of shipping clerks, that is, employees currently covered under the Clerical Industry Shipping Officers Award 2003.

PN3501

Your Honours and Commissioner Smith may be aware that this matter was alluded to on a number of times in this process of award modernisation in stage 3 in the public consultations and in the written submissions. The ASU, your Honours and Commissioner, could have filed the submission also under the ports and harbours industry sector and in fact the union's exposure draft submissions re ports and harbours filed on 12 June do refer to this issue. But having examined the list of respondents to the Clerical Industry Shipping Officers Award 2003 I think it may also be appropriate to refer to this matter here and that's the reason why we have filed this late submission.

PN3502

As I said, your Honours and Commissioner, this issue is a question or the issue of the appropriate modern award coverage of clerks currently employed under that Clerical Officers Award, there are so far as we're aware by participating and reading all the submissions, there are no proposals to include those employees under any award in the maritime or ports and harbours or any related industry award. It therefore appears to the ASU that it is likely that those employees will eventually be covered by the modern Clerks Award made in the priority stage.

PN3503

If this is the case, your Honours and Commissioner, the ASU submits that the modern Clerks Award will need to be varied to provide certain terms and conditions of employment particular to shipping officers and currently provided for under the Shipping Officers Award and those terms and conditions are detailed

in the schedule attached to the ASU's further submission filed yesterday and they are provisions taken directly without any editorialising from the Clerical Industry Shipping Officers Award 2003. Your Honours and Commissioner, you may recall that an analogous position arose last week in these public consultations in the context of the oil and gas industry regarding oil and gas - sorry, oil industry clerks and on the following day with regard to the travel industry. In the first of those proceedings the ASU submitted that if all clerks were not to be included in the Oil Industry Award as we are actually submitting, then there were two alternative possibilities to that, firstly that a modern Oil Clerks Award could be made or alternatively if these clerks were eventually to be covered by the Clerks Private Sector Award that amendments would need to be made to that award to maintain the existing safety net for those employees.

PN3504

And a similar situation arose the following day with regard to the travel industry, particularly the travel agents industry and on that occasion the ASU had proposed a modern Travel Agencies Award be made, but there was no exposure draft issued on that and the Full Bench indicated that it was unlikely to make such an award and suggested that employees in that industry be covered by another award, either the Clerks Modern Award or the Retail Industry Award.

PN3505

Your Honour, the president, may recall that I asked for some guidance as to how these matters would be dealt with if the Clerks Modern Award were to eventually apply to employees in the travel industry and we were advised verbally that we needed to deal with these matters as we went through and not at a later date, so that's the reason for the late submission with regard to the maritime industry and particularly the shipping clerks, your Honours and Commissioner, and as I said we've prepared a schedule attached to yesterday's submission which we submit should be added to the Clerks Private Sector Award to maintain the terms and conditions of employment for shipping officers.

PN3506

I should advise, I think, your Honours and Commissioner, that the ASU has also prepared similar schedules with regard to employees currently covered under the Clerks Breweries Award with regard to the liquor manufacturing industry which is scheduled for hearing tomorrow and the private transport industry other sectors scheduled for Thursday. That, of course, is in addition to oil clerks and travel industry clerks that I've just mentioned.

PN3507

Now, your Honours and Commissioner, we submit that this course of action has become necessary as a result of the original decision of the Full Bench that appropriate coverage of clerical and administrative employees would need to be considered on an industry by industry basis and therefore we have not been in a position to determine or to know until each industry sector is covered where the coverage of clerical and administrative employees will end up at the end of the award modernisation process.

PN3508

I should say just for the sake of completeness that we would also submit, your Honours and Commissioner, that this is not a matter which deals with transitional

issues and shouldn't be confused with that. As we understand it, transitional issues relate to in particular state and territory differentials arising from NAPSAs and that's the way in which transitional provisions in for example the Modern Clerks Award are dealt with, but these matters are not transitional in that sense because the awards that we're talking about are pre-reform federal awards of this Commission which operate on a national basis and therefore are not covered by those sort of transitional arrangements.

PN3509

So that's the reason for the late additional submission, your Honour, and for the further additional submissions that I've foreshadowed, but contemplating this further, your Honours and Commissioner, particularly in the light of the Full Bench statement last Friday regarding applications to amend modern awards that have already been determined by the Commission, it appears to us, your Honours and Commissioner Smith, that an alternative approach to the course of action that we've adopted in this stage three proceedings is that it may be considered.

PN3510

I think it's correct that what we're suggesting are amendments to the Clerks Private Sector Award and the Commission may find it preferable to deal with all such proposals to vary via an application to vary that award by the ASU to achieve the final determination of coverage, both coverage of that award and the terms and conditions to apply in particular sectors at a particular time, but in order to ensure that the Commission is aware and the other parties are aware of what we propose in this area, we determined that it was incumbent on us to file these additional submissions and indicate what we considered, what we saw as the issue that has arisen, particularly in stage three as the final outcome of award coverage for clerical employees in certain industries and industry sectors is determined. Those are our submissions in this matter, your Honour, but I am obviously happy to answer any questions that the Bench may have. If the Commission pleases.

PN3511

JUSTICE GIUDICE: Did the ASU participate in the consultations before the drafting?

PN3512

MR HARVEY: Yes, your Honour, we did and some of these matters were canvassed, your Honour, and that's reflected and, in fact, we quoted from the transcript of those hearings in our submission that we filed with regard to the exposure draft with regard to port and harbour services and we flagged at that stage that the terms and conditions relating to shipping officers under that Clerical Industry Shipping Officers Award would need to be determined as part of this process and that's in our submissions which I was going to refer to later today, your Honour.

PN3513

JUSTICE GIUDICE: Well, the difficulty that presents itself is that the ASU has now put forward a proposal in relation to coverage of clerks in the industry late in the consultation process which might be said other parties haven't had an adequate opportunity to consider.

PN3514

MR HARVEY: Yes, your Honour, and we do appreciate that that's a criticism of what has occurred, but we would also submit, your Honour, I mean, we're happy to take our share of the responsibility for that, but we also say that it's a natural outcome of the process that has been taken with regard to the coverage of clerical and administrative employees generally. For example, your Honour, if I go back to the oil industry and I don't want to re-argue that matter, but we still don't know until the final award is made with regard to the oil industry as to whether clerical employees are to be covered by the industry award or not and we won't know that until the Commission publishes its final decision on the form of the Oil Refineries and Manufacturing Award, so we are a little betwixt and between, your Honour, and that's why we have also submitted an alternative proposition so that everybody can be on notice if necessary for us to file a submission, an application to vary the Clerks Modern Award to if you like mop up or pick up those areas of coverage which we find in retrospect are now being covered by the Clerks Modern Award which we certainly didn't know in the priority stage.

PN3515

JUSTICE GIUDICE: Yes. Well, is it your position or the union's position, Mr Harvey, that it places a high priority on having an occupational clerical award, but where there are industry provisions for clerks that are more beneficial, you wish to retain those?

PN3516

MR HARVEY: Yes, your Honour, particularly where they're found in existing pre-reform awards and we say that's appropriate for two reasons, your Honour, and one of the reasons - - -

PN3517

JUSTICE GIUDICE: I am not asking you whether it's appropriate or not. I am just asking if that's your position.

PN3518

MR HARVEY: Yes, your Honour.

PN3519

JUSTICE GIUDICE: All right. It may be as you say that there will have to be some later step in the process to deal with clerical coverage in some of these areas, but in any event, thank you for your submission and we will consider it.

PN3520

MR HARVEY: Thank you, your Honour.

PN3521

JUSTICE GIUDICE: Yes.

PN3522

MR PLATT: I notice that Mr Nucifora appeared for the ASU at the consultation hearings and the bulk of that discussion was to the effect that there wasn't any clerical classifications in the relevant awards and that there was an interest in relation to the dredging award. The submission in relation to the shipping industry as we've found out has only been made yesterday, so we've only been able to search it this morning, but I note that most of the shipping industry

representatives, apart from AMMA and ASA, aren't present to hear the submissions.

PN3523
JUSTICE GIUDICE: Yes.

PN3524
MR PLATT: We having had a brief look at the appendix of the submission, there's some areas there where there would be some challenge and certainly a need for some discussion and I would suggest that in the interests of procedural fairness, the balance in the industry ought to be able to be given time to consider this proposal.

PN3525
JUSTICE GIUDICE: Yes. Any other submissions? Very well, does that conclude the matters in relation to offshore oil and gas? Very well, I think we should then, if there are no other matters for maritime, I think we should move to tourism and I will take appearances in the tourism industry matter.

PN3526
MR W MCNALLY: I appear for the Australian Institute of Marine and Power Engineers with MR KEATS.

PN3527
MR J RYAN: I appear for the Shop, Distributive and Allied Employees Association.

PN3528
MR M HARMER: I appear on behalf of the Ski Areas Association.

PN3529
JUSTICE GIUDICE: Ski Areas Association?

PN3530
MR HARMER: Yes.

PN3531
MR W ASH: I appear on behalf of the LHMU.

PN3532
MR R WARREN: I seek leave to appear for the Australian Federation of Employers and Industries.

PN3533
JUSTICE GIUDICE: Thank you. Any other appearances?

PN3534
MS Z ANGUS: I appear on behalf of the Australian Workers' Union.

PN3535
MR K HARVEY: I appear on behalf of the Australian Services Union.

PN3536
MR L MALONEY: I appear on behalf of the Whitsunday Charter Boat Industry Association and the Association of Marine Park Tourism Operators in relation to 2008/59.

PN3537
JUSTICE GIUDICE: Thank you. We will deal with the Marine Tourism and Charter Vessels Award first. Yes, Mr McNally.

PN3538
MR MCNALLY: This industry is involved in the port services collection of awards in this way. What the maritime and the institute have proposed is that there be a Maritime Industry General Award which will cover vessels and we'll have more to say about this when we get to it, vessels that aren't covered by other awards and we've proposed that the Maritime Industry Tourist Award not be made and that it be contained, that the terms and conditions of employment in respect of tourism be dealt with by the Maritime Industry General Award. We did file a substantial submission on 18 June in which we responded to the submissions that were made by the various representatives of the industry that proposed the making of a separate award.

PN3539
JUSTICE GIUDICE: Mr McNally, would it be appropriate if we also took appearances in relation to the port and harbour services area, given the cross-over here? There may be parties who want to comment on the submissions.

PN3540
MR MCNALLY: Either that or defer this to - because this will take longer than the other awards, I know Mr Morris has something to say. We could probably dispose of everything in the matter for 20 minutes, just leaving this matter, if the Commission pleases.

PN3541
JUSTICE GIUDICE: Yes.

PN3542
MR MCNALLY: We haven't dealt with the Towage Award, the Stevedoring Award, the Port Authorities Award. They should be substantially short.

PN3543
JUSTICE GIUDICE: Yes. I think you can continue with your submissions, but before you do I will just take appearances in the other matter so that anybody who wants to comment on them now or later can do so, so I will take the appearances in the port and harbour services.

PN3544
MR A MORRIS: I appear on behalf of the Maritime Towage Employer Group and the Coal Terminals Group.

PN3545
MS J GRAY: I appear on behalf of the CFMEU Mining and Energy Division.

PN3546
MR R WARREN: Your Honour, I also will be appearing in that matter and make submissions in connection with the Ports, Harbours and Enclosed Water Vessels Exposure Draft Award.

PN3547
MR A HERBERT: I seek leave to appear on behalf of Gladstone Port Corporation in relation to the Port Authorities Award.

PN3548
MR A WOODS: I seek leave to appear on behalf of Ports Australia with MR ANDERSON in respect to the Ports Authorities Award.

PN3549
MS Z ANGUS: I appear on behalf of the AWU in the Coal Terminals Award.

PN3550
MR K HARVEY: I appear on behalf of the ASU with regard to ports and harbours.

PN3551
MS C OPPY: I seek leave to appear on behalf of Westscheme Pty Ltd.

PN3552
JUSTICE GIUDICE: Thank you. Mr Maloney, do you have any separate interest in this area?

PN3553
MR MALONEY: No, your Honour, we don't. Thank you.

PN3554
JUSTICE GIUDICE: All right, Mr McNally, if you could resume. Thank you.

PN3555
MR MCNALLY: In the Ports, Harbours and Enclosed Water Vessels Award we had proposed an industry as meaning employees engaged in or in connection with vessels and we widely define vessels. We finished up with an exposure draft which defined the industry as vessels operating within ports, harbours and other bodies of waters within the Australian coastline.

PN3556
It was the intention of the unions to have an award made that applied to all other maritime activities other than those covered by the specific awards, the Seagoing Award, the Offshore Oil and Gas Award and the Dredging Award and the Towage Award. In our submission filed in this matter on 22 June, that's filed in respect to the Ports, Harbours and Enclosed Waters Award, we address that difficulty and the award that we proposed or the coverage of the award that we propose is to operate in respect of all types of vessels used for navigation on waters that isn't covered by those other awards which we specifically refer to.

PN3557
We have suggested that the name of the award be changed to the Maritime Industry General Award 2010 because the name of the award that we previously suggested was confusing and it certainly confused the Commission in that they made an award that only was in enclosed internal waters. What the intention is and what the need is, is to have an award that covers coastal waters including the territorial sea 12 miles out and possibly beyond.

PN3558
The reasoning for that is set out in our written submission. It was then proposed that a Tourist Industry Award be made, a Maritime Industry Tourist Industry Award be made. We oppose the making of that award in the submissions which we filed on 17 June 2009. There is a later submission filed by those representing

the Whitsunday charter boat industry area. We have nothing to say in respect to that because is re-canvasses the matters covered in our filed submission.

PN3559
In short, what we propose is that if some recognition must be given to a shifting of ordinary hours and related penalty rates, then that should happen, but that should happen within the ambit of the coverage of the Maritime Industry General Award rather than making a separate award. The function as we understand the Commission is to reduce the number of award, not to increase them.

PN3560
JUSTICE GIUDICE: Overall I think we will achieve that objective, Mr McNally.

PN3561
MR MCNALLY: We've done pretty well.

PN3562
JUSTICE GIUDICE: Can I just ask, Mr McNally, I don't want to interrupt you, but those two Queensland NAPSAs, the Whitsunday charter boat one and the North Queensland Boating Operators Award, the MUA was involved in the making of those awards, I think.

PN3563
MR MCNALLY: I am sorry?

PN3564
JUSTICE GIUDICE: The MUA was involved in the making of those awards or not?

PN3565
MR MCNALLY: To a great extent, the AWU's role when it was made was a greater role than the MUA.

PN3566
JUSTICE GIUDICE: I see.

PN3567
MR MCNALLY: Our concern is that the award or the NAPSA covers a very small area.

PN3568
JUSTICE GIUDICE: Yes.

PN3569
MR MCNALLY: Principally between Mackay and Bowen. You can't quite see one from the other, but it's a very small area. It is an area where the vessels that are used in respect of length, in respect of power don't necessarily differ from those vessels that are involved in the Maritime Industry General Award. The master of those vessels possesses the same qualifications and skills. The only exception to that might be that the master of a vessel may perform other functions such as drawing the attention of tourists to items of interest and items of historical importance and those sort of matters. We don't see the necessity for a general award. We may recognise that there may be some requirement to extend the ordinary hours of work with resulting penalties. Our submissions deal with that

alternative, but we don't see the necessity to have a separate award. If a separate award is to be made, it should be modelled on the Maritime Industry General Award with different provisions in relation to ordinary hours of work and the associated penalty rates that are attached to those ordinary hours of work. If the Commission pleases.

PN3570

JUSTICE GIUDICE: Thanks, Mr McNally. Yes, we're still dealing with the Marine Tourism and Charter Vessels Draft.

PN3571

MR MCNALLY: Might I add the ..... which is the word that those that were responsible for the making of the exposure draft isn't defined anywhere which is another added difficulty.

PN3572

JUSTICE GIUDICE: Yes. Thank you. Are there any other submissions in relation to the Marine Tourism and Charter Vessels Award?

PN3573

MR MALONEY: Yes, your Honour, in Brisbane.

PN3574

JUSTICE GIUDICE: Yes, Mr Maloney.

PN3575

MR MALONEY: Your Honour, I think ours are the only other submissions in relation to this award. The MUA submissions simply say that there shouldn't be a Marine Tourism and Charter Vessels Award. Obviously our strong submission is that there should be, not only because it's not limited to the region between Mackay and Bowen, it also covers the whole of the coastline and it's designed to cover all of those tourism operators around the Australian coastline.

PN3576

We've already said in our earlier submissions that 85 per cent of the charter vessels in Australia are located within Queensland, New South Wales and WA and we find a total of 65 per cent in Queensland and New South Wales. It's not just limited to Far North Queensland, although that is where a significant number of operators are located and the rationale behind a separate award is that the industry itself which did include the MUA in its state union guises as the Merchant Service Guild and the Seamen's Union of Australia was directly involved in the making of the North Queensland Boating Operators Award as I was on behalf of the employers and it was definitely involved directly in the making of the consent Whitsunday Award and I stress that was by consent.

PN3577

Yes, the AWU was one of the major parties, but the MUA was also a party to that and to that consent arrangement and they can't deny that and now they say, well, that consent arrangement, we don't like that, it should be somewhere else. The exposure draft that's been made is quite limited in its coverage to marine tourism and those charter vessels. We confirm that it's designed to exclude the operation of coastal trading or freighter operations, common carriers, water taxis, regular passenger transport ferry services, some of which are government subsidised in various areas and those types of operations are not designed to be covered under

the marine tourism charter vessels and we say, look, they're quite appropriate to be covered under the proposed Maritime Industry Award 2010 as Mr McNally says, as the MUA argues for, but the provisions that have been designed for the Marine Tourism and Charter Vessels Award cater for those requirements where as we've already said in our submissions they're subject to the vagaries of weather, seasonal fluctuations, tourism fluctuations, et cetera.

PN3578

We have we believe addressed the areas of coverage in our submissions of 16 June and 26 June. The issue of classifications has already been covered in those submissions, as have the pay rates where we've tried to maintain the relatively unique arrangement that applied in the Whitsunday NAPSA for daily rates as well as providing for hourly rates, weekly and casual provisions. We've addressed the hours of work provision which was left in the exposure draft to be developed at clause 20.4 in our submissions of 16 June.

PN3579

We've also proposed that the allowances in the exposure draft at clause 14.5 should be adjusted as per our submissions of 16 June. The submission of the members of our associations if the Commission pleases is simply to say that the proposed conditions in either the ports et cetera award or the maritime award are simply not appropriate for these operators. They don't reflect the existing rates and conditions and they would impose very significant changes and very significant increases on those operations.

PN3580

The rates of pay, finally, if the Commission pleases, we've proposed are certainly in excess of any of the rates that have been proposed by the MUA and we say it's appropriate that they should be included in the proposed award and we set out those wage rates in our submission of 15 June with a comparison chart attached to them. Those are the submissions, if the Commission pleases.

PN3581

JUSTICE GIUDICE: Yes, thank you, Mr Maloney. Mr Warren.

PN3582

MR WARREN: Thank you, your Honour. Your Honour, can we say from the outset that we are fundamentally opposed to the submission made by my learned friend Mr McNally that there should be a Marine Industry General Award which would subsume the current exposure draft issued by the Commission covering marine tourism and charter vessels.

PN3583

Clearly in our submission the Commission has heard and considered this argument. There is a clear need for recognition of the particular and distinct nature of the tourism and charter vessels. We say the scope and coverage of the exposure draft is appropriate and should be maintained and the Commission should reject the submission put by my learned friend Mr McNally on behalf of his client union.

PN3584

With respect to the position of the Whitsunday Charter Board Industry Association we note the submissions filed and also the submissions made today

with respect to rates. The AFEI has a fundamental problem with the rates as expressed in the Whitsunday Charter Boat Industry Association submissions of 16 June in the hourly rates as expressed in clause 3.5. We note the Commission in its statement of 22 May in paragraphs 216 through 218 raised issues with this concept of a pay per day and the difficulty in obtaining an hourly rate and that appears to be the difficulty expressed further by the Whitsunday Charter Boat Association in the hourly rate in 3.5.

PN3585

We note that criticism is directed towards the AFEI position and the distinction drawn between daily and casual employees in the charter boat industry's submission at paragraph 6.1 and the indication there that there is no support from that association for AFEI's position on 26.2. I will return to that briefly in a moment. Can we indicate that the problem seems to have arisen if one looks to 3.5 of the Whitsunday Charter Boat Industry Association by drawing from the Queensland NAPSA which only described daily rates whether the person, and indeed the same daily rate, whether the person worked five hours or 10 hours they still received the same rate, yet they have established an hourly rate.

PN3586

If one looks to 3.5, by first nominating the daily rate, multiplying that by five to get a weekly rate and then dividing that weekly rate by 7.6 or by a 38 hour week to obtain an hourly rate. Now, the problem with that is the daily rate when established was not established on the basis of 7.6 hour and so it throws out a rate particularly at the master level significantly in excess of those that AFEI say are appropriate when one looks at the AFEI submission and in paragraph 14 of the AFEI submission if one goes there, this is the submission of 12 June that was filed, if one looks to clause 14 the hourly rates there were achieved by dividing the weekly rate prescribed in the New South Wales NAPSA by 38.

PN3587

There is currently in the New South Wales NAPSA a 40 hour provision but concession was given to the 38 hour week and those rates as can directly translate with the exception of crew level 3 and crew level 1, were directly translated there from the New South Wales NAPSA by a divisor of 38 and that gives an appropriate, we say, hourly rate which spreads from the master classification down to the crew level 1 classification. If the method of, we say, artificially creating an hourly rate is adopted as is pursued by the Whitsunday Charter Boat Association, the hourly rate particularly at the top end of the master's rate is skewed and significantly greater rate than is appropriate and that has been arrived at, as I've said, by starting with a daily rate and there is no hourly rate or weekly in the Queensland NAPSA.

PN3588

So starting with a daily rate, putting a notional 7.6 on that and you end up with an hourly rate. There clearly has been in the daily rates expressed in the Queensland NAPSA a recognition of the fluctuations in the amount of hours that a person works and that's not for us to comment on or to submit or have information of. But there must be some averaging system, but in any event, it is fundamentally wrong to start with a daily rate, multiply that daily rate by five to get a weekly rate and then divide the whole lot by 38 to get an hourly rate when your daily rate is

not calculated apparently in the award either on a 40 hour week or a 38 hour week, hence the skewing.

PN3589
We note of course that the CVA in its submission, the Commercial Vessel Association of New South Wales, in its submission of 24 June it appears seems to come to that same conclusion in paragraphs 2 and 4 and particularly in 4 when the CVA indicates that the Queensland NAPSA, and I quote:

PN3590
In the absence of any definition for worked hours and no defined maximum hours the daily rate under the Queensland NAPSA cannot form a basis from which to derive an hourly rate as there is no mechanism to achieve.

PN3591
Those are the words of the CVA and we would support such a position. We note in the most recent submission of the MUA on this particular exposure draft in paragraph numbered 11 that the MUA appears to be pursuing a classification structure which rewards an employee for the type of qualification they have as opposed to paying the employee for the type of qualification they need to work the particular vessel. It appears as though from paragraphs 11 and following that that is the aim of that submission.

PN3592
We note in the Commercial Vessel Association submission of 17 June in paragraph numbered 3 that this issue is addressed and we note that therein the CVA says and I quote in the first paragraph of paragraph numbered 3:

PN3593
The necessary qualification required by the crew is determined by the governing state authority and is stipulated within the individual vessel survey permit.

PN3594
Indeed this appears to be recognised by the MUA in paragraph 12 of their most recent submission and I quote:

PN3595
In addition, these authorities set minimum manning requirements for commercial vessels. For some vessels there is a requirement that the manning include a person with an engineering certificate competency.

PN3596
Et cetera. And it is clear that the manning of the vessel, the qualification required to man that vessel and to navigate that vessel comes from the survey to the vessel and indeed if one returns to the Commercial Vessel Association's submission of 17 June, on the last page of that under heading Classification Structure and Definition, it is apparent that when one looks towards the bottom, master 5, navigate vessel requiring a master 5 certificate, master 5, navigate a vessel requiring master 4 certificate, et cetera.

PN3597
So in other words, that is an appropriate classification or descriptor of the duties required to man that vessel and that is the appropriate way in our submission that

the matter should be addressed and the employee should be paid, even if the person has a master 1, if the vessel only requires a master 4 they shouldn't be paid as a master 1 and so much is clear. One only has to say that to see the good common sense in my respectful submission of that position. Whilst on the CVA submission of 17 June we note paragraph 6 of that submission and it deals with the capacity of an employee to obtain recognition by on the job training and we say that is an appropriate way of addressing that issue and the qualification training not be mandatory but be able to be obtained by on the job training.

PN3598

Finally, your Honours and Mr Commissioner, might I just refer to the exposure draft and indeed the paragraph that issue was taken by our Queensland friend with respect to 26.2. It appears, with respect, when one looks at the wording in 26.2 there it refers to a daily basis yet it is clear from clause 10 that the only types of employment are full time, part time and casual and that's an appropriate break and there shouldn't be a recognition necessarily of daily basis in 26.2. We say in terms of clause 10 it would be more appropriate to say employees other than employees engaged on a casual basis required to work on Christmas Day be paid treble time and then in 26.3, instead of weekly employees to be consistent with clause 10 it should say full time and part time employees required to work on public holidays other than Christmas Day should be paid double time.

PN3599

It just links 26.2 and 3 to clause 10 and there is then internal consistency within the expressions of the award. Unless there is any further questions from the Bench those are our submissions.

PN3600

JUSTICE GIUDICE: Mr Warren, do you make any submission about the remuneration of employees engaged on an overnight charter?

PN3601

MR WARREN: No, your Honour.

PN3602

JUSTICE GIUDICE: You don't have any helpful suggestions on how the parties might deal with that? I understand your position.

PN3603

MR WARREN: I don't have a brief to that extent, your Honour, with respect.

PN3604

JUSTICE GIUDICE: No.

PN3605

MR WARREN: Thank you. Does your Honour wish me to make any comment with respect to ports, harbours and closed water vessels or will I wait - - -

PN3606

JUSTICE GIUDICE: No, I think we will take that in sequence.

PN3607

MR WARREN: Thank you, your Honour.

PN3608

JUSTICE GIUDICE: Thank you. Is there any other submissions in relation to this draft? Mr McNally.

PN3609

MR MCNALLY: Yes, your Honour. Contrary to Mr Warren's understanding of our submissions we ..... Australian Federation of Employers. We don't suggest that the classifications be described by reference to qualifications. We recognise that a person with a higher qualification may be employed in a lower capacity. If the Commission pleases.

PN3610

JUSTICE GIUDICE: Yes, thank you. All right. We might deal now with the Alpine Resorts Draft Award. Are there any submissions in relation to that? Mr Harmer?

PN3611

MR M HARMER: Yes, your Honour, if the Commission pleases. The Australian Ski Areas Association amends the exposure draft award which we basically note extends fairly unique coverage of this industry across a number of classifications but that exposure draft faces challenges under the later set of submissions from a number of unions including the LHMU, ASU, SDA, AMWU and CEPU. Now, most of the submissions in question were filed in writing and in accordance with the timetable by 12 June 2009, however there were further submissions from the AWU on 18 June and only yesterday you received some further written submissions from the LHMU.

PN3612

Now, in respect of all the unions submissions it was tempting on our part given the extensive range of issues raised going to coverage and terms and conditions under the exposure draft to put on a written response but consistent with the directions of the Commission we stayed our hand. We're in a position today where we will attempt to address orally all of the unions submissions although I must say in relation to the LHMU's submission lodged yesterday I do not have instructions and it does go not only to some issues of coverage in terms and conditions but specifically to considerable tables of rates, so we would seek the leave of the Commission to address that somehow although we're entirely in the Commission's hands in that regard.

PN3613

JUSTICE GIUDICE: Yes.

PN3614

MR HARMER: If the Commission pleases, I would like to make some submissions going to issues of general principle relating to coverage of this particular exposure draft award or at least the principles that should be applied in resolving what are not insignificant contests over the coverage of the award. The first point we make is that the exposure draft consistent with section 576A of the Act properly reduces regulatory burden on the employers in this unique industry, promotes flexible work practices whilst maintaining a fair minimum safety net for relevant employees. It also fits in with paragraph 9 of the Consolidated Request in that it seeks to minimise the number of awards impacting on employees in this industry which but for this specific industry award could number up to 15.

PN3615

Now, the unions, five in particular, have now challenged that outcome under the exposure draft, challenged to our mind the achievement of those specific objects of the Act and the Consolidated Request. The next point we make on coverage is that in our respectful submission in this industry coverage has to be determined by reference to the industry of the employer in the case of all classifications which are integral to the industry and it's our respectful submission that all classifications referred to within the current exposure draft fit that description. Now, in support of that submission we just very briefly summarise for the members of the Commission the unique aspects of work in this particular industry and I will be brief I guarantee.

PN3616

But by way of summary, the work is highly seasonal. It basically involves the quantum of work being highly dependent on day to day weather conditions. That in turn demands a higher level of flexibility across all areas of work and that really to transfer employees in all and any classifications from one part of a resort to another to meet exigencies of weather on any particular day, the work of course is performed in extreme weather conditions and that impacts on some specific protective clothing and ski equipment requirements that are addressed within this award. There's an industry specific career path training and set of conditions and importantly, many of the employees given the flexibility requirements do and indeed actively seek to perform a number of roles, multiple roles within a particular season so that they can maintain work levels for themselves in all forms of weather.

PN3617

Specifically in the area of penalties the busiest times for this particular industry are on weekends and public holidays. Large percentages of the workforce come to the area to have the benefit of skiing and of course the slopes are least accessible on weekends when custom is busiest for the resorts and the employees seek and enjoy having week days off so that they can ski when the slopes are less crowded by normal customers and accordingly flexible arrangements such as in 5 and 7 and a lack of what would be called traditional penalties have been characteristic of this industry throughout its entire history.

PN3618

There are also many benefits for employees working in the industry including free lift passes which range in value from between 1100 to $1300 for approximately a three months season, subsidised accommodation, subsidised ski equipment, subsidised meals and a whole range of benefits involved for employees who are supported to come to the remote ski areas to work in this industry. Now, what we have now faced through the five unions concerned is an attempt to carve out from those specific arrangements that have been included in the exposure draft for a number of stated classifications are certain categories of work and in our respectful submission the modern awards in question do not in any way, shape or form cater appropriately for the unique conditions that we have set out.

PN3619

And specifically in terms of the Commission, the approach the Commission has been adopting to issues of coverage, as I say, industry of employer would be appropriate and having particular regard to the work performed and the

environment in which it is performed, adopting some of the wordage inserted in coverage clauses by the Commission in its modern awards we respectful submit there's no question that the only award that can cater for the flexibility, transferability of work and unique conditions is the exposure draft award before the Commission.

PN3620

We further submit that the Commission in its 19 December 2008 award modernisation decision at paragraph 23 indicated that awards with occupational coverage would not cover employees covered by an industry award which contained relevant classifications and again it's our respectful submission that here we have an industry award that covers the relevant classifications, has done so historically in either Victoria or New South Wales, which is where the vast preponderance of the industry sits and accordingly on the basis of that approach it would be appropriate to leave the coverage of this particular industry or exposure draft in the award intact.

PN3621

The next point we seek to make on coverage goes to the weight to be given to certain historical aspects of coverage. The first relates to Victorian award coverage which has been permanent historically in the context of Victorian common rule awards and in accordance with the Victorian common rule principles adopted by a Full Bench of this Commission and absent substantial challenge and yet that coverage has extended classifications such as workshop and a number of areas of work which are under challenge by the unions raising issue with the exposure draft.

PN3622

Secondly, in terms of the history in New South Wales, in our earlier written submissions we pointed to the decision of Watson J that founded the award in New South Wales that covers the industry that covers the industry, main Ski Industry State Award which is now technically a PCSA which I will come to. That particular decision by Watson J was described as establishing an equitable base for the relevant employees in the context of structural efficiency principle under the previous principles of wage fixation and involved challenge by a large number of unions to the attempt to create an island in effect for the award covering a number of classifications including many of those now challenged in this exercise.

PN3623

Now, all of the unions that raised their heads to make challenge in that particular matter that led to Watson Js decision either reached arrangements with the AWU resulting in their awards being the subject of specific exemption from the scope of the - sorry, there being specific exemption from those unions awards such that they did not impact on the unique coverage, island coverage if you like of the Ski Industry Award, or in the case, for example, that the SDA had that exemption within the Shop Employees State Award mandated by a later decision of the Commission.

PN3624

So what we have in a number of unions now raising objection to coverage is a challenge to matters which have been historically determined both in Victoria and

New South Wales properly in a common rule context in each state and really we have an attempt to overturn history and in some cases specific agreements reached between unions and employers on what would be historical coverage determined long ago in the case of both New South Wales and Victoria. The next point I just briefly make is that there is reference made in some of the unions' submissions to the fact that the Ski Industry Awards in New South Wales are PCSAs.

PN3625

In our respectful submission that arises from a specific exigency of the New South Wales legislation introduced by the New South Wales Government in order to attempt to protect certain consent award arrangements on the onset of WorkChoices and does not in our respectful submission change the fact that for many years up until the WorkChoices legislation they operated as awards properly and would have been NAPSAs normally other than for that specific New South Wales legislation and we respectfully submit that that doesn't reduce the weight that should be allocated to either the Ski Industry State Award or the Ski Instructors State Award for the purposes of coverage or otherwise before this Commission.

PN3626

The next point we make is that all classifications in the exposure draft have historically been subject to coverage by either the New South Wales or the Victorian awards. We don't press that to the point whereby both states always covered all classifications, although we note that in New South Wales apart from their being specific reference to employees such as in the retail area, there was a not elsewhere included provision called resort worker, which as I will come to, was utilised to deal with employees performing municipal style duties with the resorts, hospitality workers, childcare workers, and indeed as a result the Childcare Award in New South Wales was the subject of specific exemption, as was the Shop Employees State Award as I will come back to.

PN3627

So there is precedent for the coverage of the entire exposure draft determined in the common rule context that I have referred to. The next point I wish to make by way of introduction on the coverage issue is that the Commission's decision on 19 December 2008 at paragraph 24 indicated that maintenance classifications would not be included in industry awards unless there was existing arrangements that made it desirable to do so. Now, significantly in this exposure draft we have maintenance classifications included and in our respectful submission that principle if you like stated on 19 December 2008 is met here in that there is a unique history of coverage in Victoria of maintenance classifications and a unique set of circumstances in terms of the conditions I've referred to that extend also to maintenance workers who equally may want to ski during the off days, during the middle of the week or take up multiple roles when maintenance work is low or do any number of the flexible things that are permitted historically in this industry and indeed under the exposure draft.

PN3628

So those introductory comments we respectfully submit address in general the concept of the attack that we now see from some five unions on coverage of the scope of this exposure draft and I would now seek to move briefly, if the Commission will permit me, to address in turn each of the unions challenging

either coverage or by reference to their own modern award conditions in this exposure draft and I will - - -

PN3629
JUSTICE GIUDICE: Mr Harmer, these aren't really new issues, are they? I mean your submissions of 12 June, was it, do deal with these questions of coverage and I appreciate some refinement of the arguments might have been developed by the unions in their submissions.

PN3630
MR HARMER: Yes, your Honour.

PN3631
JUSTICE GIUDICE: But I would ask you to bear in mind that the question of coverage has hardly arisen in the last little while so you might bear that in mind in considering how much detail you deal with in your presentation today.

PN3632
MR HARMER: Yes, your Honour. Thank you for that guidance. I won't then respond in detail to the submissions all of which were of course lodged on 12 June we haven't formally replied to.

PN3633
JUSTICE GIUDICE: No.

PN3634
MR HARMER: But to the extent that we are overlapping with issues previously addressed I will try and curtail my comments.

PN3635
JUSTICE GIUDICE: Thank you.

PN3636
MR HARMER: Perhaps briefly then I will refer to first of all the two submissions lodged by the LHMU. They address specifically hospitality and childcare employees. Again the general submissions I have made going to the unique nature of this industry apply to those particular employees and I note in relation to childcare the specific exemption provided to the Miscellaneous Workers Kindergartens and Childcare Centres State Award New South Wales when the issue of coverage first came up for the industry and also the fact that hospitality workers have been traditionally covered under the resort worker classification New South Wales and also within Victoria.

PN3637
There is thereafter within the LHMU's submission a number of observations about specific conditions which again I acknowledge we have probably addressed in our own submissions concerning those conditions sufficiently to respond to, although I note specifically that there's emphasis on hourly rates and I just note the unique history of the developments of those rates which do differ because of the many other benefits involved in the industry from rates in the mainstream Hospitality or Childcare Awards. We also rely on our written submissions in terms of specific examples we've provided of both childcare workers requiring flexibility in that they do look after children within a ski school context and have a

career path in that area, as do hospitality workers who can rotate between work on the slopes and indoors within hospitality arrangements.

PN3638

The ASU's specific further submissions which were filed yesterday, or at least we received a copy of them yesterday, again I'll just make a few brief observations because, as I say, I don't have any detailed instructions on the material but the LHMU tries to place weight on the PCSA status of the awards which I've addressed in New South Wales. Secondly, there's some observations on coverage which we've already adequately addressed, and there's reference to the inappropriateness of the not elsewhere included style classification which, of course, we have in this matter dismantled and which now appears in the exposure draft in a series of specific classifications going to hospitality, childcare and municipal services. Other than that the LHMU submissions of yesterday contain a detailed number of comparisons of rates and conditions which, as I say, I have not received instructions on and I'm not properly in a position to respond to and merely reserve our position on that. That deals with the LHMU.

PN3639

The ASU raises similar issues and our response again is similar. The only specific aspect of the ASU submission which goes beyond the hospitality and childcare workers goes to both clerical and municipal employees. Both those categories have been historically covered by the awards I've referred to, particularly in New South Wales where, if I can just explain very briefly in terms of municipal services, obviously the exposure draft only covers employers in this unique industry. It doesn't cover local government work but within the lease allocated to each resort within the National Park, they are very much isolated and self-contained operations and accommodate a large number of people and sublet to a large number of operations for accommodation and entertainment and other purposes. All municipal services have to be on a self-contained basis provided by each of the resorts and it's for that historical reason that the industry awards have catered for municipal services, if you like, water supply and other things being supplied by these resorts and that's been dealt with under the resort work category, for example in New South Wales.

PN3640

In terms of the SDA's submissions, it's submissions go more to issues of comparative rates with the modern awards. I've referred to the express exemption from the Shop Employees State Award in terms of the coverage issue and won't repeat the unique nature of the industry that warrants different rates.

PN3641

Finally, both the AMWU and the CEPU make submissions attempting to extricate from the exposure draft maintenance staff. As I've already mentioned there is historical coverage of workshop employees in Victoria. There is also the fact that the unique conditions I referred to do impact on and are relevant to both mechanical and electrical maintenance employees and in our respectful submission, without labouring the point, we believe that the complete scope of classifications included in the exposure draft should remain intact as all those classifications are integral to this unique industry.

PN3642

If the Commission please, the AWU, which notably is the principal union in this industry, does not object to any aspect of the coverage of the exposure draft, other than suggesting some other categories of employers might be included, which we've already addressed in writing and I won't further address on that. I may, if the Commission will permit me, just briefly reply to some fresh issues raised with the exposure draft content by the AWU and I acknowledge that these are fairly trivial in nature but they're matters we haven't previously had an opportunity to reply to.

PN3643

Firstly, in paragraph 2 of the AWU's submission of 12 June there's an issue raised in relation to the necessity for a definition of outdoor employee. That is necessary because it links into certain equipment and boot provisions in the wider award. At paragraphs 4 to 7 there are submissions made in respect of seasonal employees and the need for termination notice and severance provisions. We have already addressed that issue so I won't dwell on it, in our prior written submissions, and we rely on those but certainly any reversion to that form of lack of recognition that our employees are engaged for a unique and separate period of seasonal work with no guaranteed return next season, would impose huge costs on this industry and is inappropriate.

PN3644

Paragraphs 8 to 9 of the AWU's submission of 12 June there's reference to the need for minimum guaranteed hours for snow sports instructors. That's inappropriate, given the high level of casualisation across snow sports instructors and I note to the extent that New South Wales has had some guaranteed hours, it's been based upon the high level of certain ski instructors and has been variable rather than fixed so we consider that an inappropriate suggested change to the exposure draft.

PN3645

At paragraph 10 of their submissions of 12 June there's reference to monthly superannuation contributions. The resorts consider it appropriate that that should be quarterly in accordance with taxation requirements.

PN3646

There's then the further submissions on 18 June 2009 where there's at attempt at paragraph 6 to question the calculation of the seasonal rates that are set out in the exposure draft. We'd just like to correct those calculations put forward by the AWU and confirm that the loading is 1/12th and we press the calculations in the exposure draft.

PN3647

At paragraph 7 there's a request from the AWU in relation to the requirements by employers for employees to obtain certain equipment. We would like to concede that point and indicate that if an employer requires an employee to purchase clothing, the employer will reimburse the employee so we are pleased for that change to occur to the exposure draft.

PN3648

At paragraphs 8 and 9 there's an issue raised about airfare reimbursement which has been a limited benefit in New South Wales but not applied at all historically in

Victoria and it's aim in New South Wales was to attract back to the resorts the skills and abilities of people who serve in the northern hemisphere outside our season and there's an attraction or retention point that has been specific to the consent awards in that state. We oppose its extension across the entire industry so applies it only to limited more senior levels of snow sports instructors in New South Wales. We oppose that pressed for change by the AWU.

PN3649

We otherwise press for the benefits that we've alluded to within our own written submissions and, if the Commission pleases, unless there's any questions that's all I sought to raise in response to the various union written submissions but I do repeat again that we haven't had an opportunity to take proper instructions on the LHMU submissions, particularly on rates received only yesterday. If it pleases the Commission.

PN3650

JUSTICE GIUDICE: Yes, well, I think if you could make any written response you wish to as promptly as possible, that would be appreciated.

PN3651

MR HARMER: May it please the Commission. We'll attempt to do that within seven days if that's permissible.

PN3652

JUSTICE GIUDICE: Thank you. Yes, who's next?

PN3653

MR RYAN: If the Commission pleases, on behalf SDA, I'd make some responses to some of the submissions that have been filed in this matter. The LHMU submission appears to have hospitality workers and childcare workers removed from the award. The SDA didn't go down the same approach in terms of our written submission, however, the SDA would be quite comfortable in accepting the removal of the service workers from the award. Our prime submission was based upon the premise that retail workers, hair and beauty workers or fast food workers who are employed under the terms of the exposure draft award should have not less than the same relative classification structure as defined industry awards. That was the details of our written submission as filed.

PN3654

The key issue clearly in terms of whether or not the service workers are in this award or out is really determined by the issue of the coverage clause of the Alpine Resorts Award and the very coverage clause of the Alpine Resorts Award means that the other industry awards will necessarily apply in the snow sports industry or in the ski fields and that's simply because the coverage clause of the Alpine Resorts Award is so specific, it actually should probably be renamed the Alpine Lifting Award because the whole definition of the industry is dependent upon an establishment that includes alpine lifting which simply means that any establishment in the ski fields or in the snow sports industry that does not provide alpine lifting is simply not covered by the Alpine Resorts Award.

PN3655

In that sense it's not an award covering the resorts, it's an award covering only those establishments that include alpine lifting. Very clearly, in our submission,

not all employers who are employers within the ski fields area are going to be employers who include alpine lifting. That very fact means that the other industry awards will apply and it is inequitable, in our submission, for employees only under this award to be put in a lesser position than employees who would also work in the ski fields who would be employed under the prime industry awards that would cover their respective classifications.

PN3656

We note that the submissions of the Australian Ski Areas Association as filed on 12 June had attached to it amendments that they sought to the award and one of the amendments that they seek is to delete clause 4.4 from the award. It's a standard clause in most of the modern awards which relates to the operation of other awards which may be appropriate. The general submission of the Australian Ski Areas Association is that there is no other award that is appropriate, therefore clause 4.4 is simply not required. In our very strong submission it is required because even with those establishments that provide alpine lifting, it is apparent from the classification structure in the Alpine Resorts Award that not every possible job classification which could be used in an alpine resort or by an employer who first the definition of an alpine resort, is necessarily included in the exposure draft. On the basis that not every possible job classification is included in the award, then there must be the capacity for other awards to apply if there are awards that would be more specific to a part job title. On that basis we'd certainly oppose the removal of clause 4.4 from the exposure draft award.

PN3657

The key issue that we raise concerns the issues of conditions of employment for retail workers, hair and beauty workers and fast food industry workers. We note even today in the oral submissions made by the ASAA that one of the justifications for the lack of loadings and the low rates in the award is that there are clearly other benefits that employees can get by working for an establishment that provides alpine lifting and one of those benefits is things such as they might get free lift tickets. Well, it doesn't matter what may or may not occur, they're not conditions that are in the award itself. Any of the fringe benefits that may be applied simply don't form part of the valid safety net because they're not award terms and conditions of employment and on that basis, anything that may be an extra or a freebie is simply not relevant for the determination of what constitutes the fair and effective safety net which does mean, in our very strong submission, that you need to discount any of the fringe benefits that may apply and only then concentrate of what are the essential safety net conditions determined by the exposure draft of the Alpine Resorts Award vis-à-vis the awards issued by the Commission certainly in stage 1 which is the area of interest for the SDA, the General Retail Industry Award, the Hair and Beauty Industry Award and the Fast Food Industry Award.

PN3658

The other particular issue we'd raise in relation to the proposed amended draft as provided by the Australian Ski Areas Association is that clause 25.1 of their draft seeks to remove the public holiday loading for casuals, keeps it for permanent employees but removes it for casuals. We would strongly oppose that. The public holiday loading recognises the value of the holiday for all employees and to suggest that casual employees do not warrant any extra remuneration for public

holiday work certainly goes against the approach of the Commission in relation to all of the other modern awards that have been issued so far.

PN3659

Clause 26.2 of the Australian Ski Areas Association amended draft seeks reductions in the overtime rate. The first reduction they seek is that for the first two hours of overtime the rate should be reduced from time and a half to single time. The effect of that is that's a default creation of a 40 hour week because the moment there is no overtime penalty being paid for the first two hours, and if they're treated as simply additional ordinary hours, it is by stealth the introduction of a 40 hour week. The second reduction that they seek is to reduce the overtime rate for the second two hours from double time to time and a half. In other words, what they're really saying is overtime will only occur after 40 hours have effectively been worked. The SDA would strongly oppose the suggested amendments to clause 26.2.

PN3660

The Australian Ski Areas Association also seeks to introduce a new clause at clause 13.4 which is a rolling notice provision which relates to seasonal workers who have already been given notice of termination and then, because of good weather in the Australian Ski Areas Association's concept of good weather which is freezing cold and the stuff I'd like to be sitting around a fire at home rather than being out in the weather, but what they refer to as good weather which may extend the ski season, they then want to reduce the period of notice , if there's an extension of work, down to one hour. The SDA would oppose the concept of clause 13.4. If notice has been given in accordance with the notice requirements of the Act or the award, it is quite simple, we would suggest, for additional forms of employment to continue after the termination of the seasonal employment. Casual employment comes to mind, in which case they don't need the rolling notice provision because as casuals there would be termination on the basis of an hour, or alternatively, the employers could withdraw the notice and then reissue the notice subject to what they understand to be the extent of the good weather that would extend the season. In any event, the SDA strongly opposes the concept behind clause 13.4 and its proposed inclusion in the award.

PN3661

JUSTICE GIUDICE: You don't think there should be any concession for the weather.

PN3662

MR RYAN: No, simply because the industry operates - generally has a set start date and it starts, even if there is no snow - I mean, I'm not a fan of skiing but I understand some people will go up to the ski resorts even if there's no snow and some people go to ski resorts even when there is snow but never ski because they're into a social life drinking, wining and dining and other activities that don't involve skiing. I think it's necessarily weather dependent.

PN3663

JUSTICE GIUDICE: I think we may be straying from the issue.

PN3664

MR RYAN: They're the submissions of the SDA.

PN3665
JUSTICE GIUDICE: Thanks, Mr Ryan. Mr Ash.

PN3666
MR ASH: Mr Harmer mentioned that we filed written submissions yesterday so in the course of those I'll be very brief. The submissions of the LHMU are that the current award landscape does not provide for the inclusion of hospitality and childcare workers in an industry award that covers ski related employment. As the AWU note in their submission they cannot comment on the appropriateness of terms and conditions for employees other than those regulated by the list of ski related awards. The LHMU submits that if an award is to be made to cover ski related work it should be made on the basis of current award regulation in the industry.

PN3667
It also appears that some of the awards that Mr Harmer or the ASAA have sought to source conditions from are PCSAs for the purpose of the award modernisation process, as mentioned by Mr Harmer. Childcare and hospitality workers are currently covered by the relevant industry awards, as is shown in part 1 of our submission filed yesterday and previously. These workers are often required to maintain industry relevant qualifications and training relating to outside regulation. This is related to the industry they work in, not their occasional employment for parts of the year in alpine resorts.

PN3668
As the tables appended to our submission yesterday demonstrate, the exposure draft removes almost all the award safety net conditions that currently apply to workers in LHMU classifications at alpine resorts, notably, the trade rate is also below the minimum rate for tradespeople and the ASAA proposal does not appropriately recognise the numerous work value cases that have set the appropriate rates for childcare workers in particular, but also hospitality workers.

PN3669
We would also agree with the submission of Mr Ryan in relation to the comments on fringe benefits. We would see that as unrelated to the award safety net and an attraction and retention issue for the individual employer in ski resorts. If the Commission pleases.

PN3670
JUSTICE GIUDICE: Mr Ash, the issue of the existing award coverage in relation to hospitality workers, I think the argument against you is that the classification of resort worker under the Ski Industry State Award would cover those classifications.

MR ASH: If I understand correctly, at present those workers are being picked up, and we would argue that it's a misapplication of the catch-all provision, picked up by the catch-all provision in that award and that the appropriate award that should be applying is the applicable NAPSA.

PN3671
JUSTICE GIUDICE: Presumably there is some way of knowing whether in fact hospitality employees are covered by the resort workers classification at present and paid under it. That's what's suggested.

PN3672
MR ASH: I'll have to take that question on notice, your Honour.

PN3673
JUSTICE GIUDICE: Thank you. Ms Angus.

PN3674
MS ANGUS: Thank you, your Honour. Your Honour, the AWU position in relation to coverage has been slightly mischaracterized by the representative of ASAA. It's not so much that we agree with the published outline in the exposure draft, rather that we can only make - our submissions only extend to the application of the modern award as it covers those classifications that appear in the three Ski Industry Awards.

PN3675
Your Honours and Commissioner, the Ski Industry Award there's been some discussion about does include a reference to a classification called resort worker which I'm advised only applies to the equivalent of a general hand provision. From my understanding of the industry, the three Ski Industry Awards to which we've referred to in our submissions, cover essentially outdoor employees and that hospitality, childcare and retail workers have not fallen within the scope of those three awards. We'd certainly support the submissions of my colleagues from the two previous speaking unions that any Alpine Resorts Award should not operate as a ghetto award for childcare, hospitality and retail workers and so we'd support the general approach that if those classifications are to be included, then the terms and conditions attached to those classifications should be consistent with other relevant modern awards.

PN3676
In respect to the content of the exposure draft, in large part we are content with the content as it applies to outdoor employees, subject to the comments that we've included in our written submissions. There are a number of areas that we continue to press where the exposure draft departs from what we say is the appropriate safety net for the award classifications that we represent. They are our submissions.

PN3677
JUSTICE GIUDICE: Thank you. Any other submissions?

PN3678
MR HARVEY: Your Honour, in Melbourne, ASU.

PN3679
JUSTICE GIUDICE: Yes, Mr Harvey.

PN3680
MR HARVEY: Thank you, your Honour, the ASU has submitted written submissions in this matter and I'm hearing myself as I say this, your Honour, there's a bit of feedback, but the ASU has filed written submissions dated 12 June. I think Mr Harmer at one stage referred to some ASU submissions filed yesterday but I think it's clear that they were LHMU submissions, not ASU submissions. We only filed one set of submissions with regard to the exposure draft award.

PN3681

Those submissions, which I won't go over, did address just two issues; firstly, the coverage or the appearance that the award was going to cover local government employees and in our written submissions we did indicate the source of our concern about that which was largely two things, your Honours and Commissioner Smith, and that was actually with respect to my colleague from the AWU that in the AWU's original submissions back on 26 March they referred to the Victorian Alpine Resorts Award as one of the underpinning awards which should be considered as part of this and went on to say and I quote:

PN3682

The award regulates public sector and local government employees undertaking work such as rubbish collection, park attendants, ski patrollers at alpine resorts, civil maintenance work.

PN3683

Therefore, we are also concerned to see in the exposure draft reference to a classification dealing with municipal services and some misapprehension perhaps continuing that this work did apply to local government employees or work performed by local government employees. I think in that respect, your Honours and Commissioner, Mr Harmer's submissions have probably clarified that position today as to the source of that particular classification and I think in doing so he referred to the fact that certain leases that applied in what are, as I understand, national parks required the resorts to undertake some work which might be considered to be of sort of a municipal nature. In that respect, if that matter is reasonably clear, then this doesn't apply to local government employees and that local government work is not affected by this proposed award, then I don't need to take that matter any further.

PN3684

The second matter that the ASU's submissions did deal with was simply the rate of pay with regard to clerical employees either - if you compared them with hospitality workers under the Hospitality Award or clerks under the Modern Clerks Award, that the rates of pay were too low if that comparison was made and we stand by those submissions. I don't think Mr Harmer addressed the level of pay for clerical classifications, either as clerical hospitality workers or clerical workers generally so we would maintain our submissions with regard to that particular matter.

PN3685

Other than that, your Honour, we agree with the submissions made by my colleagues from the LHMU. We have specifically previously supported their submissions. I'm not sure whether I've seen their submissions dated yesterday. I have two copies in my file, two submissions from the LHMU but both of them appear to be undated and because I don't have access to the Commission's website here, I can't check but generally speaking, we certainly support the LHMU's submissions and also those of the SDA that have been made today. If the Commission pleases.

PN3686

JUSTICE GIUDICE: Mr Harmer, I wonder if you have any submission to make about the issue raised as to the coverage of the award, in particular the definition of alpine resort.

PN3687

MR HARMER: The definition is satisfactory to the Australian Ski Areas Association, your Honour. The resort operators measure their productivity and market share by reference to ski lift hours or trips and all of the alpine resorts operate ski lifts and it would appear to be a significant distinguishing feature compared to other employers in the region of which there obviously are some. The unique circumstances we face and I apologise if this is not directly in response to your question, your Honour, but in response to comments made by some of the unions, we cannot emphasise too much how much the exigencies of the weather can devastate our business and how much poor weather in terms of lack of snow and the reporting of it can reduce demand for our product to such a significant extent as to render the resorts non-viable in some seasons.

PN3688

JUSTICE GIUDICE: Yes, Mr Harmer, I was particularly interested in the definition and the submission that was made about the requirement that the resort include alpine lifting. The suggestion seemed to have been made that there would be other resorts that don't include alpine lifting which would be covered by other awards and that was the issue that I was interested in your submission on.

PN3689

MR HARMER: In our respectful submission, your Honour, there would be no alpine resorts involved in the ski industry as we understand it that does not involve ski lifts, so I am unable to assist with the nature of any resort operating in the ski areas that would fall into that category. There are, of course, your Honour, for example in Jindabyne there are operations that might be described as resorts in terms of accommodation and things of that nature which some other facilities, but they do not operate in the ski area and do not fall under the intended coverage of the exposure draft.

PN3690

JUSTICE GIUDICE: And with the exception of lifting, do those resorts or other establishments provide the same or similar services to the public as the resorts covered by this award.

PN3691

MR HARMER: The example I just used, your Honour, was talking about lower areas of altitude, so they're not operating in the precise region, they're not as heavily impacted by snow and they're not providing any of the services associated with skiing that we are dealing with, in our respectful submission, your Honour.

PN3692

JUSTICE GIUDICE: Thank you.

PN3693

MR HARMER: It's not a like with like comparison.

PN3694

JUSTICE GIUDICE: Thank you.

PN3695

SENIOR DEPUTY PRESIDENT WATSON: Mr Harmer, the wage rates in the exposure draft reflect those proposed by the association you're representing, is that correct?

PN3696

MR HARMER: In large part as I understand it, your Honour, I think those with me will correct me if I'm wrong, certainly as I understand it there are some rates and conditions that exceed both the existing awards in Victoria or New South Wales, but the rates reflect the historical rates in large part, your Honour.

PN3697

SENIOR DEPUTY PRESIDENT WATSON: In your initial submission you explained the derivation of those rates as obtaining of rates from various awards in a broad-banding sort of exercise. How did the Association derive a range of hospitality rates from a single resort worker rate or were there other hospitality rates drawn upon?

PN3698

MR HARMER: In relation to the issue of hospitality workers, on my instructions a large number of resorts in New South Wales, for example, utilise that resort worker category for child care, for hospitality, for municipal and a range of other services not elsewhere included. In relation to hospitality specifically, there are resorts such as Thredbo, your Honour, which is part of the Amalgamated Holdings Group and that group controls ..... hotels and that particular resort has been a member of the AHA and so historically has complied with the federal Hospitality Award, but that's an exigency based on their specific employer group membership. As I understand it, your Honour, the resorts building off the not elsewhere included classification and having reference also to the federal Hospitality Award came up with their own specific categorisation. Your Honour, I can't be any more particular than that.

PN3699

SENIOR DEPUTY PRESIDENT WATSON: Is it true that the rate in each case for a comparable hospitality worker is in fact less than that in the Hospitality Modern Award?

PN3700

MR HARMER: Marginally, your Honour, and again - - -

PN3701

SENIOR DEPUTY PRESIDENT WATSON: That's on the base rate and then there's the issue of penalties as well.

PN3702

MR HARMER: Yes, your Honour, and that's historically been the case going back again for example in New South Wales to the decision of Watts J and that was understood to be the case given the whole range of other exigencies of the industry and benefits of it, that was specifically listed in his Honour's decision in approving what were essentially consent arrangements between the AWU and the resorts at that time, but seeing as I indicated establishing a suitable equitable base in compliance with the principles of wage fixation at that time have since been adjusted by reference to National Wage Case decisions up to the point where the New South Wales awards became PCSAs by virtue of a quirk of New South Wales legislation. I understand that the rates in the exposure draft had been adjusted to acknowledge the lack of adjustment of PCSAs since the inception of WorkChoices, your Honour.

PN3703
SENIOR DEPUTY PRESIDENT WATSON: And when you say rates, you mean the rates generally beyond hospitality?

PN3704
MR HARMER: Yes, your Honour.

PN3705
SENIOR DEPUTY PRESIDENT WATSON: Because there's only one classification in that award.

PN3706
MR HARMER: That's correct, your Honour.

PN3707
SENIOR DEPUTY PRESIDENT WATSON: Dealing with you say hospitality. Very well, thank you, Mr Harmer.

PN3708
MR HARMER: Thank you, your Honour.

PN3709
JUSTICE GIUDICE: Is there any other submissions in relation to the alpine resorts draft? Very well, we will move to the ports and harbours area. Who would like to commence, port and harbour services?

PN3710
MR MCNALLY: Your Honour, the Maritime Union wish to rely on their written submissions filed on 12 June.

PN3711
JUSTICE GIUDICE: Thank you, Mr McNally. Mr Morris.

PN3712
MR MORRIS: Thank you, your Honour.

PN3713
JUSTICE GIUDICE: Mr Warren.

PN3714
MR WARREN: Your Honour, with specific reference - could I firstly indicate that the AFEI maintains the position that the exposure draft of Ports, Harbours and Enclosed Water Vessels Award 2010 and the enclosed coverage clause in that award is appropriate, properly meets the needs of the industries that it covers and the Commission should with respect to my learned friend reject the suggestion or the submission that the persons currently covered by that award should be covered by some general marine award and we support the establishment of a Ports, Harbours and Enclosed Water Vessels Award and would submit that the coverage clause should be maintained.

PN3715
With respect to the submission of the MUA most recently filed and clause 25 of that submission, it is put against the position of the AFEI that there is a requirement from the Minister that there be no reduction in terms and conditions and therefore the position put by the AFEI should be rejected with respect to rates. It goes without saying, but we once again remind the Commission that the

Request is not a requirement. The Request in paragraph 2 from the Minister expresses an intention. It expresses a lack of intention that any modern award should disadvantage employees.

PN3716

Equally it expresses a lack of intention that it should result in an increased cost for employees. It is an equal and balanced intention and it is not a requirement. We further note that there has been a legislative response it would appear to the concerns with respect to take home pay and the problems or the perceived problems from the trade union movement that that might create and the Commission or Fair Work Australia will be placed in a position where it may consider an application from an employee and make appropriate orders it deems fit in the circumstances where there is a disadvantage in take home pay without in any way conceding whether that is or isn't the case so far as on a merit basis is concerned. It clearly is a matter that the union could take up under the new regime and the Commission need not concern itself with the submission made by the MUA in paragraph 25. Unless there are any questions, those are our submissions.

PN3717

JUSTICE GIUDICE: Yes, that's in relation to the whole of this area, I take it, Mr Warren, is it?

PN3718

MR WARREN: It's in relation - we obviously stand by the AFEI submission made with respect to the exposure draft and we note that that is the only issue it appears that the MUA has taken with the Australian Federation of Employers' submission and it's noted in paragraph 25 of their submission and their submission is a general submission which deals with a number of awards and in particular with the Port, Harbours and Enclosed Water Vessels Award, that is the submission made and is our response to that submission.

PN3719

JUSTICE GIUDICE: Thank you.

PN3720

MR WARREN: If the Commission pleases.

PN3721

JUSTICE GIUDICE: We might take any other submissions in relation to the Ports, Harbours and Enclosed Water Vessels Draft Award.

PN3722

MR HARVEY: Your Honour, in Melbourne - - -

PN3723

JUSTICE GIUDICE: Yes, Mr Harvey.

PN3724

MR HARVEY: Thank you, your Honour. Just very briefly, your Honour, the ASU has made a written submission with regard to this group of awards, but including the Ports, Harbours and Enclosed Water Vessels Award 2010 which is at pages 3 and 4 of our written submission of 12 June, we simply sought there an exclusion for local government employees.

PN3725

I notice in the written submissions of the MUA there is a line at the end of their submissions simply saying that they oppose our submission for the exclusion of local government, but don't expand on it any further and I think we should just desist with our application for an exclusion for local government employees without expanding on it any further. If the Commission pleases.

PN3726

JUSTICE GIUDICE: Thank you, Mr Harvey. We will deal next with - - -

PN3727

MR MCNALLY: Your Honour, can I - - -

PN3728

JUSTICE GIUDICE: Yes.

PN3729

MR MCNALLY: As Mr Warren submitted, the Maritime Industry General Award or whatever its name is going to be is confined to enclosed waters. The whole area beyond the coastline would be award free if the vessel wasn't a passenger or cargo transporting vessel, a tug, a dredge, et cetera, but that's the very reason why we propose the general award to cover all that's left such as pipe laying vessels and those types of vessels who work beyond the coast.

PN3730

JUSTICE GIUDICE: Yes. Thank you. We will deal next with the coal export terminals draft. Mr Morris.

PN3731

MR MORRIS: If the Commission pleases, I need to make a number of detailed comments on the content of this award because of the submissions filed on behalf of the CFMEU on 19 June which we haven't previously dealt with and which raise a lot of points going to content, but before going to the detail, can I make these general submissions?

PN3732

The employer group, the Coal Terminals Group, with respect accepts with the very limited exceptions that we deal with in our 12 June submission, the terms of the exposure draft. The main change that we sought was to the definition of coal export terminal that's dealt with in our submission and I don't repeat it. The second point is that there has been quite a deal of consultation between the employer group and the unions interested in the coal terminals sector and as a result of that, the employers have accepted quite a number of changes.

PN3733

Those were dealt with in our 24 May submission and our 12 June submission - sorry, 24 April submission and 12 June submission and with the exception of some that I will deal with, we don't accept the further changes that the unions are now proposing or in particular the CFMEU is proposing. The third point we make is that the CFMEU submission of 19 June has relied in numerous respects for supporting the proposal, the changes that it seeks to the exposure draft on the Stevedoring Industry Award and I refer there to I think the Stevedoring Industry Award, not the Stevedoring Industry Modern Award.

PN3734
What we say about reliance on the Stevedoring Industry Award is this. First of all that award has not applied over some decades, three or four decades the coal terminals have been operating, it has not applied to the coal export terminals. Furthermore, the Stevedoring Industry Award and its predecessors has not been used as a benchmark. It hasn't had a nexus with the coal expert terminal terms of employment.

PN3735
It really is a late reliance on what we would say is an award that doesn't provide a proper benchmark or a proper starting point for the Coal Terminals Award. I say that submission at the beginning so that I don't have to sort of repeat it as we go through the various specific terms which the CFMEU has proposed relying in part or wholly on the terms of the current Stevedoring Industry Award.

PN3736
The next preliminary point I make or opening point I make is that the CFMEU in its submissions has relied in many instances on particular current coal terminal enterprise awards. The one that is most regularly relied on in the CFMEU submission is the Port Waratah Coal Services Enterprise Award. That is an enterprise award and what we say about that or any of the other enterprise awards is that again they don't provide on a sort of a cherry picking basis a proper justification for altering the terms of the exposure draft or, indeed, for setting standards in the award.

PN3737
JUSTICE GIUDICE: Despite the fact a lot of people are suggesting that they do.

PN3738
MR MORRIS: I am sorry?

PN3739
JUSTICE GIUDICE: Despite the fact a lot of people are suggesting they do.

PN3740
MR MORRIS: Yes.

PN3741
JUSTICE GIUDICE: There's been a fair amount of cherry picking on all sides.

PN3742
MR MORRIS: Yes, but I emphasise the point that it's one enterprise award. There are some seven current operators at coal export terminals on the east coast, that's Queensland and New South Wales and again one repeatedly finds the CFMEU's submission relies on that Port Waratah Coal Services Award or one or other of the awards and finally by way of opening comment, many of the CFMEU submissions of 19 June were covered in substance in submissions by the CEPU as far back as 6 March so we have proceeded on the assumption that those submissions that the CEPU put and which the CFMEU now in many instances repeats really have been considered by the Commission in developing and formulating the exposure draft.

PN3743
Now, if I could go then to the CFMEU's proposed changes to the exposure draft contained in its 19 June submission and I do have to spend a little time on these. I

will go as efficiently as I can. The CFMEU proposes some expansion of the definition of coal export terminal in clause 4.2. We've accepted that. That's provided for in our 12 June submission and is agreed.

PN3744
JUSTICE GIUDICE: Yes, I am looking at the CFMEU's submission. The structure of that appears that the left hand column is based on the exposure draft, is that right?

PN3745
MR MORRIS: Yes.

PN3746
JUSTICE GIUDICE: Yes. So any alteration which your clients may have conceded or thought appropriate in light of that submission won't be reflected in that document?

PN3747
MR MORRIS: That's correct. The left hand side is, that's right, the exposure draft. The middle column, whilst it's not uniformly the case, it's generally what the CFMEU contends for and the right hand column is sort of an elaboration by way of comment.

PN3748
JUSTICE GIUDICE: Yes. I'm just stating the obvious I think, Mr Morris.

PN3749
MR MORRIS: Sorry, the combined unions. I am corrected by the - - -

PN3750
JUSTICE GIUDICE: Yes. That's what the heading says, yes.

PN3751
MR MORRIS: Yes. Now, as I say, the CFMEU if one goes to clause 4.2, I'm sorry the combined unions, I'll get that right.

PN3752
JUSTICE GIUDICE: Yes.

PN3753
MR MORRIS: The combined unions don't actually suggest the change to the words defining a coal export terminal but we rely on the reference to minor or incidental work associated with the coal export terminals operations.

PN3754
VICE PRESIDENT LAWLER: They do propose a change, don't they? It's includes rather than is.

PN3755
MR MORRIS: I'm sorry, I still didn't hear you?

PN3756
VICE PRESIDENT LAWLER: They propose a change from the coal expert terminal is to a coal export terminal includes.

PN3757
MR MORRIS: Yes.

PN3758

VICE PRESIDENT LAWLER: Which is allowing for sort of a practical expansion on a case by case basis by reference to facts.

PN3759

MR MORRIS: Yes. Your Honour, we propose a different approach. In terms of the principle I think we agree to but our approach, if I could just go to it, would be to add, and this is in our 12 June submission, the words after where it says - I'm sorry, I'll read the whole clause:

PN3760

A coal export terminal is a facility that receives and stockpiles coal and loads coal onto vessels for export and which does not deal with other cargo or undertake other port activities.

PN3761

That's the exposure draft. We propose to add the words and I quote:

PN3762

Unless such cargo or activities are of a minor nature or incidental to that facility's activities relating to the receipt, stockpiling and loading of coal.

PN3763

And we explain why we seek that. One or other of the terminals may from time to time handle a very small amount of slag or coke I think in the case of Port Kembla Coal Terminal, and we don't want to inadvertently exclude the coverage of maintenance work, for example, on plant or infrastructure that is carried out by a coal export terminal but may not be strictly speaking the receival, stockpiling and loading of coal. I thought that was going to be the easy part.

PN3764

Then the next change of substance proposed by the CFMEU is a new clause - I'm sorry, by the combined unions is a clause 9.A providing for employee representative leave. That is opposed. It does not presently exist in any of the Coal Export Terminal Awards with the exception of the enterprise award for Port Waratah Coal Services and the unions here have relied on that award and the Stevedoring Industry Award. So we say it isn't a feature of the industry, it should not now be introduced. The next change proposed by the unions is in clause 10.3(b) where the combined unions propose a clause providing for conversion of casuals to permanent employment - I'm sorry, I will withdraw that.

PN3765

10.3(b) is a proposal that the minimum engagement for a casual should be seven hours. That's not a feature of any of the current instruments applying. The employers have previously agreed to a four hour minimum engagement for casuals. There's just no basis for a seven hour minimum engagement. Then 10.3(d) is a proposal by the unions for conversion of casuals to permanent employment. That again doesn't apply in any of the ports at the moment and it should not be included in the new award. The unions rely on the Manufacturing Award and Building and Construction Modern Awards. That is opposed.

PN3766

Then the next item is clause 11 where the unions appear to contend for the inclusion of provisions about employee duties and so that was a clause in the draft

filed in the proceedings. We know the Commission has withdrawn those generally from its exposure drafts and the employers don't seek that it be included. So to the extent that the unions are opposing it we don't find ourselves in support of that. We are content for it not to be there. Then clause 11.2, here the unions seek that the notice required by an employee of termination of employment be one week, whereas the exposure draft provides for a symmetry of notice, leaving aside the extra week for employees over the age of 45 whether the termination is by the employer or the employee.

PN3767

Again the employers oppose that change and the provision in the exposure draft it is submitted by the employers is appropriate. Clause 12, redundancy is the next area where the unions propose a change. They propose redundancy provisions in excess of the National Employment Standards. The union proposal is opposed by the employers. There is currently no redundancy scheme applying across the industry and we submit, with respect, that inclusion of a redundancy provision in excess of the NES would run counter to the intent of paragraph 36 of the Minister's Request as to when redundancy provisions should be included.

PN3768

I then come to clause 13, classifications and minimum wage rates. The rationale for the employer proposal which has been reflected in the exposure draft was set out in the employer group's 6 March submission. We dealt with it in some detail and explained how we had arrived at it. The employers did indicate they were willing to consider alternatives in consultation with the unions. Those consultations occurred. Agreement hasn't been reached. The employers submit that the exposure draft provisions are appropriate and the testing of those in the consultations that we've had with the unions has reinforced us in that view.

PN3769

We say the unions' proposal is not appropriate and is not an appropriate alternative and we just make these comments by way of a critique of the unions proposed classification structure. First of all, the unions propose that the entry level for all employees whether they're trades or non trades should be equivalent to the C!0 in the Manufacturing Award. Again there's just no justification advanced for that. Secondly, the union proposal assumes that trades and non trades' personnel should have identical progression, there should be no differentiation. Again, there's nothing really put in to justify that. The employer proposal juxtaposes or aligns trades and non trades and we submit that that employment proposal which is now in the exposure draft is fair, it's practical.

PN3770

Thirdly, the unions argue for larger increments between the wage rates for the classifications. Again there's no real justification put for that and we submit that what's in the exposure draft establishes an appropriate progression in terms of increments between the classification levels. The next matter that we think is inappropriate in the union proposal is that it introduces at the higher levels of its proposal and these can be seen in the unions submission, it starts to include in the higher classifications really what are job titles such as wharf foreman, control room and then relief coordinator, relief supervisor, project officer and so on, or contract coordinator.

PN3771

What we say about that is that those are job titles that one or other of the terminals may have but others just don't and one confuses a classification structure which is generic when one starts to include job titles in it. The modern award has a generic - sorry, the exposure draft has a generic classification progression which accommodates people regardless of their title and we say that's the appropriate approach, with respect, and it simply confuses the structure when one starts to include these job titles which a terminal may or may not have. And again one notes on that page of the unions' submission table after the classifications there's a reference to SIA, clause 10.1. That appears to be a reference to the Stevedoring Industry Award which again we'd say is unhelpful and has seven grades but it tells us very little else.

PN3772

So for all those reasons and for the reasons that we've put in support of our submission on 6 March, we strongly submit that the exposure draft classification structure should be adhered to. If I could then go to clause 13.2 which provides for the frequency of payment of wages, the unions have sought weekly payment of wages as the standard. Initially we proposed monthly. We have accepted fortnightly. That was accepted in our 22 April - sorry, our 24 May submission - sorry, I will get that right in a moment, 24 April. So we have moved from monthly to fortnightly. We submit that fortnightly is entirely reasonable.

PN3773

The unions have also sought the deletion of clause 13.3 of the exposure draft which enables an employer to deduct overpayments from subsequent payment of wages or allowances. The employers oppose the removal of that subclause. We say it's a sensible one, it appears in a number of modern awards, it reasonably enables an employer to recover overpayments without complicating issues of being in breach of a modern award in the future. Then clause 13.4 the unions have sought that adult apprentices be provided for. The employers accept that. We accepted that in our 12 June submission. We accepted the percentages in effect that the unions have proposed.

PN3774

We submit that there should be a short definition of an adult apprentice being an apprentice who commences his or her apprenticeship at the age of 21 or over. Then the next item on the unions' submission is in relation to clause 13.5 and the supported wage system. The unions argue that there should not be such a provision in this award. The employers are not opposed to its inclusion. If it's in the award it operates according to its terms. If it's not appropriate for particular work then it will have no work to do.

PN3775

Then the unions submission, and I'm using its ordering now, proposes that overtime be provided for in clause 14. It is clause 18 in the exposure draft. The unions' submission proposes a number of changes to the overtime provisions. All of those changes are opposed by the employers. The employers accept the exposure draft. The precise reasoning of the unions is not very clear. We'd say it's not clear at all, but it's apparent that they rely repeatedly on the Stevedoring Industry Award. As you'll see in the middle column there's regular reference to

SIA clause 19.2 or clause 19. I have made my submissions already about the invalidity and lack of justification for relying on the Stevedoring Industry Award.

PN3776
The unions rely also again on the Port Waratah Coal Services Award and I have made submissions about that already. Overall what the unions appear to be seeking is just a lifting of a number of the penalty rates. We submit for the reasons we have put in our initial submissions on 6 March that the overtime provisions are appropriate. If one goes then to clause, this is in the unions' submission; it's over a couple of pages. At the bottom of the prior page it's clause 18, 18.2, 18.4 and then over the page there's (b), where the employee does not get a 10 hour break. The unions propose that the reference in the second dot point in paragraph (ii) and the third dot point in paragraph (iii) should be changed from reference to the word ordinary to the word rostered.

PN3777
I'm happy to say that that was a change that the employers indicated in their 12 June submission they accept. Then clause 18.5, which is what the unions would propose as clause 14.4, there's reference to call back provisions. The employers oppose any change to the exposure draft there. There's really no basis put forward for the changes other than again the Stevedoring Industry Award or the Port Waratah Coal Services Award and for example, the unions propose that where an employee is called back to work overtime he or she should be paid a half hour travel time. That is just simply not a feature of this industry with I think the one exception of again, Port Waratah Coal Services.

PN3778
Perhaps I should just pause at this point just to note, if it needs noting, that as an enterprise award the Port Waratah Coal Services Award will continue to apply and this award will not apply while that enterprise award applies.

PN3779
JUSTICE GIUDICE: Mr Morris, if that's a convenient time we might adjourn now for lunch and we'll resume at 2 o'clock.

<LUNCHEON ADJOURNMENT [1.01PM]

<RESUMED [2.07PM]

PN3780
JUSTICE GIUDICE: Yes, Mr Morris.

PN3781
MR MORRIS: If the Commission pleases. Might I make one correction to what I put before lunch, it relates to clause 13.2 and the frequency of payment of wages?

PN3782
JUSTICE GIUDICE: Yes.

PN3783
MR MORRIS: I said I think before lunch that we had agreed to move that to fortnightly in our April submission. In fact it was our 12 June submission.

PN3784
JUSTICE GIUDICE: Yes.

PN3785
MR MORRIS: There's been so many submissions. The next provision in the union submission I want to deal with relates to the superannuation clause, that's clause 15 in the exposure draft. There, as we say in our 12 June submission, we would accept the reference to further specific current superannuation funds in clause 15.4 and I understand Ms Gray will be tendering the names of some further funds. As I say, we're happy with those insofar as they are presently funds that are receiving employer contributions.

PN3786
Then if I could turn to clause 14 in the exposure draft and the various allowances and the submissions that are made by the unions in respect of those. By way of opening, our 6 March submission explained the approach of the employers in relation to allowances. Essentially we sought to only include allowances that were in common usage across the terminals and not include allowances that only had a scattered operation in one or other or maybe a couple of the terminals. So generally we submit that the exposure draft allowances are sufficient and appropriate.

PN3787
The allowances then specifically referred to by the unions, they refer first to the tool allowance and they propose an allowance based on the Port Waratah Coal Services Award. We say that's not a proper basis to deviate from the exposure draft. Then the next one is the licence allowance. The exposure draft provides for reimbursement of the cost of licences which are required. That is, we say, appropriate and there's no justification for introducing licence allowances of the kind that might appear in the Stevedoring Industry Award or indeed in the case of Port Waratah Coal Services Award which is relied on by the unions, it appears to be a reimbursement provision. We submit again, no need to deviate from the exposure draft.

PN3788
The meal allowance, we say the allowance in the exposure draft is appropriate. There's no cause to adopt any other allowance. The allowance that is in the exposure draft matches that in the Manufacturing Award and, as one would see from the middle column of the unions' submission, allowance are all over the place in terms of quantum, if anything, our allowances at the upper end of what's currently in use.

PN3789
First aid allowance, over the page in the unions' submission, the Commission has included an allowance in the exposure draft. It was what we submitted for in our 6 March submission. There's no cause to increase that and again, the allowance in the exposure draft matches that in the Manufacturing Award, modern award that is.

PN3790
Then protective clothing and equipment allowance, again we say there's no cause to move away from what's in the exposure draft. The union has relied on stevedoring and again there just doesn't seem to be a case to make any change.

PN3791

Then the unions propose, and for this I think you need to go back a little earlier in their submission. They propose an industry allowance of 5 per cent. That's on the page where clause 14.2 of the exposure draft is set out in the left-hand column. In the right-hand column there's reference to all purpose industry allowance of 5 per cent to compensate for common disabilities. That's not supported by the employer group. We say there's no particular justification for 5 per cent or any other particular figure and again, so far as the unions rely on the Stevedoring Industry Award, not a proper benchmark or starting point.

PN3792

Then if I can go forward in the union submission, there's a proposal for a leading hand allowance - sorry, that's under the all purpose industry allowance I was making submissions about a moment ago. The employers oppose a leading hand allowance in this award and we do that because the classification structure in the exposure draft supported by the employers provides in each of the levels, as one goes up the classification ladder, for supervision of employees, supervision of work. In other words, supervision or leading people is built into the requirements of the classifications and the descriptions of the classifications and the requirements for classification. With respect, a leading hand allowance might make sense where you have jobs that don't have a supervisory requirement, but we say it's really double-counting if your classification already takes account of supervisory responsibilities. You don't then add a leading hand allowance because someone is then doing what the classification itself contemplates. Leading hand allowances are very much the exception currently in the coal terminals.

PN3793

Then going to the next page in the unions' submission, across the page from where it says clause 14.7 in the left-hand column, there's reference to other allowances such as laundry allowance, vehicle allowance, travel allowance, other allowances specific to the industry. In our submission again there is no justification for those at this stage. The CEPU back in its March submission sought various additional allowances. There's really no cause to have those included at this stage and again the union relies, opportunistically we'd say, on the Stevedoring Industry Award and the Port Waratah Coal Services Award. Summing up on allowances, our submission is that the exposure draft includes the right allowances and no further allowances should be included in the modern award.

PN3794

If I could then move off allowances to clause 16.1, averaging of ordinary hours, the exposure draft provides for shift workers' ordinary hours to be averaged over the cycle of a roster or up to 26 weeks. We submit that's appropriate. The unions propose 10 weeks. We submit that 26 weeks is not unreasonable in the circumstances. There are other industries, mining, coalmining where 26 weeks is the period used for averaging. We had previously agreed that for day workers the averaging should be over four weeks. that was in our 24 April submission and again the averaging of hours was dealt with in the CEPU's 26 March submission which was prior to the exposure draft.

PN3795

Then clause 16.2 the provision in 16.2(a) for the span of hours for day workers, the exposure draft provides that day workers' hours can be between 6 am and 6 pm Monday to Sunday. The unions submit from 7 am to 5.30pm Monday to Friday. We submit that the exposure draft is appropriate there. There's no cause to move from what is a not uncommon provision for day workers. As it happens, at present the earlier starting point in any of the terminals presently for day workers is 6 am. The latest finishing time for day workers appear to be 5.30 pm so six to six is a not unreasonable safety net provision.

PN3796

The unions propose then in clause 16.3(iii) a new definition of dayshift. We don't support that. It's unnecessary. Nightshift and afternoon shift are defined and a shift that's not an afternoon or a nightshift must be a dayshift. We note that, for example, in the Mining Award, modern award, the dayshift is not itself defined.

PN3797

Then in clause 16.3(b) shiftwork rates, the unions propose various increases, higher loadings that is for various shifts. They rely again on the Stevedoring Industry Award and the port Waratah Coal Services Award. We submit that the exposure draft should not be departed from, we do make this one perhaps qualification to that. The exposure draft provides for a shift worker or continuous shift worker whilst on permanent night shift being paid a loading of 25 per cent of the ordinary hourly base rate of pay. We would not oppose that being 30 per cent. We I think used as a reference point initially in our submissions on this the Mining Industry Award and we note that a permanent night shift worker appears to be 30 per cent.

PN3798

Clause 16.4(c), roster and shift changes, the unions propose to vary or propose the variation of the exposure draft by increasing the notice period from 48 hours to seven days. We submit that the 48 hours is reasonable. It matches the Mining Industry Award, then clause 17 - - -

PN3799

SENIOR DEPUTY PRESIDENT HARRISON: Mr Morris, I should comment that we never used the Mining Industry Award as some justification. I then remember what you're criticising the union about in their cherry picking, but continue to do so.

PN3800

MR MORRIS: I was using the Mining Award as the Modern Mining Award as being an award that covers obviously a vast industry and includes amongst other things the bulk commodity ore loading in iron ore, for example, and in our initial 6 March submission we made reference to that. There is some similarity between what a coal terminal does, loading coal onto ships 24 hours a day, seven days a week, using highly automated gear at the coal terminal and a iron ore loader, that was really the - so the extent that we've been selective in that, we've been consistently selective.

PN3801

Then if I could go to the clause concerning meal breaks or breaks, clause 17, the exposure draft provides for and this is in 17.2 for 20 minutes per shift and in 17.3

40 minutes per shift. In our 12 June submission we accepted that the 20 minute should become 30 minutes in 17.2 and the 40 minutes should become 60 minutes in 17.3, then clause 19.2, leave entitlements, the exposure draft provides for annual leave to be in accordance with the NES.

PN3802

The unions propose an additional week's leave in effect so that continuous shift workers would get six weeks and non-continuous shift workers or day workers would get five weeks. Indeed, I think they may say all shift workers should get six weeks. We submit that there is no cause to provide for an enhancement on top of the NES.

PN3803

Some terminals do provide more leave, others don't and it's properly a matter for enterprise agreements or bargaining, then in clause 19.4(a), the annual leave loading, the exposure draft provides for a loading of 17.5 per cent. The unions propose it appears 20 per cent and again they rely on some particular enterprise awards. We submit that the common standard of 17.5 per cent is appropriate and should not be departed from.

PN3804

In clause 19.6 there's provision for the taking of annual leave during annual shutdowns or during shutdowns, rather. The exposure draft provides for - does not provide for a notice period for that. The unions propose a minimum four weeks' notice before a shutdown when employees are required to take annual leave. The employers accept that and we put that in our 12 June submission, so we would agree to that notice period being required.

PN3805

Then clause 19.7 which is a provision enabling the employer subject to certain preconditions to require an employee to take leave where a very substantial accrual of leave has occurred for a particular employee and the exposure draft provides that - this is in 19.7(a), at the time of the direction the employee has eight weeks or more of annual leave, the unions have proposed that it be in the case of employees with an entitlement to five weeks' annual leave a year that the trigger, if you like, or the threshold when the employer can require this leave to be taken should be 10 weeks.

PN3806

We put this in our 12 March submission, so we accept in effect that the threshold or trigger for the obligatory taking of leave at the direction of the employer arises when the employee has accumulated a total of two years of leave, then clause 20, personal and carer's leave and compassionate leave, here the unions propose 13 days personal carer's leave, in other words three days more than the NES.

PN3807

We submit there is no case made for that. There's some employers who provide presently more, others don't provide more than the NES and it should not become a general standard safety net provision and the NES is appropriate. Likewise in respect of compassionate leave, the unions propose that there should be not two days on each occasion as provided in the NES, but three days. Again some enterprise awards provide for three days, others don't and again there is no justification for generally requiring as a safety net provision more than the NES.

PN3808

Can I then turn to schedule A? The unions have proposed a new schedule A, clause A.1.2 which is a set of provisions relating to training and how training is to be afforded and how it's to be treated. The exposure draft didn't include such a provision. We oppose its inclusion now. We say training is properly a matter for local arrangements and local agreements and does not require and does not justify a safety net provision and then if one goes to the clause A.1.2 in the exposure draft, so that's in the left-hand column, there's provision in relation to progression.

PN3809

The unions appear to be saying in the middle column that progression above level 3, competent, will be on appointment. There doesn't seem to be a difference between us. Of course, we have a different classification structure from what the unions are proposing, but I think I can leave that, then I've made submissions already when I was dealing with clause 13 I think it was about the classification structure that we think there are a number of features of what the unions are proposing in the classification structure that are inappropriate.

PN3810

One I perhaps didn't deal with earlier relates to mixed functions. The unions have proposed in their middle column, A.1.4, a mixed functions clause. We say that it's inapt or inappropriate to have a mixed functions clause where you have a generic classification structure, rather than job titles. The structure contemplates that people work to the limit of their skills and competence and perform all the work that might be required at a lower level and all the work required at their level.

PN3811

Putting in a mixed functions clause in a grading system, particularly where appointment is required to grade to the higher levels, is just going to be a cause of confusion and if you look at our classification structure which has the competent, the advanced, the dual trade, there's just no work for a mixed functions clause to do that in that structure so we submit that a mixed functions clause just is inappropriate and then finally the unions' proposal refers to particular job positions and we submit that that's inappropriate.

PN3812

By positions I mean particular titles, so we strongly support the current structure of the exposure draft. Those I think are the submissions we make. If the Commission pleases.

PN3813

JUSTICE GIUDICE: Thank you, Mr Morris. Ms Gray.

PN3814

MS GRAY: Thank you, your Honour. Your Honour, I note that Gladstone Port Authority didn't put in a submission in respect to the export coal terminals exposure draft in the latest round and I was wondering if it might be more economical if Mr Herbert who is representing them today just indicates if there's any submissions to make in respect to that award and then I can cover any response to that in my submission, but I am happy to go ahead before him. I just may need to jump again after him.

PN3815

JUSTICE GIUDICE: What do you think about that suggestion, Mr Herbert?

PN3816
MR HERBERT: I'm happy to co-operate.

PN3817
JUSTICE GIUDICE: Very well. Thank you.

PN3818
MR HERBERT: Your Honour, I didn't announce an appearance in this matter, although what I have to say about the Port Authorities Award is in a sense a mirror image of one thing that we do have to say about the Coal Terminals Award. The only thing that Gladstone Port Authority really has to say about the Coal Terminals Award is that it should continue not to apply to it and that the way in which the Commission has presently arranged the terms of the respective exposure drafts of the Port Authorities Award and the Coal Terminals Award is that they are neatly and logically mutually exclusive as they should be and the Gladstone Port Authority as a port authority properly so called, similar to many other port authorities around Australia give or take various mixed of functions, is contained on the appropriate side of the dividing line between those two awards, that is firmly and squarely on the side of the Port Authorities Award.

PN3819
The Gladstone Port Authority is content with all of the other terms and conditions proposed for the Port Authorities Award and in particular clause 4.1 of the exposure draft that lists that - it specifies that the award covers employers who are port authorities to the exclusion of any other modern award. It follows that if the Port Authorities Award is to stay in that form, the alterations proposed as we submit it should for all of the reasons that were put in, in the earlier submissions on behalf of the Gladstone Port Authority and in that respect if I can say - Gladstone Port Corporation, I should say, in that respect can I say that the submissions by the CFMEU in response to the exposure drafts put nothing new in factual terms.

PN3820
All that is asserted again is that there is nobody at Gladstone Port Authority who is exclusively devoted to coal operations. There are a number of employees who are predominantly engaged in the loading of coal. There are a very much larger number of employees who have nothing whatsoever to do with coal and are a group in the middle, particularly the maintenance employees who work across the entire facility, everything that Gladstone Port Authority does from front to back and stem to stern and because of that amalgamated situation and the aggregated situation constituted by the workforce and the flexibilities that are able to be drawn from the present situation, it's earlier been submitted and accepted by the terms of the exposure draft that Gladstone Port Authority should not be required to be disaggregated in its respective functions simply because the CFMEU wants to take part of its functions away and put it under another award, but in order to facilitate that approach, as I understand matters, could I refer the Commission to the submissions of the CFMEU and in particular the spreadsheet setting out proposed award changes in relation to the Coal Terminals Award that Mr Morris has just gone through very recently and can I refer the Commission to the curious terms of the proposed clause 4 of the CFMEU or the unions' proposal as to how clause 4 of that award would read if the CFMEU was to have its wishes in this regard.

PN3821

If the Port Authorities Award is to stay in its current terms, that is it applies to the exclusion of any other modern award, a variation of the terms sought to the Coal Terminals Award would set up an immediate tension where in fact by the terms of the CFMEU proposed amendments, that the Port Authorities Award would not apply to the exclusion of any other modern award, even though it's said that it does, because this proposed award would apply to port authorities as well, so that the neat mutual exclusivity achieved by these current terms of the two exposure drafts would immediately be lost, but the terms of clause 4.1 as proposed by the CFMEU suggests that the award covers employers who operate coal export terminals in respect of work by the employees in classifications and to the exclusion of any other modern award.

PN3822

Now, essentially what that would mean is that Gladstone Port Corporation would be covered because it operates a thing which is defined in clause 4.2 as being a coal expert terminal and being the Tanner terminal that's been described in the material, so that this award would operate in relation to Gladstone Port Corporation to the exclusion of all other modern awards, despite what the Port Authorities Award says, that it doesn't.

PN3823

The definition in 4.2 of a coal export terminal is as Vice President Lawler pointed out earlier, has a subtle, but very important change. The word is has been changed to the word includes, that it does permit the possibility of future debates and arguments about the possible creeping coverage of this award over other facilities such as Gladstone Port Corporation and like facilities. It defines the coal export terminal as including facilities of receiving stockpile coal and as I submitted earlier, Gladstone Port Corporation along with a number of other port operations does have such a facility so it would be caught by clause 4.1 and 4.2. 4.3 however goes on to say:

PN3824

The award does not cover an employer who is covered by the Port Authorities Award.

PN3825

Well, it would seem from 4.1 that that provision is not necessary because it excludes other awards anyway. But it goes on to say:

PN3826

Except as otherwise covered by 4.1 or 4.2.

PN3827

Now, frankly my client doesn't understand that and I can't explain to the Commission how that would work. Presumably the intention is what was submitted by the CFMEU in April of this year in a written submission that what they intend is that the Port Authorities Award can cover everything in Gladstone except the coal terminal. The problem with that is the coal terminal is a place. It is a place of work. It is not an identifiable group of employees and given the structure which has even been asserted by the CFMEU in its recent material, that coal terminal has a rotating workforce of employees who move in and out and work in other places of the Gladstone Port Authority's operations.

PN3828

In some cases they work in the coal terminal one week in four. Some places they work predominantly there but do other work in other terminals. Some employees who do maintenance rotate in and out on a daily or hourly basis and some employees never go there at all. Now, for that reason it would seem that these clauses would appear to set up a circular inclusion and exclusion which doesn't make a great deal of sense except that it would appear that there would need to be something in the nature of a Bundy clock installed at whatever entrances are available for the coal terminal and as employees go in and out they have to punch the clock as to the amount of time they spend in the coal terminal area so that the award will apply to them when they're in it but it won't apply to them when they're out of it.

PN3829

As I say, that may well alter on an hourly, weekly or monthly basis. That of course, if that is what is intended and it's not at all certain that that's what the words say, that would be a nonsensical outcome in the context of the award modernisation process and the intention to simplify matters and to bring, as far as can be done, employers who have overall operations under the umbrella of a single award and in the context of award modernisation process which really encourages this Commission to do precisely what it has done in this case and that is to characterise employers by reference to their overall activities and the industry in which they sit and to make award regulation which is suitable to their overall characterisation and the industry in which they sit.

PN3830

The Commission has, as I have submitted, landed precisely on the point in relation to this particular matter by granting mutual exclusivity as between port authorities properly so called and privately owned coal terminals who effectively do nothing but. The CFMEU proposal would be to rub out all of those lines and to create an enormous smudge mark, as it were, within the operations of Gladstone Port Corporation for reasons that aren't entirely clear. It certainly won't promote any form of efficiency. It won't promote simplicity and it won't promote the objective of reducing the number of awards that apply. It really would apparently suit the interests of the CFMEU only without serving any other particular objectives.

PN3831

Now, for those reasons it is submitted that the proposed alterations to the Coal Terminals Award in terms of clause 4 coverage provisions should all be rejected by the Full Bench and that the respective coverage clauses of each of the awards, that is the Port Authorities Award and the Coals Terminal Award, be left precisely in the exposure drafts, be left precisely where they are and that the CFMEU's submissions to the contrary be rejected. Unless there's anything further those are the submissions that Gladstone Port Corporation would wish to make in relation to the relationship between those two awards and what the Commission should do in respect of that issue.

PN3832

Gladstone has nothing else to say to anticipate matters when the Port Authorities Award matter is formally called on. Gladstone Port Corporation has nothing further to say in relation to the terms of that award. It is content to accept the

terms of the award as presently placed or as presently drafted and save and except that in the case of some unions having made submissions to the effect that wage rates ought to be taken from particular awards that have been identified and the Victorian Ports Award is one in particular that was identified as being a potential source of wage rates.

PN3833

The simple submission that Gladstone makes about that matter is that the Queensland Port Authorities Award NAPSA wages and conditions ought to be those which are contained within the award but otherwise leaves the matter to the discretion of the Commission. The question as to how one moves from whatever might be the existing rates of pay that port authorities throughout Australia are currently paying and the Gladstone Port Corporation are currently paying vis-à-vis the rates which are ultimately inserted in a final modern award will be a matter in my submission for the transitional provisions that might apply and are not matters in respect of which the Port Corporation wishes to be heard at this time. Unless there's anything further, your Honours and Commissioner, that's the submission for Gladstone Port Corporation.

PN3834

JUSTICE GIUDICE: Thank you. Ms Gray.

PN3835

MS GRAY: Thank you, your Honour. I might start with the uncomplicated part which is that I have provided to the Full Bench's associates a document headed Export Coal Terminals Existing Superannuation Funds to which Mr Morris has referred. There are already two superannuation funds mentioned in the exposure draft. We say that the four listed in this document completes the default funds currently existing at coal terminals. We note that it also includes Gladstone Port Authority as the bottom one. We have that there for completeness and with the optimism that our arguments in favour of having Gladstone Port Authorities coal termination operations brought within the scope of the Export Coal Terminals Award would be successful when the award is finally made.

PN3836

We note that Mr Morris has no objection to that list of funds which I provided to him earlier today and we also note that we've conferred with Ms Angus of the AWU there is no default fund existing at Dalrymple Bay. Also in respect to the AWU Ms Angus was unable to, due to other work commitments, remain this afternoon. She has asked me to advise the Full Bench that the AWU supports and accepts and adopts the submissions of the CFMEU lodged on 19 June. We then move on to conditions. We have very little extra to say because it has been covered in our submissions. In terms of the table there was an error which is the key at the top of the table which refers to the existing industry awards has next to PWCS Port Waratah Coal Services that Port Waratah Coal Services Consent Enterprise State Award 1995 that in fact the conditions which are cross referenced in our document are to the Port Waratah Coal Services Consent Enterprise Award 2002, a federal award.

PN3837

We note that Mr Morris has relied heavy - well, not heavily, has relied at various times on the Mining Industry Award as commented on by her Honour SDP

Harrison. We would suggest that conditions where not taken from the existing enterprise awards would be more appropriately taken from the Black Coal Mining Industry Award and in respect to that we refer to our submission which was made in support of the priority issues. Unfortunately we were unschooled in the modernisation process at that time and did not date it, but it is contained on the website under Initial Priority Issues May through to June 2008. In that we draw the comparison or connections between coal mining and coal ports and in particular at paragraph 24 we outlined the various coal supply chains which are associated with the coal export ports and in respect to that it identified the regions of coal mining which supplied each of the ports.

PN3838

The second last dot point referred to the Blackwater Gladstone coal chains which supply to Gladstone Port Authority. On conditions, as I say, we have covered that in our submissions. Just briefly, Mr Morris said that the seven hour minimum engagement or one shift minimum engagement for casuals being sought by the combined unions was not a common provision across the existing enterprise awards. That comes as no surprise because the Bulk Terminal Services Bulk Handling Award 1998 and the Hay Point Award don't provide for casuals at all. The Port Waratah Coal Services Award does provide for casuals and has a seven hour minimum engagement, seven hours being a shift under that award being a 35 hour week.

PN3839

In terms of the maximum period for the roster cycle, although the employers are seeking 26 weeks maximum the rosters currently existing at all of the coal terminals have a maximum of 10 weeks and in terms of annual leave we note that Port Waratah Coal Services provides five weeks annual leave with a 45 per cent loading. The Hay Point Award provides for five weeks with 20 per cent loading and six weeks for shift workers and the loading under the Stevedoring Industry Award is 27.5 per cent loading. Although Mr Morris says that the Stevedoring Industry Award is irrelevant, we refer to the submission of the MUA in respect to the modern Stevedoring Industry Award, the exposure draft, and note that an exclusion is proposed with which we agree for the Coal Expert Terminals Award 2010 and is done so on the basis that the loading of coal or fuel oil whether the bunkers or not was included in the Stevedoring Industry Act 1949 as stevedoring operations, that's on page 2 of the MUA's submission of 12 June.

PN3840

We do agree with Mr Morris that since coal ports have become the type of operation which they are today that it is true that the enterprise awards rather than Stevedoring Awards have applied there and that is why we in our submission cross referenced existing conditions from the existing enterprise awards to reflect what is prevalent across the industry and to enable the Full Bench to identify the source that the combined unions claim. I note that your Honour the President had perhaps slight scepticism in your Honour's voice when referring to the combined unions' counterproposal as being the title of the middle column in the CFMEU's submission.

PN3841

I do submit that the CFME Mining and Energy is the coordinating union by the ACTU in this industry. The same process which I referred to in the electrical

power industry last Friday in Melbourne was conducted by the CFMEU Mining and Energy in this industry as well and we have active and consistent participation because of that inclusive and full information process of ourselves, the MUA, the AWU, the AMWU and the CEPU. I note with some concern though that the AMWU appears to have made consistent submissions in the last round of submissions on the exposure draft to the effect that the Manufacturing Industry Modern Award classification structure should be essentially inserted into virtually every other modern award.

PN3842
Mr Guy Noble from the national office of the metal workers was present and involved in the negotiations on the coal export terminals proposed award and the only concern raised by the AMWU different from the other unions was the level of the allowance claimed in respect to first aid. Our submission deals with that by incorporating that AMWU concern that where coal terminal employers do not enable virtually every employee to be trained in, for safety reasons, first aid and receive the lower amount which we claimed but rather only have a selection of employees trained, then the appropriate percentage should be 2 per cent rather than the lesser amount which we had been satisfied with on the basis of existing provisions being essentially a multitude of employees or anyone who wished to be trained receiving that allowance upon completing the training.

PN3843
JUSTICE GIUDICE: Ms Gray, I hope you didn't misinterpret my exchange with Mr Morris earlier. I wasn't sceptical at all about the CFMEU's role in coordinating the other unions. The purport of my remark was actually directed to the fact that I had asked him a question without looking at the title at the top of the columns.

PN3844
MS GRAY: Thank you, your Honour.

PN3845
JUSTICE GIUDICE: Which I should have done and I wouldn't have had to ask him the question.

PN3846
MS GRAY: And sometimes it's a little difficult for us to believe that there is a combined union position with the constituent unions but nonetheless that has been achieved in this case. We also handed up another document to the Full Bench's associates which is headed the Combined Unions Coal Export Terminals Proposed Classification Structure. Your Honours and Mr Commissioner, when the Full Bench made the exposure draft for this industry the only draft award it had was the employer draft. Unfortunately we had a choice between comparing a draft or negotiating with the employers on their draft and time and resources being stretched, as they are by everyone in this process including the Commission, we chose to negotiate with the employer and we did so the first meeting being able to be held on the closing date for draft awards to be put into the Full Bench.

PN3847
So we're saying that the Full Bench has had the employers draft, that employers draft was amended after early meetings that the unions had with the employers and further concessions in respect to the claims which have been pursued by the

unions with the Coal Terminals Group have been referred to by Mr Morris and put into their written submissions. So we commend the combined unions counter proposals and the basis upon which they have been made for terms and conditions and have nothing further to add about terms and conditions which brings us to the scope.

PN3848

This is an area which the union has made a number of submissions, particularly directed towards Gladstone Port Authority. We note that as a result of the submissions of the Coal Terminals Group initially and Gladstone Port Authority that what the Full Bench was appraised of was a - by the Coal Terminals Group was that their operations only dealt with coal. In the main that's true but there are exceptions and those exceptions have led to the proposed amendment to the scope clause now being sought by the Coal Terminals Group. On the other hand, Gladstone Port Authority has put to the Full Bench consistently that their operations are quite different to the other coal terminal operators. We have addressed those differences and demonstrated that in fact - although it was glossed over by Mr Herbert - there is at least a group of employees who do nothing but work at R G Tanner or Barney Point at Gladstone Port Authority. That is 180 production employees and the majority of the tradespeople who perform the majority of their time on coal, but certainly the production people, the 180 people referred to in our submission of 19 June do nothing but coal, except for a load of calcite once every three to six months.

PN3849

When the Full Bench published the draft Coal Export Terminals Award, it did so on the basis of the information that it had at the time. It said in paragraph 170 of the statement of 22 May:

PN3850

The draft award is confined to coal export terminals where the loading of coal for export is the only port operation undertaken.

PN3851

Certainly the Gladstone Port Authority has listed a screed of other functions which it says it undertakes. We heard this morning in respect to the Dredging Industry Award that only Brisbane and Newcastle ports actually perform the dredging operation and yet at paragraph number 35 of the Gladstone Port Authority submissions on 17 April it referred to it having responsibility for the harbour, marine, land reclamation and dredging activities. We don't doubt that it has responsibility but it doesn't perform them. I've been up and done an inspection of Gladstone Port Authority and were shown around by the manager and had it explained to me in recent weeks and certainly a number of the functions which were referred to by Gladstone Port Authority are conducted through contractors as is the case at other coal ports. Port Waratah Coal Services and Port Kembla Coal Terminal both look after vessel management, land development on their own lease sites and the port users at Port Kembla also share dredging costs with the Port Corporation.

PN3852

The same can be said and I only did a comparison between Port Waratah Coal Services, Port Kembla Coal Terminal and Gladstone Port Corporation's areas of

activities but it is true to say that either or both Port Waratah Coal Services and Port Kembla Coal Terminal, the functions outside of coal loading, unloading, blending and stockpiling are also conducted which are referred to by Gladstone Port Authority in its submission of 17 April are also conducted by the operators of the coal terminals at Port Waratah Coal Services and port Kembla Coal Terminal in respect to paragraphs 17, 19, 20, 35, 40, 43 and 44 of Gladstone's submission of 17 April.

PN3853

We say two things, your Honours and Mr Commissioner, that is that coal is not the only product loaded at Port Kembla Coal Terminal. There's about 4 per cent of product that is something other than coal and the functions which Gladstone Port Authority has submitted distinguish it from the operators of the coal terminals are performed in the main at other coal terminals as well where those operators have the lease of the coal terminals from the relevant port authorities in each case.

PN3854

We also have referred in our submissions in April to the expansion of the R G Tanner coal terminal. What we didn't know at that stage but we have subsequently found out is that 50 per cent of that expansion was funded by the coal companies whose product is exported through Gladstone Port Authority. We also note that Gladstone Port Authority stated in its submissions that it may not utilise Barney Point for coal exports in the future, although its annual report stated that the combined throughput at Barney Point and R G Tanner coal terminal were fully utilised.

PN3855

The ability for Gladstone Port Authority to meet its coal export commitments, being the third largest coal exporter in Australia, would only occur to enable it to use Barney Point for something other than coal when its planned Wiggins Island coal terminal is built and I note in respect to Wiggins Island coal terminal that it will be built by a consortium of 16 coal companies. They will develop and own the terminal but it will be operated by Gladstone Port Authority. I have an article from The Age to that effect which quotes the Premier of Queensland in respect to Wiggins Island and I'm happy to hand up a copy of that if the Full Bench requires it.

PN3856

The other area of differentiation between Gladstone Port Authority and coal export terminals does not follow through into the rest of Gladstone Port Authority's operations. In Gladstone Port Authority's submissions of 17 April it identifies in paragraph 31 who operates its other terminals and in that respect we note that Boyne Wharf, which is operated by Boyne Smelters Limited would fall under the Aluminium Industry Award. Rio Tinto Aluminium exports an imports from Fishermens Landing wharves. We say that it is likely that that operation would fall under the Aluminium Industry Award and Auckland Point Number 2, 3 and 4 wharves, which is addressed in paragraph 31(c) of Gladstone's submissions of 17 April, include the operators there being Caltex Australia Petroleum Pty Ltd, BP Australia Limited and Shell Australia.

PN3857

We submit on the scope of the Oil Refining and Manufacturing Award 2010 that those operations of oil and petroleum products would fall under the Oil Refining and Manufacturing Award so Gladstone has a number of terminals which are operated by employers in other industries so its argument that somehow separating out its coal terminals which is 70 per cent of its entire throughput, that's including the other operators - 70 per cent of it coal, separating it out it says will be untenable and impossible. It has done it for the other operators and we say that on the basis of all of our submissions that we've made both in the priority industry stage of award modernisation which is the submission I referred to, the undated one which is in the initial priority issues section of the drop-down menu on the Commission's website and our submissions in respect to Coal Terminals Award support the inclusion of Gladstone Port Authority's coal terminals.

PN3858

We suggest that the appropriate manner with respect to achieve that would be our draft scope, which is in paragraph 7, and explained in paragraph 8 of our submissions of 14 April and we commend that scope to the Commission. We also note that when Wiggins Island is complete and operating, it will double the capacity of Gladstone Port Authority for coal and only for coal and make it by far the largest coal export terminal in Australia. May it please.

PN3859

JUSTICE GIUDICE: Thank you, Ms Gray.

PN3860

MR HERBERT: Your Honour, might I say I understand why Ms Gray wanted me to go first. If I might be heard very briefly, a very large part of what was just said by way of the results of her personal tour guide of what she said she saw in Gladstone is contested. It is just quite wrong as a factual matter, but I understand these are consultations and the normal rules in relation to these matters don't apply, but really, given that she was referring to material that was put on three and four months ago by my clients in writing and available for anybody to challenge or test or to put on further material, to come into these proceedings and recite controversial and quite wrong material of that kind for the bar table in that way from a personal perspective, without - - -

PN3861

JUSTICE GIUDICE: You dispute that this is going to be the biggest coal terminal in Australia when the expansion is completed?

PN3862

MR HERBERT: It will be a very large one. I don't know that, quite frankly, whether it will or it won't.

PN3863

JUSTICE GIUDICE: If it was, do you think it would be rather peculiar to have the largest coal terminal in Australia outside the scope of an Export Coal Terminal Award?

PN3864

MR HERBERT: No, not at all, your Honour. For all the reasons that were mentioned in the Full Bench statement of 22 May as to why port authorities were to be separated out, if one goes to the material about what Gladstone Port

Corporation is, it is a massive operation, quite apart from the coal business. I have mentioned to the Full Bench but the government announced last week that the Bundaberg port is to be added to the Gladstone Port Corporation's responsibility so Gladstone Port Corporation will be responsible for the ports in Gladstone, it is presently responsible for Port Alma at Rockhampton, it will also be responsible for port of Bundaberg and that will cover many kilometres of the coastline, many hundreds of kilometres of the coastline and massive infrastructure, land and facilities that have nothing to do with coal or coal ports or coal terminals.

PN3865

It is the local authority, in effect, for all of those lands and areas and responsibilities. It has quarries. It operates quarries. It engages in land reclamation and the management of massive infrastructure which has nothing to do with coal as appears from the material that has already been put before the Commission in the earlier consultation processes and to that extent it remains what it is, a statutory authority quite separate and distinct from privately owned coal terminals.

PN3866

The question of the regulation of the employees' terms and conditions can be adequately dealt with within the award. It doesn't need to be covered by an award which relates to the specific functions of coal terminal operators, your Honour, privately owned and operated coal terminal operators when it is a statutory corporation with quite a different character so there is no conflict at all involved in that. As I submitted earlier, the appropriate course is for the Commission to characterise the port corporation for that it is, not for its individual functions and what it might do in particular instances. If that reasoning or character was the logical extent, then any port corporation which was involved in dredging activities would have to have the dredging activities carved off and put in the Dredging Award and if it was involved in various other activities which are covered by Port Services, Closed Waters and Maritime Services Awards, each one of them would have to be carved off and handed over to the individual constituent awards in which case there'd be a small rump of employees left in the middle who would be the only ones covered by the Port Authorities Award because they didn't fit comfortably within any of the other constituent activities and that would, with respect, be a very untoward way to deal with these matters.

PN3867

One appreciates lines have to be drawn somewhere and they ought to be drawn in the most logical and sensible and coherent place but the submission I put earlier is that in this particular instance, given the complex nature of what port corporations do and what Gladstone Port Corporation is called upon by statutory charter to do, the logical place to draw the line is at the boundaries of the corporation, not internally within its constituent individual activities.

PN3868

The reason I got to my feet is that much of what is said and much of what was said by Ms Gray is hotly contested in terms of its factual accuracy in relation to the comparisons between what Gladstone Port Corporation does and what some other coal loader in New South Wales might do but we're being, as it were, ambushed by that material here and now today without anybody bothering to put

it in writing so that we could see it coming and we could address it in an appropriate way. Having said that, I understand the limitations of the consultation process in relation to that matter but if the Commission is disposed to act on the truth of some of the matters that were put forward by Ms Gray, I'd seek an opportunity to put some further submissions to set the record straight in relation to those matters. If it please the Commission.

PN3869

MR WRIGHT: Excuse me, your Honour, I seek to make submissions in regard to the Coal Export Terminal Award. Wright, initial M, appearing on behalf of the CEPU. Given the calibre of Ms Gray's previous submissions, these submissions will be necessarily brief.

PN3870

The CEPU joins in the confusion regarding as to why it is that only the Mining Industry Modern Award is of any relevance. We say that it is of some relevance, indeed it forms part of the basis on which we see an electrical licensing allowance, but we would join with the CFMEU in noting the Stevedoring Industry Award and also the relevant enterprise awards

PN3871

In turning to specific issues within the award raised by Mr Morris, we note that the licensing allowance issue is obviously a topic near and dear to the heart of the Electrical Trades Union division of the CEPU. The licensing allowance is not simply covered by - it's to compensate for the additional responsibilities that are attached to holding an electrical allowance. Those are responsibilities that stem from relevant state legislation. The CPEU and its various state branches have made these submissions repeatedly over the years to the Commission and I don't intend to expand on them greatly here. I believe that they are contained in our submissions in regard to certificate other awards such as the Aluminium Industry Award, Gas Industry, et cetera.

PN3872

We wholeheartedly support indeed the whole of the submissions made by the CFMEU in regard to the coal export terminals. Particularly in relation to the classification structure, we appreciate the situation which the Commission was in publishing the exposure draft in that there was only one draft award proposed by the parties, being that from the employers with that heavily drawing from the Mining Industry Award. However, the classification as it's proposed would see a qualified tradesperson starting on a submission C 10 rate. That is quite a peculiar position, frankly, and not something that we would appreciate seeing rolled out in any award.

PN3873

The final two matters would just be the general - there are very few allowances contained within the exposure draft as referenced in the joint unions' submission. As foreshadowed, the licensing allowance is of particular importance. In response to Mr Morris's submissions regarding the leading hand allowance, notwithstanding what he says the effects of the classification structure proposed - it still does not appropriately countenance the work done by a leading hand. A leading hand could be working in a group where all people sit on the same classification level, but because of their role they have additional

responsibilities, that is what is compensated for in the leading hand. We're surprised that it is controversial and accordingly we would seek it and the other allowances referred to in the submissions of the CFMEU to be incorporated into the award. In terms of scope, we have nothing further to say than what Ms Gray has already put to the Commission. May it please the Commission.

PN3874
JUSTICE GIUDICE: Thank you, Mr Wright.

PN3875
MR HARVEY: Your Honours and Commissioner, I am not going to respond to Mr Herbert, but I did drift off when I went to address the other document which I handed up to the Full Bench being the classification structure. I would just like to draw the Full Bench's attention to the fact that this classification structure is in fact the same structure which is in terms of level and pay rates in the 2002 federal award for Port Waratah coal terminal and has been simplified.

PN3876
The process which the unions went through is not only to have all of the unions review it and be satisfied with the levels and percentages and rates, but in terms of the job descriptions column which is clearly only indicative job description, we also had the advantage of having our on site union representatives from Hay Point, Gladstone Port Authority coal loading, Port Waratah, MUAs Port Waratah union delegate and Port Kembla coal terminal representatives who actually perform this work day in, day out and they went through this and were comfortable that the existing roles are accurately reflected.

PN3877
Now, we don't resile from the fact that it could well be improved by having some position descriptors added, but we say that in terms of the number of levels and the internal relativities, the entry for the base trade and the fact that the operator rate and the trade rate do line up and progress at the same level and the salary rates or the wage rates which are 2002 rates in the federal enterprise award for Port Kembla coal terminal make it a far more appropriate classification structure than that prepared by or presented by the employers in the industry.

PN3878
I would only finish by saying that Gladstone Port Authority has not put in any written submissions in response to our written submissions at any stage in this industry development which has taken issue with any of the facts the CFMEU has outlined in its written submission. May it please.

PN3879
JUSTICE GIUDICE: Thank you, Ms Gray. Any other submissions? Yes, Mr Woods.

PN3880
MR WOODS: On behalf of Ports Australia, just to deal with this coverage question. When it arose in the initial consultations, we put forward a proposition that the port corporations or port authorities should be covered by one all encompassing award and that was the basis of a principal decision consistent with the overall principles of award modernisation. There has been obviously a lot of excitement today in respect of Gladstone. In terms of the approach on coal - - -

PN3881
JUSTICE GIUDICE: Do you call that excitement, Mr Woods?

PN3882
MR WOODS: Yes, perhaps I should get out more. There is, of course, another port authority that operates at another coal terminal on the other side of the coast in Fremantle at Kwinana and the principle that was put forward in the drafting of the Port Authorities Award and is then reflected in the exemption in the exposure draft is that the mixture of staff undertaking a variety of duties and therefore the common sense approach in terms of building an award structure that is sought to cover all of those employees and that's reflected also when we come to look at the Stevedoring Award in respect of the exemption that exists in that, so that was a principle in terms of approach that was undertaken and on our understanding the classifications, knowing that we've got coal loaders within the group of ports that are covered by Ports Australia and Gladstone is a member as is Fremantle and other activities, not only exporting coal, but exporting other material, that that is a structure which would provide appropriate conditions across all those employees, so on that principal basis, we support the maintenance of the existing exclusion in the exposure draft and to the extent that there is a tightening of the definition of a coal terminal for the purposes of that award, the further amendment put forward by the Coal Terminal Group.

PN3883
JUSTICE GIUDICE: Thank you.

PN3884
MR HERBERT: Your Honour, if I might with leave respond to something Vice President Lawler put to me, the instructions I have about the Wiggins Island situation is that it is by no means settled that Gladstone Port Corporation will be operating the Wiggins Island facility at all. The facility is being financed by coal companies, but there is still significant negotiations to be undertaken as to whether it will or it won't and I haven't seen any articles in any newspapers, but my instructions from the corporation are that it is not as yet settled in the least that it will operate the facility, but the recent economic downturn in relation to the coal industry in Queensland which is more significant than in other places in Australia because the coal is generally directed towards steel making has thrown whatever arrangements might have been thought of previously to be in frame are now far more doubtful and it may well be that Gladstone Port Corporation stays precisely where it is in terms of its current operations, despite the construction of Wiggins Island.

PN3885
VICE PRESIDENT LAWLER: Do you challenge the Port of Gladstone's website that identifies the Port of Gladstone's major cargo today as coal?

PN3886
MR HERBERT: No, no. We've asserted that in the submissions we've put forward. In volume terms that is certainly so, but there are 30 commodities that are exported through Gladstone. That is certainly the biggest, but as Ms Gray says, there are no employees whose sole occupation is devoted to coal. As she concedes, all employees - - -

PN3887
VICE PRESIDENT LAWLER: I think on the contrary, she said there was a significant group of workers who work exclusively on coal.

PN3888
MR HERBERT: She then qualified that by saying that every couple of months they go out and do something else and as her written submissions say with respect, your Honour, calcite she nominated as being the other commodity that that group is involved with, but that group comprises about a quarter of the workforce of Gladstone Port Corporation.

PN3889
VICE PRESIDENT LAWLER: But in any event, your arguments don't turn upon whether it is or isn't the major export group?

PN3890
MR HERBERT: No, no. That is beside the point on our submissions. One needs to characterise the corporation on an over-arching basis as to what it is and not go around counting the product or measuring the volume of the product. A downturn in the economic fortunes of coal, for example, could convert the Port Authority from one entity to another by that standard, whereas it would remain precisely what it is in respect of what commodities go through. A massive increase in another product, for example, that puts coal in the shade would change the equation yet again so that would be a very unruly horse as they say to hitch these matters to.

PN3891
JUSTICE GIUDICE: Yes, we will deal now with the Port Authorities Award so far as it hasn't already been dealt with. Yes, Ms Gray.

PN3892
MS GRAY: In respect to the amendment in the scope clause of the Coal Export Terminals Modern Award as adopted, then we see that there would be no necessity to make any change to the Port Authorities Award or scope because the remainder of the work other than the coal terminals work would continue to operate underneath it. May it please.

PN3893
JUSTICE GIUDICE: Yes, fine. Very well, Mr Harvey, are you about to do something?

PN3894
MR HARVEY: Yes. Can you hear us, your Honour?

PN3895
JUSTICE GIUDICE: Yes.

PN3896
MR HARVEY: Yes, your Honour, we did want to make a submission, well, the ASU did want to make a submission in regard to the Port Authorities Award, but also the Coal Export Terminals Award. You didn't appear to be able to hear us at the time.

PN3897
JUSTICE GIUDICE: There's a button in the middle of that device in front of you which has the effect of muting your microphone. I don't know whether you touched it or not.

PN3898
MR HARVEY: No, your Honour, I only touched it to take it off mute. Can your Honour hear me now?

PN3899
JUSTICE GIUDICE: Yes, I can hear you.

PN3900
MR HARVEY: Thank you, your Honour. Can I proceed?

PN3901
JUSTICE GIUDICE: By all means, yes, please proceed.

PN3902
MR HARVEY: Thank you, your Honour. Apologies for that and, your Honour, I can hear myself when I speak. Thank you, that's better, your Honour. Your Honour, with regard firstly to the Coal Exports Terminals, perhaps I can group this with the Port Authorities Award submissions. The ASU has filed written submissions with regard to both those matters and we thought the Full Bench had got it right with regard to the coverage as between the two awards. We noticed in the Commission's or the Full Bench's statement of 22 May when they decided to publish a Port Authorities Award, the Full Bench said:

PN3903
We have decided to publish a draft Port Authorities Award. Port authorities are usually government-owned bodies responsible for the overall administration of a port.

PN3904
That's how we see the characterisation of those activities, your Honour, and there are a number of underpinning Port Authorities Awards around the country and we thought that it was appropriate to have such a Port Authorities Award applying to those sorts of organisations. The ASU as I said has members employed by port authorities, including under the Queensland Port Authorities Award that Mr Herbert referred to earlier and that award as I am advised applies to our members who do work at the Gladstone Port Authority and our constant submission in these matters, including at the public consultations, is that our preference was for the modern Port Authorities Award to apply to the port of Gladstone, the Gladstone Port Authority, at least with regard to our membership and coverage areas.

PN3905
We are not concerned about the terms of the Coal Export Terminals Proposed Award because we have no employees who would be covered by that award because it doesn't cover white collar workers, so we haven't been involved in the combined unions' drafting process or negotiating process, because we simply have no membership or coverage areas involved in that, but that does raise the question, that's one of the reasons why we preferred the situation to have the Port Authorities Award apply to all port authorities of the type that I've described,

including, your Honours and Commissioner, the Gladstone Port Authority where our members work under the terms of a port authority now and if the Coal Export Terminals Award was to apply to the Port of Gladstone, one of the presumably unintended consequences of that as applies to us may be that the white collar professional employees would cease to have award coverage as a result which is certainly not a situation that we would prefer so we thought, your Honours and Commissioner, that the Full Bench had got the balance right between the coverage of the Port Authorities Award and the Coal Export Terminals Award in the coverage clauses they propose in both awards.

PN3906

The only other submission to make, your Honour, was we're talking about port authorities at the moment, we made some written submissions about the content of the proposed Port Authorities Award based on the provisions of the Queensland Port Authorities Award that Mr Herbert referred to, including pointing out that it had a substantially shorter ordinary hours of work of 36.35 I think it is as opposed to 38 in the modern award but nobody has dealt with those written submissions by way of any other written submissions or verbal submissions today so I won't repeat any of that, your Honour, but I draw the Bench's attention to it.

PN3907

Just finally, your Honours and Commissioner, at the every end of our submissions we filed with regard to these matters on 12 June at pages 9 to 11 we did refer there to the position of the shipping officers that I referred to this morning with regard to the Clerical Industry Shipping Officers Award. We referred to the situation that was likely to arise as a result of what had come out of the consultations and the exposure draft awards that had been published by the Full Bench and flagged particularly at paragraphs 36 to 40, flagged that issue clearly and what we thought ought to be done about that and that's what we've done yesterday and referred to this morning under the heading of Maritime Officers with regard to that.

PN3908

So at least, your Honour, I feel content that at least we flagged that to the Bench and also to other parties to these proceedings at the earliest possible opportunity with regard to that particular award, obviously not with regard to the specifics of what we proposed, but we did address that issue at the earliest possible opportunity. They're the submissions of the ASU this afternoon in this matter, your Honour.

PN3909

JUSTICE GIUDICE: Mr Harvey, as I understand what you've just said is simply repeated what's in your written submission.

PN3910

MR HARVEY: Only on the last point, your Honour, that is true, but your Honour questioned me about that this morning.

PN3911

JUSTICE GIUDICE: I mean generally.

PN3912

MR HARVEY: No, your Honour. I only wanted to comment in response to the debate that we've just had about whether Gladstone in particular should be in the

Port Authorities Award or effectively covered by the Coal Export Terminals Award and some of the material that I mentioned to that was material that I felt I needed to include only in response to comments that have been made in verbal submissions this afternoon. If the Commission pleases.

PN3913
JUSTICE GIUDICE: Yes. Any other submissions in relation to the Port Authorities Award? Mr McNally?

PN3914
MR MCNALLY: The Maritime Union and the institute have filed written submissions. We rely upon those. I was asked by Ms Angus on behalf of the AWU to indicate to the Commission that they support MUA AIMPE position in that dredgers should be excluded from the Port Authority Award and assigned to the Dredgers Award which is in stage 4.

PN3915
JUSTICE GIUDICE: Thank you, Mr McNally. No other submissions?

PN3916
MR WOODS: Your Honour, if I could respond to the Ports Award?

PN3917
JUSTICE GIUDICE: Yes, Mr Woods.

PN3918
MR WOODS: I just have a couple of submissions. Mr McNally had made a submission as in their reply in respect of some allowance questions to submissions that we had put in writing and the point was that if there was one port that had one of the allowances they should all appear. We have addressed why we have sought to have 14.2(c) and 14.3 excluded in our submissions. If there is a matter where there is a port that needs to have that continued then that can be addressed either through a transitional matter or through a take home pay order as anticipated if needed.

PN3919
In the APESMA's submissions there was a reference back to the Ports of Victoria Consolidated Award in respect of engineers. When you turn to the classification structure that we have put into the draft award and been delivered as part of the exposure draft by the Commission we see that there is a descriptor of types of duties and responsibilities and qualifications at the upper ranges of those classifications which actually satisfactorily addresses the points raised by APESMA in respect of engineers so that there's no need to otherwise vary that classification structure.

PN3920
In respect of the ASU's submission in respect of the Queensland Port Authority provisions, what we say in respect of the operation of that is that again if it's a matter that is peculiar to these relevant ports then it's a matter that could be addressed either through a transitional provision or through a take home pay order as the appropriate way of dealing with a particular state based provision. There is in respect of the Towings Awards we have identified in our submissions that having looked at that and for the two ports that operate towage operations, rather than incorporate all of the effective provisions into a class of employee because

they are unusual we sought to depart from that principle that we had identified in respect of the Ports Authorities Award having total coverage and I understand Mr McNally's clients support that proposition.

PN3921
That would probably require a minor change to clause 4.1 in the Port Authorities Award that has a total exclusion in respect of other modern awards to incorporate that and I make the point that the reason that we see the towage applying is simply rather than to replicate those very seagoing particular clauses that operate to those employees into the Port Authorities Award.

PN3922
The only other point was there are submissions at 2.1(b) of our written submissions that are about marine pilots and to the extent that there's a heading above that referring to superannuation that was incorrect. There should have been a heading in respect of the marine pilots' submissions we make in respect of their non inclusion in the award.

PN3923
JUSTICE GIUDICE: I don't quite follow that, Mr Woods.

PN3924
MR WOODS: Sorry?

PN3925
JUSTICE GIUDICE: I don't follow what you just said.

PN3926
MR WOODS: Right.

PN3927
JUSTICE GIUDICE: I'm looking at 2.1, superannuation, clause 18.5.

PN3928
MR WOODS: Yes, and 2.1(b) relates to marine pilots and there should have been a heading. It should have been numbered differently.

PN3929
JUSTICE GIUDICE: I follow, yes. Yes, thank you. All right. If there's nothing else on the Port Authorities Award we'll turn to the Stevedoring Industry Award.

PN3930
MS GRAY: Your Honour, I wonder if I might go first and then be excused because I have a very, very quick submission and that is - - -

PN3931
JUSTICE GIUDICE: You're confident that Mr Herbert isn't involved in this matter?

PN3932
MS GRAY: I don't care. We support the MUA's submissions in this respect and I appreciate the exclusion in respect to the Coal Export Terminals Award being proposed. But we do note that the reference to fuel oil in cargo may lead to some overlap between the Oil Refinery and Manufacturing Award which initially on its draft is only seeking to cover those terminal operations conducted by oil companies then Terminals Pty Ltd came along and sought an inclusion which was

agreed to by all parties subject to the Full Bench finding that acceptable. So we just say that it may be the cautious approach to also have an exclusion to the Oil Refining and Manufacturing Award 2010 and we note that if an oil terminal is not being operated by an oil producer or Terminals Pty Ltd then it may well be done by stevedoring employees, an employer would be covered appropriately by the Stevedoring Industry Award. May it please. If the Full Bench would - - -

PN3933
JUSTICE GIUDICE: Yes, certainly, Ms Gray. Mr McNally.

PN3934
MR MCNALLY: The MUA and the AIMPE have no difficulty with the exclusion of the awards referred to on behalf of the CFMEU. We have filed a written submission here in this matter dated 12 June and we rely on those written submissions. Mr Morris's client raises a difficulty in relation to expression of allowances in their written submissions - sorry, that's another matter. Thank you, your Honour.

PN3935
JUSTICE GIUDICE: Very well. Yes, other submissions in relation to the Stevedoring Industry Award, draft award? Very well, I think that leaves us with marine towage.

PN3936
MS C OPPY: Your Honour, I just had a very brief submission in relation to the Port Authorities Award but I don't think at the time you could hear me. Would it be appropriate for me to make that submission now?

PN3937
JUSTICE GIUDICE: Why don't you make whatever submission you wish to make in relation to any of these matters, Ms Oppy, and then provided it's not controversial you will be free to do something else.

PN3938
MS OPPY: Thank you, your Honour. Westscheme is seeking the inclusion of the named default superannuation fund in the Port Authorities Award. It was previously included as a default superannuation fund in the Marine Stores Award and on this basis it is submitted that it should be included as a default fund in the Port Authorities Award. Your Honour, that concludes my submissions and with your permission I will be departing the proceedings. Thank you very much.

PN3939
JUSTICE GIUDICE: Thank you, Ms Oppy. Yes, Mr McNally, you were saying?

PN3940
MR MCNALLY: We rely upon our written submissions. There were allowances in respect to multiple towing allowance, cooking allowance and added skill allowance expressed in the exposure draft on a per hour basis. We agree with Mr Morris's submissions that the multiple towage allowance should be expressed per day and the other two allowances expressed per week. If the Commission pleases.

PN3941
JUSTICE GIUDICE: Thank you, Mr McNally. Mr Morris.

PN3942
MR MORRIS: If the Commission pleases. We likewise rely on our 12 June submission in relation to this award and as Mr McNally says, we've drawn attention to an issue in respect of those tug and barge allowances in clause 16 which Mr McNally indicates is acceptable so that seems to be a matter on which we're totally agreed. We also accept the union's proposal in its submission to delete schedule A which lists classifications and the relevant clause, clause 13.1(b) that refers to schedule A. Mr McNally made submissions this morning in relation to Maritime Awards about this classification issue.

PN3943
We don't see a need to include classifications or definitions of classifications in this award. There's a master, an engineer and a rating. They're the classifications. Everyone knows what they are. They're not really capable of confusion and we have no further submissions to make. If the Commission pleases.

PN3944
JUSTICE GIUDICE: Thank you, Mr Morris. Any other submissions?

PN3945
MR MCNALLY: Can I draw the attention of the Full Bench to the fact that while we were here this morning there was promulgated regulations relevant to chapter 1, division 3, geographical application of the Act which regulations deals with the coverage of the Act in certain areas beyond the territorial sea and deals with the permit and licence situation.

PN3946
JUSTICE GIUDICE: I see. I think I gathered from this morning's exchanges, Mr McNally, that there are two potentially relevant developments, one being the regulations and the other being the foreshadowed amendment to the Request.

PN3947
MR MCNALLY: Ministerial direction, yes.

PN3948
JUSTICE GIUDICE: Thank you for bringing that to our attention. If there are no other submissions, Mr Harvey, you have been very quiet.

PN3949
MR HARVEY: No, we have no submissions with regard to this particular award, your Honour. Thank you.

PN3950
JUSTICE GIUDICE: Thank you. This court room is going to be used for a largely ceremonial purpose in the morning. If there is anybody here who was contemplating leaving anything in the court room to use tomorrow I would urge you not to and we will adjourn now until 11 o'clock tomorrow morning.

<ADJOURNED UNTIL WEDNESDAY, 1 JULY 2009 [3.50PM]

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 13

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation Statement (AM 2008/25-63)

[2009] AIRCFB 450

Giudice J, President, Lawler and Watson VPP, Watson, Harrison and Acton

SDPP, Smith C

22 May 2009

Awards — Award modernisation — Provisional determination of modern awards to apply within stage 3 industries and occupations — Publication of exposure drafts of stage 3 modern awards — Transitional provisions to be determined separately.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, which was subsequently varied. Following an initial statement and consultation, the Full Bench dealing with award modernisation published a decision in which, inter alia, it determined the industries and occupation to be the subject of the priority modern awards, and set an indicative timetable for the award modernisation process ((2008) 175 IR 120).

The Full Bench then determined the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published a more detailed timetable to apply to each of those stages ((2008) 177 IR 5). Subsequently, the Full Bench published the modern awards to apply in the priority industries and occupation ((2008) 177 IR 364), and in the stage 2 industries and occupations ([2009] AIRCFB 345; (2009) 181 IR 19).

This statement deals with the modern awards to apply in the stage 3 industries and occupations.

Held: (1) Consistent with the approach it had adopted in relation to the priority and stage 2 awards, the Full Bench decided to defer consideration of the transitional provisions to apply to the stage 3 awards until later in the award modernisation process.

(2) The Full Bench decided provisionally upon 50 awards to apply within the stage 3 industries and occupations. Exposure drafts of those awards were published with this statement.

(3) The Full Bench commented on why it proposed to make, or not make, various awards within the stage 3 industries and occupations. In some instances

comments were also made on the reasons for adopting or rejecting, on a provisional basis, award clauses proposed by interested parties. Further submissions were requested on specified matters.

Cases Cited

Award Modernisation, Re (2009) 181 IR 19.

Employment and Workplace Relations, Re Request from Minister for — 28 March 2008 ([2009] AIRCFB 50) (2009) 180 IR 124.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 1000) (2008) 177 IR 364.

Employment and Workplace Relations — Award Modernisation, Re Minister for (2008) 177 IR 8.

Redundancy Case (2004) 129 IR 155.

Redundancy Case — Supplementary Decision, Re (2004) 134 IR 57.

Cur adv vult

The Commission

Introduction

1 This statement deals with award modernisation and in particular the exposure drafts for Stage 3. The statement should be read in conjunction with earlier statements and decisions but particularly the decisions relating to the making of the priority modern awards and the Stage 2 modern awards made on 19 December 2008 and 3 April 2009 respectively.[1]

2 Stage 3 is by far the largest stage in award modernisation. It covers some 39 industries and occupations. We publish with this statement 50 draft awards. Proposals, submissions and other material in relation to the draft awards are to be lodged with the Commission by 12 June 2009. Material can be lodged by post, fax or email and all material lodged will be made available through the internet as soon as practicable. The Full Bench will sit to conduct consultations in relation to the Stage 3 awards for two full weeks between 22 June and 3 July 2009. In the week of 22 June the consultations will be in Melbourne. In the week of 29 June the consultations will be in Sydney. The primary method of dealing with the exposure drafts is by interested parties lodging their views in writing. The consultations are only intended to give parties an opportunity to respond to matters raised by others and not to restate or summarise the material already lodged. We reiterate the view, expressed in a number of statements and decisions, that parties should adhere to the timetable for lodgement. If they do not they run the risk that their contributions will be received too late to be given proper consideration by other parties or by the Commission. Before dealing with the individual exposure drafts there are some matters of general relevance which should be mentioned.

3 First we think that it is important to reiterate the way in which the modernisation process operates and the purpose of the exposure drafts. Award modernisation is carried out by the Commission subject to the terms of Pt XA of the *Workplace Relations Act 1996* (Cth) (the Act) and in accordance with a request from the Minister for Employment and Workplace Relations (the

1 *Re Request from the Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364; [2008] AIRCFB 1000 and *Re Award Modernisation* [2009] AIRCFB 345; (2009) 181 IR 19.

Minister). The request has been varied by subsequent amendments on two occasions. The first occasion was on 19 December 2008. The second occasion was on 2 May 2009. We refer to the request as varied as the consolidated request. The process requires the making of a comprehensive set of modern awards by 31 December 2009. The procedure is now reasonably well established. It primarily involves the lodgement of proposals, submissions and other material by interested parties, pre-drafting consultations, publication of exposure drafts by the Commission, lodgement of proposals submissions and other material in relation to the drafts by the parties, further consultations and, finally, publication of the modern awards by the Commission. While the publication of exposure drafts is a critical step in the process, the drafts reflect a provisional view only and changes can and will be made on the basis of the material advanced by the parties. In some cases the drafts may be incomplete because the Commission has not had sufficient information to form even a provisional view in relation to a particular matter.

4 The modern awards are not to contain State or Territory based differences although there is provision for such differences for a transitional period of five years. We have previously decided that in relation to the first two Stages of award modernisation we would consider whether any transitional provisions were necessary after the modern awards had been made. The published award modernisation timetable makes provision for that process. We have also decided to defer consideration of transitional provisions in the Stage 3 awards. At the time of publication of the Stage 3 awards, scheduled for 4 September 2009, we shall also publish a timetable for submissions and further consultation dealing with the nature of any transitional provisions required in light of the provisions of each modern award as a whole.

5 We have taken the recent variation to the consolidated request into account in formulating the Stage 3 exposure drafts published with this statement. That variation dealt with principles of equal remuneration, award exemption clauses, individual flexibility terms, industry specific considerations, supplementation of the National Employment Standards (NES), franchisee awards and pieceworker base rates of pay. The President of the Commission was notified of the variation by letter from the Minister dated 7 May 2009. That letter, as well as the consolidated request, has been published on the Commission's website. We have not yet had the benefit of any input from the parties concerning the impact of the variation on the terms of the Stage 3 awards. We shall of course take any comments into account in finalising those awards. There is, however, one matter of importance which requires attention in connection with a number of Stage 3 awards. That matter concerns piecework and in particular the calculation of pay for pieceworkers during paid leave provided for in the NES, including annual leave.

6 We note that while a number of pre-reform awards and Notional Agreements Preserving State Awards (NAPSAs) provide for piecework it is rare that the conditions of pieceworkers are not based in one respect or another on time. Typically piecework rates are based in some way on the quantity which could be produced by an average employee. This is in many cases subject to a minimum payment contained in a stipulation that the weekly remuneration of a pieceworker cannot fall below a particular amount fixed as a percentage above the ordinary pay for the relevant classification. It may be that an employee working under such provisions should be treated as a timeworker for the

purpose of calculating pay while on leave. We also note that many pre-reform awards and NAPSAs do not exclude pieceworkers from the requirements governing ordinary hours of work. In those cases the view might be taken that any piecework should be dealt with by overaward arrangements. Among the industries in which these issues arise in Stage 3 are the wine industry and the timber industry. Where, on the other hand, there is provision for the establishment of a piecework rate but no provision for a minimum payment based on timework or for the application of ordinary hours, an averaging approach may be appropriate in calculating paid leave. Another possibility is to include a component in the piecework rate which is referable to paid leave. There may be other alternatives. We do not think these matters have as yet been adequately discussed. The variation to the consolidated request emphasises the need for such discussion, which should also take into account the relevant provisions of the Act, including the provisions in Divs 2 and 4 of Pt 7, the terms of the NES and the relevant terms of the consolidated request.

7 Another more general issue arises in connection with the recent variation to the consolidated request. It is likely that the variation will have some significance in relation to modern awards made in the priority stage and in Stage 2. We do not intend, however, to initiate a review of those awards as that course would lead to considerable delay in completing modernisation. A party covered by a modern award who wishes to challenge terms in that award based on the variation to the consolidated request should make an appropriate application.

8 In considering provisions related to the contract of employment and types of employment we do not feel that it is appropriate to include provisions providing expressly for probationary, fixed term or seasonal employment in modern awards unless there is a particular reason for doing so. Provided nothing in the award prohibits probationary, fixed term or seasonal employment, they are matters which parties can agree on at the commencement of employment. We do not see any general need for award regulation of those matters. Nor do we think it is appropriate to include requirements that employees work to a particular level of skill or competence or in a particular general fashion. Such requirements simply add to the amount of regulation. While they may have had historical importance, in most cases they no longer serve any useful purpose.

9 We again draw to parties' attention the need in a number of industries to update and rationalise allowances. Many allowances in pre-reform awards and NAPSAs are inappropriate for inclusion in a modern award because they apply only to one establishment or in one State or Territory. Others may be of uncertain application, excessively detailed, difficult to apply, of little monetary value or simply obsolete. We urge parties to give further consideration to this issue in relation to the Stage 3 awards.

10 Finally we note that there are a large number of references to legislation, the NES and other matters in the exposure drafts which will require alteration before the awards are finalised. We have not thought it appropriate to anticipate the passage of transitional and consequential legislation. It is prudent to wait until all of the legislative changes are known so that all necessary changes can be made at the same time.

11 We turn now to the Stage 3 exposure drafts. We shall deal with them according to the industry or occupation to which they are relevant. An alphabetical list of the drafts is in Attachment A.

Comments on Stage 3 Exposure Drafts

Airline operations

12 Airline operations in Australia include the operations of international carriers, domestic and regional aircraft, aircraft used for agricultural and other specialty purposes, passenger and freight transport, fixed wing aircraft and helicopters. A large number of awards apply to parts of the industry, different occupational groups and some of the larger enterprises.

13 Because air pilots are a discrete type of employment it is not convenient to combine terms and conditions with those applying to other categories of employment under one award. The parties to existing awards have been involved in extensive consultations on the terms of a single award for pilots. Although there are complexities arising from differences between different types of operations the parties have made significant progress in rationalising provisions within the limits of practicality. We have revised the award in an effort to reduce those complexities further, and publish an exposure draft of the Air Pilots Award 2010 for comment. It is drafted as an occupational award for pilots employed in all industries except in the very limited situation where an industry award contains classifications for pilots.

14 Cabin crew are engaged in a more limited range of operations but the nature of their employment also does not lend itself to common regulation with any other type of airline industry employee. The rationalisation of international, domestic and regional terms and conditions has been possible to a large extent, although certain differences are proposed to be maintained. Any potential for further rationalisation should be addressed by the parties in their comments on the exposure draft. It is desirable that there is greater uniformity in the safety net for cabin crew. We publish an exposure draft of an Aircraft Cabin Crew Award 2010. It applies within the airline industry to cabin crew classifications.

15 There was not full agreement on the structure of awards to apply to ground staff. The Transport Workers Union (TWU) favours the separation of transport workers into a separate award. Australian Industry Group (AiGroup) proposes coverage of engineering employees by the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Modern Award).[2] Other parties generally support a significant degree of aggregation of ground staff work groups. We have prepared a draft award covering all employees within the specified classifications in transport, clerical, maintenance and stores streams where the employer is involved in either operating aircraft or performing ancillary on-airport servicing of aircraft. The Airline Operations-Ground Staff Award 2010 is drafted to apply to the exclusion of other awards. Maintenance conducted away from an airport would remain covered by the Manufacturing Modern Award.

16 We have sought to adopt classifications currently applicable in the airline industry for transport workers, clerical, maintenance and stores employees and applied rates that we believe reflect properly fixed minimum rates for the classifications involved. We have included an eight level structure for each of the transport, clerical and maintenance streams and a five level structure for the stores and logistics streams. Obviously in an exercise such as this there is a balance to be struck in formulating classifications and rates because of the significant differences that exist between the current instruments.

2 MA000010.

Airport operations (other than retail)

17 We publish a draft Airport Employees Award 2010. Airport operations involve the operation of infrastructure at airports so as to allow airlines to conduct their operations. Airports vary in their size and nature. Generally, however, relevant award covered employees fall into the categories of clerical and administration employees, technical employees and ground operations staff.

18 An existing federal award applies to most airports. It had its origins in an award which applied to the Federal Airports Corporation when that body operated most airports on behalf of the Commonwealth. Most airports have now been privatised and the level of prescription in the existing award is not appropriate for private sector infrastructure operations of the type now covered. We have endeavoured to simplify and shorten the award. We have had regard to the draft award proposed by the unions who are party to the current award. The input from employers has been limited. We would be greatly assisted by comments from all affected parties on the draft. Further simplification of the award will make it simpler to understand and apply.

Aluminium industry

19 There are no general awards which apply in the aluminium industry. In this industry award regulation is in the main by way of enterprise awards. There is one NAPSA that covers one operation (although we were told that the terms and conditions at that operation were regulated by a workplace agreement). Nevertheless, there is a general consensus among the parties that participated in the consultations that a modern award should be made for the aluminium industry. There were no submissions vigorously opposing such a course. We have decided that it is appropriate, in the circumstances, to make a modern award for the aluminium industry. We publish a draft Aluminium Industry Award 2010.

20 There is considerable consensus amongst the parties as to the coverage of a modern award for the aluminium industry. In general terms, we have decided that the modern award should cover bauxite operations and all processing, refining, smelting, casting and rolling operations performed in connection with the treatment of bauxite, alumina, aluminium or any of their derivatives. The industry should include power and steam generation and material handling at a port, provided the power/steam generation and materials handling (in whole or in part) are directly related to the bauxite/alumina/aluminium operations or activities described earlier. The award should not cover manufacturing operations covered by the Manufacturing Modern Award. Maintenance and electrical contracting employers will only be covered by the award in respect of embedded employees.

21 There was considerable debate between the parties as to the appropriate approach to be taken to drafting a modern award for this industry. The employers proposed that the Commission ought to adopt the *Mining Industry Award 2010*[3] as the basic template for the making of a modern award in the aluminium industry. On the other hand, The Australian Workers' Union (AWU) contended that where industry standards can be established across the enterprise awards the Commission ought to include those standards in the modern award.

22 At this stage we have decided not to adopt the AWU approach or the employers' approach. We think it is appropriate to consider each of the clauses

3 MA000011.

that might be included in the aluminium industry award without being limited to what appears in one particular modern award. That is not to say that the *Mining Industry Award 2010*[4] or various parts of it are not relevant. As a general approach we have adopted a number of the standards contained in various awards that have been modernised.

23 We are in the position that there are no widely established award wage rates or allowances in this industry upon which we can rely. At this stage, the parties have not agreed on classifications and wage rates. We have included classifications and wage rates in the exposure draft based generally on those proposed by the employers. We are not wedded in any way to either the detail of each classification and/or its attendant wage rate and allowances. These matters will be revisited in light of the consultations.

Arts administration

24 There will be no modern award for arts administration. Any relevant awards are dealt with in the entertainment and broadcasting industry.

Cement and concrete products (including asphalt and bitumen industry)

25 We publish a draft Premixed Concrete Award 2010. An issue arose in the consultations concerning a potential overlap between the premixed concrete industry and the on-site building, engineering and civil construction industry, covered by the *Building and Construction General On-site Award 2010*.[5] It appears that premixed concrete batch plants are predominantly operated by employers in the premixed concrete industry, servicing customers in a variety of industries including the on-site building, engineering and civil construction industry. There are, however, some employers in the on-site building, engineering and civil construction industry who have purchased and operate their own plant, principally in relation to road-making. We think that batch plant operators and associated premixed concrete classifications should fall within the coverage of the modern award covering the employer - the Premixed Concrete Award 2010 in the case of employers within that industry and the *Building and Construction General On-site Award 2010* in relation to employers in that industry. The industry of the employer should determine the coverage. As a result, we have included in the coverage clause of the premixed concrete industry exposure draft an exclusion in relation to employers and their employees in the on-site building, engineering and civil construction industry, covered by the *Building and Construction General On-site Award 2010*. We propose to vary that award to add, in clause 4.2, an exclusion in relation to the Premixed Concrete Award 2010 when that award is made.

26 The exposure draft is based on the drafts submitted by the Boral Group (Boral) on 6 March and 15 May 2009, which were amended after discussions with the AWU. Having regard to the *Concrete Batching Plants Award 1999*,[6] we have:

- updated the minimum wage rates to incorporate Australian Fair Pay Commission increases up to and including the 2008 increase; and

4 MA000011.

5 MA000020.

6 AP772226CRV.

- included a casual conversion provision to the effect of that within the *Concrete Batching Plants Award 1999*, but in the simplified form contained in the AWU draft.

27 We have included standard supported wage system and national training wage schedules to the exposure draft and edited the classification descriptors in Schedule A.

28 We have also adjusted the level of various allowances in the Boral draft:

- the meal allowance from $11.00, to $11.85 reflecting clause 19.11 of the *Concrete Batching Plants Award 1999*;
- the disability allowance has been calculated at 3.1% of the standard rate; and
- the first aid allowance has been calculated at 1.95% of the standard rate.

29 Applying our general approach, we have not included provision for redundancy benefits for employees of businesses employing fewer than 15 employees.[7] On our understanding, relevant current instruments, including the *Concrete Batching Plants Award 1999*, provided for a small business exemption prior to the *Redundancy Case* 2004.[8]

30 We have not adopted the AWU proposal to include State based allowances on a transitional basis. Such proposals will be considered when addressing transitional provisions in the award.

31 We also publish a draft Cement and Lime Award 2010. We considered whether to incorporate the cement and lime industry within the *Quarrying Award 2010*,[9] or to make a separate award for the cement and lime industry, based on the drafts filed by Boral.

32 We decided to publish a separate exposure draft for the industry but invite comment on both options in the exposure draft consultations, having regard to the broader range of classifications within the current cement and lime industry awards and NAPSAs. In respect of the possible incorporation of the cement and lime industry into the *Quarrying Award 2010*, we are particularly interested in the views of the parties as to any additional classifications required to cover the scope of cement and lime industry work and/or additional conditions needed for the cement and lime industry.

33 We have included the classification structure and rates proposed by Boral in its 15 May draft. Given the variety of minimum wage structures and rates in current awards and NAPSAs in the industry, the absence of any wage rates or classifications in Boral's March draft and the extremely late filing of Boral's later draft, the publication of the structure and rates in the exposure draft will provide all interested parties with an opportunity to consider and comment upon them. This might include consideration against other structures and minimum rates for similar classifications in the exposure drafts for other sectors of the industry and those in the *Quarrying Award 2010*.

34 The Boral draft included an industry disability allowance of 7.5% of the standard rate (or $46.40) in place of a range of specific, as incurred, disabilities

7 See *Re Request from the Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364 at [60].

8 *Redundancy Case* (2004) 129 IR 155 and *Re Redundancy Case — Supplementary Decision* (2004) 134 IR 57.

9 MA000037.

found, for example, in Table 2 of the *Cement Industry (State) Consolidated Award (NSW)*.[10] For the purposes of the exposure draft, and subject to further submissions, we have adopted the Boral approach. The exposure draft also contains a number of separate allowances, such as leading hand, first aid, private vehicle usage and protective clothing.

35 We publish an exposure draft of an Asphalt Industry Award 2010 based on the Boral drafts of 12 March and 15 May 2009, with some amendment.

36 Whilst we have included road-making in the definition of the asphalt and bitumen industry, as proposed by Boral, it is possible that the term is too broad in its reach, covering activities associated with road-making beyond the asphalt and bitumen industry. We note that the AWU draft award of 6 March does not include road-making in the definition and that some federal awards do and others do not. We invite comment.

37 We have inserted the casual conversion clause in the terms of the *Asphalt and Bitumen Industry (Southern States) Award, 1999*[11] in the simplified form proposed by the AWU in its draft of 6 March 2009. We have not included a probation provision. That matter is better left to the contract of employment. We have removed the redundancy provision for employers with fewer than 15 employees, on the understanding that it was not an entitlement in the various federal awards in the industry prior to the *Redundancy Case* Decision[12] and the *Re Redundancy Case — Supplementary Decision*.[13]

38 We have included the classification structure and minimum classification rates from the 15 May Boral draft, which are based on the *Asphalt and Bitumen Industry (Southern States) Award, 1999* rates updated to reflect Australian Fair Pay Commission increases.

39 We have expressed expense-related allowances as dollar amounts, where they appear as percentages of the standard rate in the Boral draft, and added such allowances to the provision setting out the basis of adjusting such allowances. State-based allowances, such as the job location allowance for the Australian Capital Territory, have not been included in the exposure draft and will be further considered in the context of transitional provisions, if necessary.

40 No superannuation clause has been included in the exposure draft on the basis that none of the current Federal awards or the New South Wales NAPSA contains a superannuation provision.

41 We publish an exposure draft of a Concrete Products Award 2010. It is based on the Boral draft filed on 12 March 2009 and we have also had regard to the draft filed by the AWU on 6 March 2009.

42 We have removed the redundancy provision for employers with fewer than 15 employees, on the understanding that it was not a feature of the award prior to the *Redundancy Case* Decision and the *Redundancy Case — Supplementary Decision*.

43 We have replaced the Western Australian district allowance provision and the accident pay provisions with the transitional provisions inserted in other modern awards on the basis that these current benefits apply only in some States.

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10 AN120109.

11 AP766012CRV.

12 *Redundancy Case* (2004) 129 IR 155.

13 *Re Redundancy Case — Supplementary Decision* (2004) 134 IR 57.

44 A number of expense-related allowances, expressed as a percentage of the standard rate in the Boral draft, have been replaced with dollar amounts.

45 We have made some changes to the Boral draft in respect of annual leave, to reflect existing provisions of the *Cement and Concrete Products Award 2000*.[14]

46 At this stage we propose to add fibre cement products to the definition of manufacturing and associated industries and occupations in the Manufacturing Modern Award.

Cemetery operations

47 We publish an exposure draft of a Cemetery Industry Award 2010. There is no principal federal award in this industry, rather there are a number of common rule NAPSAs containing disparate classifications and wage rates.

48 Australian Federation of Employers and Industries (AFEI) and the AWU have submitted drafts neither of which addressed properly fixed minimum rates. The *Cemetery Employees Award 2003*,[15] which the AWU relied upon, contains a base rate plus a skill increment ranging from $29 to $58 plus a disability allowance of $24.18 to arrive at the total minimum rate.

49 We have included a six level minimum wages structure and an industry allowance of 3.8%. At this stage we see no room for the application of incremental payments.

Coal treatment industry

50 At present coal treatment in Australia consists of processing done at wash plants, coke works and in the production of briquettes from brown coal for burning in coal-fired power stations. All existing wash plants are integrated into black coal mining operations and are covered by the *Black Coal Mining Industry Award 2010*.[16] All briquette production occurs in conjunction with the mining of brown coal for use in electrical power generation and will be covered by the proposed Electrical Power Award 2010. The only operative coke works in Australia is the Bowen coke works and it is covered by an enterprise NAPSA which is excluded from the award modernisation process. The Illawarra Coke Company has two coke works on the New South Wales South Coast. Both of those plants were closed earlier this year. In summary, it appears that there is no coke works or other coal treatment operation in Australia that would be covered by a coal treatment industry modern award and that such an award would cover new entrants only.

51 In all the circumstances we are inclined to deal with this residual area by extending the scope of the Manufacturing Modern Award to include coal treatment not covered by another modern award. Parties who oppose such a course and who wish to argue for the creation of a coal treatment industry modern award should make a submission in support of that position. In the event that we are dissuaded from our provisional view that there should be no separate modern award for the coal treatment industry we will issue an exposure draft of such award as part of Stage 4.

Defence support

52 There is no exposure draft for defence support. The comparative schedules produced by the Registry indicate that the work undertaken is largely regulated

14 AP772057CRV.

15 AP822505CRV.

16 MA000001.

by pre-reform enterprise awards. The one exception is a Queensland NAPSA, the *Ground Staff — Defence Force Contractors Award — Southern Division 2004*.[17] The pre-reform enterprise awards that exist are small in number and there are very few respondent employers. The Liquor, Hospitality and Miscellaneous Union (LHMU) filed a draft award which was based on the *Australian Liquor, Hospitality and Miscellaneous Workers Union (Defence Contracting) Award 2002*[18] (the Defence Contracting award). That award is binding on two related corporate employers. The scope of the Defence Contracting award, and in turn that reflected in the LHMU draft, relates to work performed by employers and employees under contracts with the Department of Defence. The types of contracts the LHMU had an interest in related to garrison support services and comprehensive maintenance services.

53 Our provisional view is that it is not appropriate to make a modern award which covers solely the provision of services under contract to one client. The predominance of enterprise awards and the small number of employers operating in this industry also indicates that no award is necessary. Employees performing work under contracts with the Department of Defence will be covered by modern awards already made and in that respect we note the submissions of the LHMU that the work is largely covered by the *Hospitality Industry (General) Award 2010* (Hospitality Modern Award),[19] the *Security Services Industry Award 2010*[20] and the *Cleaning Services Award 2010*.[21]

Educational services (other than Higher education)

54 The educational services sector, excluding the universities, covers a wide range of institutions and occupations. These include teachers in a preschool setting and organisations which offer non-accredited courses to adults through community based teaching and instruction. We do not consider it appropriate to attempt to encompass all of these operations in one industry-wide award and indeed none of the submissions received suggested that this was possible. We publish the following exposure drafts:

- Educational Services (Teachers) Award 2010
- Educational Services (Post-Secondary Education) Award 2010
- Educational Services (Schools) General Staff Award 2010

55 The Commission received a number of submissions concerning the appropriate award coverage for preschool teachers. Some of these submissions argued that preschool and early childhood teachers should be covered by a children's services industry award and that consideration of this should be deferred to Stage 4 when consultation concerning the childcare industry will occur. On the other hand, a number of submissions argued that preschool teachers should be covered by an education industry award.

56 Currently classifications for preschool teachers can be found in teachers' awards, preschool teachers' awards and in awards covering other children's services. A person with a degree in early childhood education can teach in either a dedicated preschool, a childcare centre, or in a school, including in the lower primary grades.

17 AN140138.

18 AP818225.

19 MA000009.

20 MA000016.

21 MA000022.

57 We have decided, at this stage, to include preschool teachers working in services operated by a school in the draft Educational Services (Teachers) Award 2010. We will defer for further consideration, in Stage 4, the question of award coverage for preschool teachers working in preschools, kindergartens and childcare centres. Our decision to do so should not be taken as indicating that we have formed a final view in relation to award coverage for those teachers.

58 We received a number of submissions concerning award coverage for schools including whether there should be separate coverage based on who operated the school in question. Our preliminary view is that we should not relate award coverage to the faith or religion of the school. We have, however, considered it appropriate to produce separate draft awards for teachers and for non-teaching staff. For the most part this is the model which has prevailed in the industry and is consistent with the approach we have taken in higher education, with respect to academic and non-academic staff. The nature of the employment of teachers has particular features which differentiate teachers from other employees.

59 Traditionally teachers' awards have not regulated ordinary hours of work. This has reflected the nature of the flexibility in working arrangements whereby teachers work unregulated hours during term time and to a large degree are able to be absent from the workplace during school holiday periods. The approach we have taken in the exposure draft is to provide for hours of work to be averaged over a period of one school year with a cap on the number of days on which a teacher can be required to attend the workplace. The corollary to this in the exposure draft applying to non-teaching staff is a provision providing the option for staff to be on leave without pay during non-term time and for their wages to be averaged over the school year. There are some other arrangements existing in the industry but due to their limited coverage they are not reflected in the exposure draft.

60 The draft award for general staff in schools contains a clause, which is reasonably standard, and which requires that at the time of engagement the employer and a part-time employee must agree in writing to the hours and pattern of hours to be worked. Once agreed this can only be varied by agreement. These type of clauses are not typical of teachers awards, particularly with regard to variation of hours. We invite submissions on whether a modern award for teachers should contain such provisions.

61 Coverage of non-teaching staff in schools has been sporadic and no existing award covers all of the types of employment which may exist in a school. In developing the exposure draft we have taken into account minimum rates and classification descriptions for similar classifications in other modern awards, the need for appropriate relativities between teachers and non-teaching staff and other matters dealt with in submissions. The classification structure in the draft award contains some very detailed lists of typical duties. We are of the view that these could be rationalised and invite submissions on how this might be done.

62 The range of organisations offering education and instruction to adults in post-secondary education is extremely diverse. At one end of that spectrum are institutions which offer degree level education but which are not universities and at the other community organisations offering unaccredited training. Award coverage in this sector is limited. The exposure draft has been developed on the basis of three teaching streams: academic teachers, who are equivalent to university teachers, teachers who are qualified to teach in institutions such as English language schools and tutor/instructors, who may have no teaching

qualifications but possess expertise which qualifies them to instruct students in a particular subject. The draft also includes classifications and minimum wages for non-teaching staff based on other modern awards providing for similar classifications and taking internal relativities into account.

63 Awards in this sector also cover employees of university unions, student unions and university controlled entities. When the higher education awards were created in the priority stage of award modernisation we did not deal with the coverage of these areas but provided for them to be considered in this stage.

64 We have decided that coverage of university unions and student unions can most appropriately be dealt with by amendment to the *Higher Education Industry-General Staff-Award 2010*[22] rather than by the creation of an award specific to those organisations. In relation to non-teaching staff in university controlled entities generally, some may be covered by the draft Educational Services (Post-Secondary Education) Award 2010. Others will be covered by a classification in another industry award or in an occupational award.

65 We have not considered it to be necessary at this stage to make any provision for the matters covered by the *Australian Higher Education Practice Teaching Supervision Award 1990*.[23]

Electrical power industry

66 We publish a draft Electrical Power Award 2010. The preparation of a modern award for the electrical power industry is attended by particular difficulties in terms of establishing a single set of terms and conditions to operate uniformly throughout the States and Territories. There are few federal awards and these are mostly enterprise awards. There are only two pre-reform awards that have a significant general application: the *Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998*[24] (QuadE award) which has a practical operation confined to Victoria and the *South Australian Power Industry Award 2002*[25] which applies to various employers in South Australia. A third federal award, the *Victorian Electricity Industry (Mining & Energy Workers) Award 1998*[26] applies to several large employers in Victoria. There is one industry NAPSA in Queensland, otherwise award regulation at the State level is essentially confined to enterprise NAPSAs. The classification structures, rates of pay, allowances and others terms and conditions of employment in the various awards and NAPSAs vary greatly. We note that all or almost all employees in the industry are covered by enterprise agreements. These agreements generally provide for significantly better terms and conditions than the relevant awards and NAPSAs.

67 The coverage clause included in the exposure draft does not include the level of detail proposed by the combined unions in their draft. We think that level of detail (eg. the exhaustive listing of various generation technologies and fuel sources) is unnecessary. At this stage we consider that the form of words we have adopted is sufficient to cover employers who would be commonly understood as being in the electrical power industry.

68 Our provisional view is that embedded employees of electrical and

22 MA000007.

23 AP765754.

24 AP793302.

25 AP814328.

26 AP802098.

maintenance contractors and providers of temporary labour services should be covered by the award and the draft makes provision for coverage of those employers in relation to such employees. One issue was the extent to which the award should cover construction work. The coverage clause does not expressly address this issue. However, construction work undertaken by employees of employers who are otherwise within the industry (eg. powerline construction by a network operator) would be caught by the coverage clause in the draft award.

69 We favour a classification structure of the sort found in the QuadE award. For the purposes of the exposure draft we have adopted the classification descriptions proposed by the national employer group. However, we are not satisfied that these descriptions are adequate. The classification descriptions, including the lists of indicative roles, will need to be revised after further consultation with the parties. Moreover, while we think that a multi-stream classification structure is appropriate, we are not wedded to the streams contained in the QuadE award. For example, it may be better to dispense with a supervisory stream and include supervisory classifications in the other streams and/or include leading hand/supervisory allowances.

70 While the combined unions and the national employer group proposed very different classification structures the overall range of rates of pay within those classification structures was almost identical. At this stage we have adopted the range proposed by the employers in their penultimate draft with a minor adjustment to ensure that the standard rate is set at the C10 level.

71 In relation to allowances, we note that the combined unions proposed a very lengthy and prescriptive set of allowances. There is substance in some of the criticisms of the unions' proposals made by the national employer group. At this stage we have included allowances as proposed by the national employer group. However, we are far from persuaded that those allowances are sufficiently extensive or otherwise adequate in terms of specification and rates. Allowances will be revised in light of the consultations.

Entertainment and broadcasting industry (other than Racing)

72 We publish exposure drafts of the following awards:

- Sporting Organisations Award 2010
- Amusement, Events and Recreation Award 2010
- Live Performance Award 2010
- Broadcasting and Recorded Entertainment Award 2010

73 The exposure draft of the Sporting Organisations Award 2010 is based on the terms of the pre-reform award applying in the area — the *National and State Sporting Organisations Award 2001*.[27] The draft covers only coaching, clerical and administrative classifications employed by national and state level sporting organisations. Some greater precision in the coverage clause may be desirable. Provision for fixed term coaching contracts is unnecessary and has not been included. The terms of the existing award have been modified in an attempt to accommodate the requirements of the NES. We refer in particular to the provisions of the draft which deal with extra annual leave for coaches. We assume that the provisions constitute supplementation of the NES and compensate for the lack of weekend penalties. Submissions are sought on whether such a provision is consistent with the NES.

27 AP811193CRA.

74 The implementation of the standard 25% casual loading will have a cost impact which may need to be considered when the Commission deals with transitional provisions for Stage 3 awards.

75 The exposure draft of the Amusement, Events and Recreation Award 2010 is based to a large extent on the terms of the *AWU Theme Park and Amusement Award 2001*[28] but also incorporates many proposals advanced by the Media Entertainment and Arts Alliance (MEAA). Live Performance Australia (LPA) filed a very late draft exhibition industry award for which there has been inadequate time to properly consider.

76 The classification structure brings together the classifications in a number of pre-reform awards. The classification descriptions require further refinement so that the duties and skills of each level are summarised and the excessive detail is eliminated. The number of allowances will require review. Those proposing that the number of allowances should be increased will need to advance a case based on the maintenance of the safety net.

77 The exposure draft of the Live Performance Award 2010 is largely based on a draft provided by LPA. It is intended that the award should cover the area presently covered by around one dozen pre-reform awards and NAPSAs. In that context, there may be a need for transitional arrangements in some areas. In many respects the draft simply places all of the standard provisions in one document. The definition of the live performance industry, central to the coverage of the award, will be subject to further review in light of the views expressed during the consultations. While there has been an attempt to standardise some of the general provisions, there is a further need for rationalisation, particularly in relation to the wide range of allowances, many of which are of uncertain relevance and some are quite small. The draft public holiday clause, with different provisions for various classifications, is another area where rationalisation and standardisation is necessary. A number of obsolete award provisions have not been included.

78 In relation to actors specifically, we will require further input in relation to the award regulation of their engagement and their ordinary hours of work. We refer to the provision permitting 48 hours work in the week prior to a performance and note also that there is no provision for averaging of ordinary hours generally. Similar issues may arise in relation to dancers. We have included the hours provisions from the relevant pre-reform award for orchestral musicians but we query how they relate to the NES. Provisions dealing with Codes of Practice and standard contracts have not been included. We take the view, at this stage at least, that they do not deal with modern award matters and are not appropriate for inclusion.

79 While we have provided for engagement for the run of the show, we have not made provision for fixed term employment because, as explained earlier in our introduction to this statement, provided such arrangements are not prohibited they are a matter of contract.

80 Finally we note that the part of the exposure draft dealing with striptease artists does not include minimum wages for the two classifications specified. Nor does the relevant pre-reform award. An award which does not contain wage rates would not normally constitute a safety net and we would be reluctant to make such an award.

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28 AP817297.

81 The draft of the Broadcasting and Recorded Entertainment Award 2010 attempts to bring together a wide range of occupations covered by many pre-reform awards and NAPSAs. The draft covers the television, commercial radio, motion picture production, film and television distribution and cinema industries. It contains some separate conditions for journalists, actors and musicians involved in those industries.

82 There is a common salary structure, based on an MEAA proposal but with actors included, which covers all employees except journalists and musicians. The separate classification structure for journalists is based on the one currently applying to radio journalists. Parties are urged to give attention to those structures and identify improvements that can be made. In relation to actors we have not included the separate hourly, daily and weekly rates proposed from the *Actors Feature Film Award 2002*[29] and the *Actors Television Programs Award 2001*[30] as we are unsure of the basis for them. They have apparently not been adjusted for some years. Similar issues arise in relation to musicians' rates. We shall require the parties' assistance to establish the appropriate rates.

83 We have attempted to arrive at safety net wages and provisions and have avoided references to negotiated fees and personal margins. We have not included standard contracts for reasons expressed above in relation to the live performance exposure draft. Equally we have not sought to regulate other matters which are peripheral such as repeat fees and residuals and we have not replicated some award provisions related to Australian content.

84 There are a range of other matters which will need to be considered before the award can be finalised. We note in particular that many of the provisions around engagement, allowances and pay are very detailed and not really appropriate for a modern award. The classification definitions also require rationalisation. A great deal more needs to be done to update and simplify the language and expression of the draft generally.

85 Two other matters should be noted. We have included provision for extra annual leave for journalists required to work on public holidays, but we think some attention should be paid to the terms of the NES in this context. We have included provision for the standard casual loading of 25%. This will be an increase in some areas and a reduction in others and may result in a need for transitional provisions. It is also a matter to be taken into account in considering whether there should be separate hourly and daily rates for actors and musicians.

Food, beverages and tobacco industry (manufacturing)

86 An exposure draft Food, Beverage and Tobacco Manufacturing Award 2010 has been developed for the food, beverages and tobacco manufacturing industry. The exposure draft incorporates the aerated waters, baking, confectionary, dairy and general food sectors of that industry. It also incorporates the pet food manufacturing industry, the food component of the grocery products manufacture industry and the brewing sector of the liquor and accommodation industry. The non-foods component of the grocery products manufacture industry may, most appropriately, be covered by the Manufacturing Modern Award to the extent it is not already so covered. Submissions are sought from

29 AP817364CRN.

30 AP811656.

those with a relevant interest as to whether that modern award should be varied to further include the non-foods component of the grocery products manufacture industry and, if so, on the details of the variations needed.

87 The exposure draft is largely based on that submitted by the AiGroup. However, the definition of "food, beverage and tobacco manufacturing" has been altered to reduce the potential for overlap with other modern awards and exposure drafts. Further, the draft specifically excludes those covered by the Manufacturing Modern Award and the proposed Meat Industry Award 2010, Poultry Processing Award 2010 and Wine Industry Award 2010. Our preliminary view is that the award should not cover clerical employees.

88 The classification structure in the exposure draft is quite generic. If it remains this way, consideration will need to be given as to how the many employees proposed to be covered by the award are to be classified under the structure. Perhaps some indicative positions could be included in the structure to assist in the process.

89 A separate exposure draft Poultry Processing Award 2010 has been developed for the poultry processing sector of the food, beverages and tobacco manufacturing industry. The draft is based on a draft award proposed by the AFEI, the National Union of Workers (NUW) and The Australasian Meat Industry Employees Union (AMIEU). That draft award did not contain a classification structure and the structure in the exposure draft is based on that proposed by the AiGroup.

90 A Seafood Processing Award 2010 exposure draft has also been developed based on the substantively agreed draft award proposed by numerous seafood organisations representing employers in the seafood processing industry, the AWU and the NUW.

Grocery products manufacture

91 We have already dealt with this area in conjunction with the food, beverages and tobacco industry.

Journalism

92 We publish a draft Journalists Published Media Award 2010. The main parties who participated in the consultations were MEAA, a group of major employers including News Limited, Pacific Magazines, ACP Magazines, the Country Press Association (CPA) and Fairfax Media. These parties reached a consent position on most issues. Submissions were also received from AiGroup.

93 The biggest point of difference between the parties concerns coverage. The employers submitted that there should be a journalists' published media award applying only to editorial staff (that is, journalists) in the published media industry. They proposed that - in line with current practice - clerical employees, editorial assistants, call centre and library staff in the published media industry should be covered by the *Clerks-Private Sector Award 2010* (Clerks Modern Award).[31] Journalists employed in television and radio should be covered by an award (or awards) specific to those industries. MEAA submitted that the award should encompass journalists in television and radio as well as some employees traditionally covered by clerical awards.

94 The exposure draft covers journalists employed by newspapers, magazines, periodicals, journals, wire services and online publications. It is envisaged that

31 MA000002.

journalists employed in television and radio will be covered by the proposed broadcasting and recorded entertainment award dealt with earlier. Non-journalists will generally be covered by the Clerks Modern Award, or the *Graphic Arts, Printing and Publishing Award 2010*[32] (for printing and pre-press employees).

95 Many employees working for news and editorial websites are not currently award covered. The employers acknowledge that journalists employed on online publications should be covered by an award. The draft award provides that the employees of an employer working on an online publication that is associated with that employer's print publication be covered by the award in the same way as other journalists. Journalists employed by online businesses not associated with a print publication would also be covered by the award, though they would be exempted from the hours, overtime and shiftwork clauses. Our preliminary view is that this is a reasonable compromise between the need to ensure appropriate award coverage of a new area of employment created by technological change and the need for flexibility and limiting the imposition of additional costs on employers.

96 The main parties agreed on a provision to exempt a certain number of editorial staff employed in specified enterprises from the terms of the award. We have not included the provision. Any proposal to include exemption provisions must be so framed as to ensure it operates consistently across the full range of establishments covered by the award. We would also require submissions addressing the terms of clause 2(f) of the Minister's consolidated request.

97 An issue arises in relation to termination of employment and redundancy provisions. Some of the relevant NAPSAs include provisions for notice of termination which are more generous than the terms of the NES. On the other hand the pre-reform awards and NAPSAs do not contain redundancy provisions. The application of the minimum standards in the NES will have significant practical effects. Submissions are sought on the adequacy of the provisions we have drafted to implement the NES in these unusual circumstances.

98 The draft does not include provision for employers and employees to make written agreements to "buy out" overtime and shift penalties. However the award flexibility provision is obviously available.

99 The proposed modern award will replace 10 current non-enterprise pre-reform awards and four non-enterprise NAPSAs. The weekly award rates of pay (which have been agreed to by all the major parties) are in some cases significantly higher than the existing applicable rates. There are also additional employee benefits, such as a higher casual loading, and the right to redundancy pay. On the other hand, the proposed award deletes a small number of allowances that have traditionally been payable in some parts of the industry.

Licensed and registered clubs

100 The question of award coverage for licensed and registered clubs first arose in the priority stage of award modernisation. We deferred a final conclusion, noting that it might be possible to include the sector in the Hospitality Modern Award and the potential overlap in relation to events staged by clubs and grounds management and maintenance.

32 MA000026.

101 There is general support amongst employer and employee associations in the industry for a separate licensed and registered clubs modern award. While it might be possible to include clubs within the Hospitality Modern Award, with some sector specific arrangements, we have decided to make a separate clubs award. We publish a draft Registered and Licensed Clubs Award 2010. The LHMU and Clubs Australia provided a draft award, in a largely agreed form, and we have used this as the basis of the exposure draft.

102 A major point of contention between the LHMU and Clubs Australia concerned the part-time work provision, with the LHMU proposing a provision based on the *Licensed Clubs (Victoria) Award 1998*,[33] which is in the same terms as the part-time provision in the Hospitality Modern Award. Clubs Australia proposed a provision based on part of the part-time work provision of the *Club Employees (State) Award (NSW)*.[34] Clubs Australia submitted that its proposal would remove onerous requirements associated with recording the regular pattern of work and any agreed variations to it. The proposal also contained additional restrictions on the days and hours in which part-time work can be performed (which we think constitute unnecessary detail).

103 We have included the *Licensed Clubs (Victoria) Award 1998* provision in the exposure draft rather than the additional provisions proposed by Clubs Australia drawing on the *Club Employees (State) Award (NSW)*. Further, an examination of the *Club Employees (State) Award (NSW)* discloses two sets of arrangements in respect of part-time employees: those applying to persons engaged before July 1999, which include a 15% part-time loading, and those applying to part-time employees engaged after that time, prescribing an absorbable "overaward payment" based on that loading for any part-time employees who were previously engaged as casual employees. We prefer the federal award prescription, which is common across most current federal hospitality industry awards.

104 The major issue raised by Clubs Australia in support of its position was that the New South Wales prescription was agreed between it and the New South Wales branch of the LHMU in order to promote part-time employment over casual employment and that the New South Wales provisions were essential to continue to achieve that end. We are not persuaded, at this stage, that the requirement to document an agreed mutual variation of the regular pattern of work will impede working on a part-time basis. Nor do we see any additional cost implications given the capacity to vary part-time hours by agreement.

105 Clubs Australia and the LHMU proposed different definitions of shiftworker for the purpose of an additional week's annual leave under the NES. Clubs Australia proposed that we adopt the provision in the Hospitality Modern Award and some other modern awards in the absence of any relevant provision in the predominant current awards. There are provisions for additional leave for shiftworkers in the major federal award and in the NAPSAs for clubs. We have applied the definition in the *Licensed Clubs (Victoria) Award 1998*, which provides additional leave to a seven day shiftworker who is regularly rostered to work on Sundays and public holidays. This is of similar effect as the *Club Employees (State) Award (NSW)*, although that NAPSA requires that a specific number (30) of Sundays and public holidays be worked.

33 AP787060.

34 AN120136.

106 The final issue which arises for immediate consideration is the inclusion, or otherwise, of a greenkeeper classification within the clubs award. Clubs Australia argue that such inclusion is necessary in light of the number of sporting clubs - bowls and golf clubs - within the clubs industry and the working of employees across grounds and hospitality classifications. The major opposition to the inclusion of greenkeepers/groundsperson classifications within a clubs award came from the AWU, which submitted that their inclusion would cause a substantial loss of wages and conditions of employment to employees who have traditionally been employed under the *Sportsground Maintenance and Venue Presentation (Victoria) Award 2001*.[35] That award, which covered specific named respondents before being made a common rule in January 2005, applies to the industry of:

> the construction, ornamentation, presentation, formation, maintenance or keeping in order of grounds or enclosures used in conducting outdoor entertainments, outdoor shows, outdoor sports or outdoor amusements of any kind; and the laying out, planting, construction, cultivation, maintenance, keeping in order or removal of gardens (including features) and or lawns and/or trees.

107 We have incorporated a greenkeepers' stream classification in the exposure draft, because of the incidence of such work within the industry. The stream is broadly reflective of the classification structure in the *Sportsground Maintenance and Venue Presentation (Victoria) Award 2001*, with similar minimum wages. We understand this award to be the pre-eminent federal award dealing with sportsground maintenance. We have also had regard to the rate for the Greenkeeper Supervisor in the Tasmanian NAPSA — the *Licensed Clubs Award*.[36] We have also included management employee classifications in the greenkeepers structure.

108 In submissions dated 8 May 2009, the AWU submitted an amended draft which contained greenkeeper classifications similar to but not identical to those which we have included in the exposure draft. In addition, they included other additional terms and conditions which, they submitted, were necessary to accommodate greenkeeping classifications in the award. These proposed amendments were advanced relatively late, with a limited opportunity for a response by other interested parties. We would welcome further comment on the structure contained in the exposure draft and the recent AWU proposals during the forthcoming consultations.

Liquor and accommodation industry (manufacturing)

109 We have developed an exposure draft Wine Industry Award 2010. The exposure draft covers the wine industry from the growing of wine grapes through to the despatching of wine or grape spirit from storage associated with a winery or wine distillery. The draft largely reflects a draft award submitted by the South Australian Wine Industry Association Incorporated, the AWU and the LHMU. Interested parties should give further consideration to simplifying the classification structure in the exposure draft. The provision for piecework also requires careful consideration.

110 While some urged us to include independent wine grape growing in the *Horticulture Award 2010*,[37] or at least apply some of the provisions of that

35 AP812760CRV.

36 AN170057.

37 MA000028.

modern award to independent wine grape growing, the extent to which current horticulture awards and NAPSAs actually apply to independent wine grape growing was not readily apparent. We invite further submissions on this issue.

111 The brewing sector of the liquor and accommodation industry has already been dealt with in our consideration of the food, beverages and tobacco manufacturing industry.

Maritime industry

112 We publish three maritime awards, namely:

- Seagoing Industry Award 2010
- Dredging Industry Award 2010
- Maritime Offshore Oil and Gas Award 2010

113 The draft Seagoing Industry Award 2010 reflects substantial agreement between the unions (the Maritime Union of Australia (MUA), the Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers Union (AMOU)) and employers represented by the Australian Mines and Metals Association (AMMA) and the Australian Ship Owners' Association (ASOA). The exposure draft also reflects the current *Maritime Industry Seagoing Award 1999*[38] with the necessary amendments and inclusions reflecting standard modern award provisions.

114 The employers proposed the insertion of part-time and probationary employment. This proposal was opposed by the unions. The current award does not provide for part-time or probationary employment. Part-time employment is not a current employment practice in this industry and we have decided not to include provision for it at this stage. We have also decided not to insert a probation clause but observe that it is open to any employer to engage persons on probation. We have referred to probationary engagement in some general remarks at the beginning of this statement.

115 We have included the Commission's standard termination of employment clause but without the job-search benefit as it would not seem to be practical in the seagoing environment. We have included a national training wage clause which is new to this industry but may facilitate the use of trainees if appropriate. We have not included a superannuation provision on the basis that superannuation has not been a feature of the relevant awards.

116 The classification definitions may not adequately differentiate between what seem to be occupations within the same stream albeit attracting different rates of remuneration. We invite further submissions with a view to establishing appropriate definitions.

117 CSL Australia Pty Ltd (CSL), submitted that some key features of the current pre-reform award are inappropriate. These include annualised rates comprehensive of overtime, certain penalties and the leave factor. The current award reflects the outcome of the award simplification process and includes features of predecessor awards that have applied in this industry for many decades. Annualised salaries comprehending a range of components and the lengthy periods of leave recognise the nature of an industry where seagoing employees are required to remain on a vessel even when they are not physically working. It is a unique working environment and these award provisions reflect that fact. At this stage we are not persuaded that we ought to depart from current provisions.

38 AP788080.

118 CSL also proposed that some new classifications (e.g. tradespersons) should be provided for. We consider that the inclusion of such classifications and the striking of appropriate rates should be a matter for further comment by all parties. We are unaware of any attempts by CSL to vary the current pre-reform award in that regard.

119 Finally, CSL observed that the current award only applies to named respondents. The union and AMMA/ASOA proposals would extend the coverage of the modern award to all vessels operating in Australian waters, including foreign flagged vessels. We have not made specific provision for this in the draft. Any restriction or expansion of the coverage of awards is a matter properly governed by the Act.

120 The draft Dredging Industry Award 2010 reflects some consent between interested parties comprising various unions (the MUA, AIMPE, AMOU and the AWU) and the Dredging Industry Industrial Secretariat (DIIS). The exposure draft proposes to replace three existing awards: the *Maritime Industry Dredging Award 1998*,[39] the *Dredging Industry (AWU) Award 1998*[40] and the *Marine Engineers (Non Propelled) Dredge Award 1998*.[41]

121 We have decided to include provisions as to part-time employment which were proposed by DIIS but opposed by the unions. We have also decided to adjust the loading for casuals to 25% as proposed by the unions in accordance with our standard approach.

122 DIIS also proposed the insertion of annual salaries comprehensive of a range of penalties and provisions setting out what is known in the maritime industry as a "leave factor". The proposal does not reflect the existing award provision and the unions did not support it. We are not satisfied that such significant changes should be made at this time.

123 We have also not included existing aggregate weekly wages for fully operational vessels as the basis or components of such rates were not readily ascertainable. We are prepared to review the position if the parties are able to provide us with further material. The minimum wage rates reflect the skills and responsibilities of the classifications concerned, but also the unique environment in which employees operate on vessels engaged in dredging operations.

124 We have inserted the current award allowances associated with shipkeeping. They refer to "remote" and "less remote" areas. We invite further submissions as to how such terms can be better defined. We have decided to include the national training wage provisions in order to provide an opportunity for such employment if the circumstances exist. We have not included provisions as to superannuation as this is not provided for in the current awards.

125 The classifications in Schedule A of this draft do not sufficiently define the classifications and do not differentiate between occupations within the same stream. The deficiencies will have to be attended to before the award is finalised.

126 We deal now with the draft Maritime Offshore Oil and Gas Award 2010. The unions initially proposed the making of an industry award that would cover the entire offshore oil and gas sector. Those unions were the MUA, the AIMPE, the AMOU and the AWU. This was opposed by various employer interests who

39 AP787991.

40 AP778702.

41 AP788027.

sought the continuation of separate awards in the offshore area for maritime and for production. The unions subsequently proposed an alternative whereby there could continue to be a separate maritime offshore oil and gas award. We have decided to establish a draft award which is confined to the maritime area of the offshore oil and gas industry. The draft is based on the current *Maritime Industry Offshore Oil and Gas Operations Award 2003*[42] with variations reflective of award modernisation provisions.

127 The principal employer group AMMA/ASOA proposed the inclusion of provisions as to part-time and probationary employment. They are not a feature of the current award. We have decided not to include them at this stage. We observe once again that provided it is not prohibited, probationary employment is a matter of contract in any event.

128 The parties proposed the insertion of comprehensive termination of employment provisions. We have decided to insert the usual provision in modern awards but without the job-search provisions which do not seem to be relevant to this industry.

129 The annual salaries reflect the complex working arrangements on board vessels as well as what is known as the "leave factor" which recognises balancing the extensive time on board a vessel with extensive time on shore. This was a matter of consent and also represents award provisions of many decades standing.

130 The classification definitions set out in Schedule A like those in the two previous maritime drafts, also need attention. We invite further submissions with a view to establishing appropriate definitions.

Meat industry

131 We now publish an exposure draft of a Meat Industry Award 2010.

132 This industry has been the subject of a number of inquires and Full Bench decisions. Significant reform has already taken place and, as such, the three underpinning pre-reform awards covering different sections of the industry are mostly up-to-date.

133 There is a high level of agreement on the terms of a modern award. With the exception of one matter, the draft combines the three pre-reform awards and follows the decision of the Full Bench and proceedings under its supervision. Where there has been a difference between those most involved in the industry we have preferred to follow the Full Bench decisions and the terms of the existing pre-reform awards. The exception to this is in relation to the salesperson in a retail butchers shop. In light of the rates fixed in the *General Retail Industry Award 2010*,[43] we have raised the minimum rate for a salesperson to a level closer to the entry rate for a retail employee but maintained internal relativities.

134 The award contains provisions for incentive payments. The ascertainment of the payments to be made to employees on incentive payments during annual leave is a matter that needs to be addressed in the context of piecework and payment by results provisions generally. We note that in this award employees on incentive schemes are entitled to a minimum weekly payment based on the relevant minimum wage plus a loading. We referred to this matter in the introduction to this statement.

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42 AP826061.

43 MA000004.

Offshore island resorts

135 Consideration was first given to modern award arrangements for offshore island resorts in dealing with the priority industries.[44] The Full Bench deferred consideration of award coverage for offshore island resorts currently subject to the *Off-Shore Island Resorts Award — State 2005 (Qld)*[45] (the Queensland Offshore NAPSA) until Stage 3.

136 In the Stage 3 consultations submissions were made on behalf of some island resorts respondent to the Queensland Offshore NAPSA:

- Holiday Villages (Australia) Pty Ltd — Club Med Lindeman Island Resort;
- Ocean Hotels Ltd — Long Island Resort;
- Daydream Island Resort and Spa; and
- Stella Resort Group.

137 The Australian Hotels' Association (AHA) put submissions on behalf of some other respondents to the Queensland Offshore NAPSA — Hayman Island and the Voyagers Group. All of those employers sought a separate modern award for offshore island resorts, based upon the Queensland Offshore NAPSA. In the alternative they sought separate provisions within the Hospitality Modern Award, directed to incorporating the broader range of classifications within which employees working on offshore islands are engaged and flexibility to permit employees to undertake work across classifications.

138 The principal unions with an interest in the industry, the LHMU and the AWU, opposed a separate award or the provision of separate safety net terms and conditions of employment from those in the Hospitality Modern Award. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) submitted that the work performed by electrical and electronic employees will be adequately covered by other modern awards.

139 We have decided to reject the employers' proposal at this stage. The Hospitality Modern Award should be varied to delete clause 4.1(h), which exempted offshore island resorts from coverage. We will, however, consider appropriate transitional arrangements for employers covered by the Queensland Offshore NAPSA to allow those employers a period of time to negotiate appropriate agreements, bearing in mind there are already agreements which operate on top of the Queensland Offshore NAPSA.

140 We have taken this approach for several reasons. First, it is evident that while the Queensland Offshore NAPSA is a multiple-employer award it applies to a limited number of offshore island resorts in Queensland. It does not cover the offshore island resort industry as a whole. A majority of offshore island resorts are covered by general hospitality awards and NAPSAs. There is no good reason to extend the Queensland Offshore NAPSA arrangements to offshore island resorts generally for the purpose of a safety net award, nor to distinguish between offshore island resorts. Indeed, notwithstanding the endeavours of the AHA to provide a definition of offshore island resorts to allow such a distinction, it is not apparent to us that a workable definition can be derived.

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44 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 8; [2008] AIRCFB 717.

45 AN140196.

141 Secondly, the classification structure and rates in the Queensland Offshore NAPSA are not consistent with minimum rates and allowances in other safety net awards. When the traditional hospitality classifications in the Queensland Offshore NAPSA rates are adjusted for Australian Fair Pay Commission increases the minimum rates are still below those for comparable classifications in the Hospitality Modern Award. In addition, the classifications and rates proposed in respect of non-traditional classifications provide an extremely compressed classification structure for particular occupations and inadequate minimum wages. This is best illustrated by reference to the single classification for a nurse at salary level 7, which includes a registered nurse. The *Nurses Award 2010*[46] provides wages for registered nurses at level 1, commencing at $697 per week, and going up to $843 per week. In comparison the updated Queensland Offshore NAPSA rate for a nurse is $680.50.

142 Finally, we believe there will be sufficient scope for employees to work flexibly across classifications at the same level in the Hospitality Modern Award.

Oil and gas industry

143 We have decided to publish three exposure drafts. They are the Hydrocarbons Industry (Upstream) Award 2010, the Oil Refining and Manufacturing Award 2010 and the Gas Industry Award 2010.

144 We refer first to the Hydrocarbons Industry (Upstream) Award 2010. The exposure draft is based on the draft award filed by AMMA. We have not adopted the AWU submission that the activities traditionally covered by the various upstream production awards should be incorporated into the same exposure draft as the maritime oil and gas sector activities.

145 We have varied the wage rates from those in the AMMA draft. We invite further submissions explaining the basis upon which the minimum wage rates have been arrived at. The level 3 classification is the first level at which a trade qualified employee is referred to. The rate for that classification in the AMMA draft is $685.90. The other rates reflect a percentage relativity to that rate. We would be assisted by submissions explaining how these rates were calculated and how it is said that they are appropriate for this minimum safety net award. For the time being we have included a trade equivalent rate of the same amount as the rate in the Manufacturing Modern Award and the remaining rates at the same level as in the *Mining Industry Award 2010.*

146 The exposure draft reflects expense related allowance percentages by reference to the revised level 3 classification. It is not our intention to reduce the monetary value of the allowances as contained in the AMMA draft and the parties should give consideration to the revised calculations. We should refer to one significant allowance which was contained in the AMMA draft titled "Recovery of initial travel cost from outside capital city metro area". We have not included this allowance in the exposure draft. Should the employers press for this we invite further submissions including the identification of any awards containing a similar allowance.

147 We have not accommodated all of the provisions of clause 16 of the AMMA draft. An employer's right to stand down an employee and the circumstances in which they can be exercised are contained in the Act and we doubt the need for

46 MA000034.

clause 19 of the exposure draft. To the extent to which we have accommodated other provisions of the AMMA draft we have placed them in the annual leave clause.

148 We next refer to the Oil Refining and Manufacturing Award 2010. This exposure draft is based on the draft proposed by the Oil Industry Industrial Committee (OIIC). The AWU also filed a draft award however it did not contain classifications or wage rates and the allowances appeared to be largely extracted from the Manufacturing Modern Award. Should these allowances be pressed by the AWU as relevant to this sector of the oil and gas industry we invite further submissions about each allowance.

149 In the pre-exposure draft consultations the parties advised that they were having discussions concerning the appropriate wage and classification structure and further submissions would be made. Subsequently we received a proposal from the OIIC but nothing from the unions who had appeared at the consultations. The OIIC structure has been reflected in the draft award. It will be seen however that at this stage we have not included rates for the two highest levels in the maintenance stream. We require further submissions in relation to the appropriate minimum safety net rates for those classifications.

150 The OIIC draft ordinary hours were set at an average of 38 per week. The AWU proposed 70 per fortnight. A similar issue arose in the context of the hours of employees in oil distribution activities in the *Road Transport and Distribution Award 2010*[47] (RT&D Modern Award). That modern award now contains an hours clause dealing specifically with oil distribution workers. They are 35 ordinary hours per week or 70 per fortnight. We there acknowledged the submissions made by the OIIC that, in the context of a modern transport award, there should not be different hours for the various sectors within that industry. We noted that the hours in the oil distribution sector had been the equivalent of 35 per week for many decades. For largely the same reasons we have again decided to retain the lesser hours in this exposure draft. They have been the hours for this sector since at least the making of the *Standard Hours (Oil Companies) Award 1974*.[48] On balance, our current view is that for this sector of the oil industry these hours constitute, in terms of s 576L, a fair minimum safety net.

151 The OIIC draft contains a clause allowing an employee's weekly hours to be averaged over a period of up to 26 weeks. It is not apparent from a perusal of the existing awards in this sector that there is any ability to average ordinary hours over a period in excess of two weeks. We invite further submissions in relation to this matter and assistance in relation to identifying existing provisions which deal with the averaging of hours.

152 The OIIC draft provides that the ordinary hours for employees other than shiftworkers may be worked on any day from Monday to Sunday. The existing awards do not reflect ordinary hours for these workers being performed on Saturdays and Sundays. We have reflected the existing Monday to Friday provisions in the exposure draft however the parties are invited to make further submissions about this matter.

153 We now turn to the Gas Industry Award 2010. The only proposal for an award in this industry was filed by the AWU. The AWU described it as covering the

47 *Re Award Modernisation* [2009] AIRCFB 345; (2009) 181 IR 19 at [177].

48 AW796032.

activities from the time gas enters the pipelines offshore through to downstream retail. It was not intended to cover offshore accumulation or retail which is associated with retail in the electrical power industry.[49]

154 The draft was largely based on the *Energy (Gas) Industry Award 1999*[50] a pre-reform award (the Energy Gas Award). We note that a number of provisions in the draft also reflect the provisions of the *Gas Industry Award — State 2003*, a Queensland NAPSA[51] (the Queensland NAPSA). We doubt that the provisions of either award are an appropriate basis for a modern industry award for this sector.

155 The Energy Gas Award reflects a number of provisions similar to those traditionally found in public sector awards. In this respect, and without going into any detail, we note the circumstances surrounding the making of this award and the contemporaneous proceedings which led to the making of the *VENcorp Award 1999*.[52] The wages and classification structures in each of these awards are very similar if not identical. There is no description of the scope of the employers' industry covered in the Energy Gas Award so it is unclear as to whether it is a reliable basis for a modern industry award covering the whole of the sector. In this respect we note a number of other pre-reform awards that cover employers and employees associated with the operation of transmission pipelines, gas plants and facilities, gas industry contractors, salaried employees in the LP gas industry and gas extraction, treatment, separation and supply. It is not apparent that the Energy Gas award should be preferred as the basis for classification structures, wage rates and conditions to the exclusion of any provisions of these other awards.

156 We also note that the award respondents are limited to a number of Victorian based corporations and although we accept that they may have activities beyond that State the list is small and does not contain the major corporations operating around Australia in this sector. As no submission was made on behalf of any of these employers we do not know if they are still active in this industry.[53]

157 The only appearance at the pre-exposure draft consultations on behalf of any employer interests was by AiGroup and its submission was principally directed towards the manufacture of industrial gases. It submitted that that activity had been covered, for many decades, by the Metal Industry Award[54] and should now be covered by the Manufacturing Modern Award. In this respect it identified its member BOC Gases. We note clause 4.3(d) in the Manufacturing Modern Award which, read together with clause 4.2(a)(i), provides that the award covers the manufacture, making, processing, treatment and preparation of industrial gases.

158 The draft we publish should be considered by parties in the industry as a matter of urgency. Assuming that an award should issue for this industry a great deal more needs to be done. Firstly the coverage of the award needs to be clear. It would appear from the AWU draft that it proposes the coverage to extend to clerical, administrative, professional and managerial employees and trades and

49 AM2008/44, Senior Deputy President Harrison, transcript 24 March 2009 PN96.

50 AP780799CRV.

51 AN140130.

52 AP802232.

53 AM2008/44, Senior Deputy President Harrison, transcript 24 March 2009 PN117.

54 AM2008/44, Senior Deputy President Harrison, transcript 24 March 2009 PN216-PN 220.

engineering employees. The structure contains definitions which were described as generic which is certainly an accurate description for them. Importantly though the draft provides that the reader needs to look to the employer's method of classification which would depend on "an objective evaluation system as contained in the employer's policies manual". The draft also provided that the application of the generic definitions were to be determined by "comprehensive position descriptions". It is unclear from the AWU draft which level an employee should be classified at.

159 As for remuneration levels we have not adopted the wage rates in the draft. The lowest levels are described as wage rates A to E. Thereafter there are some 10 bands each of which has three levels within the band. Although there is no explanation contained within the wages structure it would seem that levels B through to E may well have historically related to junior employees. Level A is said to be the trade equivalent and the next level, being level 1 of Band 1, is said to be the minimum level at which an adult employee can be paid. If this structure is pressed by the AWU much more needs to be said by way of explanation of how it is justified as providing appropriate minimum wages for the industry. A number of other provisions in the classification definitions and structure are unsuitable for a minimum safety net award and in that respect we refer to the provisions relating to the selection of employees which, in certain circumstances are to be by reference to seniority and the obligations placed upon employers in relation to advertising of positions internally.

160 For the purposes of encouraging discussion between parties in the industry we have included wages identifying a trade level similar to that in the Manufacturing Modern Award and other wage levels by reference to what might be appropriate percentage relativities. In doing so we have also considered the actual rates in the ten levels of the Energy Gas Award. It is likely that these rates may be able to be adopted in relation to operator and some trades classifications but they may not be appropriate in the event the parties agree that the award should cover clerical, administrative and professional classifications. Finally we note that within the draft proposed by the AWU there are a number of provisions and allowances for building and construction work. We are unclear as to whether it is proposed that that work should be covered by this award and urge the parties to also give consideration to these provisions. Consideration also needs to be given to whether driving classifications are appropriate. In this respect the parties should refer to the RT&D Modern Award and the reasons of the Full Bench for making that award.[55]

Paper products industry

161 The paper products industry is dealt with below in conjunction with the timber industry.

Pet food manufacturing

162 Pet food manufacturing has already been dealt with in conjunction with the food, beverages and tobacco industry.

Pharmaceutical industry

163 We publish a Pharmaceutical Industry Award 2010 exposure draft. It is based

55 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 180 IR 124 at [97]-[104] and *Re Award Modernisation* [2009] AIRCFB 345; (2009) 181 IR 19 at [167]-[179].

on that proposed by the NUW. However, the coverage clause has been simplified to try to overcome concerns about potential overlap with the coverage of the Manufacturing Modern Award. The classification structure does not extend to technical and professional employees who will be covered by awards and exposure drafts with occupational scope.

Photographic industry

164 We have decided not to make a modern award for this industry. The LHMU, which has coverage of most of the relevant employees submitted that:

> …significant changes in the nature of photography, namely the movement to digital media and away from film, removes the need for a separate photographic industry award.

165 Employees engaged primarily in printing photographs from digital media in retail outlets, who may or may not perform other retail duties, will be covered by the *General Retail Industry Award 2010*.[56] There appears to be no need for any amendment to the current proposed award to accommodate this.

166 The coverage of the Manufacturing Modern Award might be altered to make it clear that the award covers employees engaged in process manufacturing. This could be done by expanding the list of industries in clause 4.2 of the award to cover the processing and printing of photographs from film.

Port and harbour services

167 Consultations in relation to this industry revealed that there are a range of different types of employers and operations, from predominantly land based administrative bodies to the operators of various types of vessels. These differences make it impractical to aggregate the various operations under one award. We have decided to publish five exposure drafts as outlined below.

168 First, we have decided to publish a draft Port Authorities Award 2010. Port authorities are usually government-owned bodies responsible for the overall administration of a port. They oversee shipping, stevedoring and other operations but often also conduct a number of activities related to the operation of the port and port infrastructure. The exposure draft covers all of the employees of all port authorities even though some employees may be involved in activities such as dredging or bulk loading which would be covered by another award if their employer was not a port authority. We can see the desirability of comprehensive coverage of port authority employees so that only one award applies to each employer, but also of confining the award to those types of employers. The draft reflects this approach. We have included marine pilots as they are often employees of the port authority. We have not attempted to particularise every type of employee activity but the classifications should be reviewed by interested parties to ensure that they are sufficiently comprehensive.

169 The Stevedoring Industry Award 2010 is proposed to cover the land based operations of employers who are involved in the loading and unloading of vessels. A number of exclusions have been included. Employees at bulk sugar terminals will be covered by the proposed Sugar Industry Award 2010. Employees at coal export terminals will be covered by the proposed Coal Export Terminals Award 2010, with which we deal now.

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56 MA000004.

170 We publish a draft Coal Export Terminals Award 2010. These operations have discrete characteristics and are usually operated by interests associated with coal mining companies and often within a port operated by a port authority. The draft award is confined to coal export terminals where the loading of coal for export is the only port operation undertaken.

171 We also publish a draft Marine Towage Award 2010. It covers all tugboat operations including tug and barge activities and harbour towage.

172 We publish a draft Ports, Harbours and Enclosed Water Vessels Award 2010. It covers all marine operations in enclosed waters including ferries, barges, and all other miscellaneous vessels. We consider that tourist based charter operations should be excluded as these are more appropriately combined with seagoing tourist charter operations and covered by an award developed by reference to existing standards in the tourist industry. We deal with this award later.

173 With respect to each of the five drafts the Commission has been greatly assisted by the contributions of interested parties who have submitted well developed draft awards. The exposure drafts we publish are intended to simplify the drafts further and reflect the general approach to award provisions in other modern awards.

Postal services (other than Australia Post)

174 This industry does not include parcel and courier services or electronic mail services: those activities are covered by other modern awards. Obviously, Australia Post is the key employer in the postal services industry. Australia Post is bound by a number of awards all of which are enterprise awards. As such any modern award made for the postal services industry would not cover Australia Post. In the result, the postal services industry, for award modernisation purposes, consists of privately operated post offices under a license or franchise from Australia Post. There is a single underlying pre-reform award, the *Postal Services Industry Award 2003*,[57] that binds all or almost all the operators of licensed or franchised post offices.

175 The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (T&C Bill) is presently before the Parliament. Clause 2 of Schedule 6 to that bill, in the context of a part establishing a process for modernising enterprise awards, contains a definition of enterprise award that is broader than the definition of enterprise award in Pt 10A of the Act and in the *Fair Work Act 2009* (Cth). Several parties submitted, we think correctly, that the *Postal Services Industry Award 2003* is an enterprise award within the meaning of the definition in the T&C Bill. Be that as it may, the *Postal Services Industry Award 2003* is not an enterprise award for the purposes of Pt 10A of the Act because it does not apply to a "single business" as specified in s 322 of the Act and we commenced preparation of a modern award for the postal services industry based on that award. However, the amendments to the consolidated request made on 2 May 2009 introduced a broader definition of enterprise award for the purposes of the request which is in line with the definition in the T&C Bill. Paragraph 2(e) of the request provides in part that the creation of a modern award is not intended "to result in the modification of enterprise awards". The amendments of 2 May 2009 added a new paragraph 2A to the request:

57 AP830245.

2A. In paragraph 2(e) an enterprise award means an award that regulates the terms and conditions of employment in:

(a) a single enterprise (or part of a single enterprise) only; or

(b) in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:

i. franchisees of the same franchisor; or

ii. related bodies corporate of the same franchisor; or

iii. any combination of the above.

176 The term "franchise" is not defined. Our provisional view is that the licenses under which licensed post offices operate have the attributes of a franchise and are to be treated as franchises for the purposes of paragraph 2A of the consolidated request. If this view is correct then the terms of the consolidated request require us to exclude the *Postal Services Industry Award 2003* from the current award modernisation process and, accordingly there is no need to make a modern award for the postal services industry. Any party who opposes this conclusion should make an appropriate submission. In the event that we are persuaded that our provisional view is incorrect we will issue a draft modern award for the postal services industry as part of Stage 4.

Private transport industry (remaining sectors) Public Transport (other than rail)

177 We deal with these two industries together.

178 We have decided to publish one exposure draft which is titled the Passenger Vehicle Transportation Award 2010.

179 A number of submissions were received relating to an appropriate modern award for what was termed the "public" and the "private" sectors of passenger transportation. Over many years the operation of passenger transportation systems throughout Australia has changed significantly. In the case of transport by road historically it was the Ministries of Transport (or similar portfolios) which owned and operated the public transport system and directly employed persons to operate the system. They transported the public on designated routes generally in accordance with a published timetable. Awards covering these activities tended to be referred to as "public transport awards". On the other hand, bus and coach operators undertaking country work, interstate trips, charter hire etc., were conducted by private sector companies and they were party to awards that were referred to as "private transport awards". The distinction between the types of corporations or entities operating in each sector no longer exists and it appears unlikely to change. Throughout Australia, State governments have put designated routes and services, including special events and other service requirements, up for tender to operators in the private sector. Not dissimilar developments have occurred in the case of some tram operations. Light rail and monorail operations are largely contracted to corporations in the private sector.

180 Our provisional view is that there is no justification for making two modern awards reflecting the historical patterns of employment and operation of transportation systems which we have referred to above. Within the one award there should be room to accommodate any flexibility a particular type of transport may require. In this respect we have in mind rostering provisions, hours and allowances. Concerns expressed by representatives of some bus

operators about the terms of existing contracts with, for example, governments may be addressed when there is a consideration of appropriate transitional arrangements.

181 Submissions were made by the New South Wales Taxi Council Limited (the Taxi Council) which were supported by the Victorian Taxi Association. They opposed any classification of taxi driver being included in a modern award. In short the submission was that the relationship between taxi operators and drivers was properly characterised as that of bailor and bailee and was not one of employment. The TWU conceded that the majority of taxi drivers were not employees but would not go so far as to accept that there would be no person in Australia driving a taxi who could be categorised as an employee. The Taxi Drivers' Association of Victoria asserted that an award should contain a taxi driving classification and took issue with the submissions made by the Taxi Council.

182 There are existing taxi driver classifications in awards and orders. In this respect we note that the *Transport and Storage Industry Sector — Minimum Wage Order— Victoria 1997*[58] refers to "Taxi and/or other road passenger transport". Level 4 employees in that order include "Taxi and Hire drivers". The *Public Vehicles Award*, a Tasmanian NAPSA[59] contains the classification of taxi driver in Grade 1 of the Transport and Transport support wage structure. On the other hand we note that in the definitions clause in the *Transport Workers (Passenger Vehicles) Award 2002*[60] a "car/limousine" excludes a motor vehicle used for private purposes or taxi operations.

183 We cannot make any definitive statement about whether or not all taxi drivers around Australia are in fact bailees and not employees nor is this the occasion to make any comment about the competing submissions made on behalf of the Taxi Council, the TWU and the Taxi Drivers' Association of Victoria. If a taxi driver is an employee then, assuming the employer is in the industry as described in the exposure draft, that employee would come within the classification of a driver of a motor vehicle.

184 The exposure draft does not cover clerical, administrative or maintenance classifications. The majority of the awards and NAPSAs considered as the basis for this modern award do not contain these types of classifications. Our provisional view is that clerical and administrative classifications within the industry should be covered by the Clerks Modern Award and maintenance classifications by the Manufacturing Modern Award. The coverage does not include on-float classifications associated with the operation of passenger ferries.

185 The exposure draft contains a six grade structure. The classifications and definitions are a combination of the parties' drafts and a consideration of the structure and definitions found in the relevant industrial instruments contained in the comparative schedules. The parties should consider the description of each classification in Schedule A. If drivers of trams, light rail or monorail vehicles need to be specifically identified in the structure we invite suggested amendments to the schedule.

186 In arriving at the minimum weekly wages for each of the classification levels

58 AP800417.

59 AN170085.

60 AP818060.

consideration has been given to the rates in each of the awards contained within the comparative schedules published in what was described as the public and private transport sectors. Particular consideration has also been given to striking a rate that takes into account the higher rates in the New South Wales NAPSA covering motor bus drivers and conductors and the service grants and supplementary payments that have, for many years, been in the *Transport Workers (Passenger Vehicles) Award 2002*. Additionally, in this context, we consider that some allowances which are not widespread (for example the dual capacity allowance) are more appropriately reflected in the skills required of drivers and the wage rates for those drivers. We have also rationalised allowances generally as many had limited operation and were not appropriate for a minimum safety net modern award. Parties may wish to identify particular allowances that they contend should be in the award.

187 The exposure draft contains minimum engagement provisions for full-time, part-time and casual workers. We invite submissions as to whether a minimum engagement provision is necessary for a full-time employee. In the case of part-time and casual employees we have included a three hour minimum engagement. We are aware that the transport of school children gives rise to special considerations about minimum hours particularly in more remote areas. We leave it to the parties to make any further submission about this matter if they see fit.

Publishing industry

188 The *Graphic Arts, Printing and Publishing Award 2010* covers the printing side of the publishing industry. The *Journalists (Book Industry) Award 1998*[61] covers book editors and publicists. We have decided to modernise that award as proposed by the MEAA. We publish a draft Book Industry Award 2010. We should indicate that it will be necessary to develop proper classification definitions and rates for publicists.

Scientific services (including Professional Engineers and Scientists)

189 We have decided to publish four exposure drafts. They are:

- Architects Award 2010
- Hydrocarbons Field Geologists Award 2010
- Surveying Award 2010
- Professional Employees Award 2010

190 We were asked, but decided against, publishing a draft award for the space tracking industry. To the extent that professional engineers, scientists or information and telecommunication professionals are employed, the proposed Professional Employees Award 2010 will apply. Other technical employees will be covered by the Manufacturing Modern Award. Similarly we have decided against publishing a draft award for quality auditing and assessment. This is an area which does not appear to warrant a separate award. We invite comment but it may be that this area is best left until Stage 4.

191 The draft architects award was largely agreed and some variations have been included to deal with the requirements of modern awards.

192 There were some important differences between relevant parties in relation to the draft surveying award. We have sought to resolve the contested issues by

61 AP785593CAN.

reference to the conditions applying to the majority of employees covered by NAPSAs and the pre-reform award. We have also borne in mind that the award will cover employees other than qualified surveyors.

193 The draft Hydrocarbons Field Geologists Award 2010 raised a difficult consideration of the fixation of minimum rates in circumstances involving an offshore roster and onshore duties. The parties agreed on a provision which is derived from the pre-reform award. It provides for a retainer and certain allowances which make up expected earnings. It does not fix an annual minimum rate and therefore consideration had to be given to this issue.

194 The award provides for full-time, part-time and casual employment. Given the nature of the employment we have decided to include for comment a full-time annual rate of $38,273. This is the rate for a three year degree under the draft Professional Employees Award 2010. This is a rate below which a full-time employee should not be paid. Given the structure of the award, we expect that the resultant minimum earnings (should someone be on the minimum) will exceed this amount and we have sought to ensure that it is only treated as a default amount.

195 A further issue concerns the allowances in the pre-reform award referable to the daily rig allowance. In the normal course a wage-related allowance would be expressed as a percentage of the standard rate. However, if we were to follow that course confusion may result. Consideration needs to be given to the manner in which minimum rates and the attendant allowances are to be fixed and expressed generally.

196 Finally, we have prepared a draft award for professional employees. This is an amalgamation of three proposed awards. In examining the proposed awards we saw a number of common conditions and similarity in the wage rates. We have sought to amalgamate these proposals. This has involved an exercise in judgment particularly in relation to the treatment of hours of work and overtime in professional employment. It may be that there are reasons not yet advanced why this amalgamation should not occur and we invite comment. Our objective is to simplify the regulation of these areas consistent with the provision of an appropriate safety net for professional employees.

197 We have not adopted the position advanced by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union that the Manufacturing Modern Award should be varied to provide a common stream from technical to professional. The approach we have adopted is designed to provide appropriate flexibilities relating to professional employment.

198 The Australian Workers' Union of Employees, Queensland sought to include coal samplers in the coverage of the drafts. We have not included them. We are satisfied that those employees will be adequately covered by the Manufacturing Modern Award.

Storage services

199 We publish a draft Storage Services and Wholesale Award 2010. It may be that the coverage clause will require further refinement. For example, there may be some overlap between this award and the proposed commercial travellers award. We deal with that award later in this statement.

200 At this stage it is proposed that the award should cover retail distribution and steel distribution and appropriate classifications have been included. Storeworkers' wages have been taken from the *Road Transport and Distribution*

Award 2010.[62] This will involve increases in minimum wages for some classifications. Wages for wholesale employees have been aligned with those for storeworkers.

Sugar industry

201 We publish a draft Sugar Industry Award 2010. It is an industry award covering cane farming, sugar milling, refining, distilling and bulk sugar terminals. The coverage of the award also extends to incorporate the production of a range of industry by-products including the co-generation of electricity where such is used in whole or in part in the operations of the sugar industry. Similarly, material handling at bulk sugar terminals is covered by the award. The award also specifically covers the sugar industry's dedicated network of cane rail operations.

202 The award does not cover contractors, apart from those engaged in minor construction on cane farming operations. Clerks employed in sugar mills are also excluded from the award and are to be covered by the Clerks Modern Award.

203 The development of this draft has required consideration of a diverse range of provisions in awards covering employees in the industry. This has resulted in three separate wage structures. One for the field sector - cultivation, cane production, haulage and harvesting, one for factory operations - milling, distilling, refining and maintenance, and one for bulk sugar terminal operations. Predominantly the wage rates submitted were not reflective of minimum wage rate structures, accordingly it has been necessary to substantially review these. Submissions are sought from the parties in relation to the wage rates and classification structures.

204 As a consequence of the amalgamation of these sector provisions into one industry award the document is lengthy and would benefit from further revision and a rationalisation of the allowance provisions. It may be necessary to amend the coverage clause of some other modern awards. We mention in particular the RT&D Modern Award.

Technical services

205 We have already dealt with technical services in conjunction with scientific services.

Timber industry

206 We publish a draft Timber Industry Award 2010. The draft brings together in one integrated award six sectors which have been covered by a range of pre-reform awards and NAPSAs. Those sectors are:

- harvesting and forestry management;
- milling and processing;
- panel products;
- manufacturing;
- merchandising and retailing; and
- paper products.

207 Because of the great diversity in conditions in the existing awards and NAPSAs it is necessary to undertake a major rationalisation and simplification.

62 MA000038.

The Construction, Forestry, Mining and Energy Union, AiGroup and a number of others made some contribution in that regard but a great many issues have been left untouched in the pre-drafting consultations.

208 The coverage of the proposed award will no doubt require some refinements so as to clarify the award's scope. We have at this stage included furniture manufacturing in the draft. An appropriate exclusion will be required in the Manufacturing Modern Award. There may also be a potential overlap with the *Joinery and Building Trades Award 2010*.[63]

209 The amalgamation of various awards and NAPSAs can produce a long list of allowances. As in so many modern award areas, rationalisation is essential.

210 There is a wide range of piecework prescriptions, particularly in the NAPSAs applying to forest operations. These provisions need to be rationalised and considered in the contrast of piecework entitlements generally. We refer to this general issue in the introduction to this statement.

211 In relation to many conditions of employment we have adopted provisions from the Manufacturing Modern Award. In the absence of consensus we regard these conditions as constituting an appropriate safety net given their widespread application to similar industries.

212 We have included the national training wage schedule in preference to the other arrangements in this industry. We are prepared to consider special provisions should they be shown to be necessary.

Tourism industry

213 We publish two exposure drafts: the Marine Tourism and Charter Vessels Award 2010 and the Alpine Resorts Award 2010. We have decided not to make provision at this stage for employees who conduct guided tours or who work in connection with non-competitive outdoors activities as diverse as bungy jumping, fossicking, rock-climbing, ballooning, etc. We think these areas of employment should be considered in Stage 4.

214 The draft marine tourism and charter vessels award covers vessels engaged wholly or principally as a tourist, sightseeing, sailing or cruise vessel and/or as a place of or for entertainment, functions, restaurant/food and beverage purposes engaged in the provision of water orientated tourism, leisure and/or recreational activities. The draft applies to such activities conducted both in bays, rivers and estuaries as well as offshore sightseeing involving overnight stays. Coverage of the award does not extend to commercial freight and ferry services, and is not intended to disturb traditional coverage. The Full Bench invites any further submissions in relation to whether further refinement of the award's coverage is warranted.

215 There are three NAPSAs operating in the area, two in Queensland and one in New South Wales, which were dealt with in the pre-drafting consultations. No one sought to canvass the implications of a modern award in this industry in other parts of the Commonwealth. But just on the basis of the position in Queensland and New South Wales a number of issues have arisen for resolution. This has meant that the exposure draft is incomplete in a number of areas. They are principally classifications, minimum wages and hours of work.

216 In relation to classifications and minimum wages, the NAPSAs have different bases for differentiating between vessels of various sizes and do not all cover the same range of classifications. Consequently the structures cannot be

63 MA000029.

reconciled without more information and assistance from the parties. The problem is made more challenging by the fact that the New South Wales NAPSA does not apparently apply to ocean charters and the Queensland NAPSAs do. One Queensland NAPSA provides for pay on a day or part day basis only for work on charters and the other provides for daily rates referable to the duration of the charter, without limiting the number of hours per day or per charter.

217 The question of minimum wages overlaps with the question of hours. The New South Wales NAPSA and one Queensland NAPSA provide for a 40 hour week. Clearly the NES requires a 38 hour week. The remaining Queensland NAPSA, as already alluded to, does not regulate maximum hours at all other than by reference to the number of days notionally worked (referable to the duration of charters) within a 28 day cycle. The application of the NES will require a fresh look at these arrangements.

218 A modern award must provide a safety net of minimum conditions. There are no more important safety net conditions than minimum wages and hours of work. It is not clear to us how some of the existing arrangements could be applied in practice or even whether they are. All of these matters require urgent attention from those likely to be affected by the contents of the final award.

219 The draft Alpine Resorts Award 2010 covers the seasonal snowsports industry in particular, though it will also have application to alpine resorts that operate over the summer season. Employees of alpine resorts are employed in a wide range of occupational groupings and experience considerable fluctuating demand for their skills and services with peaks during weekends and public holidays. Accordingly, the industry is marked by a high level of casual and seasonal employment and flexible hours of work. There are, however, a range of differences between the conditions of employment in the New South Wales alpine resorts as compared to those in Victoria. It has been necessary to take into account the various pre-reform awards and NAPSAs applicable to the industry.

220 New South Wales alpine resorts have a casual loading of 15%, as opposed to 25% in Victoria. While we intend to maintain the federal standard of 25%, this increase in costs will need to be considered in the context of the impact of the modern award on costs overall. This is best done when the transitional provisions are being dealt with.

221 It has been necessary to establish a number of accommodations between the conditions in the two states in relation to such matters as the days in the week on which ordinary hours may be worked (irrespective of the season), overtime rates, maximum daily hours, meal breaks, apprenticeship rates, some allowances (including relocation reimbursement) dual role employment, minimum hours for ski instructors, and the definition of seasonal employment.

222 We decided not to include in the draft provisions for annualisation of salaries or cashing out of annual leave. Such arrangements are not common in the awards applicable to the alpine resort and snow sports industry. We have also decided not to make any special provision in relation to alpine resorts management boards. We have provisionally decided to include employees who perform hospitality and childcare duties. Nonetheless we would be assisted by further submissions on that matter.

Travel industry

223 We have decided not to make a modern award for the travel industry. The

only pre-reform award is the *Travel Industry-Agencies General Award 1999*.[64] That award apparently has quite limited coverage. It seems likely that employees of travel agencies and employees performing similar functions in other industries are presently covered by pre-reform awards and NAPSAs which apply on an industry or occupational basis. In the modern award system they would appropriately be covered by industry awards such as the *General Retail Industry Award 2010* or the Clerks Modern Award. At this stage we see no need to extend the terms of the pre-reform award to a very large number of employers and employees who have never been covered by them.

Vehicle industry (repair, service and retail) Vehicle manufacturing industry

224 We publish a draft Vehicle Manufacturing, Repair, Services and Retail Award 2010. The proposed award is intended to deal comprehensively with the vehicle manufacturing sector and the repair, services and retail sector. It is our preliminary view that there will be operational benefits in having one industry award as there are many common conditions. Where necessary separate provision is made for distinct parts of the industry. Given the nature of much post-production and after-sale modification of specialised vehicles, it is anticipated that access to a single source of industrial regulation will assist employees and employers alike.

225 The draft award does not markedly depart from the provisions of the existing pre-reform awards and existing conditions for employees involved in the sale of fuel and other vehicle related retailing have been adopted. We have decided not to include the pay and classification provisions from the Clerks Modern Award or from any other award. It is our view at this stage that clerks should not be covered by the vehicle industry award.

226 Submissions were put seeking that the pay and conditions of sales staff in the car rental industry be aligned with those of console operators. We have not accepted this proposal. To do so would segment the sales office staff from the purely administrative/clerical staff of the car rental companies who, with the car rental employers' call-centre staff, will also be covered by the Clerks Modern Award. At this stage it is our view that the sales staff should also be covered by that award.

227 We draw attention to a number of draft provisions, and seek comment on them. Clause 4.2(a)(ii) has been included in the draft but both its utility and its legal effect are open to question. Clause 51.4 deals with the five day week and is on one view out of date. Clause 13.1 deals with prohibited work for juniors and may be inappropriate in a modern award. We invite any party to submit reasons why the provision might be included. We have not included a payment by results provision.

228 We accept that the elimination of the differentials from several of the pay rates, casual loadings and shift premiums payable under Queensland and Western Australian NAPSAs will require staged implementation and note the arrangements proposed by the Motor Trades Association of Australia. These will be considered at a later stage.

229 The relevant pre-reform awards contain different terms for conversion of casuals who have worked full-time hours, for four and six weeks respectively.

64 AP799612CRV.

Such provisions have the capacity to operate inflexibly against the interests of the casual employee and the employer. We have included the conversion provision found in the Manufacturing Modern Award.

230 Finally we note that appropriate exclusions may be necessary in the coverage clauses of the Manufacturing Modern Award and the RT&D Modern Award.

Wholesale and retail trade (wholesale) and commercial travellers

231 We have included parts of the wholesale industry in the proposed storage services and wholesale award dealt with earlier. In this part of our statement we deal with commercial travellers. We have decided to make a modern award covering commercial travellers. We publish a draft Commercial Travellers Award 2010.

232 The draft includes advertising sales representatives but not telephone sales persons. The latter will be covered by the Clerks Modern Award. The coverage of the award will be limited to employers and employees not covered by an industry award. An exemption provision is found in the *Commercial Sales (Victoria) Award 1999*[65] but is not a feature of awards and NAPSAs applying outside Victoria. No provision has been made for an exemption rate at this stage.

233 Once again the question of allowances arises. All of the NAPSAs have different allowance provisions. Mainly we have adopted those from the pre-reform award. Similarly the overtime and weekend work provisions come from that award. Further proposals designed to standardise these and other conditions will be welcomed.

Attachment A to Full Bench Statement of 22 May 2009

List of Stage 3 Exposure Draft Modern Awards

Air Pilots Award 2010
Aircraft Cabin Crew Award 2010
Airline Operations—Ground Staff Award 2010
Airport Employees Award 2010
Alpine Resorts Award 2010
Aluminium Industry Award 2010
Amusement, Events and Recreation Award 2010
Architects Award 2010
Asphalt Industry Award 2010
Book Industry Award 2010
Broadcasting and Recorded Entertainment Award 2010
*Cement and Lime Award 201*0
Cemetery Industry Award 2010
Coal Export Terminals Award 2010
Commercial Travellers Award 2010
Concrete Products Award 2010
Dredging Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Educational Services (Schools) General Staff Award 2010
Educational Services (Teachers) Award 2010
Electrical Power Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010

65 AP772623CRV.

Gas Industry Award 2010
Hydrocarbons Field Geologists Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Journalists Published Media Award 2010
Live Performance Award 2010
Marine Tourism and Charter Vessels Award 2010
Marine Towage Award 2010
Maritime Offshore Oil and Gas Award 2010
Meat Industry Award 2010
Oil Refining and Manufacturing Award 2010
Passenger Vehicle Transportation Award 2010
Pharmaceutical Industry Award 2010
Port Authorities Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Poultry Processing Award 2010
Premixed Concrete Award 2010
Professional Employees Award 2010
Registered and Licensed Clubs Award 2010
Seafood Processing Award 2010
Seagoing Industry Award 2010
Sporting Organisations Award 2010
Stevedoring Industry Award 2010
Storage Services and Wholesale Award 2010
Sugar Industry Award 2010
Surveying Award 2010
Timber Industry Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010
Wine Industry Award 2010

PAUL C MOORHOUSE

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 14

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation (AM 2008/25-63)

[2009] AIRCFB 826

Giudice J, President, Lawler and Watson VPP, Watson, Harrison and Acton

SDPP, Smith C

4 September 2009

Awards — Award modernisation — Modern awards to apply to stage 3 industries and occupations — Coverage of modern awards — Stage 3 modern awards published.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, which was subsequently varied on a number of occasions. Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) provides for the continuation of the award modernisation process resulting from the Minister's request.

Following the Minister's request the Full Bench dealing with award modernisation determined the industries and occupations to be the subject of the priority modern awards, and the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published detailed timetables to apply to each of those stages (see (2008) 175 IR 120 and (2008) 177 IR 5).

The Full Bench subsequently published exposure drafts of the priority modern awards, expressed certain views on the coverage provisions to be included in modern awards, and adopted proposed model award clauses dealing with a range of matters ((2008) 177 IR 8). Subsequently, the Full Bench published 17 modern awards to apply in the priority industries and occupation ((2008) 177 IR 364), and then the modern awards to apply to the stage 2 industries and occupations ((2009) 181 IR 19).

The Full Bench published exposure drafts of the modern awards to apply to the stage 3 industries and occupations ((2009) 182 IR 413) and subsequently received written submissions and conducted consultations in relation to those exposure drafts.

This decision concerns the modern awards to apply in the stage 3 industries and occupations, and was accompanied by the publication of those modern awards.

Held: (1) The Full Bench noted that it was inevitable that the award modernisation process would result in changes to wages and conditions of

employment, and referred to the importance of transitional provisions in cushioning the impact of the changes. The Full Bench would announce a process in due course for the inclusion of transitional provisions in the stage 3 modern awards consistent with the Commission's decision on 2 September 2009 dealing with transitional provisions for the priority and stage 2 modern awards.

Re Request from Minister for Employment and Workplace Relations — 28 March 2008 [2009] AIRCFB 800, considered.

(2) The Full Bench noted key features of the stage 3 modern awards, including coverage provisions, and set out its reasons for changes from the exposure drafts and responses to submissions made by the interested parties.

(3) The Full Bench published 49 modern awards to apply in the stage 3 industries and occupations, as listed in Attachment A to its decision.

Cases Cited

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 1000) (2008) 177 IR 364.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 345) (2009) 181 IR 19.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 450) (2009) 182 IR 413.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 50) (2009) 180 IR 124.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 645) (2009) 184 IR 246.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 765) (2009) 186 IR 14.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 800) [2009] AIRCFB 800.

Journalists (Metropolitan Daily Newspapers) Award 1982, Re (1984) 293 CAR 69.

Meatpak Pty Ltd (t/as Holco Fine Meat Supplies) v Moran (2005) 145 IR 248.

CONTENTS *Paragraph*

The Commission

Introduction

1 This decision deals with the award modernisation process and in particular the Stage 3 modern awards. The decision should be read in conjunction with earlier decisions concerning award modernisation. The process is being carried out pursuant to statutory provisions and a request made by the Minister for Employment and Workplace Relations (the consolidated request). To avoid repetition, we do not intend to set out the relevant statutory provisions again. They are, in brief, the provisions of the *Workplace Relations Act 1996* (Cth) (the WR Act), in particular those found in Pt 10A, and the provisions of Sch 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act), in particular item 2(5). It is necessary to make some brief comment concerning the consolidated request.

2 The consolidated request, originally made on 28 March 2008, has been varied on a number of occasions, most recently on 26 August 2009. That variation to the request deals principally with modern awards made in the priority stage and

Stage 2 of award modernisation and transitional provisions. Although there has not been an opportunity for us to consider any views about the significance of the variation for the making of Stage 3 awards, we have proceeded on the basis that the variation has no direct relevance to the matters dealt with in this decision.

3 In its decision making the Stage 2 modern awards the Commission referred to and set out some of the statutory and other provisions which guide the Commission in the modernisation process.[1] To these should now be added the terms of item 2(5) of Sch 5 to the Transitional Act mentioned above. We emphasise that in all cases we have attempted to produce a modern award which properly takes all of the relevant criteria, objectives and other matters into account. In this context we repeat what the Commission said in its decision concerning transitional provisions on 2 September 2009:

> [3] The consolidated request requires us to formulate awards which apply to corporations throughout Australia in the industry or occupation concerned, replacing many hundreds of federal and state awards containing a wide diversity of terms and conditions. In doing so we are to have regard to, among other things, the desirability of reducing the number of awards operating in the workplace relations system. We are required to complete the process by the end of this year so that the new system of bargaining can operate on the basis of the statutory elements of the safety net, the National Employment Standards (NES), and the terms of the applicable modern award. Clearly it is not possible to conduct a full reconsideration of all terms and conditions of employment in the course of this exercise. Rather, within the constraints of existing safety net award provisions, our approach has been to rationalise existing award provisions along logical industry and occupational lines.
>
> [4] The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers — objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.
>
> [5] Various parties have pointed to the impact of modern award provisions. The parties largely addressed this matter on the basis of a comparison between existing and proposed award obligations rather than the impact of the modern award on actual terms and conditions. Even so, it is clear that some award conditions will increase, leading to cost increases, and others will decrease, leading to potential disadvantage for employees, depending upon the current award coverage. The creation of modern awards which will constitute the award elements of the safety net necessarily involves

1 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 181 IR 19, also see ss 576A(2) and 576B(2) of the *Workplace Relations Act 1996* (Cth), and cls.1 and 2 of the consolidated request.

> striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply. It is in that context that the formulation of appropriate transitional provisions arises.[2]

4 This passage reflects our approach to modernisation and also indicates the importance of transitional provisions in cushioning the impact of changes. We have taken into account all of the submissions as to cost and disadvantage, including those based on item 2(5) of Sch 5 to the Transitional Act. Any economic impact on an industry flowing from a modern award must be assessed against the totality of the provisions in the award, including the transitional provisions. We shall announce a process in due course for the inclusion of the model transitional provisions in the Stage 3 modern awards and any additional provisions which may be required, consistent with the Commission's 2 September 2009 decision.

5 One proposal was received, dated 20 August 2009, requesting the Commission to provide an opportunity for parties to modern awards made in the priority stage and Stages 2 and 3 to make further submissions on the significance of the variation to the consolidated request made on 2 May 2009 and item 2(5) of Sch 5 to the Transitional Act. The proposal listed a number of areas for specific consideration. In view of the timing of this proposal and its potentially broad scope we do not intend to adopt it. It would also require us to seriously compromise the program for the completion of award modernisation. All of the matters raised can be dealt with by one or more applications to vary modern awards. We emphasise, however, that parties have not been restricted in the material to which they can refer in the proceedings to date and all of the submissions, proposals and material which have been advanced as to the contents of modern awards have been taken into account. As we indicated in our statement of 26 June 2009, review or variation of the substantive terms of modern awards should be dealt with by an application to vary.[3]

6 Previous statements and decisions have used the statutory language appearing in the WR Act. In particular, pre-modern award instruments have been referred to as pre-reform awards, Notional Agreements Preserving State Awards (NAPSAs) and so on. The Transitional Act employs a range of replacement terms such as award-based transitional instrument. In the part of the decision which follows we have generally used the earlier terminology, reflecting the language used in the submissions and proposals under consideration.

Stage 3 Industries/Occupations

7 We now make the Stage 3 modern awards as identified and described below. We shall deal with each award by reference to its industry classification, following the order in which the exposure drafts were dealt with in our statement of 22 May 2009.[4]

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2 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 800; (2009) 187 IR 146.

3 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 184 IR 246.

4 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413.

Airline operations

Air Pilots Award 2010

8 The parties have requested that a number of agreed provisions which were omitted from the exposure draft should be reinserted. The provisions include highly prescriptive clauses which we would expect belong more in enterprise agreements rather than a minimum safety net award. Nevertheless we have decided to include agreed provisions regarding additions to salary, Civil Aviation Safety Authority (CASA) drug testing, suspension of employees, commission payments on termination of employment, splitting of meals and accommodation provisions, pilot indemnity and some other corrections and minor variations sought by the parties.

9 Given the strong opposition by the Australian Federation of Air Pilots (AFAP) we have decided not to amend the definition of "home base" and "permanent base." In our view such matters cannot be fully considered without an opportunity for all those affected to present a comprehensive case.

10 We have decided not to deal in the award with the interaction between award provisions and CASA approval and exemption for rostering arrangements. The parties had divergent views about the legal effect of such provisions and they have not been a feature of existing awards.

11 We have also rejected submissions to reduce the minimum classification rate as this would take the rate below the federal minimum wage.

Aircraft Cabin Crew Award 2010

12 The parties agreed on a number of variations which we have reflected in the final award. A large number of variations sought were justified by reference to an award which only applied to one employer — either Qantas or an airline which has since gone out of existence, Ansett Airlines. In general we have not had particular regard to the contents of enterprise awards.

13 On the question of hours of work for domestic and international flying there was considerable debate as to the appropriate number of weekly hours. The employers submitted that the annual equivalent of a 38 hour week (1976 hours) is appropriate and is currently the limit applying to low cost airlines established in recent years. It appears however that practices do not reflect this level of working hours although they could if traffic increases. We have decided that a lesser figure of 1872 hours (a 36 hour week) is more reflective of current practices and award provisions in this area of employment.

14 A number of increased entitlements were sought by the Flight Attendants' Association of Australia (FAAA). We do not consider that a sufficient case has been made out for their inclusion.

Airline Operations — Ground Staff Award 2010

15 Various modifications have been made to the exposure draft as a result of the submissions of the parties. The clauses affected relate to the definition of the airline industry the exclusion of planning, drafting and technical officer classifications, the insertion of stores classification definitions, the limitation of indemnity provisions to maintenance engineering classifications, grouping of allowances along classification lines, allowing 12 hour shifts by agreement and various other simplifications and corrections.

16 We have decided not to amend the classification structure to reflect the

structure of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Modern Award).[5] The structure in the modern award is consistent with existing airline industry structures.

Airport operations (other than Retail)

Airport Employees Award 2010

17 We have made changes to the superannuation provisions, classification structure and scope clause in this award together with some more minor corrections. Other changes sought which are not consistent with standard modern provisions have not been made.

18 The award largely reflects the terms of an existing federal award modified by limited agreed items and our standard approach to certain award matters. The parties generally did not seek changes to the existing provisions. We remain of the view that due to its history the award is overly prescriptive and could be simplified much further. This should be considered in future reviews of modern awards.

Aluminium industry

Aluminium Industry Award 2010

19 The aluminium industry is characterised by enterprise awards and NAPSAs: there are no awards or NAPSAs that apply to multiple employers. All aluminium industry employers were represented by a single firm of solicitors and styled themselves "Aluminium Industry Parties". We will refer to them as the "employer group". The Australian Workers Union (AWU) was the lead union for the aluminium industry albeit that a number of other unions made submissions.

20 A number of proposed changes to the definitions in the exposure draft were agreed. Others were not agreed. We have added words to the definition of "afternoon shift" to exclude 12 hour shiftworkers, as sought by the employer group, to allow for reasonable flexibility in the commencement of 12 hour shifts. In particular, we think it a reasonable flexibility that an employer be able to start the day shift in a 12 hour shift roster at 7am without attracting afternoon shift penalties. There is some substance in the employer group criticisms of the definition of roster cycle. We have decided to omit the definition altogether. The concept of a roster cycle is well understood and does not need to be defined. In a similar vein, the definition of "shift work" is unnecessary and has been omitted. We are not persuaded that there is any need for a change to the definition of "shiftworker". We have not added a definition for "work cycle". That expression is used in only one clause and its meaning is clear from the words of that clause.

21 The word "melting" was added to cl.4.2(b) with the agreement or non-opposition of all industry parties.

22 One of the most contentious issues was where the line should be drawn between the aluminium industry and the electrical power industry and the proper form of words to effect that demarcation. In particular, there was considerable debate over the extent to which the generation of power for use in aluminium smelters and other aluminium industry establishments should be regarded as being within the aluminium industry.

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5 MA000010.

23 We have varied the wording of cl.4.2(c)(i) of the exposure draft but have not adopted the form of words suggested by either the employer group or the combined unions. We note the extensive submissions of the Construction, Forestry, Mining and Energy Union, Mining and Energy Division (CFMEU(M&E)) in relation to co-generation within Australia and within the aluminium industry in particular. Although we accept the general thrust of the CFMEU(M&E) submissions that would see large stand-alone power stations as properly being within the electrical power industry, we are concerned that the form of words proposed by the combined unions may have unintended consequences of the sort identified by counsel for Australian Federation of Employers and Industries (AFEI) during the oral consultations. We have modified the form of words used in the exposure draft and included that same modified form of words in the *Sugar Industry Award 2010* where identical issues arise. When cl.4.2(c)(i) comes to be construed, proper emphasis needs to be placed on what is "ancillary" or "incidental" to the "employer's activities in cll.4.2(a) or (b)". It is unlikely that the generation of power in a stand-alone power station that ordinarily supplies a significant portion of its output into the grid would come within the inclusion in cl.4.2(c)(i). If such a power station was operated by an employer who also operated an aluminium smelter the employer would prima facie be in the electrical power industry so far as the power station was concerned. Of course, each case will turn on its own facts.

24 On balance, we have decided to maintain the inclusion of embedded contractors in cl.4.2(d). That inclusion is quite limited because it only applies to a contractor in relation to employees engaged in the specified activities and "principally employed to perform work on an ongoing basis" at an aluminium industry establishment. Clause 4.2(d) is not intended to cover contractors who place employees at an aluminium industry establishment during the period of a maintenance shutdown. However, to remove any scope for argument on this point we have added a note to cl.4.2 to make it clear the inclusion in cl.4.2(d) does not extend to such contractors and their employees. We were not persuaded by submissions that sought the incorporation of classifications from the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Modern Award) or the *Electrical, Electronic and Communications Contracting Award 2010*[6] for contractor employees included within coverage by cl.4.2(d).

25 We have accepted the proposal of the employer group (with some minor modification) in relation to a separate subclause for exclusions, now cl.4.3. We note that that proposal was supported or not actively opposed by the relevant unions. We also note that some employees excluded by cll.4.3(d) and (e) will be covered by the occupational operation of the Manufacturing Modern Award. We note also that we modified the exclusion in what is now cl.4.3(d) to exclude only "senior" supervisors on the basis that some employees who could be described as "supervisors", for example, leading hands, will be covered by the *Aluminium Industry Award 2010*.

26 The coverage exclusion in cl.4.3(a) requires some comment. That exclusion is in the following terms:

(a) the processing, melting, casting, rolling, extrusion and fabrication of

6 MA000025.

aluminium as part of other manufacturing operations and activities of employers covered by the *Manufacturing and Associated Industries and Occupations Award 2010*.

27 The Australian Industry Group (AiGroup) proposed an amendment to the Manufacturing Modern Award coverage clause to effect an inclusion for what was described in the exposure draft as "downstream" manufacturing involving aluminium. The form of words proposed by AiGroup would have created its own problems including, in particular, circularity of exclusions as between the two awards and, on one view, the exclusion of technical employees in the aluminium industry from award coverage altogether — a result that is not intended by any of the aluminium industry parties.

28 We do not think that any amendment to the Manufacturing Modern Award is required. Certain activities and employees are excluded from the coverage of the *Aluminium Industry Award 2010*. The broad definition of what constitutes manufacturing in the Manufacturing Modern Award will pick up all "downstream" aluminium manufacturing not covered by the *Aluminium Industry Award 2010* because the exclusion in cl.4.3(a) is expressed by reference to the operation of the Manufacturing Modern Award in relation to "other manufacturing operations and activities of employers" covered by that award. The occupational coverage of the Modern Manufacturing Award will operate in relation to excluded employees whom it is agreed by the industry parties ought be covered by it.

29 We do not propose to comment on every change made to the exposure draft. There was merit in many of the suggestions made by the employer group (a number of which were not opposed by the unions) and we have adopted many of those suggestions for the reasons advanced by the employer group. We have rejected some of the employer group suggestions for the reasons advanced by the unions or because we are unpersuaded that the change proposed is appropriate. A number of suggestions proposed by the unions have also been adopted.

30 In relation to casual employment, apart from some non-contentious changes to cl.10.4(a) we are not persuaded that the changes sought by the employer group should be made. We have included provision for juniors notwithstanding the opposition of the AWU. We have inserted the clause proposed by the employer group.

31 We have included the standard superannuation clause and named Westscheme Pty Ltd (Westscheme) as a default fund. As noted, the aluminium industry is characterised by enterprise awards and NAPSAs. Westscheme is apparently the only fund named in any of the awards and NAPSAs in this industry.

32 In relation to hours of work, we have adopted the employer group suggestion for changes to cl.18.2(d) of the exposure draft, to which there was no opposition from the unions, but have varied the wording of the proposed change to prevent an inconsistency between the terms of the clause as varied and the entitlement of a non-shiftworker to an unpaid meal break of 30 minutes every five hours. We have not made the changes sought by the employer group to cl.18.3 of the exposure draft. We have, however, made the maximum hours limitation in that clause subject to the right of the employer to require reasonable handover work.

33 In relation to rostering, we have omitted cl.18.4 of the exposure draft on the basis the clause limited flexibility in circumstances where adequate protection is provided by the provisions dealing with breaks between shifts. However, we

have rejected the employer group's suggestions for changes to cll.18.5 and 18.6 of the exposure draft. The rejection of those suggestions should not be interpreted as an indication that continuous rostering is not available under the award. The award is intended to encompass operations being carried out 24 hours per day, seven days per week.

34 We note that cl.19.4 has been included by consent between the industry parties.

35 We are not persuaded by the employer group arguments in relation to the clause dealing with rest period after overtime, now cl.21.4. However, we have added paragraph (d) to that clause allowing for a break between shifts of eight hours rather than 10 hours by agreement with an individual employee.

36 We accept the union submission that a critical mass exists in the underlying awards and NAPSAs for an annual leave loading of 20% rather than 17.5% and have amended the annual leave clause accordingly. However, we are disinclined to supplement the National Employment Standards (NES) entitlement to compassionate leave notwithstanding that most of the underlying awards contain an entitlement to compassionate leave that is greater than the NES standard.

37 While we have accepted the employer group proposal to vary the subclause relating to an employer's entitlement to require an employee to take excessive leave, now cl.22.6, we have inserted words that ensure an appropriate leave balance is retained.

38 In relation to the classification descriptions in Schedule A, we note that there was agreement between the employer group and the unions in relation to the descriptions for levels 1 to 5 but no agreement on the descriptions for levels 6 to 8. We have adopted the classification descriptions proposed by the employers. We note the absence of any detailed post-exposure draft submissions from any of the relevant unions in relation to the classification descriptions for levels 6 to 8. The CFMEU (M&E) has proposed a review of the classifications on a work value basis at some appropriate point. We think that would be desirable.

Cement and concrete products (including asphalt and bitumen industry)

Asphalt Industry Award 2010

39 We have retained roadmaking within the coverage clause of the award. Roadmaking, in this context, is intended to comprehend those elements of roadmaking associated with the asphalt industry and undertaken by employers within the industry as defined. Other roadmaking activity, undertaken by employers within the civil construction sector of the building, engineering and civil construction industry, will fall within the coverage of the *Building, Engineering and Civil Construction Industry General On-site Award 2010*.[7]

40 The only major change made to the exposure draft reflects our acceptance of the skills based classification structure jointly proposed by Boral and the AWU from the *Asphalt and Bitumen Industry (Southern States) Award 1999*[8] in place of the classification structure in the exposure draft. The "in charge of plant" allowance, which is now comprehended in skill level 5 in the classification structure, has been deleted as a separate allowance from the exposure draft.

7 MA000020.

8 AP766012CRV.

41 Minor amendments have been made to the rostered day off provision in cl.20.2(c) and the close down provision in cl.24.4, in accordance with the joint position of Boral and the AWU.

Cement and Lime Award 2010

42 In our statement of 22 May 2009,[9] accompanying the publication of the exposure draft, we invited comment on the appropriateness or otherwise of the incorporation of the cement and lime industry within the *Quarrying Award 2010*.[10] There was no support in the post-exposure draft consultations for such an outcome. Boral and the AWU continued to support the making of a separate modern award for the cement and lime industry. We accept that position and will make a separate cement and lime industry modern award.

43 We have made several amendments to the exposure draft, each of which was jointly supported by Boral and the AWU.

44 First, we have removed blast furnace slag from the definition of the industry in cl.3.1 to meet the concern expressed about an unintended incursion into the activities of the steel manufacturing industry.

45 Second, we have included a casual conversion provision in similar terms to that contained in other modern awards in the asphalt, concrete and cement industries.

46 Third, we have included the minimum rates jointly proposed by Boral and the AWU in cl.14. The rates proposed, which have been reduced at the lower classification levels and increased at the higher classification levels, better reflect the classification descriptors and properly reflect minimum rates within other modern awards.

47 Fourth, we have made minor modification to the level of the leading hand and first aid allowances as a percentage of the standard rate, with reduced percentages offsetting the slightly higher standard rate now contained in the modern award.

48 Fifth, we have included an allowance compensating for work in wet weather.

49 Finally, we have added Westscheme as a named default fund in the superannuation clause, in light of the naming of that fund in the *Cockburn Cement Limited Award 1991 (WA)*.[11]

Concrete Products Award 2010

50 Boral and the AWU supported the terms of the exposure draft. The only change we have made to the exposure draft is to slightly amend cl.16.3 to clarify the operation of the payment to be made in circumstances where an employee is unable to return home and is not provided with board and lodging by the employer. We have also added Westscheme as a named default fund in the superannuation clause for the reason indicated in respect of the *Cement and Lime Award 2010*.

Premixed Concrete Award 2010

51 Boral and the AWU supported the terms of the exposure draft, save for a correction of an error in the exposure draft sought by them in respect of the

9 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413.

10 MA000037.

11 AN160083.

specification of the standard rate for the purpose of work related allowances. We have made that correction. We have also added Westscheme as a named default fund in the superannuation clause for the reason indicated in respect of the *Cement and Lime Award 2010.*

Cemetery operations

Cemetery Industry Award 2010

52 The *Cemetery Industry Award 2010* is generally in the same terms as the exposure draft but with some changes.

53 The hours of work clause has been amended to reflect the prevailing standard that ordinary hours are worked between Monday and Friday. The Leading Hand Allowance has been amended to exclude employees at levels 5 and 6. The definitions of Cemetery Employee Class 5 and 6 have been amended to reflect in part, the provisions of the *Cemetery and Crematorium Employees' Award — State — 2005*.[12] The new definitions link the higher classifications to skills and training.

Coal treatment industry

54 In our statement of 22 May 2009[13] we noted, in summary, that there is no coke works or other existing coal treatment operation in Australia that would be covered by a modern award for the coal treatment industry and that such an award would cover new entrants only. We indicated an inclination to amend the scope of the Manufacturing Modern Award to include coal treatment not covered by another modern award.

55 Following the publication of our statement of 22 May 2009 we received no submission urging the Commission to make an award for the coal treatment industry or challenging the appropriateness of placing the production of coke within the scope of the Manufacturing Modern Award. The CFMEU(M&E) objected to the production of "Syngas" being placed within the scope of that award. Syngas is a term that refers to a gas produced from coal processed on site through a number of technologies. It appears that those technologies remain experimental and that no commercial Syngas enterprise has yet been established (albeit that the CFMEU(M&E) has pointed to material suggesting that a commercial Syngas operation will be developed in the near future). The fact remains that we have almost no information on how commercial production will be undertaken or the nature of the work that will be performed by employees in the commercial production process. We are not inclined at this stage to apply black coal mining industry conditions to any Syngas industry that may emerge in the future. Nor are we persuaded that the production of Syngas should necessarily find a permanent home in the Manufacturing Modern Award. Rather, we think that this matter should be revisited if and when a commercial Syngas industry has been established. Parties can make appropriate application(s) if and when that circumstance comes to pass.

Educational services (other than Higher education)

Educational Services (Teachers) Award 2010

56 The main changes relate to part-time employment where some conditions

12 AN140059.

13 (2009) 182 IR 413 at [50].

have been placed on the capacity of the employer to vary the days and hours of duty. Part-time employees will also now accrue experience for the purpose of determining prior service on a pro rata basis.

57 In recognition that prior service is a factor in determining starting salary we have also made provision for a statement of service to be provided to an employee on termination of their employment.

58 A new schedule has also been inserted to deal with hours of work of teachers employed in an early childhood service, operated by a school, which operates for more than 48 weeks per year, rather than in accordance with school terms.

Educational Services (Schools) General Staff Award 2010

59 The most significant changes in the exposure draft are in the hours of work provisions. In response to concerns about the hours of boarding supervision services employees, where the current award coverage tends not to prescribe hours of work, we have made provision for the hours of work of these employees to be averaged over 12 months. There are also changes to the penalty provisions which would apply to these staff where hours are not averaged.

Educational Services (Post Secondary Education) Award 2010

60 Changes have been made in the exposure draft to clarify coverage and to deal with the wages applicable to casual staff. In particular the range of duties and rates for casual academic teachers have been expanded, the rates payable to casual teachers and tutor/instructors have been corrected and the basis for calculating the hours of work of these employees has been adjusted.

61 Other variations have been made to more closely align the provisions in relation to higher duties and overtime with awards applying in higher education. The rights of those staff who currently have an award entitlement to paid parental leave have been preserved.

62 Provisions requiring casual teaching staff to be given notice of termination have been deleted. Where current awards contain such provisions parties may seek special transitional arrangements if thought necessary.

Electrical power industry

Electrical Power Industry Award 2010

63 The fact that electrical power generation was once exclusively a public sector activity in each of the States and the Northern Territory, together with the trend to privatisation of power generation in recent decades, has led to a somewhat unusual situation in relation to state and federal awards. In particular, many if not most of the major employers in the industry are covered by enterprise awards or NAPSAs. There is no federal award that has application outside a single state or territory. There are only two federal awards, both in Victoria, that apply to more than one employer (albeit that all such employers are successors of the state electricity generator). There are industry NAPSAs in South Australia and Queensland. New South Wales is characterised by state enterprise NAPSAs (or, more accurately given the effect of state legislation passed in response to the WorkChoices legislation, preserved state agreements) although the number is small and, again, each of the main generators in New South Wales are successors of the state-owned generator. The particular history to which we have adverted has resulted in awards and NAPSAs with disparate terms and conditions. Although we have relied upon the non-enterprise Victorian awards,

particularly the *Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998*[14] (QuadE Award), this is an industry where the particular circumstances make it appropriate to also have regard to the terms of enterprise awards and NAPSAs.

64 We have already discussed, in the context of the aluminium industry, the contentious issue of the dividing line between the electrical power industry and other industries, including the aluminium and sugar industries, where employers often generate electrical power for the purposes of their activities that other industry and the form of words adopted to identify that dividing line. An equivalent form of words has been adopted to describe the generation and transmission of power and steam that is excluded from the electrical power industry.

65 We have maintained the inclusion of embedded contractors within the coverage of the award. As noted in relation to the *Aluminium Industry Award 2010*, that inclusion is in truth quite narrow because it only applies to employees placed at an electrical power industry facility on an "ongoing" basis.

66 The employer group objected to the inclusion of a casual conversion clause in the exposure draft. We agree with the employer group that such a provision is not a common feature of the underlying awards and it has been omitted.

67 The employer group and combined unions engaged in constructive negotiations with a view to reaching agreement on minimum wages and an appropriate classification structure. Agreement was achieved and we have adopted the agreed provisions.

68 We have adopted union proposals for an expanded clause in relation to apprentices and trainees. Those proposals were reasonable.

69 The particular history of award regulation in the electrical power industry has resulted in a situation where there is little consistency in allowances. There was a measure of agreement between the employer group and the unions in relation to allowances but significant differences remained. We have not accepted union proposals for the creation of sector allowances covering the whole of the industry. In particular we are not persuaded that there should be a residual "industry" allowance for employees not in receipt of one of the other sector allowances. Such an allowance would cover employees who do not suffer any of the disabilities to which the other sector allowances are directed. We have generally maintained the categories of allowance provided for in the exposure draft albeit that we have adjusted the rate of several of those allowances in line with union suggestions, the unions having made good the proposition that the rates in the exposure draft were lower than the rates generally prevailing the in underlying awards and NAPSAs. To the extent that there are classes of employees in the industry who suffer disabilities that do not attract a relevant allowance, this is a matter that can be addressed in the first review of the award. In this context we note that collective agreements are ubiquitous in the electrical power industry and that the modern award will have little or no application before the time of that review.

70 We have included a coal handling allowance for employees not entitled to either the open cut brown coal mine or briquette factory allowances on the basis that there are significant disabilities associated with handling coal and there are

14 AP793302.

employees in South Australia and Western Australia who may not qualify for either of those allowances but who will still suffer the disabilities associated with handling coal.

71 We have included a tool allowance although at a rate less than that sought by the unions. We have rejected a union suggestion for an electrical license allowance on the basis that such an allowance is not a common feature of the underlying awards and NAPSAs.

72 The unions sought the inclusion of a travel allowance. The employer group did not oppose this in principle. There was a difference between the parties as to whether this should be on the basis of prepayment with acquittal or reimbursement upon production of receipts and invoices. We have adopted a partial prepayment model.

73 We have not varied the period that must be worked in a higher classification before the employee becomes entitled to pay at the rate for that higher classification. The unions sought a shorter period and the employer group a longer period. We think the period in the exposure draft is adequate. We agree in principle with a union suggestion that employees working for an extended period on higher duties should be paid for leave at that higher rate. We think that three months at the higher classification is an appropriate qualifying period.

74 We are not prepared to make provision for monthly pays as sought by the employer group. There is no such provision in any of the awards or NAPSA in this industry. This is something that should be bargained for.

75 In relation to superannuation we have named all superannuation funds nominated for inclusion by both the combined unions and the employer group.[15]

76 We were not persuaded that there is any basis founded on the terms of industry awards and NAPSAs to increase the span of hours as sought by the employer group and we have not done so. The employer group is correct to point to the desirability of early starts in hot weather. We think that the appropriate way of providing flexibility to address that circumstance is to allow for a change to the span of hours by agreement with a majority of affected employees. The clause has been amended accordingly. A similar position obtains in relation to the maximum duration of roster cycles.

77 We were not persuaded by the arguments of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) for a lower daily maximum of ordinary hours for dayworkers and shiftworkers other than 12 hour shiftworkers.

78 We have largely adopted the CEPU's suggestions for changes to the clauses in the exposure draft relating to availability duty and duty officers.

79 There is little consistency between the various awards and NAPSAs in the electrical power industry in relation to breaks. We are not persuaded that it is appropriate to vary the incidence and duration of morning and afternoon tea breaks as sought by the employer group. Other changes to the relevant clause go some way to addressing other employer group concerns.

80 We have made changes to reflect the largely agreed position of the industry parties in relation to working without a meal or crib break.

81 In relation to breaks between shifts both the CEPU and the employer group sought amendments to the exposure draft that would, in certain circumstances, have reduced the minimum 10 hour break specified in the exposure draft

15 See [2009] AIRCFB 800; (2009) 187 IR 146 at [67].

although that they proposed different circumstances when this should occur. We have provided for a reduction in the minimum break between shifts in particular circumstances but we have not accepted fully the proposals of either side.

82 In relation to overtime we agree with the suggestion by the employer group that there should be a distinction drawn between continuous and non-continuous shiftworkers for the purposes of overtime rates and that immediate double time should only be available to continuous shiftworkers. There was substantial agreement between the parties on the need to include a minimum payment clause.

83 In relation to penalty rates, it will be evident that we have accepted some and rejected other proposals made by the employer group and the unions. The penalty rate for Saturday in the exposure draft was an error. The underlying awards and NAPSAs almost uniformly provide for a rate of 150%. We agree with the employer group that a distinction should be drawn between night shift and permanent night shift and that a penalty rate of 30% should only apply to permanent night shift.

84 We have not accepted a union proposal for a penalty shifts clause where less than the required notice is given for a change of roster. Such a provision does not appear in a sufficient number of the underlying awards. The unions had previously sought a minimum of 72 hours notice for roster changes. In the exposure draft we accepted the employer proposal for a shorter period of 48 hours notice. Employers will be obliged to give 48 hours notice.

85 We have included a time off instead of overtime provision at the suggestion of the CEPU and CFMEU on the basis that it is a relatively common feature in the underlying awards and NAPSAs. We have based the wording on the clause in the QuadE award.

86 We have accepted an employer group proposal to remove cl.27.3 of the exposure draft on the basis that the additional supplementation of annual leave for continuous shiftworkers contained in that clause is only to be found in the QuadE award. We have accepted as reasonable a proposal by the CEPU to increase the amount of notice required for an employee to be directed to take excessive accrued annual leave.

87 We are not persuaded by union suggestions that the additional personal leave entitlement provided for in the exposure draft should be further increased.

88 The specification of a day as a public holiday is a matter for government. We are not prepared to increase the number of public holidays by a variation to the exposure draft as suggested by the unions.

89 We have accepted union proposals for the inclusion of dispute resolution procedure training leave on the basis that a significant proportion of employees in the industry presently have access to such leave.

Entertainment and broadcasting industry (other than racing)

Sporting Organisations Award 2010

90 We have noted the concerns of the Australian Municipal, Administrative, Clerical and Services Union (ASU) as to the classification descriptors and wage levels for clerical staff but have decided to largely retain the provisions of the existing federal award. In this regard we note that there is a two year review period for the award and any real concerns can be dealt with in a considered manner at that time. The award is in very similar terms to the exposure draft.

Amusement, Events and Recreation Award 2010

91 We have not included any provisions concerning the interaction of this award with local government or State bodies. These are matters that will be dealt with at a later stage.

92 A number of employers raised concerns about the penalty rates applicable under the exposure draft. These have been altered to a degree to better reflect the provisions of the *AWU Theme Park and Amusement Award 2001*[16] upon which the modern award is largely based. A number of the employers who raised concerns about the penalty rates are currently party to enterprise awards. These issues can be revisited at the time those awards are modernised.

93 We have decided not to include the coverage of the *Theatrical Employees (Showmen's Guild) Award 2002*[17] in the modern award. The current conditions under that award are sufficiently different to warrant a separate award. A modern award, which we shall tentatively title the Travelling Shows Award 2010, will be considered as part of Stage 4.

Live Performance Award 2010

94 The award contains a number of provisions that were not in the exposure draft. These were largely agreed between the parties who contributed to the modernisation process. While we still hold concerns that a number of those provisions are not suitable for inclusion in a modern award, in light of the agreement between the employers and employee representatives we have decided to give effect to their views.

Broadcasting and Recorded Entertainment Award 2010

95 We have included a number of provisions in this award relating to actors and motion picture production staff which were not in the exposure draft. The Media, Entertainment and Arts Alliance (MEAA) put strong submissions for the retention of provisions of the current awards which, to us, appear out of place in a modern award. However, as no other parties made any representations to exclude them, we have decided to include many of the provisions sought by the MEAA.

96 We have deleted from the exposure draft provisions dealing with film and television distribution. It was put that this area could more adequately be dealt with through the clerical and administrative and warehousing and storage industries. If there is a case to be made for retention of specialised film and television distribution provisions a variation application could be made.

97 As with the exposure draft, the modern award does not contain any provisions for motion picture laboratories. It was put that the modern award should contain such provisions as there is a current federal award for the area.[18] An examination of that award raises a number of questions. The classifications, for which there are no descriptors, were inserted when the award was made in 1978 and appear, on the face of it, archaic. The MEAA, who sought the inclusion of the provisions, did not indicate where in the modern award those classifications would properly be situated. Again, if there is a case to be made for the inclusions of these provisions, the variation process is available.

16 AP817297.

17 AP816117.

18 *Theatrical Employees (Motion Picture Laboratories) Award 2001*, AP806122.

98 Although we have taken into account the position put on behalf of commercial radio we are not convinced that there is a valid case for differentiating between the rates of pay of radio station employees on the basis of the audience population. Any significant increases in pay rates can be dealt with as part of the transitional process.

99 As sought by the MEAA and the representative of the television networks, we have decided that the journalists' salary scale should be based on the scale currently found in the television journalists award[19] and not, as was the case in the exposure draft, the radio journalists award.[20] The television scale is very similar to the scale found in the *Journalists Published Media Award 2010* and is, in our view, the more appropriate scale. We have retained the band classifications as currently found in the radio award and are confident that a transitional arrangement can be arrived at which will allay the concerns of the commercial radio employers about any wage increases that may result from the translation. Some adjustment to the wording contained in the description of the bands may be required.

Food, beverages and tobacco industry (manufacturing)

Food, Beverage and Tobacco Manufacturing Award 2010

100 The definition of food, beverage and tobacco manufacturing in the exposure draft of the *Food, Beverage and Tobacco Manufacturing Award 2010* (Food Modern Award) has been varied to include distilling and stock feed. It has been decided not to create a separate milling industry award given that there would be a large overlap in coverage between such an award and the Food Modern Award.

101 A specific facilitative provision has been included in the award at the request of a number of parties and the proposed Level 7 in the classification structure has been deleted given the existence of leading hand allowances. The heavy vehicle driving allowance has been converted to an hourly rate. With respect to hours, an early morning shift with an appropriate penalty rate has been added to the modern award in recognition of the early start times required by some covered by it. The penalty rate has been set having regard to the underlying awards and NAPSAs. The existing annual bonus or Christmas allowance for some brewery and related employees has been included until the end of 2014 as has the existing annual leave bonus for such employees. Some changes have been made to the classification definitions to reflect the historical relativities and to update qualifications. No other changes have been made to the classification definitions bearing in mind discussions between the parties on the translation of existing classifications to the modern award structure.

102 We have decided not to provide for other types of employment. Seasonal and other fixed term employment is not precluded by the types of employment in the modern award. In light of the underlying awards and NAPSAs, the casual conversion clause remains as it was in the exposure draft, as do the meal and rest breaks clauses. For similar reasons, we have not included dispute resolution training leave in the award. The reimbursement allowances sought have not been included as they are compensated through the classification structure.

19 *Journalists (Television) Award 1998*, AP785611.

20 *Commercial Radio — Journalists Award 1999*, AP776547.

103 Other changes in terms and conditions arising from the making of this award may be dealt with through the transitional provisions for this award.

Seafood Processing Award 2010

104 The exposure draft of the *Seafood Processing Award 2010* has been amended to specifically exclude employees employed on oyster farms and those covered by the *Fast Food Industry Award 2010*,[21] the *General Retail Industry Award 2010*[22] and the *Hospitality Industry (General) Award 2010*.[23] Some minor changes to the classification structure definitions have also been made. These changes are designed to clarify the modern award's operation. Further, a number of superannuation funds have been added to the superannuation clause. Other changes, which were sought by some parties, have not been adopted. The hours and penalty rates in the underlying awards and NAPSAs vary. Those in the modern award reflect an appropriate safety net. The application of the casual loading in the modern award reflects that in many of the pre-reform awards and NAPSAs. A facilitative clause has not been included in the modern award. Such a clause had the potential to introduce unnecessary complexity into the operation of the award's facilitative provisions.

Poultry Processing Award 2010

105 The definition of the poultry processing industry in the exposure draft has been amended to clarify that the modern award covers employers involved in the processing of uncooked poultry and those involved in the processing of cooked poultry where the cooking is incidental to the processing of uncooked poultry. Further, the modern award provides for ordinary hours to be worked up to 12 hours per day by majority agreement consistent with provisions in the underlying award and NAPSAs. Additional allowances beyond those in the exposure draft have not been included in the award having regard to the classification definitions and the allowances already provided.

Grocery products manufacture

106 The manufacturing of food will mainly be covered by one of the three modern awards dealt with in food, beverages and tobacco industry (manufacturing). Any remaining area will be covered by the Manufacturing Modern Award.

Journalism

Journalists Published Media Award 2010

107 The exposure draft has been modified having regard to the written and oral submissions made by the parties. Substantive submissions were received in relation to the exposure draft from News Limited, ACP Magazines, Pacific Magazines and Text Pacific (the employers), Country Press Australia (CPA) and MEAA. We refer only to the changes which appear to be significant.

108 Certain editorial positions have been exempted from coverage. The exemptions were generally supported by all parties. The only exception was that

21 MA000003.

22 MA000004.

23 MA000009.

MEAA did not expressly support the exemption for senior positions in on-line publications. Given that such publications are not currently covered by an award it is appropriate to exclude them also.

109 All three parties pointed out that the published media industry has a long history of exempting certain editorial positions from award coverage. This is reflected in a wide range of pre-reform awards and NAPSAs. Specific reference was made to a decision of a Full Bench of the Commission in 1984[24] which maintained the exemptions at the time, noting the long history of journalists' awards having exemptions for senior editorial positions from the application of those awards. The Commission at the time confirmed that it was appropriate for senior editorial staff who had managerial or executive functions to be exempt from award coverage. The manner in which this principle has been implemented has been generally consistent across the various sectors of the industry, reflecting the agreed position between publishers and the MEAA regarding the types and number of positions appropriate to be exempted in a particular sector or market.

110 The employers pointed out that there is an apparent inconsistency between the way full-time employees employed on on-line publications are treated with regard to the application of the hours provisions in Part 5 of the modern award, and the way part-time and casual employees are treated. This was unintentional and a provision along the lines proposed by the employers has been inserted to clarify, in relation to on-line publications, that part-time and casual employees are treated the same as full time employees with regard to hours of work.

111 MEEA submitted that cl.4.6(b), which exempts employees on specialist publications from Part 5 of the modern award dealing with hours of work be deleted on the grounds that such employees currently have such entitlements. In our view Part 5 is much more prescriptive than the current hours provisions for employees on specialist publications and should not apply to those employees. Instead we have included a special hours provision for employees in specialist publications, based on the current arrangements for such employees.

112 The employers and the CPA have pointed out that the exposure draft was worded in such a way as to remove the grading "cap" for new employees employed on country non-daily newspapers etc. This was a drafting oversight and has now been corrected by the insertion of a provision along the lines proposed by the employers.

113 CPA pointed out that the exposure draft increases the maximum time allowed for a paid meal break for country non-daily newspapers and regional daily newspapers to "less than one hour" - as opposed to the current 30 minutes. We have made an appropriate variation to cl.20 to accommodate the existing position.

114 The employers have submitted that the higher duties allowance included at cl.16 of the exposure draft should be removed as such higher duties allowances are not generally contained in existing federal awards and NAPSAs. Those that do contain such allowances are not consistent and usually require an employee to be undertaking the higher duties for an extended period of time, longer than one week. In addition, awards have always included flexible classification structures, allowing journalists to deal with news stories at short notice and gain additional experience. In light of these submissions we have altered the

24 *Re Journalists' (Metropolitan Daily Newspapers) Award 1982* (1984) 293 CAR 69.

provisions. The higher duties allowance provided for in the exposure draft only applied where an employee was called upon to do the work of another for more than a week. The provision has been altered so that it only applies when higher duties are performed for more than a fortnight.

115 MEAA submitted that "wire service" should be added to the list of areas where an employee is entitled to the 17.5% shift penalty for working between 8:30 pm and 6:00 am. We have made an appropriate amendment.

116 The employers requested that a provision allowing for the cashing out of annual leave be included in the modern award, reflecting the same arrangement as provided for in the *Fair Work Act 2009* (Cth) (*Fair Work Act*). Journalists receive more than the standard amount of annual leave and tend to accrue large amounts. The cashing out of annual leave is apparently a common request by employees. Nevertheless we have decided not to include a provision for cashing out of annual leave, consistent with our earlier decisions.

Licensed and registered clubs

Registered and Licensed Clubs Award 2010

117 There are a significant number of changes resulting from submissions and proposals made in relation to the exposure draft. We have decided to adopt the integrated minimum rates provision suggested by Clubs Australia, incorporating the maintenance and horticultural employees, both non-managerial and managerial, into the existing structure at the levels they proposed. We have applied the rates for managerial classifications from the *Liquor and Accommodation Industry — Licensed Clubs — Managers and Secretaries — Award 2002*,[25] updated since 2005. They vary marginally from those proposed by Clubs Australia, as a result of differences in the method of calculating annual salaries. The rates for managerial classifications replace those in the exposure draft, drawn from the parties' drafts which appear to have been drawn from the *Liquor and Accommodation Industry — Licensed Clubs — Managers and Secretaries (A.C.T) Award 2003* (ACT club managers award).[26]

118 We have applied the exemption provisions within the exposure draft to all managerial positions, including the maintenance and horticultural managerial classifications, reflecting a two level exemption process. We have applied 20% at the first exemption level, reflecting the terms of the major federal award for club managers.[27] We have also included an exemption provision for maintenance and horticultural managerial classifications in the terms of the New South Wales *Bowling and Golf Clubs Employees (State) Award*.[28]

119 We have amended the coverage clause to exclude golf professionals, in the compromise terms agreed between the Liquor, Hospitality and Miscellaneous Union (LHMU) and the Professional Golfers' Association (PGA). We have also excluded from coverage of the award thoroughbred, harness, trotting and

25 AP817963.
26 AP824122.
27 AP824122.
28 AN120079.

greyhound racing clubs and their employees in relation to operations covered by the *Racing Clubs Events Award 2010*[29] and employers and their employees covered by the *Racing Industry Ground Maintenance Award 2010*.[30]

120 The Australian Golf Course Superintendents' Association filed a submission on 6 July 2009, addressing possible overlap between this award and any modern award which might arise from the Stage 4 consideration of gardening services and the adequacy of coverage, in either case, of golf course superintendents. We have decided that these issues should be considered in the context of the gardening services industry, with any amendment to the licensed clubs award, if necessary, being undertaken at that time.

121 We have amended the exposure draft to incorporate changes agreed between the AWU and Clubs Australia in relation to maintenance and horticultural employees in relation to:

- definitions of maintenance and horticultural employee;
- an addition to the work organisation clause;
- inclusion of maintenance and horticultural employee classification minimum wage rates;
- inclusion of maintenance and horticultural employees within the apprentice wages provision;
- additions to the clothing, equipment and tools provision to reflect the circumstances of maintenance and horticultural employees;
- insertion of Sunsuper as a nominated default fund;
- additional provision for breaks;
- specific hours provisions to reflect the circumstances of maintenance and horticultural employees; and
- inclusion of specific penalty provisions.

122 We have not included the provision in respect of blood tests for horticultural employees proposed by the AWU and drawn from a New South Wales NAPSA. It is not a common provision within existing awards and NAPSAs.

123 In relation to superannuation the exposure draft provides for a threshold of $350 income before superannuation is payable, which is more beneficial than the $450 threshold in the superannuation legislation. The $350 threshold appears in the *Licensed Clubs (Victoria) Award 1998* (Victorian clubs award),[31] the *Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998*[32] (the ACT clubs award) and a lesser threshold, $250, appears in the *Hotels, Clubs, Etc., Award (SA)*.[33] Elsewhere the legislated threshold of $450 applies. The weight of existing regulation clearly supports the deletion of cl.23.2(b) of the exposure draft.

124 We have retained sub-cl.23.5 of the superannuation provision, dealing with payment during absences on injury, reflecting the common position between the major employer and employee representatives.

125 An issue arose between the LHMU and Clubs Australia in relation to cll.10.5(d) and 17.4 of the exposure draft, which identified and prescribed

29 MA000013.
30 MA000014.
31 AP787060.
32 AP787017.
33 AN150066.

specific wage rates for casual employment at sports grounds in Victoria. That provision in the exposure draft came from the Victorian clubs award. Clubs Australia submitted that the provision should be retained only as a transitional provision in respect of Victoria and modified to provide clarity that it does not cover employees of clubs situated on or near a sportsground who are not performing duties relating to a sporting event.

126 A similar provision is found in the *Liquor Industries — Racecourses Showgrounds etc. — Casuals Award 1998*,[34] an award which operates in Victoria, Tasmania, Queensland and New South Wales in respect of the industry of persons employed as casual bar attendants, cashiers and other casual employees in the classifications prescribed on racecourses, recreation grounds, sports grounds, showgrounds, picnic grounds and any other ground where liquor is permitted to be sold under the licensing laws of any state. The respondents are a large number of racing clubs, a lesser number of football (of various codes) and cricket clubs, a limited number of agricultural societies and some labour hire companies.

127 The relevant provision currently applies, through those two awards, to the employment of casuals in events, involving the service of liquor, staged in racecourses, recreation grounds, sports grounds, showgrounds and picnic grounds and not to the normal operation of licensed clubs. Casual bar attendants employed by race clubs, the major group of employers respondent to the *Liquor Industries — Racecourses Showgrounds etc. — Casuals Award 1998* are included in the coverage of the *Racing Clubs Events Award 2010*. In those circumstances, we have decided against the inclusion of special provisions for casual bar attendants at racecourses and showgrounds in this award. In our view the general classification structure and wage rates, and related additional entitlements, in the modern award provide an appropriate safety net in relation to any residual employees of licensed clubs who might fall within the scope of cll.10.5(d) and 17.4 of the exposure draft.

128 We have maintained the exposure draft definition of "shiftworker" for the purposes of annual leave under the NES to apply to all employees to whom the modern award applies.

129 We have included in the modern award a maintenance and horticultural employees training allowance, reflecting the provision in the *Club Employees (State) Award (NSW)*[35] (the NSW clubs award) but modified to create an obligation only when the relevant training is required by the employer. Although no similar provision is found in the Victorian award, similar provisions apply, more generally, in Queensland NAPSAs.[36]

130 We have not included the amenities provision suggested by the AWU in the modern award. It is a very prescriptive provision not suitable for a modern award.

131 We have retained provisions for Sunday overtime and time off instead for work on public holidays in the exposure draft for application to all employees to whom the modern award applies. We are not persuaded that different provisions in relation to these matters should apply to maintenance and horticultural employees in the licensed clubs industry.

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34 AP787006

35 AN120136.

36 AN140072, AN140073 and AN140137.

132 The major issue which arose in the post-exposure draft consultations related to part-time provisions. Both prior to the publication of the exposure draft and in subsequent consultations, the LHMU supported the inclusion of the part-time employment provision in Victorian clubs award. That provision is in the same terms as part-time provisions contained in most modern awards.

133 The LHMU submitted that the New South Wales provision undermines the character of part-time employment, removing essential protections for employees that the part-time provisions were designed to provide and that alternate arrangements can be made by enterprise agreement, subject to the better off overall test.

134 Clubs Australia and other employer organisations proposed a provision in the terms of cl.10 of the NSW clubs award. Clubs Australia submitted that the exposure draft entails, for New South Wales, a loss of flexibility through preventing additional hours other than as overtime and an administrative burden associated with written consent for a change in rostered hours. It submitted that the provision was introduced by consent, has prevented disputes about hours and has led to a significant conversion form casual to part-time employment. It relied on several statements from clubs, which addressed the impact of the exposure draft provision on current arrangements.

135 In assessing the competing positions in relation to what are very different provisions, it is necessary to more closely consider the current regulation of part-time work against the full range of existing federal awards and NAPSAs, the weight of that regulation and the substantive terms of the competing provisions.

136 The current pre-reform awards — the Victorian clubs award, the ACT club managers award, the *Liquor and Accommodation Industry — Licensed Clubs — Managers and Secretaries — Award 2002*,[37] the ACT clubs award and the Queensland NAPSA, the *Clerks' Award — Hotels and Registered Clubs — State 2003*[38] — all contain a regular part-time employment provision in the terms found in the exposure draft and generally contained in modern awards already made. As the LHMU noted, the provision was crafted as a safety net provision in respect of part-time employment by a Full Bench in the award simplification decision in 1998,[39] after hearing evidence from employees in the hospitality industry and on submissions from relevant parties. The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime.

137 The NSW clubs award prescribes two sets of conditions for part-time employees. The first applies to employees employed as at 2 July 1999. The Restaurant and Catering Australia submitted that this provision has little, if any, continuing relevance, a proposition which was not disputed during the

37 AP817963.

38 AN140068.

39 Print P7500.

consultations. It provided for a loading of 15% in addition to the ordinary hourly rate of pay for all ordinary hours worked on Mondays to Fridays, in addition to an entitlement to annual leave, bereavement leave, blood donors leave, make up pay in respect of jury service, family care leave, repatriation leave, sick leave and unpaid parental leave.

138 The second, and presently operative, set of conditions is in the terms Clubs Australia proposes for the modern award. It prescribes a minimum of 32 hours and a maximum of 148 hours in any four week period, to be worked over no more than 20 days in a four week period, together with a minimum three hours (other than for clubs who employ fewer than 10 employees) and maximum 10 hours per shift. It provides for a roster showing starting and ceasing times for ordinary hours of duty together with meal periods for part-time employees, to be posted two weeks in advance and not be changed except by mutual consent. When such a change is necessary because of absences or shortages of staff 12 hours notice is required. Change for any other reason requires seven days notice. There is a limitation of three part-time employees for each full-time employee, other than for clubs who employ fewer than 10 employees.

139 Several NAPSAs provide flexible part-time provisions. The *Club Managers' (State) Award 2006 (NSW)*[40] provides for minimum (three) and maximum (37) weekly hours, to be worked as rostered, with at least 7 days notice. The *Clerks (Clubs, Hotels and Motels) Award (SA)*[41] has limited part-time provisions, prescribing only the basis of payment, pro-rata access to personal and annual leave and a three hour daily minimum engagement.

140 A number of other NAPSAs provide for two classes of part-time employees: those who work specified hours and those who do not.[42] We note in particular that the *Club Employees' Award — State (Excluding South-East Queensland) 2003*[43] provides daily and weekly minimum and maximum hours and a limitation to working on five days of each week. A loading of 10% applies and is applied for the payment of annual leave, sick leave, long service leave, overtime and public holidays. It should be noted that the New South Wales NAPSA provided a loaded rate for part-time employees before 1999, and the provision continues to apply to employees engaged before 1999.

141 The Western Australian NAPSAs contain a concept of regular work for part-time employees.[44]

142 A review of current federal awards and NAPSAs discloses three types of provision. First there is the provision in the Victorian clubs award, common to most modern awards, providing a high degree of certainty and regularity of working patterns for part-time employees and payment at overtime rates for work beyond agreed regular hours.[45] Secondly there is the New South Wales provision which does not provide certainty and regularity of working patterns,

40 AN120138.

41 AN150037

42 *Clerical Award — Registered and Licensed Clubs — State 2003*, AN140066; *Clubs Etc. Employees' Award — South East Queensland 2003*, AN140073; *Hotels, Clubs, Etc., Award*, AN150066; *Licensed Clubs Award*, AN170057.

43 AN140072.

44 *Clerks' (Hotels, Motels and Clubs) Award 1979*, AN160075 and *Club Workers' Award, 1976*, AN160082.

45 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [202] and [250].

although the statements provided by Clubs Australia suggest a proportion of employees are provided with regular times. Third, a number of NAPSAs applying in other states which provide for two types of part-time employees, those with specified hours and those without. A loading is paid to those without specific hours to compensate for the absence of regularity and certainty of work. In one case there is a single category of part-time employee with flexible hours and a loading.

143 In terms of the significance of those diverse forms of regulation of part-time employment, Clubs Australia submitted that the majority of clubs are in New South Wales, as is the majority of employment by clubs. This point was conceded by the LHMU and is supported by Australian Bureau of Statistics data,[46] which shows:

- New South Wales accounts for just under half of all hospitality clubs (49.4%), while Queensland accounts for 22.4% and Victoria accounts for 13.5%;
- employment in New South Wales comprises 61.5% of all employment, while Queensland has 20.4% of all employment and Victoria has 10.2% of all employment.

144 The weight of current regulation supports the adoption of the New South Wales NAPSA provision. However, that provision removes the essential characteristics of part-time employment of some degree of regularity and certainty of employment. It does not reflect a conventional concept of part-time employment as was conceded by Clubs Australia in submitting that "it is perhaps time to look at part-time in a different light and not with the conventional outlook of what is part-time." The New South Wales provisions for part-time employees provide a bare guaranteed minimum of 32 hours over a four week period, no certainty beyond the roster as to when work is to be done and a capacity to alter the roster with 12 hours notice in cases of absences or shortages of staff. These part-time provisions give little predictability to part-time employees and do not appear to be consistent with "the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38."[47] The concerns we expressed about variation of hours by consent in relation to the awards in the health and welfare services industry[48] apply equally in this context.

145 Having regard to the significant departure from the conventional characteristics of part-time employment in the New South Wales provision and the diversity of current prescriptions, we are not prepared to apply the New South Wales provision across the licensed clubs industry, notwithstanding the predominance of club employment under the New South Wales NAPSA, without a fuller consideration of the issues raised through a more traditional arbitration, in advance of or as part of the two year review of modern awards, required by the Transitional Act.

146 We have decided to maintain the part-time provision in the exposure draft, subject to the inclusion of a transitional provision for New South Wales,

46 Clubs, Pubs, Taverns and Bars. Cat No. 8687.0, July 2006.

47 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [291].

48 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 181 IR 19 at [148].

Queensland, South Australia, Western Australia and Tasmania, which will maintain the current arrangements for three years into the transitional period. This should accommodate the completion of the two year review. The transitional provision is in the following terms:

> Transitional Provision — New South Wales, Queensland, South Australia, Western Australia and Tasmania
>
> An employer subject a NAPSA that applied in New South Wales, Queensland, South Australia, Western Australia or Tasmania immediately prior to 1 January 2010 which prescribed part-time employment provisions different from those in cl.10.4(a), may continue to apply those provisions. This transitional provision ceases to operate on 31 December 2012.

Liquor and accommodation industry (manufacturing)

147 The brewing sector of the liquor and accommodation industry is covered by the Food Modern Award.

Wine Industry Award 2010

148 We have made a number of changes to the exposure draft of the *Wine Industry Award 2010*. The award now provides that the casual loading is not payable during overtime except on Sundays and public holidays. This avoids a situation in which the overtime rate would be less than the ordinary time rate. The casual conversion clause has been altered to provide for casual conversion after 12 months' engagement because of the seasonal nature of the industry. Piecework rates similar to those agreed by the parties have been included in the modern award and the operation of some disability allowances has been clarified. Additional default funds have been added to the superannuation clause where they were named in relevant pre-reform awards or NAPSAs. The ordinary hours of work have been extended for employees rostered to perform work in the vineyard between November and April and shift definitions have been altered as requested by major employer groups to overcome potential anomalies. The rates for paid meal breaks have also been detailed.

149 With respect to the classification structure, it has been clarified that progression between Grade 1 and Grade 2 is automatic on passing the accredited assessment. Progression between Grade 2 and Grade 3 is also dependent on passing an accredited assessment. It has not been considered necessary to specify that other promotion is dependent on a position being available. If an employee has met the entry requirements for a grade and is performing the duties of the grade, they are entitled to the wage rate for that grade.

150 Some other changes sought by parties have not been adopted having regard to the prevalent provisions of the relevant pre-reform awards and NAPSAs or the existence of a contrary agreement between the major representatives of employers and employees to be covered by the modern award.

Maritime industry

Dredging Industry Award 2010

151 AiGroup sought to exclude employers covered by the Manufacturing Modern Award from this award. We have acceded to that proposal in part and the award will exclude maintenance contractors covered by the Manufacturing Modern Award.

152 To provide clarity we have inserted definitions of remote areas and ports for the purposes of the shipkeeping allowances.

153 The unions sought the deletion of the national training wage provision on the basis that specific industry arrangements already apply and are better suited. However, no details of these arrangements were provided and we therefore propose to retain the national training wage. Should a party wish to have a more industry specific provision apply this could be the subject of a further application.

154 At the request of all parties we have decided to delete the classification definitions found in Schedule A of the exposure draft. We have done so on the basis that it is not practical to define classifications by reference to Maritime Orders as this provides insufficient differentiation. We are satisfied that the classifications set out in cl.14 are in terms which are well understood in the industry and there is no need for further definition.

155 Finally, we have reconsidered our earlier decision not to insert an aggregate wage for fully operational vessels. The unions have provided further material to support such and we are now aware of a decision of a Full Bench of the Commission which endorsed the aggregate wage in this industry. We have therefore inserted relevant provisions which reflect those in the current award.

Maritime Offshore Oil and Gas Industry Award 2010

156 A number of alterations have been made to the exposure draft. At the request of the parties we have included a definition of "day" to accommodate the nature of maritime work which may extend over several time zones. We were urged by the unions to insert the existing award provisions as to termination of employment. In our view, at least in respect of an officer with more than five years service and who is over 45 years of age, the award provisions could operate to an employee's detriment by comparison with the terms of the NES. We have decided to retain the standard provision, which was in the exposure draft.

157 The unions sought the deletion of the national training wage provision on the basis that specific industry arrangements already apply and are better suited. However, no details of these arrangements were provided and we therefore propose to retain the national training wage. Any proposal for an industry specific provision could be the subject of an application to vary the award

158 We have decided to accept the submissions of the Australian Mines and Metal Association and the Australian Ship Owners Association (AMMA/ASOA) and to delete the definitions of chief integrated rating and integrated rating. Those definitions seemed to equate those classifications with others which, while still used, are increasingly obsolete. We are aware that the chief integrated rating and integrated rating are classifications that have been developed in more recent times to encompass greater multi-skilling.

159 Although AMMA/ASOA urged us to include part-time employment provisions in the award, we note that such an employment type is not a feature of the existing awards nor is it a feature of the industry more generally. In the circumstances we are not persuaded to insert such provisions at this time.

160 AMMA/ASOA pressed for the insertion of the current award provisions which restrict the ability of an employee who has undergone paid study leave to resign in the twelve months following such leave. We do not consider that the

modern award should regulate the manner in which an employee may or may not resign. We have decided to include existing award provisions for personal accident and illness insurance.

161 Finally, at the request of all parties, we have decided to delete the classification definitions found in Schedule A of the exposure draft. We have done so on the basis that it is not practical to define classifications by reference to Maritime Orders as this provides insufficient differentiation between the classifications. We are satisfied that the classifications named in cl.13 are well understood in the industry and do not need further definition.

Seagoing Industry Award 2010

162 Further consideration of this exposure draft has been postponed due to legislative changes and the variation to the consolidated request made on 17 August 2009. We intend to publish a further exposure draft along with the exposure drafts for Stage 4 industries and occupations. The situation is explained more fully in the Full Bench statement of 19 August 2009.[49]

Meat industry

Meat Industry Award 2010

163 Since the publication of the exposure draft there have been a number of changes agreed between Australian Meat Industry Council (AMIC) and the Australasian Meat Industry Employees Union (AMIEU). We have incorporated those changes in the modern award. Other changes were suggested to add greater clarity to the operation of the award. These too have been adopted.

164 The most significant area of controversy between AMIC and the AMIEU relates to the definitions of the various sectors of the industry. The issues arise from the decision of the Full Court of the Federal Court of Australia in *Meatpak Pty Ltd (t/as Holco Rine Meat Supplies) v Moran*.[50] That decision dealt with issues of possible overlap between awards covering different sections of the industry. The Full Court resolved the matter by adopting a "dominant nature of the establishment" test. The exposure draft adopted the wording proposed by AMIC which used the phrase "the sole or predominant business". It was submitted by AMIC that this best reflected the decision of the Court.

165 The AMIEU submitted that there may be circumstances where there is no dominant nature of the establishment and that the use by AMIC of business may not cater for circumstances where an employer who may operate a single business has a number of establishments. The AMIEU suggested reference to the activity or purpose of the establishment would be more appropriate.

166 We have decided to adopt a formulation which refers to an establishment wholly or predominantly concerned with a particular sector of the industry.

Offshore island resorts

167 Island resorts respondent to the Queensland NAPSA — the *Off-Shore Island Resorts Award — State 2005*[51] — again pressed for the creation of a separate offshore islands resort award.

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49 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 765; (2009) 186 IR 14 at [3]-[6].

50 *Meatpak Pty Ltd (t/as Holco Fine Meat Supplies) v Moran* (2005) 145 IR 248.

51 AN140196.

168 We have considered the further submissions but remain of the view that such an award would be inappropriate for the reasons expressed in our 22 May 2009 statement [52] Accordingly, we will vary the *Hospitality Industry (General) Award 2010* to delete cl.4.1(h), which exempted offshore island resorts from coverage by the award. We understand that appropriate transitional provisions will be required given the incorporation of the offshore island resorts currently subject to the Queensland NAPSA into the *Hospitality Industry (General) Award 2010*. We will consider such transitional arrangements when we consider transitional provisions for the *Hospitality Industry (General) Award 2010*.

Oil and gas industry

Hydrocarbons Industry (Upstream) Award 2010

169 A number of changes were sought to the coverage in the exposure draft. The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) raised concerns about cl.4.2(b) in its reference to "preparatory work" and submitted that the modern award should not cover any construction performed prior to any start-up of a facility. AMMA and AWU say this wording simply reflects current coverage in the *Hydrocarbons and Gas (Production and Processing Employees) Award 2002* and other relevant awards.[53] We agree with this submission and have made no change to the clause.

170 Clause 4.2(e) was addressed by National Electrical & Communications Association (NECA), CEPU and CFMEU each being concerned about embedded employees of electrical and maintenance contractors. They submitted that these employers should be excluded and a specific exclusion of the *Electrical, Electronic and Communications Contracting Award 2010*[54] should be put in this award. The CEPU submitted that major contractors to companies like Woodside Energy Ltd had used state electrical contracting awards to underpin their enterprise agreements. The CFMEU was concerned the clause would take coverage beyond embedded employees and apply to employees and employers engaged in construction work traditionally covered by building and construction awards with superior conditions. The AMWU submitted that the reference to "commissioning" in the clause could be interpreted as construction of a new facility and if so it should be the *Building and Construction General On-site Award 2010*. There was a disagreement between AMWU on the one hand and AMMA and the AWU on the other as to whether there is an existing industry award for directly employed maintenance employees. AMMA pointed to clear words in the relevant industry awards showing that commissioning and maintenance has always been covered. The AWU agreed maintenance and modification work has always been in these awards. We accept that appears to be so. We note AMMA's submission that it is not intended that major construction work will be covered by the award and its coverage is not intended to extend to major contractors doing work as identified by the CFMEU. The coverage in this award draws a line consistent with the current line between the various awards referred to. We do not propose to vary any part of this clause.

171 An issue arose concerning laboratory technicians in the modern award classified above the equivalent of a C8 level in the Manufacturing Modern

52 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413 at [139]-[142].

53 AP820493. AP812665,AP769637, AP812663, AP791878.

54 MA000025.

Award. It appears, however, there is no real disagreement between the parties with AMMA indicating that coverage only extends to these employees engaged up to level 4 of the award with all employees at a C8 level and professional engineers and scientists are specifically excluded from this award.

172 The AWU raised a question as to whether the Longford Gas Plant may be covered by this award. It said further discussion about this was needed but we received no other submission. In those circumstances we accept the submission of AMMA that the employer and its employees come within the coverage of this modern award.

173 The AWU submitted that the rates in cl.10 for casual employees doing work which had traditionally been covered by offshore mobile and offshore platform awards should be higher and, at the very least, there should be a minimum engagement of one day. We are not inclined to increase the percentage payable to a casual employee but this matter should be considered in any transitional provisions that are to be placed in the award. Given the engagement provisions in the relevant industry awards we agree that a minimum engagement is justified. Clause 10.4(b) now provides that it will be one day.

174 A number of variations have been made to the allowances clause. The AWU sought an increase in the living away from home allowance. We have considered its submission and reviewed the relevant industry awards. We have increased the allowance to 6% of the standard rate.

175 We have also considered the AWU's submission about cl.15.8 and the reference therein to the minimum wage rates including compensation for four hours travelling time. The AWU submitted they did not. We have not been able to research this issue adequately in the time available. A review, at least of the award simplification proceedings, would be necessary. We have not varied the clause but at a subsequent review of the award the parties may wish to revisit this issue.

176 In our statement of 22 May 2009[55] we referred to an allowance that had been sought by AMMA which was titled "Recovery of initial travel cost from outside capital city metro area." We had not included that allowance in the exposure draft but invited submissions from any employers who pressed for the allowance and the identification of any existing awards containing a similar allowance. AMMA identified clauses in similar terms in some of the relevant industry awards. It submitted that the allowance was an appropriate balance of the circumstances in which an employer or an employee should bear the cost of initial transport. We are not persuaded to put this allowance into the award. Without deciding if it would be permissible under the terms of s 326 of the *Fair Work Act*, we do not think it is necessary or warranted in this award. A new stand-by allowance is now in cl.15.5(c) which also reflects the qualification that it is payable when the employer has required the employee to be available on stand by. A new storms and cyclones allowance is at cl.19.

177 The AWU and AMWU opposed the annualised salary clause and submitted it should be the subject of enterprise bargaining. We accept the AMMA submission that all of the employer evidence, none of which was challenged, indicates that annualised salaries are prevalent in the industry. We have not varied the clause.

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55 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413 at [146].

178 We next turn to issues concerning hours and rostering. We have not varied any of these clauses. In this respect the variation to the consolidated request dated 2 May 2009 to add paragraph 33AA is relevant. That provides that in a modern award which covers work performed in remote locations (and this is such an award) "… the Commission should include terms that permit the roster arrangements and working hours presently operating in practice in those locations to continue after the making of the modern award." Accordingly the enquiry is into what roster arrangements and working hours presently operate in practice in remote locations. All the employer evidence supported the existing clauses as reflecting those arrangements. No evidence to the contrary was before us.

179 We have considered the AWU and AMWU submissions about the time off instead of payment for overtime clause but are not persuaded it will operate in the manner contended for by those unions. As we read the award it does not allow employers full discretion about whether to pay an employee overtime or require the employee to take time off instead. We have not varied the clause. If in practice this proves to be wrong a variation of the modern award may be considered.

180 Some minor amendments have been made to Schedule A in terms proposed by AMMA and foreshadowed at the Full Bench consultations. Specific reference is now made to employees with supervisory functions.

Oil Refining and Manufacturing Award 2010

181 We have made a number of changes to the coverage clause. We have amended cl.4.2(c) to extend coverage to facilities which are attached by pipeline to an oil refinery and the terms of that amendment are those which were agreed between Oil Industry Industrial Committee (OIIC), AWU, CFMEU and National Union of Workers (NUW).

182 We have added a new cl.4.2(d) which in part adopts terms proposed by Terminals Pty Ltd (Terminals) and agreed to by the NUW. The coverage of the award will now extend to the reception, handling, storage, preparation, distribution, bottling and packing of bulk liquid at a bulk liquid terminal. The terms bulk liquid and bulk liquid terminal are defined but not as broadly as Terminals and the NUW proposed. Also we have not extended coverage to transportation. These activities are expressly covered by the *Road Transport and Distribution Award 2010*[56] (RT&D Modern Award). Prior to the Full Bench consultations Terminals had submitted that its operations may be accommodated by variations to one or other of two modern awards: namely, the *Hydrocarbons Industry (Upstream) Award 2010* or the *Storage Services and Wholesale Award 2010*. The proposal to be covered by this modern award was announced on the day of the consultations and the terms of the agreed wording were provided subsequently. We were concerned that the breadth of the coverage as proposed would extend conditions in this award (particularly the 35 hour week) to employers not previously covered by oil industry awards with comparable conditions. In this respect we note for example the provisions of the *Oil Stores Employees' Award— - Southern Division (Eastern District) 2003*,[57] a Queensland NAPSA, which provides for 40 ordinary hours per week. We also note the small number of employers respondent to existing pre-reform bulk

56 MA000038.

57 AN140197.

liquid storage awards within the oil refining and manufacturing industry defined coverage of this award. We do not intend to extend coverage beyond those employers. Accordingly, clause 4.2(d) will be limited to those employers who were in this industry as at 1 January 2010 and were bound by the *Oil and Gas Industry Bulk Liquids Terminals Award 2002*.[58] We have made some consequential amendments to the definitions clause and to the Head Operator classification in Schedule A to accommodate coverage of Terminals and its employees.

183 The unions proposed that the modern award should cover the manufacture of polyolefins. This was opposed by OIIC, Qenos Pty Ltd and LyondellBasell Australia Pty Ltd, the latter two companies describing themselves as being in the plastics and chemicals industry. They submitted they were not in the industry as defined in this modern award, the only connection being their use of refined oil products as the feed stock in a manufacturing process undertaken by them. We accept the submissions made by these companies and have decided they should be covered by the Manufacturing Modern Award. A variation to that award will be made to delete cl.4.4(j) with the intention being that the activities of these companies will then come within the coverage described in cl.4.3(v).

184 We have not included cl.4.2(b)(ix) as was proposed by the CFMEU which would specifically identify Syngas as being within the coverage of this award. We have referred to Syngas earlier in comments regarding the coal treatment industry. The CFMEU proposal was opposed by the OIIC on the ground it is not an activity currently conducted in oil refineries or lubrication plants, not contemplated in the development of the classification structure of this award and, in any event, would not belong in this award. We accept these submissions; Syngas will not be referred to.

185 One significant change we have made is to now include clerical classifications in the coverage of the award. This was sought by the ASU relying on the fact that clerks have been regulated by oil industry awards in particular the *Clerks' (Oil Companies) Award 2002* (Clerks Oil Companies award)[59] and the *Standard Hours (Oil Companies)Award 2003*[60] for decades. We comment further about this in that part of this decision dealing with the minimum wages and classifications clauses.

186 The AMWU and AWU submitted that certain laboratory employees without professional qualifications, described as technicians, were exempted in the exposure draft (along with professional scientists, etc.) but the parties now agree this award should cover them. We have amended cl.4.3(f) in the manner suggested by the AMWU.

187 OIIC sought changes to the award flexibility clause. We have not been persuaded to make these changes to the model flexibility clause. In any event an employer probably has the right, consistent with the NES and other provisions of the award, to require leave to be taken in accordance with roster arrangements and for the substitution of public holidays with other days.

188 The unions sought an additional provision to the effect that redundancy was "to be dealt with by applicable company policy but will be no less favourable than the NES". We have not included this clause. Current awards do not have a

58 AP822096CRV.

59 AP820387.

60 AP825355.

similar provision and it is not an appropriate clause for a minimum safety net award. A matter like this may be more suited to an enterprise agreement.

189 OIIC filed a new draft award following consultation with unions. It contained an amended wages and classifications structure largely agreed to by the relevant unions. We have incorporated it into the award although, as we have earlier indicated, it will now also contain clerical classifications. The ASU submitted that contrary to its usual submission about the suitability of the *Clerk—Private Sector Award 2010* (Clerks Modern Award)[61] applying to all clerks on an occupational basis, this industry is an exception particularly because of the 35 hour week. It submitted that the award should include the wage rates and classification structure from the Clerks Modern Award. We have included classification levels from that award in cl.14.1. We have not included call centre classifications. We have taken into account the submission of the OIIC about the need for clerical employees to be able to have access to an annualised salary similar to that contained in the Clerks Oil Companies award and that any clerical structure should not extend beyond a level comparable with the top level in that award. Both of these considerations are, we believe, accommodated by the provisions of this modern award.

190 There are a number of other matters that arise from our including clerical classifications in the modern award. The parties should consider these and may seek to vary the award to reflect any agreed changes. Those matters include whether the preamble to the clerical classification structure and the indicative tasks at the various levels reflecting the skills and requirements of clerks are appropriate for this industry. Also the award currently excludes clerical employees from receiving the industry allowance. We have done this as the allowance was agreed to by the OIIC at a time when it was assumed clerks would not be covered by this award.

191 Clause 15.3 contains the industry allowance of 4% of the standard rate which has been agreed to by the parties. Numerous other agreed allowances have also been put into the award which we identify below. The unions sought a 20% loading for shiftworkers on permanent afternoon shift. We have included this provision, being of the view that it is contained in a significant number of existing awards in the industry.

192 Several other amendments about which the parties agreed have been made to the award. These include changes to cll.10.2(a) part-time employment, 10.3 casual employment, 14.2 junior rates, 15.4(c) protective clothing and equipment allowance, 15.4(d) kilometre allowance, 15.4(e) reimbursement for certain travel related expenses, 19 payment of wages and 26.7 a direction to take excess annual leave.

Gas Industry Award 2010

193 We refer to the coverage provisions first. Clause 4.3(a) is in the terms agreed by the parties and is intended to correspond with coverage provision in cl.4.2(c) of the *Electrical Power Industry Award 2010*. We note that the terms, whilst similar, are not identical. As the terms of cl.4.3(a) in this award were agreed we have not varied them to bring them into line with cl.4.2(c) but if that is necessary a variation application may be made.

194 BOC Limited, Coregas Pty Ltd and Air Liquide WA Pty Limited, which we will refer to as the Industrial Gases Employers, sought an exclusion from the

61 MA000002.

award. They operate businesses in the industrial, medical and special gases industry. There was no opposition to the terms of the exclusion proposed by them. It is now in cl.4.3(b).

195 Elgas Limited and Kleenheat Gas Pty Ltd, which we will refer to as the LP Gas Employers, sought to be excluded from the award. Historically their award coverage has been by LP Gas specific awards which have had no connection with gas utilities awards. Also many of the employers in this sector are bound by enterprise awards and therefore will be exempt from this modern award. The AWU opposed the exclusion sought by the LP Gas Employers although it did acknowledge that generally LP gas companies have been covered by enterprise specific awards.

196 We have decided to exclude the activities of these employers from this award. The exclusion is in cl.4.3(c). They can be covered by other modern awards which largely align with existing regulation. For example the transport functions will be covered by the RT&D Modern Award. Additionally these employers have had no real opportunity to consider any draft award proposed by the AWU or AiGroup who appeared for Jemena, SP Ausnet and Westnet Infrastructure Group (the Gas Industry Employers). We refer later to the several wages and classification proposals put by the AWU and Gas Industry Employers.

197 The CFMEU sought an exclusion in these terms;

> (c) employers engaged in carbon capture/ compression/ distribution/ sequestration for pollution reduction purposes in or in connection with the Electrical Power Industry.
>
> (d) employers engaged in the production/ refining of syngas and the distribution of syngas or its refined products.
>
> (e) methane extraction and distribution where that activity is incidental or supplementary to the core business of an employer covered by the Black Coal Mining Industry Award 2010 or the Electrical Power Award 2010.

198 We have included an exclusion of the *Electrical Power Industry Award 2010*. We have decided that it is not necessary to place any other terms of the CFMEU exclusion in this award. None of the employers or activities in the proposal come within the coverage of this award which is confined to the gas industry as defined.

199 Clerical and administrative employees will be covered by this award but there will be no transport classifications. The relevant employees are already covered by the RT&D Modern Award.

200 We next refer to cll.13 and 14 which deal with classifications and minimum wages and Schedule A which is the classification structure. When we published the exposure draft of this award[62] we expressed concerns about the draft filed by the AWU which was based on the *Energy (Gas) Industry Award 1999*[63] and the *Gas Industry Award — State 2003*, a Queensland NAPSA[64] (the Queensland Gas award). At that stage no employer had filed any draft award and the only employers who did appear were those submitting that they should be excluded from any proposed award.

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62 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413 at [153]-[160].

63 AP780799CRV.

64 AN140130.

201 Shortly prior to the Full Bench consultations on the exposure draft the Gas Industry Employers filed submissions and a draft award. The AWU also filed a new wages and classification structure. Both drafts were said to be largely based on provisions contained in an attachment the Queensland Gas award which is described as providing guidelines for the classification of positions in that award. The rates in the AWU draft partially adopted some in the exposure draft and in other cases did not and the reasons are unclear. All that was said in support was that the wage rates in the exposure draft had been modified and the trades equivalent rate was now placed at level 4. The wage rates in the case of the Gas Industry Employers draft were the same as in the Manufacturing Modern Award.

202 Both drafts at that stage covered driving classifications and the employers draft excluded clerical and administrative employees. The Gas Industry Employers and AWU indicated at the Full Bench consultations that they would have further discussions in relation to wages and the classification structure. Subsequently, on 14 August 2009, the AWU filed brief submissions and a new wages and classification structure. It indicated that it had undertaken further enquiries and consultations and had decided that the structure that applied to the electrical power industry should be adopted. It submitted that the Queensland Gas award structure was not suitable. We note that the latest structure and the rates are in very similar terms to those reflected in the agreed classifications and wages structure for proposed *Electrical Power Industry Award 2010*. They bear little similarity to earlier proposals by the AWU or the existing gas industry awards. As well, the AWU proposal contains additional wage levels to cover employees involved in handling, storage and transportation of LP gas together with an allowance of 4% of the standard rate per week for those employees. Although the AWU draft is said to be based on the electrical power agreed structure we note, for example, that an employee within the technical stream of that draft at Grade 3 includes one with Certificate III qualifications and the AWU equivalent descriptor referred to an employee with Certificate II qualifications. No explanation was given for this difference.

203 On 19 August 2009 the Gas Industry Employers filed a revised wages and classification structure. The wages structure adopted the levels and rates that had previously been sought by the AWU and the classifications reflected modifications and variations to the structure previously proposed by these employers. They indicated that in light of the development of the classifications in the RT&D Modern Award the draft did not contain transport classifications nor did it extend to managerial or professional employees. The draft included clerical and administrative classifications.

204 Given the late filing of the parties final drafts little opportunity has been provided for the Full Bench to raise concerns we have about both of those drafts and no real opportunity has been given to any other interested persons to respond. Nonetheless the modern award must be made despite our having several questions about how some of the rates proposed by the parties are said to be appropriate for a minimum safety net award. We also have concerns about several references in the employers' classification structure. For example, the references to "junior high school" may not be suitable for an award with coverage throughout Australia and the references to grades in the indicative positions in several levels are unclear. Presumably they are existing grades known to the parties but are confusing when placed in the eight Gas Industry Employee levels.

205 We have no basis to be satisfied that the AWU rates and classification structure are suitable for this industry. We do not propose to adopt them. The proposal involves a significant departure from any earlier filed. Despite concerns we have with Gas Industry Employers' draft we have, in large part, adopted it. However, it is likely the issues we have raised will need to be again considered in any forthcoming review of this award. We have set a wage rate structure reflecting the range of classifications now to be in this award taking into account existing industry awards and rates for relevant comparable classifications in other modern awards. The classification levels do not extend to any managerial or professional employee.

206 We have made a number of changes to the allowances clause which was in the exposure draft. In cl.15.1 we have deleted three allowances which related to certain installation licences held by services persons and an allowance for "contending with high pressure gas". They only appear to be in the Queensland Gas Award and in respect of the first two allowances the current classification structure does not contain comparable classifications. We suspect, however, that such licences are required to be held and invite the parties to consider at any review of this award a variation to make clear the name of the relevant licences held within the industry and persons within the classification structure that may be required to hold them and for whom an allowance may be justified. Similarly if the high pressure gas allowance and any availability allowance are considered appropriate for this award they too may be dealt with in the same way. A first aid allowance has been added and is now cl.15.1(a).

207 We have deleted cl.20.5 of the exposure draft. It is only the Queensland Gas award which provides for a 3% contribution when an employee is absent on workers compensation. No other relevant award had any similar provisions and the clause was opposed by the Gas Industry Employers as introducing a new cost.

208 We have altered the period of the meal break in cl.22 to be at least 30 minutes and allowed within five hours of the start of a shift. That entitlement appears to reflect the majority of existing relevant industry awards. Finally, we agree with the submission of the Gas Industry Employers that the annual leave loading as it was expressed in the exposure draft could give rise to "double dipping" and have now adopted their suggested wording for the clause.

Paper products industry

209 The paper products industry is dealt with below in conjunction with the timber industry.

Pet food manufacturing

210 Pet food manufacturing is dealt with in the Food Modern Award.

Pharmaceutical industry

Pharmaceutical Industry Award 2010

211 The exposure draft of the *Pharmaceutical Industry Award 2010* has been altered to clarify that its coverage extends to the wholesaling of prescription pharmaceuticals or of both prescription and non-prescription pharmaceuticals and that it does not cover those covered by the Food Modern Award or the Manufacturing Modern Award. Further, the organic phosphorus pesticide allowance has been removed, the minimum engagement on Saturdays and Sundays has been reduced to three hours and an additional week of annual leave

for seven day shift workers has been provided for having regard to the underlying awards and NAPSAs. A minimum four hour engagement for casuals and the payment of annual leave at the base rate have not been adopted having regard to the current awards and NAPSAs.

Photographic industry

212 We will expand the coverage of the Manufacturing Modern Award to cover printing and processing of photographic film. No one opposed this course and AiGroup supported it. We will adopt their draft amendment.

Port and harbour services

Coal Export Terminals Award 2010

213 The scope clause of this award was subject to considerable debate. The unions strongly pressed for the inclusion of the Port of Gladstone within this award given its significant export coal operations. That position was opposed by employers. The port of Gladstone is operated by a port authority. Its activities are diverse and the products it handles are wide ranging. We consider that it is more appropriately regulated by the *Port Authorities Award 2010* which will generally cover the operations of all other port authorities around the Australian coastline.

214 We have made changes relating to payment of wages, adult apprentices, termination of employment, meal breaks, hours of work and annual leave. Other changes sought by the unions were based on provisions of a small proportion of relevant enterprise awards and an industry award covering stevedoring which currently has no application. The changes are not therefore representative of existing award provisions and have not been adopted for this reason.

Marine Towage Award 2010

215 We have made amendments to the scope clause of this award to permit the application of the award to towage operations conducted by port authorities and exclude its application to maintenance contractors covered by the Manufacturing Modern Award. We have deleted the classification definitions at the request of the unions. We agree that the classifications are capable of ready application without the definitions in the exposure draft or those initially proposed by the parties.

216 Other changes relating to allowances and superannuation have also been made consistent with the submissions of the parties.

Port Authorities Award 2010

217 We have inserted professional engineers classifications into this award and excluded maintenance contractors. We have not varied the scope of the award in other respects. We have retained dredging classifications because the employers supported the application of consistent terms and conditions to the small number of dredging employees who would be employed by a port authority. We confirm the inclusion of marine pilots classifications which apply to any pilots employed by a port authority. We have not excluded any particular port. By virtue of the standard general exclusion, ports covered by enterprise awards will of course not be covered but there is no need to make specific reference to them.

218 Other changes to the award are minor corrections.

Ports, Harbours and Enclosed Vessels Award 2010

219 The Maritime Union of Australia (MUA) and The Australian Institute of Marine and Power Engineers (AIMPE) sought to retitle the award as the Maritime Industry General Award to reflect a desire that the award apply to vessels which venture beyond ports and harbours. The current scope clause is not so confined but we have decided to make this clearer by adding additional words to the definition of the industry. We decide below to confirm the *Marine Tourism and Charter Vessels Award 2010*. Employers and employees covered by that award will be excluded from the provisions of this award. It is unnecessary to maintain an exclusion with respect to the *Sugar Industry Award 2010*. Exclusion of employees of local governments and maintenance contractors have been inserted. We consider that the existing title of the award is preferable to the alternative suggested.

220 We have deleted the definitions for classifications as submitted by the MUA and AIMPE and the definitions were unnecessary in the circumstances of this employment. Other minor changes have been made.

221 We recognise the impact of the wage rates we have established for this award on employers covered by the *Motor Ferries State Award*[65] and *Wire Drawn Ferries (State) Award*.[66] However a consideration of the wage rates for all current awards has led us to the conclusion that the rates we have adopted are more representative of rates in existing minimum rates prescriptions. Transitional arrangements will ameliorate the impact to some extent.

Stevedoring Industry Award 2010

222 Parties covered by this award did not raise significant areas of concern. Some minor changes have been made to the scope clause of this award such as inserting a definition of cargo and confining the list of vessels to "ship" as this term is defined broadly in the *Fair Work Act*. We have also excluded maintenance contractors. We have reduced the list of awards which prevail over this award to those of likely relevance.

223 Changes sought by employers to reflect the nature of Guaranteed Wage employment have been made. An electrician's licence allowance has been inserted. Some other minor corrections have been made.

Postal services (other than Australia Post)

224 In our statement of 22 May 2009 we noted that there is one pre-reform award or NAPSA, the *Postal Services Industry Award 2003* (Postal Services Award),[67] applying in this industry and that it binds all or almost all the operators of licensed or franchised post offices. We expressed a provisional view that the licenses under which licensed post offices operate have the attributes of a franchise and are to be treated as franchises for the purposes of cl.2A of the consolidated request. We noted that if this view is correct then the terms of the consolidated request require us to exclude the Postal Services Award from the current award modernisation process and, accordingly there is no need to make a modern award for the postal services industry.[68]

65 AN120351.

66 AN120650.

67 AP830245

68 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413 at [176].

225 We received no subsequent submissions in opposition to that course and no party appeared at the oral consultations listed for 26 June 2009. We proceed on the basis indicated in our earlier statement. We will make no modern award for the postal services industry. In the event that a relevant court gives a judgment contrary to our view, that licences under which licensed post offices operate have the attributes of a franchise and are to be treated as franchises for the purposes of cl.2A, an application for the making of a modern award for the postal services industry will be considered.

Private transport industry (remaining sectors) Public transport (other than rail)

Passenger Vehicle Transportation Award 2010

226 In the statement which accompanied the publication of the exposure draft of this award we indicated that we had decided to publish one award only to cover the two sectors of the industry. We noted that in the past they had been considered to be separate as had been the award coverage. They were described as public passenger transport on the one hand and private sector passenger transport on the other.[69] We have considered the submissions concerning the coverage of both sectors by the one modern award. We have not been persuaded to depart from our provisional view nor the reasons we then gave for deciding to not make any additional modern awards for these industries. Nor have we excised from the coverage of this award the transport of passengers by tram, light rail or monorail. No current modern award is appropriate to cover these operations and we accept the submission of the Australian Rail, Tram and Bus Industry Union that the *Rail Industry Award 2010*[70] is not a suitable modern award to incorporate them.

227 The terms of this modern award are largely the same as the exposure draft. Some changes have been made which we refer to later. Before doing so however we should refer to submissions concerning taxi drivers and whether the award should contain a specific classification for them. This matter was referred to by us in our statement of 22 May 2009. We there noted the submissions made by the New South Wales Taxi Council Limited and Victorian Taxi Association that no taxi driver in Australia was an employee nor in an employment relationship with the owner or operator of the taxi vehicle which was driven. Again in the post exposure draft submissions the contest between these industry representatives and those representing taxi drivers continued. Submissions were made by the Australian Taxi Drivers Association, Taxi Drivers Association of Victoria, NSW Taxi Drivers Association and a Mr Ahmed. They sought the inclusion of a specific reference to a taxi in the definition of motor vehicle and to a taxi driver in the classifications schedule.

228 Although we acknowledge the conviction with which these submissions were made we have not been persuaded to accommodate the amendments sought. This modern award will only apply to an employee as defined under the *Fair Work Act*. Merely by identifying the classification of a taxi driver in the modern award will not of itself impact on the contractual arrangements between that taxi driver and the owner or operator of the taxi driven by them. If we were to include a specific reference to a taxi driver that may give rise to an expectation

69 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 182 IR 413 at [179]-[180].

70 MA000015.

that we had, in the context of award modernisation, considered and ruled upon the status of the relationship between these persons. All we can properly do is to repeat what we said in our earlier statement that if a taxi driver is an employee then, assuming the employer is in the industry as defined in this modern award, that employee would come within the Grade 2 classification which includes "a driver of a motor vehicle, limousine or hire car".

229 Several amendments were sought by parties with an interest in this award. We have considered the submissions in support of each amendment and the comparable provisions in the relevant pre-reform awards and NAPSAs. We have not amended the wage rates and confirm the comments about these rates made by us in our earlier statement. In other cases we have not made the amendments sought as the matter is dealt with in the NES, for example, an employer's right to require an employee to work reasonable additional hours. The amendments that have been made include inserting a definition of passenger vehicle and an alteration to the definition of scheduled route service to specified route service. We have amended the part-time provisions in cl.10.4 to accommodate, in part, the submissions of the Bus Industry Confederation. In the case of casual employees we have retained a three hour minimum for each shift but where the transportation of school children is undertaken then we have provided for a two hour minimum for each engagement. A new allowance of $10 per shift has been included where an employee is required to drive an articulated bus. Schedule A has also been varied to refer in Grade 3 to a carrying capacity of a vehicle so as to make it consistent with other descriptors in the schedule.

Publishing industry

Book Industry Award 2010

230 The only substantive submission received in relation to the exposure draft was from MEAA. The major change it sought was the inclusion of classifications and rates of pay for publicists. We have acceded to that submission. Definitions and minimum wages are based on those in the *Public Relations Industry Award 2003*.[71] The classification definitions are somewhat generic and it may be that some modification will be required in due course.

231 There have also been minor changes made to the terms of the exposure draft dealing with superannuation and meal breaks.

Scientific services (including Professional Engineers and Scientists)

Professional Employees Award 2010

232 There have been a number of variations to the exposure draft. To begin, we have now included quality auditors in the scope and coverage of the modern award. At the exposure draft stage we were of the view that there was not sufficient coverage of these persons to warrant a separate award. APESMA agreed and submitted that they could be incorporated into the *Professional Employees Award 2010*.

233 We have also decided to leave the name of the award as it was in the exposure draft. AiGroup expressed concern it could be misunderstood as

71 AT825430.

applying to all professional employees. There is some force to this submission. But the alternative would be to adopt a title which would be too cumbersome and might require further alteration in the future.

234 The Association of Consulting Engineers Australia (ACEA) suggested some changes to the definition of professional employees. APESMA was unable to asses the impact of those changes in the time available. We have not made the changes proposed as it would disturb longstanding definitions. However, this does not mean that the parties cannot examine these matters and make application to update the definitions in the future.

235 The ACEA submitted changes to a number of standard clauses. We have decided to maintain consistency with other modern awards. However, there were other changes sought by AiGroup and ACEA which have been included.

236 An important change sought by AiGroup related to the way in which employers would consider a total remuneration package for employees having regard to patterns of work. We have retained the provision contained in the exposure draft. In our view this is not prescriptive but nonetheless alerts employers to the need to take into consideration the demands placed upon professional employees when fixing remuneration.

Storage services

Storage Services and Wholesale Award 2010

237 There have been a number of changes to the terms of the exposure draft. In relation to coverage, we have specifically excluded employees covered by the RT&D Modern Award. We have also included provisions for early morning shifts to cater for work performed at wholesale markets and the like. We have also amended the annual leave provision to clarify the operation of the NES in relation to shiftworkers and amended the public holidays provisions in relation to substitution of days.

238 We have not included special provisions for retail warehouse employees as sought by the NUW. Nor have we included higher duties and shift arrangements proposed by the NUW. Those provisions have limited application beyond Victoria.

239 In our statement of 22 May 2009 we indicated that the wage rates in the exposure draft had been taken from the RT&D Modern Award. That statement was wrong. Nevertheless we have retained the rates in the draft as they adequately reflect relevant rates in the area to be covered by the award.

Sugar industry

Sugar Industry Award 2010

240 This award covers the field, factory and bulk sugar terminal operations in the industry. For the most part it is in the same terms as the exposure draft, although there are a number of changes which should be mentioned.

241 The parties have had a common goal of achieving one modern award to cover all of the sectors of the sugar industry, in field, milling, refinery, distillery, sugar research, bulk sugar handling and terminal operations. The task of producing the sugar industry award has required the accommodation of 12 NAPSAs and pre-reform awards.

242 Section 576J of the WR Act and the consolidated request require that a modern award deal with a minimum safety net of wages. A number of the

underlying NAPSAs did not contain appropriately adjusted minimum wages. An examination of the history of wage setting in the industry indicates that in the predominant NAPSAs wages have been fixed by reference to industrial disputation and economic conditions prevailing from time to time in the industry with little reference to accepted principles of minimum wage fixation.

243 In making the modern award the Commission is required to establish a fair minimum safety net. That requires some consistency between award rates for similar classifications covered by the various modern awards. In implementing the approach in this award it has been necessary to reduce the rates proposed by the parties because those rates reflect, to a large extent, the rates drawn from the relevant NAPSAs. We have adopted three sets of rates which have been fixed having regard to comparisons with relevant minimum rates applying in other modern awards.

244 While the bulk sugar terminals sector has indicated it wishes to be included in the modern award, it is clear that the rates applicable to the bulk terminals are paid rates and currently may only be applicable to a single operating business. Accordingly it has been necessary to fix rates for bulk terminals which are of a safety net character. This outcome is in accordance with the consolidated request which provides that although "the creation of modern awards is not intended to… result in the modification of enterprise awards … this does not preclude the creation of a modern award for an industry … in which enterprise awards or NAPSAs that are derived from state enterprise awards operate."

245 In our statement of 22 May 2009 we requested the parties to review the large number of allowances. The parties have been reluctant to further rationalise the allowances. We have, however, reviewed the allowances and grouped them according to their application to the relevant industry sector. Some allowances submitted by the parties have not been included in the modern award because they are not consistent with the requirements for a modern award or are State-based.

246 The impact of differences in wage rates and allowances resulting from the operation of the modern award can be taken into account when the transitional provisions are being considered for the Stage 3 awards.

247 We have declined a number of further proposed changes to the exposure draft as follows:

- the bulk sugar terminal fixed term contract provision has been excluded as it is unnecessary to make express provision to this as it is a class of full-time or part-time employment;
- industry sector specific superannuation provisions have been excluded as it is not appropriate to depart from the standard superannuation clause; and
- the field sector long service leave provisions have been excluded as these are prohibited by the Request.

248 We have adopted a number of changes to the exposure draft as follows:

- the coverage clause has been clarified to include steam production and power generation;
- the apprenticeship provision has been reviewed to retain the existing competency based assessment;
- hours of work and shiftwork provisions have been rewritten to reflect a compilation of NAPSA conditions;

- the restriction on seasonal employment to the milling industry has been removed in a revised definition;
- public holiday pay was clarified in accordance with the existing minimum entitlement decisions;
- the minimum engagement for casuals has been amended to three hours in lieu of four hours' for the industry;
- the casual conversion clause has distinguished casuals employed in the field and bulk sugar terminals sector;
- the redundancy pay provision for apprentices and fixed term employees in sugar mills has been revised;
- the operation of rates of pay for piecework has been included; and
- the higher duties provisions have been excluded from bulk sugar terminals operations.

Technical services

Hydrocarbons Field Geologists Award 2010

249 Following the publication of the exposure draft no persons has submitted that there should be any significant change. Accordingly it is now made, with only minor amendments, in the terms of the exposure draft.

Architects Award 2010

250 APESMA and the Association of Consulting Architects of Australia agreed on a number of changes which have now been incorporated. There were four areas where agreement was not reached. They are: notice of termination, professional development, leave and public holidays.

251 In relation to termination of employment, APESMA sought the notice period for termination to be one month on either side. We will include such a provision as it is a feature of this area of employment and contained in awards which will be superseded by this modern award. We have not included a provision in relation to professional development as, in our view it was aspirational rather than imposing any obligations. However we have altered the provisions in relation to annual leave but not public holidays.

Surveying Award 2010

252 A number of changes have been made to the exposure draft taking into consideration the submissions of the participants. Mostly these are minor matters which maintain consistency with other professional awards and properly balance the matters derived from the various awards.

253 Two matters remain outstanding and are of particular importance. The first relates to flexibility in working patterns for surveyors that might operate in remote areas. Our attention was drawn to the provisions of the Queensland NAPSA[72] in this regard. We have given careful attention to this issue and have reached the conclusion that the particular circumstances described can be accommodated using the award flexibility clause in the award. That clause permits agreements to be reached on hours of work, overtime and penalty rates.

254 The final matter relates to classification descriptions and wage rates. As to wage rates, the Spatial Industries Business Association proposed higher rates than those currently in the exposure draft. Whilst we appreciate the reasons for

72 *Surveying (Private Practice) Award 2002*, AN140287.

the proposal, we prefer the assessment we have made in relation to properly fixed minimum wages. Turning to the classification structure, there is a difference of view as to the role qualifications should play in the structure. It appears to us that there is a genuine desire to review the classification definitions but this will require more time. Accordingly we have retained the structure in the exposure draft as it has been drawn from existing instruments. If at some time in the future the discussion between interested parties results in new definitions an appropriate application can be made.

Timber industry

Timber Industry Award 2010

255 The exposure draft incorporated the scope of a number of industry sectors covering harvesting, milling, panel products, manufacturing including timber furniture, merchandising and retailing and the pulp and paper sectors. We have adopted the CFMEU proposal of a multi stream and the Minimum wages clause sets out separate rates for each stream.

256 We have not acceded to a submission by the CFMEU to retain majority facilitation clauses contained in the *Timber and Allied Industries Award 1999*.[73] The standard flexibility clause with its inherent protections is adequate and less prescriptive.

257 A number of submissions were made dealing with the consequences of adopting provisions from the Manufacturing Modern Award and their relevance to the timber industry. As a result we have amended a number of provisions in the exposure draft particularly the clauses dealing with hours of work and related matters.

258 The Timber Industry Alliance (TIA) submitted that a number of definitions in the exposure draft were irrelevant or outdated. We have deleted the following definitions from the exposure draft: assembler A class, assembler B class, attendant, boiler attendant or fireman, bush sawmills, carpenter bush, carpenter making stock work, kiln attendant, kiln operator, kiln supervisor, orderperson, orderperson class 1 and 2, order/salesperson, responsible person at docking saw, shiploader, tallyperson and timber grader.

259 A number of parties supported a redrafted dispute resolution clause which we have inserted. The CFMEU, with the support of a number of employer associations, submitted that the award should contain an abandonment of employment clause. We do not think such a clause is necessary and note such provisions are not a feature of other modern awards.

260 The exposure draft contained provisions for training and skill development derived from the Manufacturing Modern Award. The CFMEU submitted the provisions diminished prevailing standards. The TIA provided an alternative clause which we have adopted.

261 Consistent with our statement of 22 May 2009 a number of allowances which were included in the exposure draft have now been deleted. They are: submerged timber, hard surfacing, collecting monies, insulation & slag wool, cleaning lavatories and shifting or erecting camp.

262 We have also included a schedule of rates for piecework in regions of Tasmania.

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73 AP800937CRV.

Tourism industry

Alpine Resorts Award 2010

263 We have made a number of alterations to the exposure draft. The provisions represent an amalgam of the disparate conditions found in the pre-reform awards or NAPSAs which apply to the alpine resorts industry. The seasonal nature of the operations covered by the award has been taken into account in relation to the types of employment permitted and the conditions which apply to them, including the pay arrangements. The resulting provisions are intended to accommodate the summer as well as the winter seasons. A number of the changes which were sought involved alterations in standard provisions in modern awards. Generally we have not altered standard provisions.

264 The minimum wages applying at various levels have been altered in some respects so as to be better aligned with other relevant awards, particularly those applying in the hospitality industry. We have also altered the levels of a limited number of hospitality classifications. There have been some alterations to the allowances relating to clothing and travel which are largely agreed but in other respects bring the provisions into line with the award arrangements which already apply. There are a number of other minor changes.

265 The AWU has agreed on a provision that would exclude casual employees from public holiday penalty rates among other things. We note that the *Alpine Resorts (The Australian Workers' Union) Award 2001*[74] does not provide for such an exclusion. We have decided not to include the agreed exclusion. Casuals will be entitled to public holiday penalties under the award. If we have misunderstood the position or the intention of the penalties an application can be made to vary the award.

Marine Tourism and Charter Vessels Award 2010

266 This modern award brings together a number of different types of award provisions applying to the marine tourism industry. That industry includes day charters for both onshore and offshore tourism and overnight charters for offshore tourism. In order to accommodate the two types of charter operations we have developed two sets of hours and wages provisions. New definitions have been included of overnight charter employee and non-overnight charter employee. The various wage arrangements and entitlements that apply to each type of employee can be readily differentiated.

267 The award contains flexible working hours arrangements which are consistent with the NES and reflect the span of hours that has customarily applied in the various sections of the industry. Penalties apply in certain circumstances, depending upon the nature of the operation and the type of engagement.

268 Daily wage rates for overnight charter employees have been adjusted to reflect the incorporation of penalties for work on weekends and public holidays. The payment schedule for charters of particular duration has also been amended.

269 Because the award brings together diverse forms of regulation in NAPSAs operating in New South Wales and Queensland it involves some significant changes for some employers and employees. It may be that further variation is required. Perhaps more importantly, there may be employees covered by the modern award, particularly employees in States or Territories other than New

74 AP805713.

South Wales and Queensland, who have not participated in the consultations, and whose working arrangements may not have been adequately considered. While conscious of this possibility there is little we can do about the matter at this stage.

Vehicle industry (repair, service and retail) Vehicle manufacturing industry

Vehicle Manufacturing, Repair, Services and Retail Award 2010

270 There has been widespread support for an integrated vehicle industry award to apply as reflected in the exposure draft — the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (the Modern Vehicle Award). In adopting that course we have accepted a number of changes in the exposure draft arising from the parties' submissions, so that the modern award generally accords with the structure and content of the antecedent awards.

271 Consistent with unification of the vehicle awards, and notwithstanding the representations of the Shop, Distributive and Allied Employees Association, we have preserved the existing classification structures, including provisions as to the retailing of fuel and other commodities through the console operations which characterise modern service/petrol stations and which have been the subject of review in several earlier Commission proceedings. Similarly, we have accepted the need, given the specialised functions of the award requiring driving, for the retention of the current driving classifications. An appropriate exclusion will appear in the RT&D Modern award.

272 As to coverage it is important that the making of the new award not unsettle the relationship which has existed satisfactorily for many years between the awards of the vehicle industry and the award regulating manufacturing. The fact of complementary exclusion provisions in the Modern Vehicle and the Manufacturing Modern awards is intended to have this effect. Where claims have been made for additions to the scope of coverage of the Modern Vehicle Award, to include, for example, boats and bicycles, our approach has been to maintain the status quo.

273 Further submissions were made as to the existing record keeper classifications and as to the specialised skills and industry specific functions required of employees so classified. As it remains our view that such employment comes within the scope of the Clerks Modern Award these classifications have been removed from the award.

274 We have been assisted by the parties' further submissions as to apprenticeships and the obsolescence of several provisions. The parties have also advised that it is their intention, after the Modern Vehicle Award comes into operation, to seek the assistance of Fair Work Australia in dealing with a number of outstanding issues, including finalising levels 7 and 8 of the repair, services and retail classification structure.

Wholesale and retail trade (wholesale) and commercial travellers

Commercial Sales Award 2010

275 There have been few alterations to the exposure draft. We have amended the coverage to make it clear that the award does not cover employers and employees covered by the Clerks Modern Award, the *Contract Call Centres Award 2010*,[75] or the *Graphic Arts, Printing and Publishing Award 2010*.[76]

75 MA000023.

More flexibility was sought by employers in New South Wales in relation to part-time hours of work. The provision upon which we have decided is consistent with the existing regulation of part-time hours in Victoria and Queensland. Although the relevant award in New South Wales has more liberal hours provisions, it also contains a limitation on the number of part-time employees that may be employed.

276 The Commercial Radio Association sought a provision for the cashing-out of annual leave. This position was supported by the media interests. There is no such provision in the current awards or NAPSAs and we have decided not to provide for it. We note that we have adopted the standard motor vehicle allowance in lieu of the rather complicated formula in the exposure draft. Should this give rise to unforeseen difficulties the issue can be reconsidered at a later stage.

Other Matters

Air freight forwarders and customs clearance

277 This part of our decision deals with a submission made on behalf of the Customs Brokers and Forwarders Council of Australia Inc (CBFCA) that we should identify an industry, most recently described as the "International Trade Logistics and Border Clearance Industry", for "stand-alone" consideration and make a modern award covering employers and employees in that industry. Mr Rochfort, representing the CBFCA, has filed written submissions in proceedings which dealt with the clerical and private transport industries. In short, it was then submitted that the activities of employers who are members of the CBFCA and their employees could not be appropriately accommodated within any modern award that might be made covering employers and employees in those industries or any sectors of them.

278 Although we do not know the names of the employers who are members of CBFCA it seems they, and their employees, have been regulated by two pre-reform awards. They are the *Transport Workers (Air Freight Forwarders and Customs Clearance) Award 2000*[77] (the Transport Freight Forwarding Award) and the *Clerical and Administrative Staff — International Freight Forwarding and Customs Clearance Industry Award 2003*[78] (the Clerical Freight Forwarding Award).

279 We refer first to the transport functions undertaken by employees of CBFCA members. It should have been clear these were considered in the context of the private transport industry in Stage 2. In our decision of 23 January 2009[79] we published the exposure draft of the RT&D Modern Award and noted that the coverage incorporated many pre-reform awards and NAPSAs. One which was specifically identified was freight forwarding.[80] The coverage of the modern award which was subsequently made incorporates the activities previously regulated by the Transport Freight Forwarding Award. The vehicles driven by employees at various levels in that award are comparable to those contained in

76 MA000026.

77 AP801394.

78 AP826032.

79 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 180 IR 124.

80 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 180 IR 124 at [98].

the RT&D Modern Award and there is no significant difference in the rates payable to employees at the respective levels. It was not said that any flexibilities which may have been in the Transport Freight Forwarding Award were not available in the RT&D Modern Award and it was conceded that there was very little direct engagement of transport workers by any members of the CBFCA. We do not intend to revisit the coverage of the RT&D Modern Award.

280 During Full Bench consultations in relation to the Stage 3 exposure drafts, and in particular the private transport industry (remaining sectors) consultations, Mr Rochfort submitted that CBFCA members should be excluded from any transport modern award but his real concern was about employees whom he asserted had wrongly been referred to as clerks. We note this is at odds with what has always been the title of the relevant award ie the Clerical Freight Forwarding Award. Nonetheless, it was submitted that these employees could not be described as "clerks in the strict sense". Some tasks done by these employees and the means by which they were undertaken were addressed by Mr Rochfort. We do not reproduce those submissions but we have taken all of them into account.[81] We invited him to provide any additional submissions relating to why the relevant employees could not properly be said to be in engaged in clerical work. We subsequently received written submissions on 8 July 2009 and have considered those submissions.

281 The first observation we should make is that consistent with the title of the Clerical Freight Forwarding Award the incidence clause describes it as covering clerical and administrative work in or in connection with freight forwarding and customs clearance. The classifications in the award, with the exception of the two highest levels, are described as "Administration Clerical Officer". Throughout the descriptors for the classification levels are references to clerical and administrative tasks and duties carried out in and about an office or other facility operated by a freight forwarding/customs broking establishment. Accordingly the award which has traditionally regulated the work of these employees is replete with references to clerical and administrative functions and classifications.

282 The CBFCA submissions emphasise that the range of skills required are above and beyond the routine tasks required of a clerk. In this respect the submission stresses the need for employees to be able to interpret documents which may come from, or go to, all parts of the world and to monitor movements, consignments and transport of goods in accordance with customer requirements. All of that may be so however it seems to us that the tasks undertaken and the means by which they are undertaken are all consistent with what is generally accepted to undertaken by a clerical and/or administrative employee.

283 The submission points to requirements placed on the industry by legislation and government regulatory bodies. Accordingly employees within the industry undertake training and, in order to progress to higher classification grades, certain accreditation indicating their knowledge of those requirements is necessary. This does not distinguish these employees however from others covered by the Clerks Modern Award. Clerks in every industry need some specialised knowledge of the legislative and regulatory framework in which their employer operates. Nonetheless, they remain principally engaged in

81 PN 4990-5025.

clerical and administrative duties. That these employees perform their duties and tasks in a manner that ensures any obligations placed upon their employer and assumed by them comply with statutory requirements and regulatory controls does not identify these occupations as being other than clerical and/or administrative.

284 We acknowledge that the most senior employees of CBFCA members may be required to possess a customs broker's license and to undertake a National Customs Brokers Course giving accreditation at AQF Certificate IV level. It may well be that this higher level would not be an employee who is wholly or principally engaged in clerical work and accordingly not covered by the Clerks Modern Award. Similarly any managerial or professional employee would be excluded. Otherwise we are not persuaded to identify any industry as sought by CBFCA nor publish any additional exposure draft.

Conclusion

285 We now publish each of the Stage 3 awards. A complete list is in Attachment A to this decision.

286 Once again we express our gratitude to those who have participated in the consultations for their assistance and to the Modern Awards Team for the research and administrative support they continue to provide.

Attachment A to the Full Bench decision of 4 September 2009

Stage 3 modern awards

Air Pilots Award 2010
Aircraft Cabin Crew Award 2010
Airline Operations—Ground Staff Award 2010
Airport Employees Award 2010
Alpine Resorts Award 2010
Aluminium Industry Award 2010
Amusement, Events and Recreation Award 2010
Architects Award 2010
Asphalt Industry Award 2010
Book Industry Award 2010
Broadcasting and Recorded Entertainment Award 2010
Cement and Lime Award 2010
Cemetery Industry Award 2010
Coal Export Terminals Award 2010
Commercial Sales Award 2010
Concrete Products Award 2010
Dredging Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Educational Services (Schools) General Staff Award 2010
Educational Services (Teachers) Award 2010
Electrical Power Industry Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010
Gas Industry Award 2010
Hydrocarbons Field Geologists Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Journalists Published Media Award 2010
Live Performance Award 2010
Marine Tourism and Charter Vessels Award 2010

Marine Towage Award 2010
Maritime Offshore Oil and Gas Award 2010
Meat Industry Award 2010
Oil Refining and Manufacturing Award 2010
Passenger Vehicle Transportation Award 2010
Pharmaceutical Industry Award 2010
Port Authorities Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Poultry Processing Award 2010
Premixed Concrete Award 2010
Professional Employees Award 2010
Registered and Licensed Clubs Award 2010
Seafood Processing Award 2010
Sporting Organisations Award 2010
Stevedoring Industry Award 2010
Storage Services and Wholesale Award 2010
Sugar Industry Award 2010
Surveying Award 2010
Timber Industry Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010
Wine Industry Award 2010

PAUL C MOORHOUSE

FAIR WORK COMMISSION

Matter No: AM2016/5

Modern Award Review: Ports, Harbours and Enclosed Water Vessels Modern Award 2010, Seagoing Industry Award 2010, and the Marine Towage Award 2010.

TAB 15

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation Statement (AM 2008/41, AM 2009/10)

[2009] AIRCFB 765

Giudice J, President, Lawler and Watson VPP, Watson, Harrison and Acton

SDPP, Smith C

19 August 2009

Awards — Award modernisation — Process to apply in connection with proposed restaurant and catering industry award, and proposed maritime industry award, as required by variations to Minister's request.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, with that request subsequently varied on a number of occasions. One variation, made on 28 May 2009, required the Commission to create a modern award covering the restaurant and catering industry separately from other sectors of the hospitality industry. Another variation, made on 17 August 2009, specified certain matters in relation to the modern award to cover the maritime industry.

The award modernisation Full Bench had previously published a modern award to apply to the hospitality industry (see [2008] AIRCFB 1000; (2008) 177 IR 364), and an exposure draft of the modern award to apply to the maritime industry (see [2009] AIRCFB 450; (2009) 182 IR 413).

The Full Bench had previously published two statements dealing with the requirement to create a modern award covering the restaurant and catering industry ([2009] AIRCFB 555; (2009) 183 IR 72 and [2009] AIRCFB 640; (2009) 184 IR 240).

Held: (1) The Full Bench set a timetable for dealing with further consultation and drafting in relation to the proposed restaurant and catering industry award.

(2) The Full Bench set a timetable for dealing with further consultation and drafting in relation to the exposure draft of the proposed maritime industry award.

Cases Cited

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 640) (2009) 184 IR 240.

The Commission

1 This statement concerns award modernisation and in particular the proposed restaurant and catering industry award and the proposed seagoing industry award. We deal first with the proposed restaurant and catering industry award.

Proposed restaurant and catering industry award

2 We issued a statement on 26 June 2009 in which we provided for the filing of material relevant to the proposed restaurant and catering industry award by 24 July 2009.[1] We also indicated that we would consider what other steps should be taken to determine the issues after that date. We have decided to publish an exposure draft, along with the exposure drafts of the Stage 4 awards, by 25 September 2009. Thereafter the proposed award will be dealt with in conjunction with the other Stage 4 awards and according to the same timetable.

Proposed seagoing industry award

3 As is well known, on 28 March 2008 the Minister for Employment and Workplace Relations (the Minister) made an award modernisation request pursuant to s 576C(4) of the *Workplace Relations Act 1996*(Cth). On 17 August 2009 the Minister varied the award modernisation request by including provisions dealing with a modern award covering the maritime industry. Those provisions are:

> Maritime Industry
>
> 47 When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian-crewed ships (as defined in item 1 of Schedule 2 to the *Fair Work Amendment Regulations 2009 (No. 1))* and their employees.
>
> 48 The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.
>
> 49 As well as giving consideration to the modern awards objective in s 576A of Part 10A of the *Workplace Relations Act 1996*, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction.

4 The Commission had previously published an exposure draft of the Seagoing Industry Award 2010.[2] In light of the variation to the request it is appropriate to provide an opportunity for further consultation and to publish a further exposure draft. We have decided to publish a further exposure draft by 25 September 2009, along with the exposure drafts of the Stage 4 modern awards. Thereafter the proposed award will be dealt with in conjunction with the other Stage 4 awards and according to the same timetable.

5 To inform the preparation of the further exposure draft we direct that any submissions, drafts and other proposals concerning the proposed seagoing industry award should be lodged by 11 September 2009. There will not be any oral consultations prior to 11 September 2009.

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1 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 640; (2009) 184 IR 240.

2 22 May 2009.

6 Access to all relevant documents including the consolidated version of the request and the first exposure draft of the proposed Seagoing Industry Award 2010 are available on the AIRC website.

PAUL C MOORHOUSE