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Associate to Vice President Hatcher

Fair Work Commission
11 Exhibition Street
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By email: chambers.hatcher.vp@fwc.gov.au; amod@fwc.gov.au

Dear Associate

RE: **4 YEARLY REVIEW
SEAGOING INDUSTRY AWARD 2010
MARINE TOWAGE AWARD 2010
PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010
MATTER NO: AM2016/5**

We are the solicitor for the Maritime Union of Australia and refer to the draft determinations issued on 30 June 2017.

Draft determination – Marine Towage Award 2010

We consider that the draft determination properly reflects the decision of the Full Bench issued on 24 February 2017.

Draft determinations – Ports, Harbours and Enclosed Water Vessels Award 2010 and Seagoing Industry Award 2010

We are concerned that the draft determinations fail to provide clarity as to which of these two awards applies and indeed the operation of the proposed inclusion and exclusion provisions would leave currently award covered employers award free. For example if you had to determine which award applied to an employer who operated a cargo vessel carrying cargo from Cairns to Weipa you would perform the following analysis:

Step 1: Is the employer covered by the Seagoing Industry Award 2010?

The employer would fail within the definition of "Seagoing Industry" as the vessel is a cargo vessel which, in the course of operation, proceeded to sea (on voyages outside the limits of bays, harbours or rivers). The employer meets the first test of coverage under this award.

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Step 2: Does any exclusion provision of the *Seagoing Industry Award 2010* apply?

Yes. The vessel in this example is operating at sea on activities not covered by any of the awards listed in the exclusion part of clause 4.1 of the *Ports, Harbours and Enclosed Water Vessels Award 2010* so clause 4.5 of the *Seagoing Industry Award 2010* applies.

The employer is not covered by the *Seagoing Industry Award 2010*.

Step 3 Is the employer covered by the *Ports, Harbours and Enclosed Water Vessels Award 2010*?

The vessel in this example is operating at sea on activities not covered by any of the awards listed in clause 4.1 of the *Ports, Harbours and Enclosed Water Vessels Award 2010*. The employer meets the first test of coverage under this award.

Step 4: Does any exclusion provision of the *Ports, Harbours and Enclosed Water Vessels Award 2010* apply?

Yes. The vessel in this example is a vessel as defined in clause 3.1 of the *Seagoing Industry Award 2010* and there is a significant overlap of the classifications in the two awards.

The employer is not covered by the *Ports, Harbours and Enclosed Water Vessels Award 2010* in relation to its employee who are Masters, Mates, Engineers or Able Seamen.

Currently the employer in the example would be covered by the *Seagoing Industry Award 2010*. (see *MUA v Sea Swift Pty Ltd* [2016] FWCFB 651)

We propose that the difficulty in the overlap of the coverage of these two modern awards be resolved as follows:

1. Delete clause 4.2(a) of the draft determination for the *Ports, Harbours and Enclosed Water Vessels Award 2010*; and
2. Delete clause 4.5(a) of the draft determination for the *Seagoing Industry Award 2010*

In the example above the employer would then be covered by both modern awards. The most appropriate modern award for the work performed by the employee test set out in each award (see clause 4.6 of the *Seagoing Industry Award 2010* and clause 4.9 of the *Ports, Harbours and Enclosed Water Vessels Award 2010*) would then be the mechanism to determine which award applied.

Yours faithfully,
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