

FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010

AM2014/241

OUTLINE OF SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

Background

1. On 21 November 2016 the Maritime Union of Australia (**MUA**) advised that it was pursuing claims that are recorded as items 7, 23 (noting it includes item 9), 13 and 20 of the revised summary of submissions published on 7 November 2016 in relation to the Ports, Harbour and Enclosed Water Vessels Award 2010 (**Award**).
2. These submissions are in support of those claims and are to be read in conjunction with the witness statement of Paul Garrett dated 5 December 2016.

Legislative provisions and guidance from the Full Bench

3. In *Re 4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues* (241 IR 189) (TAB 1) the Full Bench held at [24]:

In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Pt 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see item 4 of Sch 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Pt 10A process is, in a number of important respects, identical or similar to the modern awards objective in s 134 of the FW Act. 14 In the Review the Commission will

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proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

4. Then at [60] the Full Bench made a number of observations about the review.

Relevantly

where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

5. Nevertheless the FWC is empowered to make a determination varying a modern award to remove ambiguity, uncertainty or to correct an error. (s 160 *Fair Work Act 2009 (FW Act)*)

Item 7 – clause 6.4(h) of the exposure draft published 7 November 2016

6. The clause is in relation to part time employees and is in the following terms:

“All time worked in excess of the hours as mutually arranged, excluding any additional hours, will be overtime.”

7. In the first exposure draft the FWC raised the following question in relation to this clause:

“Parties are asked to make submissions on how clause 6.4(h) applies. In particular, how does a part-time employee work additional hours that aren't overtime hours?”

8. This query highlights potential uncertainty as to the terms of the clause.
9. The award participants have not been able to reach consensus as to how to answer this question or how the clause is to operate. In light of that uncertainty the MUA has proposed that the clause be amended by deleting the words “, excluding any additional hours,” and replacing the word “arranged” with the word “agreed” so that it states:

“All time worked in excess of the hours as mutually agreed will be overtime.”

10. There is no definition of “additional hours” in relation to part time employees in the Award. Instead hours for part timers are agreed (clause 6.4(e)) and any variation to the regular pattern of work must be agreed in writing (clause 6.4(f))
11. Clause 6.4(h) is there to protect employees if their employer directs them to work hours in addition to those set out in their agreed regular pattern of work. It follows that these hours should be paid at overtime rates.
12. None of the instruments that were replaced on the making of the Award contained an equivalent provision. We set out the relevant extracts from those awards in annexure A to these submissions. Indeed, we have been unable to find any modern award that contains a similar provision for part time employees.
13. The uncertainty as to how to pay part time employees who work hours in addition to those agreed should be resolved by making the changed proposed by the MUA.

Item 23(9) clauses 12.2 (and 7.2) of the exposure draft published 7 November 2016

14. On 2 March 2015 the Fair Work Ombudsman queried in what circumstances an employee can work ordinary hours on a Saturday or a Sunday. This query highlights potential uncertainty as to the terms of the clause. The award participants have not been able to reach consensus as to how to answer this query or how the clauses are to operate.
15. Clause 7.2 makes it clear that the span of ordinary hours does not extend to work on a Saturday or a Sunday. That clause provides:

Ordinary hours may be work between 6.00 a.m. and 6.00 p.m. for up to 8 hours per day, Monday to Friday inclusive.
16. Clause 12.1 makes it clear that overtime is payable to employees for any time worked outside of the ordinary hours on a Monday to Friday.

17. Clause 12.2 provides for how an employee is to be paid when working on, relevantly, a Saturday or on a Sunday. The clause is derived from clause 20.1(b) of the current Award. That is in these terms:

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

18. Similarly in relation to Sunday work the contents of clause 12.2 is derived from clause 20.3 of the current Award. That is in these terms:

An employee will be paid a loading of 100% of the ordinary hourly base rate of pay for any hours, ordinary and overtime, worked on a Sunday.

19. In other words it is clear from the span of ordinary hours that work on a Saturday or on a Sunday is not work within the ordinary hours. All the table in clause 12.2 proposes to do is explain how the employee is to be paid for that work.
20. The query from the FWO should be resolved replacing clause 12.2 with the following:

12.2 Employees will be paid the following rates for overtime worked Monday to Friday, work on a Saturday or on a Sunday, or work on a public holiday:

		% of ordinary hourly rate
Overtime – Monday to Friday		
	First three hours	150
	After three hours	200
Work on a Saturday		150
Work on a Sunday		200
Work on a Public Holiday		250

Item 20 – clause 10.1(n)(iii) of the exposure draft published 7 November 2016

21. The clause in the current exposure draft is in these terms:

“Employees on vessels proceeding beyond the limits of a harbour, river or bay will whilst so engaged be paid their normal wage plus an allowance of 25% of their normal wage for each day with a minimum payment for four hours.”

22. The FWC has queried whether the references to “normal wage” should be to “ordinary hourly rate.” This query highlights potential uncertainty as to the terms

of the clause. The award participants have not been able to reach consensus as to how to answer this question.”

23. The clause is derived from clause 4.1 of Part 3 of the Ports Services Award 1998 (AP792489). That clause provided:

“Employees on vessels proceeding beyond the limits of Port Jackson or Port Phillip Bay shall whilst so engaged be paid at the wage rates prescribed with an additional amount of 25 per cent with a minimum payment for four hours.”

24. The words “normal wage” were inserted by the Full Bench of the AIRC when the exposure draft – May 2009 for this award was published. Normal wage is not otherwise a concept referred to in the Award.

25. It is clear that the reference to “wage rates” in the Ports Services Award 1998 was a reference to the ordinary rate of pay. This historical position should be reflected in the Award and the words “normal wage” replaced by the words “ordinary hourly rate” in both places.

Dated: 5 December 2016



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Annexure A**EMPLOYMENT CATEGORIES CLAUSES****AN120350 – Motor Boats and Small Tugs (State) Award****3. Engagement**

3.1 Unless otherwise agreed between the employer and the employee, employees may be terminated by one week's notice by the employer or the employee or by payment or forfeiture of one week's wage; provided that an employer may dismiss an employee, without notice, for serious and wilful misconduct.

AN120351 – Motor Ferries State Award**3. Engagement**

All employment shall be by the week, determined by a week's notice from either employer or employee unless that amount of a week's wages be paid or allowed in lieu of such notice: provided that if any employee fails to work on any day or part of a day when work has been provided for him/her, the employer shall be entitled to make a proportionate deduction from such employee's weekly wage.

AN120650 – Wire Drawn Ferries (State) Award**3. Engagement**

Employees shall be engaged on a weekly basis.

4. Contract of Employment

4.1 An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training, consistent with the classification structure of this award, provided that such duties are not designed to promote deskilling.

4.2 An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment.

4.3 Any direction issued by an employer shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.

4.4 Enterprises shall establish a consultative mechanism and procedures appropriate to their size, structure and needs for consultation and negotiation on matters affecting their efficiency and productivity.

AN140163 – Maritime Award - Brisbane River and Moreton Bay 2003**4.1 CONTRACT OF EMPLOYMENT**

4.1.1 Employees (other than casual employees) covered by this Award shall be advised in writing of their employment category upon engagement.

Employment categories are:

- (a) full-time;
- (b) part-time (as prescribed in clause 4.2); or
- (c) casual (as prescribed in clause 4.3).

4.2 PART-TIME EMPLOYMENT

4.2.1 A part-time employee is an employee who:

- (a) is employed for not less than 16 hours per week and for not more than 32 ordinary hours per week; and
- (b) is rostered for a minimum of 4 consecutive hours on any shift or day.

4.2.2 At the time of engagement the employer and the part-time employee will agree in writing the number of ordinary hours worked each week.

4.2.3 Any agreed amendment to the number of ordinary hours worked will be recorded in writing.

4.2.4 All time worked outside the ordinary daily and weekly hours specified in the employee's roster will be overtime and paid for at the rates prescribed in clause 6.2.

4.2.5 A part-time employee must be paid for ordinary hours worked at the rate of 1/40th of the weekly rate prescribed for the class of work performed.

4.2.6 A part-time employee will receive proportionate pay and employment conditions to those of full-time employees.

4.2.7 Where a public holiday falls on a day upon which an employee is normally employed, that employee shall be paid the appropriate rate for the number of hours normally worked on that day. An employee's regular roster will not be altered to avoid this obligation.

4.2.8 Where an employee and their employer agree in writing, part-time employment may be converted to full-time, and vice-versa on a permanent basis or for a specified period of time. If such an employee transfers from full-time to part-time (or vice-versa), all accrued award and legislative entitlements shall be maintained. Following transfer to part-time employment accrual will occur in accordance with the provisions relevant to part-time employment.

4.3 CASUAL EMPLOYEES

4.3.1 Casual employees shall be paid at the rate of ordinary time, plus 23%, with a minimum of 4 hours employment.

4.3.2 Any person working 36 ordinary working hours or over shall not be deemed a casual.

4.3.3 A casual employee shall, where possible, be given notice of termination before ceasing work.

AN140164 – Masters and Engineers' Award - Port of Brisbane 2003

4.1 CONTRACT OF EMPLOYMENT

At the point of engagement of each employee, the employer shall specify in writing whether the engagement is on a full-time, part-time or casual basis and whether any other conditions such as probation apply.

Full-time employees shall be provided with a minimum of 40 hours employment or payment therefor in each week.

4.2 PART-TIME EMPLOYMENT

4.2.1 A part-time employee is an employee who:

(a) is employed for not less than 8 hours per week and for not more than 32 ordinary hours per week; and

(b) is rostered for a minimum of 4 consecutive hours on any shift or day.

4.2.2 At the time of engagement the employer and the part-time employee will agree in writing the number of ordinary hours worked each week.

4.2.3 Any agreed variation to the number of ordinary hours worked will be recorded in writing.

4.2.4 A part-time employee's roster may be altered by the employer giving notice to the employee in accordance with clause 6.2:

Provided that the agreed number of ordinary hours per week can only be amended in accordance with 4.2.3.

4.2.5 All time worked outside the ordinary daily and weekly hours specified in the employee's roster will be overtime and paid for at the rates prescribed in clause 6.3 (Overtime) of this Award.

4.2.6 A part-time employee employed under the clause 4.2 must be paid for ordinary hours worked at the rate of 1/40 of the weekly rate prescribed for the class of work performed.

4.2.7 A part-time employee will receive proportionate pay and employment conditions to those of full-time employees.

4.2.8 Where a public holiday falls on a day upon which an employee is normally employed, that employee shall be paid the appropriate rate for the number of hours normally worked on that day. An employee's regular roster will not be altered to avoid this obligation.

4.2.9 Where an employee and their employer agree in writing, part-time employment may be converted to full-time, and vice-versa on a permanent basis or for a specified period of time. If such an employee transfers from full-time to part-time (or vice-versa), all accrued award and legislative entitlements shall be maintained. Following transfer to part-time employment accrual will occur in accordance with the provisions relevant to part-time employment.

4.3 CASUAL EMPLOYMENT

4.3.1 Casual employees shall be paid at the rate of ordinary time, plus 23%, with a minimum of 4 hours' employment.

4.3.2 Any casual employee working 36 ordinary working hours, or over, shall not be deemed a casual worker:

4.3.3 A casual employee may be engaged to relieve a full-time employee for absences of sick leave, annual leave, long service leave and workers' compensation leave on the basis of 40 hours per week over the normal spread of hours, with a maximum of 6 weeks in any one instance.

4.4 WORK PRACTICES AND REQUIREMENTS

4.4.1 All employees shall undertake such duties in relation to the operation of tourist vessels, including public relations, which are consistent with the running of tourist vessels. Improved co-operation between employees and the extra effort towards improving passengers' convenience and comfort should lead to improved productivity and positive, immediate and future benefits to the employer's business.

4.5 INCIDENTAL AND PERIPHERAL TASKS

4.5.1 An employer may direct an employee to carry out such duties as are reasonably within the limits of the employee's skill, competence and training.

4.5.2 An employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment (where relevant).

4.5.3 Any direction issued by an employer pursuant to clause 4.5.1 and 4.5.2 shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.

Masters, Mates and Engineers' Award, Motor Vessels 2500 B.H.P./1866 kW.B.P. and under - State (Excluding the Port of Brisbane) 2003

4.1 EMPLOYMENT CATEGORIES

4.1.1 Employees covered by this Award shall be advised in writing of their employment category upon appointment. Employment categories are:

- (a) full-time;
- (b) part-time (as defined); or
- (c) casual (as defined).

4.1.2 The employer will specify the place of engagement prior to the employee commencing work.

4.1.3 Full-time employees shall be provided with a minimum of 40 hours employment, or payment in lieu of, each week.

4.2 PART-TIME EMPLOYMENT

4.2.1 A part-time employee is an employee who:

- (a) is employed for not less than 8 hours per week and for not more than 32 ordinary hours per week; and
- (b) is rostered for a minimum of 4 consecutive hours on any shift or day.

4.2.2 At the time of engagement the employer and the part-time employee will agree in writing the number of ordinary hours worked each week.

4.2.3 Any agreed amendment to the number of ordinary hours worked will be recorded in writing.

4.2.4 A part-time employee's roster may be altered by the employer giving notice to the employee in accordance with the provisions of clause 6.2:

Provided that the agreed number of ordinary hours per week can only be amended in accordance with clause 4.2.3.

4.2.5 All time worked outside the ordinary daily and weekly hours specified in the employee's roster will be overtime and paid for at the rates prescribed in clause 6.3 (Overtime) of this Award.

4.2.6 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/40 of the weekly rate prescribed for the class of work performed.

4.2.7 A part-time employee will receive, proportionate pay and employment conditions to those of full-time employees.

4.2.8 Where a public holiday falls on a day upon which an employee is normally employed, that employee shall be paid the appropriate rate for the number of hours normally worked on that day. An employee's regular roster will not be altered to avoid this obligation.

4.2.9 Where an employee and their employer agree in writing, part-time employment may be converted to full-time, and vice-versa on a permanent basis or for a specified period of time. If such an employee transfers from full-time to part-time (or vice-versa), all accrued Award and legislative entitlements shall be maintained. Following transfer to part-time employment accrual will occur in accordance with the provisions relevant to part-time employment.

4.3 CASUAL EMPLOYMENT

4.3.1 Casual employees shall be paid at 1/40th the rate of ordinary time provided for in clause 5.1 plus 23% with a minimum payment of 4 hours' employment.

4.3.2 Any employee working in excess of 36 ordinary working hours in any week, shall not be deemed a casual employee:

4.3.3 A casual employee may be engaged to relieve a permanent employee for absences of sick leave, annual leave, long service leave and workers' compensation leave on the basis of 40 ordinary hours per week over the normal spread of hours, with a maximum of 6 weeks in any one instance.

AN140190 – North Queensland Boating Operators Employees Award - State 2003

4.1 Employment categories

Employees covered by this Award shall be advised in writing of their employment category upon appointment. Employment categories are:

- (a) full-time;
- (b) part-time (as prescribed in clause 4.2); or
- (c) casual (as prescribed in clause 4.3).

4.2 Part-time employment

4.2.1 A part-time employee is an employee who:

- (a) is employed for not less than 10 hours per week and for less than 40 ordinary hours per week; and
- (b) is engaged to work on predetermined days of the week for a regular number of hours.

4.2.2 At the time of engagement the employer and the part-time employee will agree in writing on the predetermined days of the week and the regular number of hours.

4.2.3 A part-time employee who works in excess of the ordinary daily or weekly hours prescribed in the Award shall be paid overtime in accordance with clause 6.4.

4.2.4 Any agreed amendment to the number of ordinary hours worked will be recorded in writing.

4.2.5 A part-time employee employed under the provisions of clause 4.2 must be paid for ordinary hours worked at the rate of 1/40th of the weekly rate prescribed for the class of work performed.

4.2.6 A part-time employee will receive proportionate pay and employment conditions to those of full-time employees.

4.3 Casual employment

4.3.1 The employment of a casual employee may be terminated without notice by either party:

Provided that the minimum payment in clause 4.3.3 applies should the employer terminate the employee.

4.3.2 The rate of pay for casual employees shall be 1/40th of the appropriate full time rate prescribed in clause 5.1, with the addition of the appropriate loading, as prescribed by clause 4.3.

These loadings are payable separately and are not to be compounded:

- (a) 23% for all ordinary hours worked;
- (b) 73% where the rate of pay is prescribed as time and a-half;
- (c) 123% where the rate of pay is prescribed as double time;
- (d) 173% where the rate of pay is prescribed as double time and a-half.

4.3.3 The minimum period of engagement of a casual employee shall be 2 hours.

4.4 Incidental and peripheral tasks

4.4.1 An employer may direct an employee to carry out such duties as are reasonably within the limits of the employee's skill, competence and training.

4.4.2 An employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment (where relevant).

4.4.3 Any direction issued by an employer pursuant to clauses 4.4.1 and 4.4.2 shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.

4.5 Outside employment

4.5.1 A full-time employee shall not undertake or perform duties for any other employer or operator in connection with the operation or running of any type of vessel operating under this Award.

AN160097 – Deckhands (Passenger Ferries, Launches and Barges) Award

Not applicable

AN160199 – Masters, Mates and Engineers Passenger Ferries Award

Not applicable

AN170095 – Shipping Award

Not applicable

AP765606 - A.W.U. Miscellaneous Workers' (ACT) Award 1998

10. TYPES OF EMPLOYMENT

10.1 Employees under this award will be employed in one of the following categories:

- full time employees; or
- regular part-time employees; or
- casual employees.

10.2 A full time employee will be engaged and paid by the week.

10.3 Where an employee is engaged for a period of less than four weeks the employment will be regarded as casual and the employee will be paid at the rate of time and a quarter of the relative rate prescribed in this award.

10.4 Regular part-time employees

10.4.1 An employer may employ regular part-time employees in any classification in this award.

10.4.2 A regular part-time employee is an employee who:

- works less than full-time hours of 38 per week; and
- has reasonably predictable hours of work; and
- received, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

10.4.3 At the time of engagement the employer and the regular part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

10.4.4 Any agreed variation to the regular pattern of work will be recorded in writing.

10.4.5 An employer is required to roster a regular part-time employee for a minimum of three consecutive hours on any shift.

10.4.6 An employee who has not met the definition of a regular part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with 10.3.

10.4.7 All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 23 - Overtime, of this award.

10.4.8 A regular part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

10.5 Casual employment

10.5.1 A casual employee is engaged by the hour or by the day, at the discretion of the employer.

10.5.2 A casual employee will be paid at the rate of 1/38th of the weekly rate prescribed for the level of work performed plus a 25% loading.

10.5.3 The casual loading specified in 10.5.2 will be in lieu of annual leave, sick leave, public holidays and the lack of continuity of employment.

10.5.4 After completing four weeks employment a casual employee will be classified as a full time or a regular part time employee.

AP792489 - Port Services Award 1998

7. EMPLOYMENT

7.1 Permanent full-time employment

Employment shall be by the week.

7.2 Causal employment

Employment shall be by the day.

**AP818251 - Senior Officer's - Rail, Bus and Ferries New South Wales Award
2002**

Not applicable.