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**VIA E-MAIL**

Associate to Vice President Hatcher
Fair Work Commission
80 William Street
East Sydney NSW 2011
chambers.hatcher.vp@fwc.gov.au

Dear Associate

**AM2014/197: Casual Employment**

We refer to the above matter, in which we act for Qube Ports Pty Ltd, Qube Bulk Pty Ltd, the employing entities in the DP World Australia group, Patrick Stevedores Holdings Pty Ltd, and Victoria International Container Terminal Ltd (**Stevedoring Employers**).

On 30 August 2018 the Commission published a schedule of draft determinations intended to give effect to the Full Bench's decision of 9 August 2018 ([2018] FWCFB 4695, the **August Decision**). We set out below the Stevedoring Employers' comments in relation to the draft determination to vary the *Stevedoring Industry Award 2010* (**SI Award**), in accordance with paragraph [62] of the August Decision.

**Definition of a 'regular casual employee'**

Clause 10.4(b) in the draft determination defines 'regular casual employee' for the purpose of the new clause 10.4. That definition is significant because under clause 10.4(a), it is a 'regular casual employee' who will have the right to request conversion to guaranteed wage or full-time employment. In practice therefore it is clause 10.4(b) which establishes the 'criterion of eligibility for conversion'.

The Stevedoring Employers understand from paragraphs [59]-[61] of the August Decision that, given the lack of regularity in the hours worked by persons in guaranteed wage employment (**GWE**), the 'criterion' of eligibility for the right to request conversion determined earlier by the Full Bench (relating to a certain pattern of work) is inappropriate for the SI Award. The Full Bench provisionally determined that a different 'special criterion' of eligibility was appropriate, being the working of at least 28 hours in 10 of the 12 months preceding a conversion request.

In the draft determination, this new 'criterion' has been incorporated at clause 10.4(d), which deals with the basis on which a casual employee converts to GWE, and specifically the number (or average number) of full shifts per week which are to be guaranteed. However, it is not reflected in clause 10.4(b), which continues to refer to the working of a 'pattern of hours' which could continue to be worked as a full-time or GWE employee.

The Stevedoring Employers submit that the new 'criterion' for conversion to GWE should be reflected in clause 10.4(b). Otherwise, the clause is confusing and potentially ambiguous, as it could create a



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situation where clauses 10.4(a) and (b) on their face allow some casual employees to request conversion, but neither clause 10.4(c) nor (d) provides for the basis on which such conversion should occur.

If clause 10.4(b) is amended as the Stevedoring Employers propose, some wording in clauses 10.4(d) and (g)(i) becomes unnecessary and/or should be revised for consistency.

**Calculation of the guarantee where an employee moves from casual to GWE**

Clause 10.4(d) of the draft determination provides that a casual who has worked at least 28 hours in 10 of the 12 months preceding conversion may request conversion to GWE, with:

> *a guaranteed minimum number or average number of full shifts each week corresponding to the pattern and number of hours the employee has worked over the period referred to above.*

The Stevedoring Employers are concerned that this is potentially unclear and confusing for several reasons:

1. It refers to conversion to a guarantee based on the 'pattern' of hours worked by the employee. As set out in the August Decision, the concept of a 'pattern' of hours is difficult to apply in the circumstances of GWE.

2. The number of hours worked by an employee over the qualifying period may have varied significantly from month to month, which requires some form of averaging.

3. The reference to the 'period referred to above' is potentially ambiguous given that an employee can request conversion based on the hours worked in 10 out of 12 months. We assume that the 'period referred to above' is intended to be the qualifying period of 12 months.

There is potentially a more significant issue for resolution, in that the average number of weekly hours worked by an employee is very likely to be a number that is not a whole number of full shifts - and may in fact be less than one full shift. For example, if an employee works 28 hours in 10 of the 12 months preceding a conversion request, but does not work in the other two months (which is not beyond the realms of possibility given the evidence adduced before the Full Bench), then they have worked an average of around 5.4 hours per week (that is 280 hours ÷ 52 weeks). That equates to a guarantee of around 0.77 full shifts (given that a full shift is 7 hours).

If the Full Bench intended that this result be possible, then potentially this does not raise any issue. However, if the Full Bench did not intend that an employee potentially be given a guarantee that is not a whole number of full shifts in each week (and indeed may be less than one full shift), more significant changes would be required to:

1. clarify the way in which rounding is to occur; and

2. ensure that employees are not provided with a guarantee which is in fact higher than the number of hours that they worked, and were available for them to work, in the qualifying period.

The Stevedoring Employers respectfully submit, for the Full Bench's consideration, that one way to deal with this issue would be to provide that:

1. In addition to working at least 28 hours in 10 of the preceding 12 months, an employee must work at least 364 hours in total over the 12 month period (that is, the number required so that if a number of hours is averaged over 52 weeks, the result is at least a full shift of 7 hours per week); and

2. The guarantee is to be rounded down to the nearest whole number of full shifts.

**Clauses referring only to full-time employment**

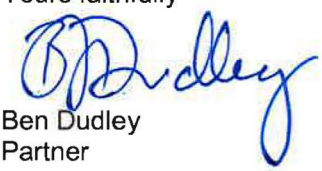
Finally, we note that clauses 10.4(f), (g)(i), (j), (l), (n) and (o) refer only to conversion to full-time employment. We assume that they are intended to apply equally to conversion to GWE.

**Draft determination**

**Enclosed** with this letter is a revised version of the draft determination indicating the drafting amendments which the Stevedoring Employers propose in light of the matters set out above. The document does not, however, incorporate the further, more substantive changes to which we refer above to resolve any confusion or ambiguity about the guarantee which a "converting" employee may request.

Please contact us if we can be of any further assistance to the Commission.

Yours faithfully



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