

**From:** Ben Cooper  
**Sent:** 15 November 2016 10:32  
**To:** 'Chambers - Watson VP'  
**Subject:** AM2016/5

Dear Associate

At the hearing in relation to the above matter, Sea Swift undertook to research the historical development of the *Self Propelled Barge and Small Ships Award* and to provide further submissions for the Full Bench's consideration.

We write now to advise that we have requested and been provided with the files for the 1991 and 1984 Awards from the Commission Library archives. On the basis of the files provided, we have made a further request for the file for the 1981 Award.

We anticipate providing submissions to the Commission shortly.

Sincerely

Ben Cooper

**From:** Ben Cooper  
**Sent:** Monday, 12 December 2016 5:47 PM  
**To:** Chambers - Watson VP  
**Subject:** RE: AM2016/5

Dear Associate

We attach the Applicant's further submissions and the additional materials gleaned from the Library's archives in respect of the 1991 and 1984 Awards.

Sincerely

Ben Cooper

**FAIR WORK ACT 2009**

**Section 156 – FOUR YEARLY REVIEW OF MODERN AWARDS**

**AM2016/5 – Substantive Issues in Ports, Harbours And Enclosed Water Vessels Award 2010 And The Seagoing Award 2010**

**SUBMISSION ON BEHALF OF SEASWIFT PTY LTD IN SUPPORT OF AN APPLICATION FOR VARIATION OF:**

*SELF-PROPELLED BARGES AND SMALL SHIPS INDUSTRY AWARD 2001*

1. The Applicant in these proceedings, Sea Swift Pty Ltd, has been granted permission from the Full Bench to provide the Commission with a written submission relating to the issue of the established relativity as between the *Self-propelled Barges and Small Ships Industry Award 2001* (and its predecessors) and the *Maritime Industry Seagoing Award* as at the making of the *Seagoing Industry Award 2010* and the rescission of the *Self-propelled Barges and Small Ships Industry Award*.
2. In the proceedings before the Full Bench, the Applicant submitted that there was an established and arbitrated relativity in relation to the differential as between wage rates and conditions applying to the operators of self-propelled barges and small ships in tropical waters of northern Australia and the wage levels and conditions applying to the Seagoing Industry Award, as derived from the Maritime Industry Seagoing Award. Reference was made in the proceedings to the application of the National Wage Case of August 1989, and as to whether the *Self-propelled Barges and Small Ship Award* had been subjected to the process mandated by that Decision.
3. The August 1989 National Wage Case<sup>1</sup> provided for structural efficiency adjustments to wage rates under certain conditions. In particular, it provided for a first and second increase in wages at a prescribed quantum, with the stipulation that the second increase will not be automatic, but subject to application.<sup>2</sup>

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<sup>1</sup> [1989] 30 IR 81

<sup>2</sup> Supra p. 101

4. The Full Bench said<sup>3</sup> in relation to structural efficiency adjustments as follows:

*“Structural efficiency adjustments allowable under the National Wage Case Decision of 7 August 1989 will be justified in accordance with this principal if the Commission is satisfied that the parties to an award have co-operated positively in the fundamental review of that award and are implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs. The measure to be considered should include, but not be limited to:*

...

- *Including properly fixed minimum rates for classifications and awards related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;*

...”

5. The Decision also made provision for the resolution of inequities and anomalies, which made allowance for remedies where classes of work where employees performing similar work are paid dissimilar rates of pay without good reason.
6. An application was made to the AIRC by the Maritime Unions on or about 15 May, 1991 for the granting of the second structural efficiency increase under the August 1989 Decision.
7. That matter was listed before Commissioner Fogarty who appears to have written to the parties on 16 May, 1991, in order to programme the progression of those applications. It appears from relevant transcript that the parties appeared on 29 May, 1991 in Brisbane and again in Darwin on 7 July, 1991. The Commission was told on transcript that the parties had met at length in relation to the processing of the Application seeking to vary the Self-propelled Barges and Small Ships Award 1981 to reflect the National Wage Case Decision of August 1989.<sup>4</sup>
8. In order to meet the requirements of the Commission for the granting of the structural efficiency increase, the parties formed a mutual intention to develop a new award to replace the 1981 award so as to warrant and justify the awarding of the second 3% increase, which had been accessible to the union since October of 1990. At page 9 of the Transcript the Commissioner

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<sup>3</sup> Supra p. 102

<sup>4</sup> (Transcript 2/7/91 page 8).

was told by the employer representative that negotiations had been occurring since October of 1990 through to 31 May 1991 and that the then existing respondents of the award had some 29 points of difference with the union in relation to the content of the new award. Mr Saundry further informed the Commission that he believed that under the 1989 National Wage Case, commitments had been given to make a substantial review of the award aimed at reflecting the conditions under which the employers, and employees for that matter, operate within the industry.

9. The parties appeared again before Commissioner Fogarty on 5 July, 1991 following significant untranscribed intervention on the part of the Commissioner, and the Commissioner was informed on the record that over a number of days of conference, assisted by Commissioner, the parties have come to the point where they are extremely close to agreement. At page 15 of the Transcript Commissioner Fogarty said as follows:

*“Well these have been difficult negotiations prior to this week and during the week, and in light of my involvement in them from time to time, in light of what has been put to me this morning I decided that a 3% wage increase should be applied to the award from the beginning of the pay period to commence on or after today’s date. That decision will be conditional in the matter in which Mr Saundry has indicated and which is agreed between the parties and that is to meet the deadline of 12 July by which date a draft order has to be complete and in the hands of the employers.”*

10. By order contained in Print K0526 Commissioner Fogarty made a consent order varying the wage rates to accord with that decision, on 12 November 1991. By order contained in print K0700 a new consent award was made under the structural efficiency principle on 16 December, 1991 incorporating those changes together with other alterations to the pre-existing award. That 1991 award applied to Perkins Shipping Pty Ltd and Barge Express Operations Pty Ltd.
11. In the case of Perkins, it applied uniform rates of pay to the crew of three named vessels and slightly lower rates of pay to a fourth vessel, and separately specified the quantum of the working cargo allowance which had been incorporated in those rates of pay.
12. In the case of Barge Express Operations Pty Ltd single rate of pay and conditions was provided for two named vessels.

13. Significantly, a clause which had been included in the 1981 award, at Clause 5(III) and (IV), which required review of wage rates under that Award on the same basis as applied to the *Maritime Industry Seagoing Award*, and an application of any variation to the *Maritime Industry Seagoing Award* to the *Self-propelled Barges and Small Ships Award* as a matter of course, was deleted from the 1991 Award as a result of the Consent Order made on 12 November, 1991 and the Consent Award made on 16 December, 1991.
14. This latter change undertaken in the course of the structural efficiency adjustment process, firmly removed the existing mandatory nexus between terms and conditions of the *Maritime Industry Seagoing Award* and the *Self-propelled Barges and Small Ships Award* and required that thereafter wages and conditions in each of those awards must be adjusted in accordance with the particular circumstances of the work performed under each of those Awards.
15. So far as can be determined, no application for any form of anomaly or inequity has been brought in relation to the wages and conditions in this Award, following the 1991 Structural Efficiency decision by Commissioner Fogarty
16. It follows as a matter of fact and history that in 1991 Commissioner Fogarty heard and determined a merit application for grant of a second structural efficiency payment in circumstances where in order to make such an adjustment to the Award, the Commissioner was required to be affirmatively satisfied of the matters set out in the structural efficiency principles which are Appendix A to the National Wage Case of August 1989.
17. There now can be no suggestion that the Commissioner, having been as involved in the matter as he clearly was, was not fully appraised of the efforts and issues addressed by the parties, and in particular by the fact that there was a deliberate severing of the nexus between the *Maritime Industry Seagoing Award* and the *Self-propelled Barges and Small Ships Award* so that wage rates were required to be determined by reference to the work value and criteria applying to the work undertaken by employees engaged under each of those two respective awards so that, although the *Self-propelled barges and Small Ships Award* was made and amended up to and including approximately 1981 by reference to general maritime standards, in 1991 it 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 vessels as are currently in contention in these proceedings.

18. A submission was made by union parties that there is significance in the fact that the orders and the award made by the Commission were made by consent. The process established by the Full Bench in the August 1989 decision mandated that the Commission be satisfied that the parties had co-operated<sup>5</sup> in achieving the required standards that must be reached before the wage increase could be granted. It was a usual case, and was also somewhat inevitable, that resulting structural changes were therefore made by consent, as a true mark of co-operation. This did not detract from the fact that the commission was required to exercise a judgement as to the results of their efforts.
19. The *Self Propelled Barges and Small Ships Award 1991* was subsequently superseded by the *Self Propelled Barges and Small Ships Industry Award 2001*<sup>6</sup>, which industry award was still in force in 2009 when it was rescinded under the award modernisation process. Award simplification had resulted in a change of the application of the wage rates so that the award now applied by reference to the capacity of the vessels (under and over 500 DWT)<sup>7</sup> rather than by reference to named vessels.
20. The rescission of the *Self-propelled Barges and Small Ships Industry Award 2001* in the modern award process without making provision for specific coverage of this deliberately excised sector of the maritime industry brought, was both erroneous and anomalous. In the Full Bench Decision [2016] FWC FB 4418 dealing with proposed variations to the *Vehicle Manufacturing etc Award* under section 160 of the FW Act, this was said at [73]-[74]:

*“ [73] ... We do not accept that disagreement – even a well founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purposes of section 160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form that which did not reflect the Tribunal’s intention. There is nothing to suggest that this occurred here .....*

*[74] ..... The classification structure for full time weekly employees in the VMRSR Award is derived from the broad banded classification structure in the RSR Award which was established in accordance with the Structural Efficiency Principles. Accordingly the relativities between each classification must be presumed to correctly reflect the relative work value of those classifications. This presumption is confirmed by the variation to the RSR Award which added the classification structure.....”*

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<sup>5</sup> Paragraph 4 above sets out the Commission standards required.

<sup>6</sup> Att “BC4” to the affidavit of Ben Cooper.

<sup>7</sup> Clause 14.2

21. In this matter, Sea Swift is not engaged in a mere disagreement as to a previous decision of the Commission, but rather the erroneous (as it now appears) 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.
22. As history now instructs, that assumption was in error and there existed a Federal Award which accommodated the circumstances of a particular sector of the *Seagoing Industry Award* which contained terms and conditions of employment and in particular wage rates which had been adjusted in accordance with the Structural Efficiency Principle, and which had been deliberately severed from any strict or automatic relativity to the *Maritime Industry Sea-going Award* as part of that process.
23. It is therefore appropriate to assume that there was no ongoing relativity as between those wage rates and the *Maritime Industry Seagoing Award*. Similarly, relativity did not exist between self-propelled barges and small ships operating in tropical waters of northern Australia and the large sea-going vessels contemplated by the classifications within the sea going Industry Award, limited as they are to the smallest classification between 0 and 19,000.
24. As was agreed by the parties and accepted by Commissioner Fogarty in 1991, there was not, and was not to be, any relativity between the vessels with which he was dealing in making that award at that time and vessels operating under the *Maritime Industry Seagoing Award*.
25. In the era in which Commissioner Fogarty was operating in 1991, the point of distinction between the 2 classes of vessels (small and large sea-going vessels) was able to be established by reference to the identity of the employers who were respondents to each respective Award. Under the current system that includes the *Sea-going Industry Award*, the modern Award applies irrespective of questions of respondents, and the scale and context of the sea-going activities is not provided for, unlike the situation under the former regime which did offer an informed award differential between different classes of sea-going vessels.

26. It is submitted that in making the *Seagoing Industry Award*, inadequate consideration was given to the existence and the history and development of the *Self Propelled Barge and Small Ships Industry Award 2001* and its small ship predecessors, and its relationship, or lack thereof, with the *Sea Going Industry Award*.

(Signed)

A handwritten signature in black ink that reads "Ben Cooper". The signature is written in a cursive, slightly slanted style.

Associate Director, Livingstones

Agent for Sea Swift Pty Ltd



### **Additional material**

1. [Self Propelled Barge and Small Ship Award 1991 \(part 1\) \(00381039\)](#)
2. [Self Propelled Barge and Small Ship Award 1991 \(part 2\) \(00381038\)](#)
3. [Self Propelled Barge and Small Ship Award 1984 \(00381040\)](#)