

FAIR WORK COMMISSION

Matter No: AM2016/5

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

**SUBMISSIONS OF CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION -
THE MARITIME UNION OF AUSTRALIA DIVISION**

1. These submissions are advanced by Construction, Forestry, Maritime, Mining and Energy Union - The Maritime Union of Australia Division (**MUA**) in response to the submissions of Sealink Travel Group (**Sealink**) uploaded on 9 March 2018.
2. The MUA opposes both the primary and alternate proposals of Sealink.
3. Sealink has applied the Seagoing Industry Award 2010 (**Seagoing Award**) as the relevant award for the purposes of the BOOT in section 189 of the *Fair Work Act 2009* since at least the approval of the Sealink Travel Group South Australia Ferry Crew Enterprise Agreement 2013 [2013] FWCA 2584 on 29 April 2013.
4. The effect of both the primary and alternate proposals of Sealink is that the Seagoing Award would cease to be the relevant award for the purposes of the BOOT. Instead the relevant award for the purposes of the BOOT would become the Ports, Harbours and Enclosed Water Vessels Award 2010 (**PHEWV Award**). A comparison of the conditions applicable under these 2 awards was provided at schedule B to the MUA's submissions of 6 December 2017. On any reasonable analysis the wages and conditions under the PHEWV Award are significantly less than those under the Seagoing Award.
5. There is no justification proffered by Sealink as to why this change complies with the modern award review objectives.
6. Sealink's concern appears to be the application of the Seagoing Award to their operations between Cape Jervis (on the South Australian mainland) and Penneshaw (on Kangaroo Island), a voyage through the Backstairs Passage. So much is apparent from their alternate claim.
7. At [7] Sealink asserts that the Backstairs Passage is a body of water with Australian coastline boundaries. In *Maritime Union of Australia, The v Sea Swift Pty Ltd & Australian Workers' Union, The and Others* [2016] FWCFB 651 (8 February 2016) the full bench considered the meaning of the words "body of water within the Australian coastline" and at [33] stated:

[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.

8. The fact that Sealink's vessels leave the Australian coast and proceed to sea before arriving at Kangaroo Island means that the Backstairs Passage is not a body of water within Australian coastline boundaries. It follows that the Seagoing Award is the appropriate award for this work.
9. There are a number of straits in Australia. These include Bass Strait; Torres Strait, Investigator Strait, Clarence Strait, Dundas Strait, South Passage, Endeavour Strait and the Backstairs Passage.
10. No consideration is given as to whether the environment in which the work is performed in these waters is more akin to that covered by the PHEWV Award than the Seagoing Award so as to justify Sealink's contention that all such work is to be covered by the PHEWV Award.
11. In *Zalups and Australian Fisheries Management Authority* [2003] AATA 908 (15 September 2003) Mr Zalups described the tides and currents in the area of either side of Backstairs Passage as amongst the strongest in the Southern Hemisphere, making the waters some of the most dangerous in the world. (at [19]) This description was not contested by the Authority. The Bass Strait is notorious for its rough water.
12. The environment in which the work is performed is more appropriately covered by the Seagoing Award.
13. There are also no work value reasons as required by section 156 proffered by Sealink as to why employees should have their minimum entitlements reduced.
14. The FWC should reject the primary and alternate proposals of Sealink.

Dated: 1 June 2018



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