

FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

AM2014/240

Submissions in reply to submissions made by the Maritime Union of Australia in relation to the Exposure Draft for the Port Authorities Award 2016 on behalf of Ports Australia

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Submissions in reply to submissions made by the Maritime Union of Australia in relation to the Exposure Draft for the Port Authorities Award 2016 on behalf of Ports Australia

1. The submissions set out at paragraphs 2 to 14 below are in reply to submissions made by W G McNally Jones Staff on behalf of the Maritime Union of Australia (**MUA**), by letter dated 14 April 2016, in relation to the Saturday rate of pay in the Exposure Draft for the Port Authorities Award 2016 (**Exposure Draft**).
2. The MUA submissions say that clause 12.3 of the Exposure Draft should be amended to reflect the position provided for in a couple of pre-reform awards (AN140213 and AP792489), being that work on a Saturday be paid at 150% of the ordinary rate for the first three hours and 200% thereafter.
3. Ports Australia submits that clause 12.3 of the Exposure Draft, which provides that an employee will be paid 150% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday, should not be amended.

Exposure Draft and Port Authorities Award

4. The provisions in the Exposure Draft and the Port Authorities Award 2010 (**Port Award**) regarding the Saturday rate are drafted in slightly different terms, but have the same effect, being that an employee will be paid 150% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday.

5. Clause 12.3 of the Exposure Draft provides that:

"An employee will be paid 150% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday".

6. Clause 21.2(b) of the Port Award provides that:

"Except as provided otherwise in this clause employees will be entitled to be paid:

...

for all ordinary hours and overtime worked between midnight Friday and midnight Saturday a loading of 50% of the ordinary hourly minimum rate of pay".

Part 10A Award Modernisation Proceedings

7. On 6 March 2009, the MUA and the Australian Institute of Maritime and Power Engineers provided a draft of a modern award known as the "Maritime Industry Port Authorities and Construction Award" (**MUA Draft**). The MUA Draft included a clause regarding the Saturday rate of pay which is the same as clause 12.3 of the Exposure Draft and clause 21.2(b) of the Port Award, in that it provided for a loading of 50% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday.
8. On 27 March 2009, there was a hearing before the Australian Industrial Relations Commission (**AIRC**) in relation to a number of draft modern awards, including the Port Authorities and Construction Award. During this hearing, neither the MUA, nor any other party interested in the Port Authorities and Construction Award, made any submission about the Saturday rate of pay.

9. On 22 May 2009, the AIRC published a draft Port Authorities Award 2010 (**AIRC Draft**). The AIRC Draft included a clause regarding the Saturday rate of pay which is the same as clause 12.3 of the Exposure Draft and clause 21.2(b) of the Port Award, in that it provided for a loading of 50% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday.
10. The MUA did not make any submission about changing the Saturday rate clause set out in the MUA Draft or the AIRC Draft during the Part 10A Award Modernisation Proceedings.
11. The Port Award was made on 16 March 2010 and included clause 21.2(b) providing for a loading of 50% of the ordinary hourly rate for all ordinary hours and overtime worked between midnight Friday and midnight Saturday. As noted above, clause 12.3 of the Exposure Draft has the same effect.

Guidance regarding the 4 yearly review of modern awards

12. Guidance provided by the Full Bench of the Fair Work Commission (**FWC**) in relation to the 4 yearly review of modern awards indicates that in reviewing the Port Award the FWC is to proceed on the basis that *prima facie* the Port Award achieved the modern awards objective, set out at section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**), at the time that it was made¹.
13. The MUA's submission on the Saturday rate of pay does not follow the FWC guidance regarding changes to modern awards²:
 - (a) the change sought by the MUA is not supported by addressing the relevant legislative provisions in the FW Act in relation to the modern awards objective and varying modern awards. The MUA submissions simply refer to a couple of pre-reform awards;
 - (b) the MUA has not submitted any evidence properly directed to demonstrating the facts supporting the proposed change; and
 - (c) the MUA has not made submissions about any previous decisions relevant to the contested issue, or about decisions of the Full Bench which should be followed.
14. For these reasons the MUA's proposed change to clause 12.3 of the Exposure Draft should not be adopted.
15. In relation to other submissions made by the MUA in the letter dated 14 April 2016, Ports Australia agrees that:
 - (a) clause 7.2(d) and (e) of the Exposure Draft are duplicate provisions and should be deleted;
 - (b) the applicable adult weekly rate in clause 9.3(a) of the Exposure Draft is Level 4;
 - (c) the allowance for use of a motorcycle at clause 10.3(a)(i) of the Exposure Draft is \$0.78 per km; and

¹ [2014] FWCFB 1788, paragraphs 24 and 60.

² [2014] FWCFB 1788, paragraph 60.

- (d) the words "1/38th of" should be deleted from clause 6.3(b) of the Exposure Draft.



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