



# DECISION

*Fair Work Act 2009*

s.739 - Application to deal with a dispute

**The Australian Maritime Officers' Union**

v

**Transdev Brisbane Ferries Pty Ltd**

(C2020/6098)

**The Construction, Forestry, Maritime, Mining and Energy Union**

v

**Transdev Brisbane Ferries Pty Ltd**

(C2020/6255)

DEPUTY PRESIDENT ASBURY

BRISBANE, 18 DECEMBER 2020

*Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – Dual Duties Rates – When employees are required to perform the duties of another employee as well as their own – Meaning of ordinary base hourly wage rate – Calculation of Dual Duties Rates – Whether loadings for ordinary time worked on weekends included in ordinary base hourly wage rate .*

## OVERVIEW

[1] This decision concerns applications by the Australian Maritime Officers' Union (the AMOU) and the Maritime Union of Australia division of the Construction, Forestry, Maritime, Mining and Energy Union (the MUA) (collectively, the Unions) under s.739 of the *Fair Work Act 2009* (the Act) seeking that the Fair Work Commission (the Commission) deal with a dispute under the dispute resolution procedure in the *Transdev Brisbane Ferries Enterprise Agreement 2019 - 2022* (the Agreement). The Respondent is Transdev Brisbane Ferries Pty Ltd (Transdev), the employer covered by the Agreement.

[2] The Respondent operates Brisbane City Cat and Ferry services under a contract with the Brisbane City Council. Generally, vessels operate with a minimum crew of three persons comprising a Master, a Deckhand and a Customer Service Officer (CSO). Clause 3.4(e) of the Agreement provides for dual duties rates, where employees are required to perform the duties of other employees, in addition to their own duties, because of the unexpected absence of an employee for all or part of the rostered work time. The dispute relates to payment of Dual Duties Rates to Masters and Deckhands in the event that a CSO is unexpectedly absent for part or all of their rostered work time. The Unions contend that if a CSO is absent, then all time that the CSO was rostered to work should be taken into account when paying the Dual Duties Rates to the other members of the crew.

[3] The MUA further contends that Dual Duties Rates payments made to crew for time worked on weekends are subject to clause 4.1(g) of the Agreement and therefore employees are entitled to penalty rates for these ordinary hours worked.

[4] In its Form F1 response to the application, Transdev contended that payment of the Dual Duties Rates is not required when no additional duties are being undertaken in the absence of the CSO and that payment should only be made at times when work is actually required to be performed (ie when the vessel is in-service or during recovery times), when passengers are on board.

[5] The dispute was not resolved by conciliation and was listed for arbitration. A hearing was conducted at Brisbane on 28 September 2020. The parties agreed on the following questions for arbitration:

“Question 1: Should the Dual Duties Rates in clause 3.4(e) of the Agreement be paid on every minute the Customer Service Officer is rostered on that particular shift in the event that they are unexpectedly absent?”

Question 2: If Dual Duties Rates in clause 3.4(e) of the Agreement do not have to be paid on every minute of the absent Customer Service Officer’s shift, under what circumstances should those rates be paid?

Question 3: Where employees are undertaking dual duties on weekends, are the Dual Duties rates in clause 3.4(e) of the Agreement calculated with reference to the rates for ordinary hours worked on a Saturday and Sunday prescribed by clause 4.1(g) of the Agreement?”

[6] Ms Tracey Ellis appeared on behalf of the AMOU, and Mr Jason Miners appeared on behalf of the CFMMEU. Mr Michael Stokes, People and Culture Business Partner – Brisbane Ferries, appeared on behalf of Transdev.

[7] The following persons gave evidence on behalf of the Union parties:

- Mr Michael Barker, CityCat Master and AMOU delegate; and
- Ms Francine Wilson, CityCat Customer Service Officer and CFMMEU Delegate.

[8] The following persons gave evidence on behalf of Transdev:

- Ms Julie-ann Daffy, Senior Master/Operations Supervisor of Transdev Brisbane Ferries; and
- Mr Bruno Lancelot, Head of Business – Operations for Transdev.

[9] Mr Barker was not required for cross-examination at the hearing.

## **RELEVANT AGREEMENT PROVISIONS**

[10] The Agreement provisions on which the questions for arbitration centre, are as follows.

[11] Clause 1.10 Dispute Settlement Procedure provides as follows:

“It is the agreed objective of all parties to this Agreement that they must make the maximum efforts to resolve any grievance or dispute that may arise between them at the workplace level.

The parties are committed to the resolution of grievances and disputes within the workplace through discussion between staff and supervisors and managers.

Subject to the provisions of the *Fair Work Act 2009*, any grievance or dispute about any matters arising under this Agreement, or in relation to the National Employment Standards (NES), shall be dealt with in the following manner:

- (a) In the first instance employee/s shall discuss any grievance or dispute with their immediate Supervisor.
- (b) If no settlement of the grievance or dispute is reached in Step (a), the matter shall be discussed between the employee/s and/or their nominated representative (which may include at the employee’s option, a representative of the Employee Organisation), and the relevant nominated Company representative(s), including more senior levels of management.
- (c) In the event that settlement of the matter cannot be reached at Step (b), the dispute may be notified by either party to the Fair Work Commission (FWC) in accordance with the Fair Work Act 2009 for conciliation / mediation.
- (d) All parties to the dispute must genuinely attempt to resolve the dispute and shall give due consideration to matters raised, or any suggestion of the FWC, with a view to the prompt settlement of the dispute.
- (e) If there is no settlement of the matter at any conciliation/mediation conference, the parties may jointly request that the FWC make recommendations about particular aspects of the dispute about which they are unable to reach agreement.
- (f) Completion of the dispute resolution process in FWC will occur when the parties agree that the matter is resolved, or the party that initiated the dispute informs FWA that the party no longer wishes to continue the dispute.
- (g) Discussions at any stage of the procedure shall not be unreasonably delayed by any party, subject to acceptance that some matters may be of such complexity or importance that it may take a reasonable period of time for the appropriate response to be made.
- (h) The parties are committed to the resolution of disputes within the workplace and through discussion. In the event that settlement of the matter cannot be reached at any of the steps above, the dispute may be notified by either party to FWA in accordance with the Fair Work Act 2009 for arbitration.
- (i) Pending completion of the procedures set out in this clause, work will continue without disruption on a without prejudice basis to both parties, and the status quo will remain while the dispute is being dealt with.”

**[12]** Clause 3.4(e) provides Dual Duties Rates as follows:

“1. An employee is entitled to be paid Dual Duties Rates for any time, rounded up to the nearest half hour, where an employee is required to perform the duties of another employee as well as their own because other employee is unexpectedly absent for part or all of their rostered work time.

2. Dual Duties Rates are the sum of the employee’s loaded hourly rate, plus the absent employee’s ordinary base hourly wage rate. This payment is split 50/50 between the two present crew members

3. To avoid any doubt, Dual Duties Rates do not apply where:

- a) An employee is rostered to perform duties that fall under more than one classification in clause 3.2;
- b) the Employee and the absent Employee were rostered to perform either the same duties, or duties that fall within the same classification in clause 3.2;
- c) the Employee is not directed to perform the absent Employee's duties;
- d) the Employee performs only part of the absent Employee's duties; or
- e) the Employee is directed to not perform their originally rostered duties, and instead perform the absent Employee's duties."

**[13]** Weekend hours of work are provided under the Agreement as follows:

“4.1 (g) Hours of Work

Ordinary hours worked on a Saturday or Sunday shall be paid as follows:

- i. Saturday: All ordinary hours worked on a Saturday shall be paid for at the rate of one and one-half times the ordinary rate (x1 .5).
- ii. Sunday: All hours worked on a Sunday shall be paid for at the ordinary rate of double-time (x2.0).”

## **EVIDENCE**

### AMOU Evidence

**[14]** Mr Barker represented the AMOU Masters during negotiations for the current Agreement. His evidence was that during negotiations, it was discussed that the reason for the Dual Duties Rates is to force the company to replace a CSO if they fall sick because this was not always happening. Mr Barker believed that Transdev were not replacing the CSOs in order to save money on wages owing. His evidence was that under the previous agreement, the Deckhand was paid the whole Rates in the absence of a CSO, but that it was agreed during this round of negotiations that the Dual Duties Rates would be split between the Deckhand and the Master, as the Master has additional responsibilities when there is no CSO.

**[15]** Mr Barker stated that when there is no CSO onboard, there is more risk for a Master. The CSO acts as an “*extra set of eyes*” to alert the Master to incidents on board, and let the Master know if there are any navigation hazards, such as rowers or vessels overtaking as the Master manoeuvres the CityCat. He stated the CSO is also an additional person to assist in an emergency.

**[16]** Mr Barker's evidence was that the Dual Duties Rates were made a condition of the Agreement as the Masters wanted Transdev to ensure there were three crew members on board at all times in case of emergency. His evidence in relation to CityCats, was that common emergencies that occur on the Brisbane River include rescuing people who have jumped from bridges or tried to swim across the river, medical emergencies on board the CityCat, and collisions between CityCats and pontoons or other vessels. Mr Barker stated during such incidents, the CSO plays an integral role in helping get the injured people on board, administering first aid, collecting safety equipment (including ladders, the first aid kit, or fire extinguishers), and communicating between the Deckhand and Master. He stated that

even in minor collisions, the Master can direct the CSO to look at the damage while the Deckhand is doing other duties such as checking “voids”.

[17] Mr Barker noted the Master has overriding authority on all vessels he has previously worked on, and under Transdev’s Vessel Safety Management System (VSMS) the Master has ultimate authority on board a CityCat and is responsible for the safety of the vessel, passengers and crew. His evidence was that where there is no CSO on board, the Master and Deckhand share the responsibility and duties the CSO would normally perform, including making announcements over the PA, cleaning, selling tickets, restocking timetables and pamphlets, crowd control, and emergency duties.

[18] Mr Barker stated that if there is something that needs to be done on board, and he cannot physically do it because he is driving, he delegates the task to his deckhand. He said where a CSO is not on board, this will include jobs that a CSO would normally do. He said that as a CityCat Master, he is not normally required to sell tickets or do any CSO duties when a CSO is on board. As Master, he plays a role in collecting the Chubb bags and ticket selling paperwork at the end of the night, but this is limited to ensuring it is safely secured for security to collect. He said he does not count the money or reconcile the ticket machine as it is the CSO’s job, and where they are absent, he may be required to perform this as an extra duty, but that it is normally the deckhand that does this.

#### CFMMEU Evidence

[19] Ms Wilson stated that question 1 should be answered “yes” as the ‘Contractor’ is paid for operational hours of the ferries, for all employees as per the current contract with Brisbane City Council (BCC). Ms Wilson referred to clause 3.11 of the contract which states that:

“The Contractor is responsible for the provision of crewing (refer attachment 3) in order to meet the requirements of the Specifications and in accordance with Marine Safety Queensland (MSQ) regulations and relevant legislative requirements at all times. (Attachment 3 suggests 3 crew at ANY time on a City Cat, particularly to meet the requirements of all Specifications which focus on safety, customer service and fares revenue collection.)”<sup>1</sup>

[20] Ms Wilson said that over the last three months,<sup>2</sup> Transdev has run several shifts, particularly during weekdays, with no CSO. She said that in most instances, employees were advised a couple of days or the day before that they would be performing Dual Duties, which she said is contrary to the concept that a CSO is “*unexpectedly absent*”.

[21] In relation to question 2, Ms Wilson stated that the CSO wage rate should be paid for all time allocated on the CSO shift, excluding meal break and ‘WAD’ (work as directed at Hawthorne base) times. In relation to question 3, Ms Wilson said that in her opinion, the prescribed rates for Saturday and Sunday should be applied to the Dual Duties performed on a Saturday or Sunday. She said this would ensure Transdev makes every effort to fill any vacant shifts, and not allow it to “exploit” the intent of the Agreement under clauses 3.4 and 4.6, and further it would ensure Transdev complies with BCC contract provisions and the Agreement statement at clause 4.6 that three crew members will be rostered on every CityCat service.

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<sup>1</sup> Witness Statement of Ms Francine Wilson, dated 8 September 2020.

<sup>2</sup> Noting Ms Wilson’s statement was filed in the Commission in September 2020.

[22] At the hearing, Ms Wilson confirmed she has worked for Brisbane Ferries for nine years and nine months.<sup>3</sup> Ms Wilson said that she first encountered issues around the dual duties payment when she started with the company, noting dual duties were performed quite frequently.<sup>4</sup> As to how the application of dual duties has changed over the years, Ms Wilson stated:

“How have you seen the application, Ms Wilson, of the dual duties change over the preceding years through various management? ---- Okay. So originally the crewing of the CSOs was not on the entire shifts and the deckhands would then have to perform outside those hours of their shifts as non paid dual duties because of the way the EO was referred to, but when there was no CSO that was allocated on that shift then they were paid dual duties for the entirety of that shift if the CSO wasn't on. However, it changed. Crewing was changed due to an incident and it was brought to the attention of the state government and the council that the correct crewing wasn't being adhered to in the contract where it should have been three crew on board at all times. That changed in 2014; June/July.

I'll take you back to that. In 2014/2015 were you involved in any correspondence or any mediation with your union official at the time and the Brisbane City Council pertaining to the CityCats being crewed by three persons? ----- Okay. So what happened, we had an incident - a safety incident - on a female person and there was only two crew that night; deckhand and master. I had already got off. Because of that incident in regards to a lot of people being on board the vessel and it was a sexual assault, we took up a petition through the union for our workplace. That petition then went to the state government and the council, and within a couple of days we were told by our management that the CSOs would be brought back onto the boats for the entire running of the boats - shifts, from start to finish as per the contract.

Okay. So it was both a regulated and industrial term being that the CityCats had to be crewed by three persons? --- It was part of the Brisbane City Council contract.

...

So as a long term delegate across various managers, have you seen your employer use the under crewing prescribed in the contract as a financial incentive? --- Absolutely. There are certain times of the year that it seems to become more prevalent. I don't know whether it's to do with end of financial - or whatever, or just constraints from their head office, but this year over a period of, say, three months, it was quite evident that it was being used, dual duties, and not crewing correctly. It would be sometimes four or five times in a day on shifts.

Having been involved in the last three rounds of enterprise bargaining discussions, the purposes of the dual duties payment - what were the purposes of that payment? --- To pay the crew that had to take on the duties of the CSO.

Okay? So to compensate their extra workload that they had to perform in regards to ticketing, inquiries, safety. The requirement of the ticketing machine to be on the runs that were designated for the stops, you know, in - to do with the TransLink requirements, in other words. TransLink have requirements that the machines are, you know, put on runs and when you come in to stop they are at the designated stops so that they're tracked, as well - it's a tracking thing, as well - and in regard to timetabling for customers, et cetera. So the requirements of all the crew that were taking over the CSO's role was to make sure those duties were performed; ticketing, safety, information, calls - calling stops, et cetera - and the safety of the passengers.

So as being involved in these discussions as a delegate responsible for pursuing your claims as your members elect you to do, the dual duties component part of that was to minimise or get rid of the financial incentive to crew the vessels? Absolutely, which we put in a clause in the last EA to make sure that this dual duties wasn't overused.

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<sup>3</sup> Transcript at PN38.

<sup>4</sup> Transcript at PN39.

The intent of that wasn't to stop services. The intent of that was to ensure that there wasn't a financial gain for under crewing those ferries? --- Yes, exactly, exactly.”<sup>5</sup>

### Transdev Evidence

[23] Ms Daffy stated that in her role, she is required to oversee the day to day performance of vessels, crew, rostering and compliance with the Agreement. From 2007, she has also worked in the roles of CSO, Deckhand, Ferry Master and CityCat Master. Ms Daffy has a comprehensive understanding of these roles, including operating as a Master or Deckhand on dual duties, and has been involved in the training and mentoring of CityCat Masters, Ferry Masters and Deckhands.

[24] Ms Daffy stated that Transdev's direction, as supported by a risk assessment, is that the maximum number of passengers is capped at 100 when the crew is operating on dual duties. Her evidence is that when she operated as deckhand on dual duties, the only additional duty she was required to perform was selling tickets and announcing the name of the next terminal, including which end of the vessel passengers were to depart from. She stated there has been no directional change to this requirement, since the commencement of dual duties which she states has been taking place “*well over a decade*”.

[25] Ms Daffy referred to the VSMS at section 8.2.3 which provides, among other things, that during operations, Deckhands are to:

“Attend to gangplanks and collect fares and provide tickets to passengers when no Customer Service Officer is on board”.

[26] She stated that in accordance with the duties listed in this section, there is no requirement for the Deckhand to undertake ‘additional duties’ when operating as a two-person crew. She stated likewise, there is no requirement for the Master to undertake additional duties apart from announcing the next stop, nor is it stated in the Masters’ list of duties contained in the VSMS. Ms Daffy emphasised this by stating that the majority of CityCat Masters are not trained in the use of ticket machines, nor are they issued with a Driver Card to sign into the machine.

[27] Regarding her experience operating as a Master on dual duties, Ms Daffy said her role was to announce the next stop via the microphone located at the wheelhouse. She said prior to the current Agreement, it was the deckhand's responsibility to announce the next stop. Under the current agreement, CityCat Masters identified the potential for the dual duties rates to be shared between the two crew and accordingly it was agreed that the duty of announcing was delegated to the Master.

[28] As to the Master having “overriding authority”, Ms Daffy stated where a service is operating on dual duties, and the Master is responsible for the safety of the vessel, the Customers and the Deckhand, it would be unreasonable for the Master to delegate extra duties to the Deckhand which are unnecessary, and not enforced by the company.

[29] In Ms Daffy's role as Senior Master/Operations Supervisor, she informs Masters and Deckhands when they are required to operate on dual duties. She said at no time would the

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<sup>5</sup> Transcript at PN40-50.

Master and Deckhand be instructed by an Operations Controller to undertake duties other than selling tickets and announcing the next stop.

[30] With respect to rostering, Ms Daffy said Transdev publishes the rosters three weeks in advance, and as part of this process, all shifts including CSO's are filled at the time of publishing, with the exception of a Sunday where overtime shifts are offered up to one week in advance. She noted a CSO shift will generally become unfilled due to illness or injury in the day or days prior to the shift, and when this happens the shift is offered to casuals in the first instance, and subsequently to part time and then full time employees. She stated that were all shift offers are declined and the pool of available employees is exhausted, the shift remains unfilled and accordingly the Master and Deckhand are placed on dual duties.

[31] Ms Daffy noted that often CSO's who are deck-trained are moved to backfill deckhand shifts at short notice, as the Master and Deckhand are critical roles for the continuation of the service provided by Transdev. Therefore, this can impact on the available CSOs for the purposes of filling shifts and can result in uncovered CSO shifts.

[32] Under cross-examination Ms Daffy said:

"So what you're telling me is that you would run a full complement CityCat with the three crew and have one CityCat not run at all because you've got only got a master? --- No, no.

...

MS ELLIS: ... you've got two masters, one deckhand and one CSO, but that CSO could do deck on the other vessel. Have you ever rostered it so that you would have a CityCat master, deckhand and CSO so that vessel could go off fully crewed or would you use that customer service officer in the second vessel as a deckhand so that you could have two crews?---Absolutely the second vessel.

Correct. So what you have just told me is that rather than having two - rather than risk running - not being able to run a CityCat service you would move a customer service officer from one vessel to another and have two vessels running without a customer service officer?---Correct. That's what the expectation of council would be, as well."<sup>6</sup>

[33] Ms Daffy stated that Transdev has undertaken an internal risk assessment, as well as an external Operational Monitoring risk assessment with the National Regulator, Australian Maritime Safety Authority (AMSA). Her evidence was that this involved assessment of vessels operating with a two-person crew in emergency situations, such as when a Master is incapacitated, Person Overboard and Fire in the Engine Room, as some of the most "*critical cases*". She stated AMSA approved the safe operation of a vessel during emergency situations with a two-person crew, "*with the current mitigation of passenger numbers limited to 100*". She stated further that AMSA "*approved and encouraged*" the practice of requesting an able-bodied passenger to assist with keeping a visual contact with the person in the water and the management of other passengers. Ms Daffy also stated that this practice is also encouraged during Emergency Preparedness Drills Training performed on out-of-service vessels.

[34] As to her evidence regarding an "*internal risk assessment*", Ms Daffy conceded at hearing that she was unaware if Transdev had conducted its own risk assessment.<sup>7</sup> Regarding Mr Barker's statement that the CSO plays an integral role in helping get injured people on

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<sup>6</sup> Transcript at PN273-278.

<sup>7</sup> Transcript at PN248-251.

board the vessel, Ms Daffy referred to section 11.3.5 of the VSMS, which states in relation to “*Person Overboard*”:

“If the person overboard is unconscious or unable to climb unassisted on board the vessel, ensure that they remain as safe and comfortable as possible in the water alongside and await further assistance from a rescue vessel”.

**[35]** She stated that a rescue vessel could be the QLD Water Police or a smaller punt style boat in the area. She stated that where no rescue vessel is available, and the person cannot board the vessel unassisted, the CityCat will slowly make its way to the nearest pontoon with the person secured on the Person Overboard ladder. Ms Daffy said emergency services are directed to the designated pontoon by the Operations Controller.

**[36]** When cross-examined at the hearing regarding an “*overboard*” situation and any duties required to be undertaken, including the situations where payment of dual duties is made, Ms Daffy stated as follows:

“During that time the deckhand has tied the - assuming the deckhand has been able to tie the person to the side of the vessel, is there anything else that the customer service officer could be doing to help during that time? (No audible reply)

Could they be relaying messages between the master and the deckhand? Well, it would be on the bough of the vessel.

Yes, so - - -? --- So there is no need to relay.

As you're aware there are some visibility issues. If the deckhand is all the way down trying to hold somebody on the side of the boat - - -? --- There is still an intercom there.

If the intercom wasn't working or if the deckhand is panicked and is not using it? --- It's two metres maximum or three metres maximum. You can still talk, as you said before, out the window.

I've been in a situation on a CityCat with a person in the water and I have not been able to hear my deckhand, so - I just have another question. In that instance could a customer service officer get a thermal blanket from the first aid kit? --- Yes.

Could they help keep the deckhand and the person in the water calm? --- Yes.

Could they relieve - - -? --- As could another passenger.

Sorry? --- As could another passenger.

We're actually talking about whether dual duties is paid when there is no passengers on board, so there would be no other passengers to help - - -? --- I do believe we have stated several times if there was to be an emergency when no passengers are on board, we would be happy to pay the dual duties.

So you're prepared to pay the dual duties if they are involved in an incident, but you're not prepared to pay them to wait for the incident. During a transit time this incident that we're talking about where the person is in the water has happened during transit time. What you've just told me is if there was an incident you will pay the dual duties and if there was no dual duties - if there was no incident, that person would not get dual duties? --- The reason being is I can't tell you when we may have had an incident and if we have had previous incidences they are one to two, three times maybe in the time I've been here. You wouldn't pay dual duties in a transit time, as you said, to wait for an emergency.”<sup>8</sup>

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<sup>8</sup> Transcript at PN307-317.

[37] Ms Daffy disagreed with the proposition put to her in cross-examination that Masters should be paid dual duties rates on the basis that it is genuinely possible for an incident to happen when there was no CSO on board, and that they should be paid to wait in case there is an incident. Ms Daffy also disagreed with the proposition that Masters are on dual duties from the time they are on board the vessel and are transiting because an incident could potentially happen. In response to a question from me, Ms Daffy said that if there was a master and a deckhand on a vessel when an incident happened, the deckhand would not be doing any more if there was no CSO present. Ms Daffy said that if there was a person in the water, the deckhand would assist. However, as the vessel would be transiting, their deckhand would put the ladder down. There would be no need for crowd control given that no passengers are onboard while a vessel is transiting.

[38] Under cross-examination, Ms Daffy had the following exchange with Ms Ellis from the AMOU and with the Commission:

Okay. So assuming there are no passengers then they wouldn't need to keep passengers clear, so they would be standing by perhaps relaying something between the master and the deckhand who is assisting the person in the water?---Correct.

Would you say that's working? That's an important role and that that the deckhand would have to do something extra if the CSO wasn't on board?---No, I don't believe they do.

Okay. So your view is the deckhand could communicate by yelling to the master who sticks his or her head out the window?---During our drills it's very important that the deckhand is trained to use a big, strong voice.

Okay. All right. Is there an intercom?---Yes, there is.

Does the intercom work - do you have to operate it, push a button, or does it just work?---The master pushes the button in the wheelhouse.

And then it works two ways from - - -?---Correct.

Right. So the master could turn on the intercom - - -?---Yes.

- - - and hear the deckhand instructions from the water?---Yes, correct.

All right. Anything arising from my questions?

MS ELLIS: If there was a customer service officer on board and you have got a deckhand leaning over to help somebody, is it not the customer service officer's job to hold the life jacket of the deckhand as they are reaching down to help?

THE DEPUTY PRESIDENT: Ms Ellis, I really think we're stretching the - we're clutching at straws here, not just at life jackets, because there is no one there to hold the life jacket of the person leaning overboard, so how is the person leaning overboard doing more work because no one is clutching his or her life jacket? It's really a safety issue, isn't it? It doesn't mean the person leaning overboard is working any harder because presumably they can't hold onto their own life jacket while they're leaning overboard. It would be nonsensical. The person is not doing any more work, are they?

MS ELLIS: I would argue that they are, because if you have got two people trying to help somebody out of the water, that's half as much work as if one person is - - -

THE DEPUTY PRESIDENT: Okay.

THE WITNESS: But we don't assist them out of the water. We can't.

THE DEPUTY PRESIDENT: What do you do?---We have to leave them on the man overboard ladder. You have to imagine this is the deck of the CityCat - - -

Yes?--- - - - the height of the deckhand and the water line.

Right?---So it's physically impossible for someone to pick even a 60-kilo person up out of that water and that's why we don't do it.

So you deploy a ladder?---Yes

The person in the water hangs onto the ladder?---Yes.

And if they need assistance you can tie them to the ladder?---Correct.

Okay?---If they are able to get up the ladder themselves, by all means, we'll put the hand out and help them, but if they are physically unable to get up the ladder themselves we do not lift them out.

All right. Do you throw them a line?---We normally put a mooring line around them to secure them there.

Okay. All right. I understand. Thanks?---A life ring is also deployed.

Yes, but your view is the deckhand isn't doing any more work because a CSO isn't there to assist in a transit situation?---Not in a transit.

Yes, but in a non-transit the CSO is controlling passengers and keeping them to of the way?---Correct.

And might assist in communicating - - -?---Correct.

Yes?---It's mainly passenger management".<sup>9</sup>

**[39]** Regarding AMSA "*approving and encouraging*" the enlisting of an able-bodied passenger to assist with keeping a visual contact with the person in the water, Ms Daffy confirmed under cross-examination that her reference is to a passenger "*if there is one*". She confirmed that where the CityCat is in transit and only the two-person crew are on the vessel with no passengers, and a rescue is performed, the deckhand would then be paid for dual duties.<sup>10</sup>

**[40]** Ms Daffy confirmed under cross-examination by Mr Miners for the CFMMEU, that two-person drills are performed accordingly.<sup>11</sup> However as to the number of staff that have completed these drills, her evidence was as follows:

"...I put it to you that all of the drills or most of the drills that you perform there's a CSO involved. So for instance a man overboard, what would the CSO's role be in that? --- To clear the front deck and to keep passenger management calm.

What would the deckhand's role be? --- Put the man overboard ladder down, go down the ladder and retrieve a person, communicate with the master.

So whose responsibility is it to keep a watch after a man's gone overboard? --- Keep a watch on the person?

Yes? After the person's gone down the ladder?

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<sup>9</sup> Transcript at PN 320-363.

<sup>10</sup> See transcript at PN373-377.

<sup>11</sup> See transcript at PN379-381.

No, they've fallen overboard, they're in the water, he's steaming up the river, what's the CSO's role, what's the deckhand's role? To keep a proper lookout and to point.

Who's role? --- That's everybody's role. So it's the deckhand, if he can while he's getting the ladder. It's the CSO's role to point - - -

So there's no assigned role in one of the most common critical parts of a maritime incident where it's a man overboard situation, it's something that your operation currently does drills of regularly, there's no assigned person to keep an eye on the passenger? The CSO - the immediate thing is for either the CSO or the deckhand to deploy the - - -

It's be the CSO wouldn't it, generally? --- To deploy the man overboard ladder, whoever gets there first. Keep an eye on the passenger, the master's also doing it and the CSO is doing it.

So who does the ladder and who keeps an eye on the passenger? Does the CSO keep an eye on the passenger or do the ladder or does the deckhand keep an eye on the passenger and the CSO does the ladder? --- The CSO.

So the CSO would keep a lookout and the deckhand would do the ladder? --- Correct.

So again, how many out of your - I think it's 197 staff is it or - - -? --- I think it's a bit more than that.

SPEAKER: 200-something.

MR MINERS: 200 staff, let's call it 200 staff. How many of the 200 staff have performed two person drills, as you refer to in this? I understand they've been ticked off by AMSA but I'll put it to you that less than half of your employees have performed two person drills? --- Unless I had access to the attendance records I couldn't say.

So less than a quarter of your staff would have performed two person drills? --- I'd only be guessing.<sup>12</sup>

**[41]** Ms Daffy was cross-examined regarding any financial incentive to the Employer in running a two-person crew shift as follows:

“... I would put it to you that less than half the masters have done these two person drills? Like I said, to run a two person drill, if you just minus the CSO operating and crowd control, they do exactly the same process as they normally would. So if a master - if you're saying the majority of the crew don't know about this two person drill they might be one of those that have always had a CSO when they've attended drills, but it's common that we didn't have a CSO, for whatever reason, and it could be that during that drill time that CSO was meant to finish at Northshore, therefore they had to continue on their vessel.

I put it to you that the drills, the two person drills were only taken because there is a financial incentive to roster two and they were never intended to be rolled out. It was basically a box ticking exercise so you could as a business get away with rostering two people?--- I disagree.”<sup>13</sup>

**[42]** Ms Daffy also said under cross-examination that CSP shifts are filled three weeks in advance and that if a CSO's shift becomes unfilled, there is no intent to not fill it.<sup>14</sup> Ms Daffy also said that the Company continues to attempt to fill that third shift until we have exhausted every single full-time, part-time, casual. If there is no more then they'll be on dual duties. If

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<sup>12</sup> Transcript at PN412-425.

<sup>13</sup> See Transcript at PN438-447.

<sup>14</sup> Transcript at PN391.

we might have - if someone calls in sick at midnight we will continue to try and cover part of that shift the following morning if it was a 4.30 start for example.”<sup>15</sup>

[43] Ms Daffy conceded however that there may be a financial benefit in some instances:

“Hypothetically if you thought for some reason that you were going to incur a lack of availability in your CSO ranks and you knew that you had to pay dual duties, if you paid dual duties as opposed to engaging a CSO on that shift it would be cheaper for the company, would it or would it not?---I think it would be.

It would be cheaper to pay dual duties - - -?---Yes.”<sup>16</sup>

[44] As to staffing levels during May and June this year, Ms Daffy gave evidence that staffing levels were impacted due to what she termed “Covid leave”, as there were crew members over the age of 70 who opted, following advice from their doctors, not to continue working during the Covid-19 pandemic.<sup>17</sup>

[45] Ms Daffy also gave evidence that passenger numbers decreased as a result of the pandemic:

“Again a lot of emphasis has been placed by the union on the period during COVID. During that period, are you aware of what happened with passenger numbers?---Dropped considerably, down to about 10 per cent.

Down to about 10 per cent. And it was during this period that we had a high incidents of dual duties?---Correct.

But people were still being put into dual duties situations?---Correct.

Notwithstanding the fact that we only had 10 per cent of the number of passengers?---Correct. But we did have a discussion during COVID when we ceased fare collection whether or not the dual duties would still be payable to the deckhand given that they're not collecting money. The head of operations decided to still continue to pay in good faith.”<sup>18</sup>

[46] Regarding the rate at which dual duties should be paid, Ms Daffy’s evidence was as follows. During a meeting between Transdev, the AMOU, the MUA and their delates on 26 May 2020, Ms Daffy stated that historically, Dual Duties Rates had been paid at ordinary time, regardless of the day. Ms Daffy stated that in correspondence on 1 June 2020 the Payroll Supervisor confirmed that the dual duties were paid at ordinary base rate regardless of the day. She noted the current payroll system was introduced in July 2019.

[47] Ms Daffy further said that during that meeting of 26 May, she stated the calculation of dual duties has remained unchanged during the six years she had been operating as an Operations Controller/Supervisor, being that dual duties applies only when the vessel is in-service and excludes transit times. She stated the Operations Controller is required to enter a comment in the crew members’ timesheets stating the exact times dual duties is payable, and transit times are not included in such calculations. Ms Daffy stated there was no way of exporting data using a search field to identify dual duties, but further to a number of “manual, random searches” she identified five examples where Dual Duties Rates were applied, which

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<sup>15</sup> Transcript at PN430-431.

<sup>16</sup> Transcript at PN396-397.

<sup>17</sup> Transcript at PN402-405.

<sup>18</sup> Transcript at PN460-463.

showed where the transit times were deducted and unpaid. Ms Duffy tendered these examples and stated that if an audit were required of all occasions where Dual Duties Rates were paid, it would be “very difficult and extremely time consuming”.

[48] Ms Duffy referred to her time operating as a deckhand, noting that she started shift 20 minutes prior to a CSO boarding. Her evidence was that a “white level inspection” is undertaken immediately as the employee boards the vessel as follows: after unlocking aft cabin doors, the deckhand transits through the cabin and unlocks the forward cabin doors, and is required to inspect a minimum of six voids that are located inside the cabin. Ms Duffy stated this is generally done prior to the CSO boarding the vessel. Ms Duffy said that it would be “unrealistic” to say the deckhand would ignore a suspicious item found in the cabin while inspecting the voids that are located between and under the cabin seats, “simply because his/her workplace is predominantly the front and rear decks”. Ms Duffy stated despite the different main areas from which each crew member operates, the vessel in general is their “workplace”.

[49] Ms Duffy confirmed that the CSO is usually rostered on 5 minutes before departure. However as to the duties listed by the AMOU in its submissions, Ms Duffy said the submissions were incorrect and the CSO is only required to:

- Sign on to the ticket machine;
- Select the relevant trip number on the DCU and;
- Prepare their float for the shift.

[50] Ms Duffy stated that where heavy loadings are experienced, a cover is placed over the card reader by the CSO or deckhand, to indicate passengers should use another card reader away from the loading area to expedite loadings. Ms Duffy stated that where the CSO is absent, the Deckhand would do this. She further stated that passengers are required to stow their own bicycles, not the CSO. She referred here to section 8.2.3 of the VSMS:

“The Deckhand is to ensure all loose items of equipment, luggage, bicycles, etc are properly secured and walk ways and passage ways are kept clear of tripping hazards”.

[51] Ms Duffy stated as to ‘Start up – getting on a CityCat that is already in service’, if the vessel is not at the start location, and there is no CSO rostered, the Deckhand “*does not assume the duties listed by [the AMOU] as the vessel is yet to arrive with the Deckhand*”. Her evidence is that when the vessel ‘does arrive’, the Deckhand simply apologises for the late arrival and boards the passengers. Ms Duffy noted that when the vessels engine or engines are engaged and passengers are embarking or disembarking, the Master is to remain in the wheelhouse at the controls. The Master should not leave to answer questions or usher passengers through the cabin while passengers are transiting over the gangplank. Nor should the Master leave the wheelhouse in the event that the mooring line breaks. In this regard, Ms Duffy referred to section 8.2.3 of the VSMS which states:

“The deckhand is to assist customers who are in need of assistance to embark or disembark”.

[52] At the hearing, Ms Duffy’s evidence as to the Master’s role in an emergency was as follows:

“So the master should not leave the wheelhouse to talk to passengers. What is the master to do in an emergency if there was something happening on the back deck? Could the master leave the wheelhouse

to attend to that emergency?---A master should indicate to his deckhand to stop loading and raise the ramp to negate the risk of that line breaking while they're loading, so, yes, he would. Obviously you don't ignore an emergency.

Does a master have to put a second line on to go to the toilet?---He should do. If you leave the vessel, he should do.

Is that written anywhere? Is that in the VSMS?---I think it was done as a safety alert - an individual safety alert - quite some time ago, again by Craig Wilkins, the safety specialist.

**[53]** In relation to a Master assisting with directing passengers boarding a vessel, Ms Daffy agreed that the Master could put his or her head out of the wheelhouse door to tell passengers to keep moving through and could also pick up the microphone in the absence of a CSO and direct passengers in this regard. Ms Daffy agreed that a Master undertaking this task would be performing the CSO's job and would be paid Dual Duties Rates.<sup>19</sup>

**[54]** As to "*Shut Down – getting off a CityCat that remains in service*", Ms Daffy stated that the maximum number of deckhand shifts that operate is 29, and of these 29, 10 operate out of Hawthorne where the office and safe is located. Ms Daffy stated that where a shift does not finish at Hawthorne, the shift takings are deposited into the vessel safe. There is no requirement for a deckhand on dual duties to deposit their shift takings in the office at Hawthorne, instead they can deposit into the vessel safe. She stated that both the office and vessel safes are cleared by a Security Contractor after the service has terminated.

**[55]** As to "*Shut Down – shutting down a CityCat for the final time that Day*", Ms Daffy stated that Transdev provides a security escort for CSOs at the end of their shift. If the guard arrives late, there would be no escort to walk the CSO to their vehicle. Accordingly, to mitigate the risk, the CSO is required to stay an additional five minutes instead of the standard "*five minute sign off time*" (therefore being 10 minutes in total), to allow the three person crew to walk to their vehicles together. Ms Daffy stated the CSO is paid for the extra time they are required to stay, but there is no requirement that the CSO assist in shut down duties nor are they trained in these duties. She referred here to section 8.3.4 of the VSMS as follows:

"Customer Service Officers are responsible for conducting the following tasks when disembarking a vessel:

- Ensuring all customers have disembarked prior to logging off the ticketing system (only if the vessel is not remaining in service).
- Removing the cash float from the till.
- Printing off the shift report from the DCU and placing this in the 'Blue Bag'.
- Ensure any cash handling procedures are adhered to".

**[56]** As to any reference to 'Transit Times' in the AMOU's submissions, Ms Daffy responded as follows. Excess stock of timetables is not generally stored on board, and to obtain stock the Deckhand first has to obtain the stock from the Hawthorne office. As only 10 shifts commence out of Hawthorne, and generally the Deckhand does not have prior notice of Dual Duties Rates, it is unlikely that stock is acquired by the Deckhand prior to boarding the vessel. Ms Daffy stated further it is not a requirement, nor is it requested by the Operations Controller, that the Deckhand undertake this task whilst on dual duties.

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<sup>19</sup> Transcript at PN285-299.

**[57]** As to cleaning duties allocated to a Deckhand while on dual duties, Ms Daffy stated these tasks already form part of his or her duties and referred to section 8.2.3 of the VSMS which is in the following terms:

“During operation:

- Inspect toilets at the completion of each trip to ensure that they are maintained in a clean and hygienic state at all times.
- Clean the wheelhouse at least once per shift.
- Clean all interior windows (including the wheelhouse) at least once per shift. When water restrictions and equipment allow, also clean the external windows.
- Carry out other cleaning duties as outlined in the relevant cleaning checklist.
- Inspect all seats on the vessel and ensure they are maintained in a clean state at all times.
- Dry outside seats as required.”

**[58]** At the hearing, Ms Daffy’s evidence as to any additional cleaning duties in light of the Covid-19 pandemic was as follows:

“What about with relation to COVID-19? Have there been any changes implemented for deckhands or customer service officers within the last 10 years?---No.

So you're saying that a customer service officer does not have to do extra duties due to COVID-19, so they wouldn't have to do an extra cleaning or any extra sanitising or - - -?---I would imagine they do. I haven't been on the boats for a while, Tracey, but I do know there was a COVID-19 cleaning regime which is mainly done prior to service. We have an outsourced company that come in and do that cleaning. The ticket seller might clean down their own area; their sanitised area.

That cleaning could be conducted during transit times?---That's correct.

That cleaning could be conducted at start-up and shutdown?---I would say start-up. Not shutdown, I don't think.

...first thing in the morning, that's when that vessel is cleaned by the outsourced company.”<sup>20</sup>

**[59]** Ms Daffy also gave evidence that employees had been instructed to perform “*in-service*” cleaning in 2015, but this no longer took place.<sup>21</sup> Ms Daffy further stated that during COVID-19 CSOs do not handle money on board and that the main portion of the CSO role – fare collection – is not being undertaken. The Company has not issued any instructions in relation to when cleaning needs to occur during this period and accordingly there is no direction that it is undertaken during transit and deckhands are not required to clean the CSO’s area. Ms Daffy also said that Deckhands are not required to replace stock and are asked to do nothing more than ticketing. Further, Ms Daffy said that recovery time is already included in the payment for dual duties.<sup>22</sup>

**[60]** In his role, Mr Lancelot is required to oversee the full scope of Transdev’s activity, including contractual, operational and maintenance performance, recruitment level, safety compliance and financial results. Mr Lancelot stated that safety is paramount in Transdev’s business and it would not be jeopardised for financial gain. He stated Transdev’s operations are based on risk assessments that are performed in consultation with Transdev’s elected

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<sup>20</sup> Transcript at PN255-263.

<sup>21</sup> Transcript at PN475-476.

<sup>22</sup> Transcript at PN450-459.

Health and Safety Representatives and have been confirmed by AMSA. AMSA had confirmed it appropriate to operate a CityCat with two crew members only, by reducing the number of customers to 100. He stated this avoids cancellation of services to customers while Transdev organises cover for the missing shift.

**[61]** Mr Lancelot stated that safety is increased through ensuring the crew are fit for duty for their shifts. Therefore, rosters are established in advance, in connection with the Rostering Committee, with an approach to minimising changes. He stated changes could impact the fatigue of the crew and must be avoided. The same approach is followed in relation to overtime. Mr Lancelot stated that any increase of overtime and changes have shown, in the past, to impact directly on injury rates.

**[62]** Mr Lancelot stated that minimising changes, overtime and fatigue is only managed with *“proper knowledge of the establishment level and appropriate recruitment”*. He noted that over 30 crew have been recruited in the 2019/2020 financial year, to allow Brisbane Ferries to operate at the correct level. However, despite this, difficulties have been encountered in covering all shifts at the end of June 2020. Even after receiving the announcement that Brisbane Ferries was unsuccessful in renewing the Contract with BCC, he decided to recruit an additional 5 CSOs in July, to assist in proper coverage levels and to reduce the amount of Dual Duties instances. His evidence was that prior to the new CSOs starting in July 2020, Transdev encountered a high level of Dual Duties situations as a number of shifts were unable to be filled on a daily basis. Since the recruitment however, Transdev is back to minimal Dual Duties instances and generally only for part of a shift. He stated these situations have been the norm, and more than often have a negative financial impact on the company. Mr Lancelot gave an example of a CSO being 14 minutes late and Dual Duties Rates being paid up to 30 minutes to the relevant Deckhand and Master, therefore at an overall cost of 16 minutes for Transdev.

**[63]** At the hearing, Mr Lancelot stated the company’s view is not that the Dual Duties Rates is a financial disincentive. He said it is not linked in any way to financial benefit, but rather is something that happens when the company struggles to have a CSO on board *“that may lead to absenteeism”*.<sup>23</sup> Mr Lancelot also stated that in many instances, Dual Duties Rates creates more costs for the company, and safety is the company’s primary consideration and not any financial result.<sup>24</sup>

**[64]** In relation to an increase in instances of payment for Dual Duties Rates between April and June 2020 Mr Lancelot said:

“So Ms Wilson talked about a three month period and I’m assuming she refers to the months of April, May, June this year. We did have quite an important increase of absenteeism or people being out of work, especially due to the COVID situation and people being in isolation while they were waiting for tests or things like this. The same part of our crew who were a bit older decided to isolate and stay at home to protect themselves or to protect their family, so we had a higher number of people out of work which created difficulties to cover all those shifts. So, yes, we had a period of time at the start of the COVID wave where we did struggle to cover shifts every day, which is why in the month of June we started the recruitment process to bring some extra CSOs - which started in the month of July - even in the situation where we didn’t renew the contract with the Brisbane City Council for the operation and maintenance of the ferry services, but we still brought in a few extra people even if it had a cost. Again

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<sup>23</sup> Transcript at PN81.

<sup>24</sup> Transcript at PN82.

it was not a financial - we didn't try to do anything to gain any money. We tried to help covering those shifts and we brought in extra people.”<sup>25</sup>

**[65]** Further, as to the “*normal*” instances of dual duties, Mr Lancelot gave evidence that generally they are only performed for part of a shift:

“So normally dual duties is to cover the last minute absenteeism; someone calling in sick. When they wake up to start their shift and they realise they're not well, they call in sick and we need to find someone, so there is a gap potentially between the start of the shift and the time where an extra crew will arrive, or it's someone who is stuck on the road because of a traffic issue or a car issue or whatever the reason is in being late for work, so that person will start a bit later. During that time the boat will start - the customer service with passengers - while we get that person on board; either that same person or we find someone to replace the CSO shift missing. It's normally a shorter period of time, it's not really a whole shift like we had in those months at the end of last financial year. It's normally just 15 minutes here or an hour there, but it's not the whole shift. It's a much smaller period.”<sup>26</sup>

**[66]** He stated currently, there are rarely instances of full shifts performed under dual duties.<sup>27</sup> In relation to dual duties for part of a shift, Mr Lancelot confirmed that the time spent on such duties is “*rounded up to [the nearest] 30 minutes*” and shared between the deckhand and master.<sup>28</sup> He confirmed that as payments are made in 30-minute increments, the minimum payment to people undertaking dual duties is 30 minutes.<sup>29</sup>

**[67]** Under cross-examination, Mr Lancelot conceded a financial benefit where a CSO position is not filled and dual duties are performed on a Sunday:

“Sorry, if a CSO was absent for one CityCat. Say that they were doing the whole shift, no boat swaps, how much would you save by not replacing them and by paying dual duties? --- So I guess if we do get the - I don't have - I was not expecting - I don't have the calculation, but if we had say a shift of eight hours of a CSO it would be eight hours at a CSO rate times two because it's a Sunday shift.

Yes. So ultimately you would be paying a hundred per cent extra because you're not paying for that CSO's double time? --- Yes.

But you will be paying the deckhand to remain? --- Yes.

You will be paying them and the master - they will split a hundred per cent, so you would effectively be saving a hundred per cent and you would also be saving the time that you would have paid for that CSO to go on a meal break? --- Yes, that's correct.

So you agree that you save money by not replacing a CSO on a Sunday? --- Yes”.<sup>30</sup>

**[68]** Mr Lancelot also said that Transdev's covers the shift when we can cover the shift and if they couldn't, they couldn't, and the day or the time of the day was irrelevant in the outcome.”<sup>31</sup> Mr Lancelot accepted that Transdev's contract with the BCC states that a normal CityCat service should operate with a master, a deckhand and a CSO. Mr Lancelot also said that there is no mention of a “mandatory crew” and the contract does not preclude Transdev

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<sup>25</sup> Transcript at PN84.

<sup>26</sup> Transcript at PN85.

<sup>27</sup> Transcript at PN87.

<sup>28</sup> Transcript at PN86.

<sup>29</sup> Transcript at PN138-139.

<sup>30</sup> Transcript at PN90-94.

<sup>31</sup> Transcript at PN96.

from operating with two crew where it is safe to do so.<sup>32</sup> When cross-examined about safety in an emergency situation with only two crew, Mr Lancelot's evidence was that:

"But that process also alludes to having the ability to ask someone from the general public to assist? --- It doesn't need it. It doesn't mean you cannot do it, but it's validated as not being required to call someone from the public. You can do it. If someone in the public is happy to assist, they can assist, but it's not a requirement for us to offset the absence of a CSO by a member of the public, no.

...

Is it entertained or ever been entertained by Transdev to ask someone from the public to assist in that? --  
- No, we don't ask if that's to be done as such. However, if a member of the public is happy to assist, they can, but it's not - the process is not to call someone from the public to help.

...

Do your emergency policies and procedures - say there's a man overboard or an emergency situation. Do they have the ability or is it factored in through your risk management systems to perform those tasks with two people?---Yes, it is. It is in our risk assessment and it has been validated."<sup>33</sup>

**[69]** In re-examination, Mr Lancelot clarified his evidence as follows:

"Okay. You were cross-examined on what happens in an emergency situation during transit times. Can you advise the Commission whether or not the company does emergency training with two crew at all?---I believe the drills that are done are always done with three crew because they're done during rostered shifts at a specific time where there is a master, a deckhand and a CSO, so the full crew is part of the drill. As part of our training we also train on what is normally an emergency situation and what's the role of everybody on the vessel in those emergency situations, and we also do those exercises about how an emergency would be managed with only two crew.

With only two crew?---Yes."<sup>34</sup>

**[70]** In relation to why overtime was not paid to cover a shift, in lieu of operating with two crew members, Mr Lancelot's evidence was as follows:

On those instances where we didn't have anybody, it's because we went through the whole list of our employees. Obviously you don't call the people who are already working, you don't call the people who have a shift that would breach fatigue rules, you don't call the people who have been off by request or have said, "I'm not available", who are sick or are staying at home because they want to stay safe, so we did call all the others and we couldn't find anybody.

What about calling someone who would be available but they would incur overtime? Did you bother calling anyone to incur overtime?---Yes, so every time we had one of those crews, the amount of time where we call - so we start calling the casuals and then we call the part-timers, too, because they have more availability obviously than a permanent full-time, then we did call the full-time who were not rostered. There have been instances in those months, yes, where we were even calling everybody who could potentially - at least on the paper - be available. We called every single one of them and we couldn't find anybody.

Okay, but sometimes you just take it as a given that you're not going to be able to find anyone and you pencil in the dual duties - - -?---No, we don't take it as a given. We take it as a fact when we have called everybody and nobody could come to cover a shift.

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<sup>32</sup> Transcript at PN114.

<sup>33</sup> Transcript at PN166-170.

<sup>34</sup> Transcript 223-224.

...

So what you're saying is there is a system in place, but it's - you call people who you think are available to come to work?---We call people who we know could work on that day for that shift because it would not breach any rules or any law.

What do you mean, breach rules? Like, incur overtime or - - -?---No. I'm not calling someone to do an afternoon shift or a morning when they did the day before a night shift.

Okay?---Because we would not have enough time in between the two shifts. We would break fatigue.

Okay?---Yes, that kind of stuff.

So overtime never factors into the decision-making. It's just fatigue?---Yes, because overtime, it's not breaching anything.<sup>35</sup>

## SUBMISSIONS

### AMOU Submissions

[71] The AMOU submitted that under the Agreement, Masters and Deckhands share in the CSO's hourly rate in the event that a CSO is unexpectedly absent for part or all of their rostered work time. The intention of the payment is to discourage Transdev from failing to replace the absent CSO because it is recognised that the CSO plays an important part in the event of an emergency.

[72] The AMOU noted that during the last agreement negotiations, Transdev changed how overtime was paid, going from overtime after 7.6 hours per day model to overtime after a 6-11.4 hour spread and after 38 hours. It submitted this change was to increase flexibility, and further that Transdev said it was also to move the overtime payments to the end of the week where they were already paying time and a half on a Saturday, and double time on a Sunday, thereby reducing their overtime costs. The AMOU submitted these penalty payments are now considered the "ordinary or base earnings" on those days.

[73] Further to its submissions that the Dual Duties payment was as a financial disincentive to compel Transdev to replace and absent CSO, the AMOU submitted that it should be paid at the rate for that particular day. It submitted that if a shift falls on a day between Monday and Friday, the payment should be made at single time, but that if it fell on a Saturday it should be paid at time and a half, and on a Sunday it should be paid at double time.

[74] In this regard, the AMOU referred to clause 4.1(g) providing for ordinary hour rates on a Saturday or Sunday, and the reference in clause 3.4(e) that the Dual Duties rate is to be paid as the sum of the employee's loaded hourly rate, plus the absent employee's ordinary base hourly wage rate (the AMOU's emphasis). The AMOU submitted that the words "ordinary base" are used interchangeably with "ordinary time" throughout the Agreement. In support of this proposition, the AMOU referred to a previous dispute regarding clause 6.3(c), where Transdev confirmed by email on 28 November 2019 that the training would be paid at double time because Sunday's ordinary time rates are double time - "Clause 6.3(c) expressly states that the relevant training time is paid at relevant ordinary time rate for the period of

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<sup>35</sup> Transcript at PN179-205.

attendance. This means that if the training is undertaken on a Sunday, it would be paid at Sunday ordinary time rates, which may include a penalty (double time - clause 4.1 (g)(ii)).”

[75] The AMOU stated that in accordance with clause 4.6 of the Agreement, Transdev’s intention is to have three crew members onboard a CityCat at all times: “For the life of the Agreement, three (3) crew will be rostered to work on every CityCat Service”.

[76] The AMOU’s submission was that the Dual Duties Rates should be paid for every minute the absent CSO is rostered on, except the normal meal break, as the remaining crew are performing the duties of another employee as well as their own.

[77] The AMOU submitted the responsibility a CSO has in the event of an emergency is a duty, and the duty to remain vigilant for possible emergencies on behalf of that CSO is an extra duty for the remaining crew. Reference was made to a “Man Overboard” incident where the vessel is alongside, which would normally require a CSO to keep passengers clear of the area where the Deckhand and/or Master are conducting the recovery, and to monitor the Master/Deckhand activities while they are carrying out the recovery and assist if requested.<sup>36</sup> The AMOU contended that this is an additional duty the Deckhand or Master will be required to carry out in the event the CSO is absent, noting this duty would be carried out whether the passengers are on the vessel or on the pontoon and could extend to keeping rowers and other vessels clear of the area.

[78] The AMOU submitted additional duties to be carried out by a CSO throughout the day include “White Level Inspections” which are inspections by employees of their respective workplaces for any articles that are unusual, suspicious, or unable to be accounted for and that employees are in the best position to conduct the inspection given their familiarity with their own workplace.<sup>37</sup> The AMOU also submitted that while the requirement to perform these inspections is in the job descriptions for Masters, Deckhands and CSO’s job description’, each employee is to inspect their own workplace, and the CSO’s “workplace” is predominantly the cabin, while the Deckhand’s workplace is the outer decks and the Master’s workplace is the wheelhouse. Therefore, when a CSO is absent, the White Level Inspection in the cabin area would become an extra duty for the Deckhand or Master.

[79] It submitted the following additional duties should also be taken into consideration:

“Start up (getting CityCat into service for the first time that day)

1. The CSO is usually rostered on 5 minutes before departure.
2. During this time the CSO, does a white level inspection, starts the ticket machine (or makes sure there is power to it), checks for faults in card readers, cleans the cabin, bathrooms, restocks timetables and ticket rolls with the stock that is onboard, sanitising their area as per the COVID-19 regime, signs on the ticket machine. When the vessel is ready to load passengers, the CSO helps speed things up by asking passengers to move inside and away from the loading door, helps passengers stow their bicycles and luggage, fixes issues with the Go Card readers so that passengers don’t stop at the loading gate tapping their Go Card and blocking the flow of traffic. They are also ready to assist in an emergency.

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<sup>36</sup> The AMOU’s submissions at [9]; Annexure A1 Transdev Brisbane Ferries Vessel Safety Management System FINAL V4 November 2019, at 11.3.6.

<sup>37</sup> The AMOU’s submissions at [10]; Annexure A1 Transdev Brisbane Ferries Vessel Safety Management System FINAL V4 November 2019, at 11.4.1.

3. If the CSO is absent, the Master and Deckhand take on these duties.

Start up (getting on a CityCat that is already in service)

1. The CSO is usually rostered on to start five minutes before departure.
2. If the vessel is already at the start location, the CSO helps speed up the loading of the vessel by asking passengers to move inside and away from the loading door, helps passengers stow their bicycles and luggage, and fixes issues with the Go Card readers so that passengers don't stop at the loading gate tapping their Go Card and blocking the flow of traffic. CSOs also make sure the cabin and toilets are clean, timetables are restocked with the stock that is onboard, sanitise their area as per the COVID-19 regime, sign on to the ticket machine and sell tickets. They are also ready to assist in an emergency. If the CSO is absent, the Master and Deckhand take on these duties.
3. If the vessel isn't at the start location, the CSO is on the pontoon advising passengers what time the CityCat is expected to arrive and are passing on any messages of cancellations as updated to them from Operations via mobile phone. The CSO is also answering questions from passengers about what stop they should be getting off at and what direction the vessel they are waiting for is coming from. In the event of an absent CSO, the Deckhand will have to provide this information to the waiting passengers. If it is a particularly busy stop, the master will help usher passengers through the cabin and answer questions.

Shut Down (getting off a CityCat that remains in service)

4. When a CSO finishes at Hawthorne, they are paid an extra 5 minutes to walk their cash and paperwork to the office. If there is no CSO, it is up to the Master and Deckhand to ensure the paperwork and cash gets to the office.

Shut Down (shutting down a CityCat for the final time that day)

5. CSOs are directed by Transdev to stay onboard with the other crew to avoid them walking alone to their cars at night. This direction means that the company no longer has to pay for security guards to walk CSOs to their car.
6. CSOs help the Master and Deckhand with their shut down duties including cleaning up and checking for passengers who may still be onboard. If the CSO was not on board, the Master and Deckhand would do more of the shut down duties.

Transit times

7. A transit time is the time it takes for a vessel to get to its start location to commence service or place of shut down.
8. If the vessel is transiting to its first starting location for the day, or after a break, the CSO normally does a white level inspection, starts the ticket machine (or makes sure there is power to it), checks for faults in card readers, cleans the cabin, bathrooms, restocks timetables and ticket rolls with the stock that is onboard, sanitising their area as per the COVID-19 regime, signs on the ticket machine. When the vessel is ready to load passengers, the CSO helps speed things up by asking passengers to move inside and away from the loading door, helps passengers stow their bicycles and luggage, fixes issues with the Go Card readers so that passengers don't stop at the loading gate tapping their Go Card and blocking the flow of traffic. They are also ready to assist in an emergency. If the CSO is absent the Master and Deckhand take on these duties.
9. If the vessel is transiting to the shutdown location, the CSO normally does a white level inspection, shuts down the ticket machine and counts the money, cleans the cabin, bathrooms, restocks timetables and ticket rolls with the remaining stock that is onboard, sanitise their area as per the COVID-19 regime. If the CSO is absent the Master and Deckhand take on these duties.

10. If the vessel is transiting from the end of an express run to the next start location, the CSO normally does a white level inspection, changes the run number on the ticket machine, checks for faults in card readers, cleans the cabin, bathrooms, restocks timetables and ticket rolls with the stock that is onboard, sanitising their area as per the COVID-19 regime. When the vessel is ready to load passengers, the CSO helps speed things up by asking passengers to move inside and away from the loading door, helps passengers stow their bicycles and luggage, fixes issues with the Go Card readers so that passengers don't stop at the loading gate tapping their Go Card and blocking the flow of traffic. They are also ready to assist in an emergency. If the CSO is absent, the Master and Deckhand take on these duties.

Recovery Time (time at end of each service)

11. Whether or not there are passengers on board, the CSO is cleaning and changing the run number on their ticket machine. If passengers are boarding during this time, the CSO is helping to speed up the loading of the vessel by asking passengers to move inside and away from the loading door, helping passengers stow their bicycles and luggage, fixing issues with the Go Card readers so that passengers don't stop at the loading gate tapping their Go Card and blocking the flow of traffic.

The Master has overriding authority

Transdev's Vessel Safety Management System (VSMS) deems the Master to have overriding authority on board the CityCats. It is on that basis that the company cannot direct a Master not to clean or do other duties that relate to safety onboard the vessel. The Master has the Authority to delegate tasks to the Deckhand and the company cannot override that authority. We note the CityCats carry the public, so vessel cleanliness is an important hazard reduction measure.

**8.1. Master Responsibilities**

The Master has the ultimate authority for the safe navigation of the vessel and for the safety of all on board and at no time should either be compromised. It is the responsibility of the Master to comply with all the guidelines and procedures within this document and its attachments.

**7. Master's Responsibility and Authority Statement**

All Masters are responsible for command of the vessel at all times whilst in operation. The Master must ensure the vessel is fit for purpose before undertaking any voyage and has the appropriate crew, is maintained and equipped with firefighting, safety and lifesaving appliances consistent with regulatory requirements for its service category, intended area of operation and associated risks. The Master is responsible for implementing and complying with the vessel's SMS including:

- Ensuring crew members know the precautions and procedures that provide for the safe operation of the vessel and protect the environment from ship-sourced pollution.
- Regularly reviewing the duties and responsibilities of the crew to ensure their currency and relevance to the vessel's operation.
- Informing the designated person or their delegate as soon as reasonably practicable of any matter that has the potential to expose those on board, the vessel and its operation or operating environment to any undue risk.
- Taking timely and reasonable measures to eliminate or effectively control any identified risk.
- Approach the designated person or their delegate for any assistance that is necessary to fulfil the abovementioned responsibilities."<sup>38</sup>

**[80]** In its closing submissions, the AMOU submitted that as to the dual duties being paid on the rate of the day, had the pay structure not changed during the latest Agreement negotiations, there would be no dispute regarding weekend or weekday rates. It submitted however that the Company has determined Saturday and Sunday are considered 'ordinary

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<sup>38</sup> The AMOU's submissions; Annexure A1 Transdev Brisbane Ferries Vessel Safety Management System FINAL V4 November 2019, at 8.1.

time' as it saves them money on overtime; that is, Sunday double time is "ordinary" for that day.

**[81]** The AMOU confirmed its submission that the terms "ordinary base", "ordinary hours" and 'ordinary time' are used interchangeably in the Agreement. It submitted there is no definition for 'ordinary base', only a definition for 'ordinary hours' in clause 4 of the Agreement, which provides 'ordinary hours' are paid at time and a half on Saturdays, and double time on a Sunday.

**[82]** The AMOU referred to split shift payments, which are provided for in clause 3.4(b) of the Agreement and are paid on the basis of two hours at the relevant ordinary time earnings per day. The AMOU submitted that the clause specifically provides that split shift rates will not be paid on weekends and stated that this is because of the extra cost and that this is a change from the 2015-2017 Agreement which did not mention split shifts on weekends. The AMOU submitted that another example of the term "base rate" being interchangeable or not necessarily correct in the "*patchwork agreement*" is the first paragraph of clause 3.4, which states:

"...For the sake of clarity annual WPI adjustments will not apply to rates defined as a percentage of the base ordinary rate of pay contained in this Agreement and exclude Annual Leave loading and Casual Loading."

**[83]** The AMOU submitted that the list of rates in the Agreement contains only one referring to a percentage being the afternoon shift rates in clause 3.4(a), which is 15 per cent. The provision does not mention "base ordinary rate of pay" but simply states that the rates applies to all hours Monday to Friday. When you read the clause it doesn't mention the word base ordinary rate of pay, it says ordinary hours. The AMOU submitted that the clause also limits the payment to Monday to Friday because the ordinary hours are worth more on a Saturday and Sunday. The AMOU contended that if Transdev only wanted to pay single time for dual duties then the Agreement would have provided that the rates is only paid Monday to Friday.

**[84]** As to payment of Dual Duties Rates, the AMOU referred to, among other things, Transdev's willingness to pay five minutes sign off so that the deckhand can count takings. It submitted that while Transdev states there is no requirement to take the money to Hawthorne to bank it, there may be instances where the safe on the vessel is broken, which would mean that the deckhand either has to find another vessel to deposit the money or take it to Hawthorne or otherwise call someone from Hawthorne to collect it. Accordingly, the deckhand has a responsibility for that money and should be paid what the CSO is normally paid to deposit the money.

**[85]** The AMOU submitted that CSOs can empty bins, close windows, lock doors and check for passengers during shutdown, and accordingly Dual Duties Rates should be paid on shutdowns. The AMOU referred to Transdev's submission that Masters do not know how to use ticket machines, and submitted that where a CSO is not on a shift, the deckhand is performing that role. And further, if there are any cleaning tasks to be performed and a CSO is not on the shift, these become an extra duty for the two-person crew.

**[86]** As to "respective workplaces", the AMOU submitted that a definition of white level inspections exists at 11.4.1 by virtue of the words: "Inspection by employees of their respective workplaces". The AMOU submitted that this means each worker has a different

workplace on the CityCat and that the cabin is predominantly the CSO's workplace, notwithstanding that other employees will have things to do the cabin on occasion, including the deckhand in there on occasion.

[87] The AMOU submitted that in relation to Ms Daffy's evidence, the Company has a practice of using able-bodied passengers to assist in an emergency, however the current dispute is in relation to what happens when there are *no* passengers onboard. The AMOU submitted therefore that Ms Daffy's evidence should be disregarded.

[88] Further the AMOU submitted that Transdev's reliance on the decision in *Codelfa Construction v State Rail Authority of New South Wales* for its assertion that extrinsic evidence should not be referred to in assessing the interpretation of an enterprise agreement is not relevant in this case, because the wording in the Agreement is not plain but is ambiguous and can be determined with proper consideration of the other terms used interchangeably throughout.

[89] The AMOU submitted Transdev is also trying to insert its own extrinsic material by using the definition of base pay in the FW Act. That definition is not the relevant one in this instance because the pay structure of the Agreement has changed since the last Agreement, so that overtime after 38 hours falls on the Saturday or a Sunday because the ordinary or base time will cost the same as the overtime payment and it will save the company money.

[90] The AMOU submitted that paragraph 28 of Transdev's submissions should be disregarded as it seeks that the Commission take into consideration the wording in the Dual Duties Rates clause of the 2009 agreement. The AMOU notes since then the wording of the Dual Duties Rates clause and the company's pay structure has changed.

[91] The AMOU accepted that Dual Duties Rates should not be paid on an employee's directed time at Hawthorne, if the CSO is at Hawthorne and not on a vessel, but submitted that if the crew the CSO was rostered to work with that day is directed to work on a vessel for any reason, including to relieve on another CityCat run or to conduct drills, the remaining crew should be paid Dual Duties Rates.<sup>39</sup>

[92] The AMOU submitted that there is work on board for three people, and where one is not present on shift, the two remaining crew members are required to perform the work of three people. Accordingly, Dual Duties Rates should be paid for the whole time a CSO should have been onboard or any time a Deckhand or a Master has to do the job of a CSO as well as their own, which includes start up, shutdown times, recovery times which is the time at the end of each lap, transit times and when they are working as directed on the vessel and the customer service officer is absent.

[93] The AMOU disagreed with Transdev's submission that if the Commission finds the Company should be paying Dual Duties Rates at times they are currently not, then backpay should not be awarded and maintained that any entitlement to Dual Duties Rates should be back paid from the start of the Agreement, which is when the "Monday to Friday" pay structure commenced.<sup>40</sup>

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<sup>39</sup> Transcript at PN514.

<sup>40</sup> Transcript at PN515-516.

[94] The AMOU also submitted that the minimum 30 minute payment of Dual Duties Rates should be paid on each occasion that Dual Duties are undertaken in circumstances where CSOs can jump on or off a CityCat multiple times throughout a day or shift.

#### MUA Submissions

[95] The MUA supported the submission of the AMOU that Dual Duties rates was established in conjunction with the prescribed crewing numbers, to ensure that CityCats would be crewed by three persons at all times. The MUA also supported the submission that considerable concerns had been raised regarding Transdev's failure to crew vessels as required, in order to gain a financial benefit.

[96] In this regard, the MUA submitted that its position during bargaining was that it should be a requirement that all CityCat vessels operate with a three person crew, comprised of a Master, a Deckhand and a CSO. According to the MUA, Transdev had a concern that mandating this crew requirement would delay services in instances of illness or unplanned absences of employees. This concern was acknowledged by the Union, and it was agreed that vessels could operate with a two person crew with a penalty of equal payment from the absent employee to be shared among the two remaining crew members, until a replacement for the absence was found to join the shift at a convenient stop to prevent "previous actions" from Transdev in financially gaining from not replacing crew when Transdev is contractually required to crew with three crew on CityCat vessels.

[97] The MUA submitted this position was agreed to by both before the Commission when assistance was sought from the employer, and by the parties in enterprise bargaining discussions. In closing, the MUA submitted that the cost of the split shift should be the amount the CSO would normally get, split between the two employees, and the "ordinary base rate" on a Saturday or Sunday is the actual rate of pay for the ordinary hours on that day including penalty payments.<sup>41</sup>

#### Transdev Submissions

[98] In relation to Question 1, Transdev submitted that the VSMS is required for the operation of all domestic commercial vessels. In the event of an emergency involving a person being overboard, where a CSO is on board, they are required to:

- Confirm passenger numbers aboard and report to the Master.
- Keep passengers clear of any danger.
- Keep passengers reassured / calm / informed.
- Monitor Deckhand while they are carrying out their duties and assist if requested.
- Follow the directions of the Master.

[99] If a CSO is not on board, the VSMS provides that a passenger or passengers may be used for these purposes. Transdev submitted that drills are regularly undertaken on this basis, and further that AMSA has confirmed this to be safe to operate. Transdev submitted that no such duty exists as an "extra responsibility" for the Master or the Deckhand in the absence of a CSO.

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<sup>41</sup> Transcript at PN526.

**[100]** Transdev further submitted that currently Dual Duties Rates are not paid during transit times as there are no passengers on board. In other cases of emergency, passengers will be on board and if there is no CSO, the Dual Duties Rates are already being paid. In relation to provisions in the VSMS relating to “White Level Inspections”, Transdev submitted:

- a. Para 1 Abbreviations and Definitions, defines a White Level Inspection as meaning an inspection by any worker of their respective workplaces for any articles that are unusual, suspicious or items that are unable to be accounted for.
- b. Para 8.1.2 CityCat Pre-start Procedures, requires the Master to conduct a “White Level Inspection. There is no reference to a “workplace”.
- c. Para 8.1.5 Shut-Down Procedures, requires the Master to conduct a White Level Inspection, essentially checking the whole vessel. There is no reference to “workplace”.
- d. Para 8.2.2 Pre-Start Procedures for Deckhands, requires the Deckhand
  - conduct inspections of both upper and main decks
  - to turn on the ticketing machine,
  - test all intercom and call buttons
  - Inspect all seats on the vessel and ensure they are maintained in a clean state at all times.
 There is no reference to “workplace”.
- e. Para 11.4.1 White Level Inspection, clarifies that inspections are to be undertaken by employees in their respective workplaces
  - Each day upon arrival at your workplace.
  - On a random basis.
  - When requested by management due to receiving information of a possible security breach.
  - Each day upon completion of shift.

**[101]** Transdev submitted that the evidence of Ms Daffy establishes that the duties of a Deckhand includes inspecting voids within the cabin, but also maintained that it is the vessel which is each employee’s “*workplace*”. Transdev also submitted that the VSMS clearly establishes that a Deckhand has responsibilities within the cabin and the Unions have not established that the “*workplace*” of Deckhands or Masters excludes the cabin. In relation to the evidence of the Unions about duties, Transdev relied on the evidence of Ms Daffy, and confirmed that many of the duties listed by the Union are current duties of the Deckhand, or did not create any added responsibility for the Deckhand, or otherwise were a duty of the CSO and Dual duties was currently paid accordingly. It was further submitted that Ms Daffy’s evidence establishes that:

- a. As a Deckhand the only additional duties required is to sell tickets and announce the name of the next terminal and from which end of the vessel passengers will depart from and there has been no directional change to this requirement since the commencement of dual duties.
- b. Whilst she was working as a Senior Master/Operations Supervisor that at no time would the Master and Deckhand be instructed by an Operations Controller to undertake duties other than selling tickets and announcing the next stop.
- c. A review of payroll indicated that the current process for payment of Dual Duties has been consistent since (at least) 2014;
- d. For Transdev to be now required to review all instances where Dual Duties has been paid under the current or prior enterprise agreement is unreasonable.

[102] Transdev submitted that Dual Duties Rates should be applied in the following circumstances

<b>Task</b>	<b>Dual Duties Payment</b>
<i>Sign on</i>	<i>Not paid – No additional duties performed</i>
<i>Sign off</i>	<i>The Company proposes to pay 5 minutes for Deckhands who have done Dual Duties to count shift takings.</i>
<i>Meal Break</i>	<i>Not paid - as no duties undertaken</i>
<i>Recovery time</i>	<i>Currently paid</i>
<i>In -Service Trip</i>	<i>Currently paid</i>
<i>Crib Break</i>	<i>Not paid - as no duties undertaken</i>
<i>Transit time</i>	<i>Not paid - no requirement/request for deckhand to undertake CSO duties. No specific CSO duties exist</i>

[103] Transdev accepted that the Master is responsible for the safety of the vessel and crew, and as per the evidence of Ms Daffy, submitted that it is unreasonable for the Master to delegate extra duties to his deckhand which are unnecessary and not enforced by Transdev. Transdev submitted there has been no direction from the company that the Deckhand and Master assume additional duties other than those required by the VSMS, being:

“In addition, the Deckhand is to assist with any reasonable request given by the Master including the collection of fares in the absence of a Customer Service Officer. The Deckhand must ensure their assigned driver card is carried on person each shift in case it is required.”

[104] Transdev submitted that in light of these factors, the authority of the Master is irrelevant to any entitlement to Dual Duties Rates. In relation to the first question, in response to Ms Wilson’s statement, Transdev submitted that Ms Daffy’s evidence should be accepted that it is possible to operate a vessel with a crew of two, provided there is adherence to the VSMS. Transdev also relied on Mr Lancelot’s evidence that risk assessments have been performed which confirm operations on a crew of two are safe and avoid the cancellation of services.

[105] Transdev also submitted that due to Dual Duties Rates being rounded up to the nearest half hour, the cost of Dual Duties Rates is not always a saving compared to rostering a CSO. Further, Transdev submitted that Dual Duties Rates should only be paid in the circumstances of “Recovery time” and “In-service Trip”. In response to Ms Wilson’s statement, Transdev submitted that while Ms Wilson states Dual Duties Rates should only not be paid during meal break and WAD, her evidence does not provide assistance to the Commission in determining why payment should be made in specific circumstances and that evidence should be discounted accordingly.

[106] In relation to Question 3, Transdev submitted that Dual Duties Rates should be calculated on the rates provided for in clause 3.3 “Wages” of the Agreement. Transdev accepted that the Unions are correct in saying the Dual Duties Rates are intended as a disincentive to operating a vessel without a CSO. However it submitted that the absence of a

CSO it is not “by design” but because a CSO has not been available to work and no replacement has been able to be found. Transdev relied on Ms Daffy’s evidence in this regard.

[107] In response to Ms Wilson’s evidence that the CSO’s loaded rates for working on a weekend should be paid to Deckhands and Masters to deter Transdev from operating with a crew of two, Transdev submitted that the issue for the Commission is the interpretation of words in the Agreement which are clear and unambiguous. Transdev submitted that the point being made by Ms Wilson in relation to question 3 does not provide evidence on which the Commission can find “other than that payment should be at the CSO’s ordinary, base hourly wage rate as per the company’s submission”. Transdev also submitted that Ms Wilson’s evidence about the wage difference between paying Dual Duties Rates calculated on the loaded rate and employing a CSO is irrelevant as the words of the Agreement are clear. It also submitted that when dual duties are for short periods, dual duties are then rounded up to the next 30 minutes, with no saving to the company.

[108] In support of its submissions regarding interpretation of the Agreement clauses, Transdev referred to the relevant legal principles as follows. It was submitted that the provisions of the Agreement are clear and precise, and do not raise any ambiguities. The purpose of Dual Duties is to provide a disincentive for management to purposely operate vessels without a CSO, and the application of the clause by the company does that.

[109] Transdev submitted its interpretation of the clause is according to the ordinary meaning of the words used therein. The Union parties have attempted to introduce evidence of how a dispute involving the training of staff was settled to support its’ claim. This should be discounted and is extrinsic material which should not be taken into account on the basis that it would contradict the words of the Agreement which have a plain meaning.<sup>42</sup> Transdev also referred to the principles in relation to the construction of enterprise agreements set out by a Full Bench of the Commission in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*.<sup>43</sup> Transdev submitted that if the Commission finds there is an ambiguity or unfairness, then the consideration of the historical development of the Dual Duties Rates clause can leave no doubt that the rates must be based on clause 3.3 of the Agreement.

[110] The *Brisbane Ferries Enterprise Agreement 2009 – 2011* (2009 – 2011 Agreement) provided as follows in relation to Dual Duties:

“3.4.1.4 Dual Duties Payment:

Where an employee who is in a classified position as defined at 3.2 herein and is required to perform in conjunction with his/her own duties the full duties of a different classified position as defined at 3.2 herein within the same working period i.e. dual duties, then the employee who is performing the dual duties **will be eligible for the equivalent payment** (emphasis added) applicable to the other classification for the time of performing the dual duties. Provided the applicable minimum payment will be paid in periods of no less than 30 minutes.

Example: A ticket seller (\$17.31ph) does not turn up for work for say, 25 minutes and the Deck Hand is required to perform dual duties of ticket selling & deck hand, then the deck hand **in addition to his own hourly rate** (emphasis added) will receive the ticket sellers hourly rate of \$17.31 x 30 minutes = \$8.65 If the same circumstance arose and it were for 2 hours, then the payment would be \$17.31 x 2 = \$34.62.”

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<sup>42</sup> (1982) 149 CLR 337 at 352.

<sup>43</sup> (2014) FWCFB 7447.

[111] Transdev submitted that based on the clause as it appeared in the 2009 – 2011 Agreement, the claim of the unions in the current matter to be paid the Dual Duties Rates based on loadings and penalty rates, would be substantiated, as the payment of the those amounts is clearly what the absent employee would have received.

[112] However, the Relevant clause in the Brisbane Ferries Enterprise Agreement 2011 – 2014 (the 2011 – 2014 Agreement) was changed to provide:

Clause 3.4(d) Dual Duties Rates:

(i) An employee is entitled to be paid Dual Duties Rates for any time, rounded up to the nearest half hour, where an employee is required to perform the duties of another employee as well as their own because other employee is unexpectedly absent for part or all of their rostered work time.

(ii) Dual Duties Rates are the sum of the **employee's ordinary hourly rate, plus the absent employee's ordinary hourly rate.** (emphasis added)

(iii) To avoid any doubt, Dual Duties Rates do not apply where:

a. an employee is rostered to perform duties that fall under more than one classification in clause 3.2; Note CityFerry Masters undertaking Level 3 or Level 4 roles are not required to be paid Dual Duties;

b. the Employee and the absent Employee were rostered to perform either the same duties, or duties that fall within the same classification in clause 3.2;

c. the Employee is not directed to perform the absent Employee's duties;

d. the Employee performs only part of the absent Employee's duties; or

e. the Employee is directed to not perform their originally rostered duties, and instead perform the absent Employee's duties.

Example: A ticket seller does not turn up for their rostered shift for 25 minutes and the Deck Hand is required to perform dual duties of ticket selling and deckhand, then the deck hand in addition to his or her hourly rate will receive the ticket seller's ordinary hourly rate plus their own for 30 minutes.

[113] Transdev submitted that the change in the 2014 Agreement, in the calculation of payment method (contained in para ii) is substantial and states the entitlement is to the employee's ordinary hourly rate, plus the absent employee's ordinary hourly rate **not** the equivalent payment of the absent employee.

[114] The Transdev Queensland (Ferry) Enterprise Agreement 2015 – 2017 provided as follows at clause 3.4(d):

Clause 3.4 (d) Dual Duties Rates:

(i) An employee is entitled to be paid Dual Duties Rates for any time, rounded up to the nearest half hour, where an employee is required to perform the duties of another employee as well as their own because other employee is unexpectedly absent for part or all of their rostered work time.

(ii) Dual Duties Rates are the sum of the **employee's loaded hourly rate, plus the absent employee's ordinary hourly rate.** (emphasis added)

(iii) To avoid any doubt, Dual Duties Rates do not apply where:

a. an employee is rostered to perform duties that fall under more than one classification in clause 3.2;. Note – CityFerry Masters undertaking Level 3 or Level 4 roles are not required to be paid Dual Duties;

b. the Employee and the absent Employee were rostered to perform either the same duties, or duties that fall within the same classification in clause 3.2;

c. the Employee is not directed to perform the absent Employee's duties;

d. the Employee performs only part of the absent Employee's duties; or

e. the Employee is directed to not perform their originally rostered duties, and instead perform the absent Employee's duties.

Example: A ticket seller does not turn up for their rostered shift for 25 minutes and the Deck Hand is required to perform dual duties of ticket selling and deckhand, then the deck hand in

addition to his or her hourly rate will receive the ticket seller's ordinary hourly rate plus their own for 30 minutes.

[115] Previous reference to an employee's "ordinary hourly rate" has been changed to the employee's "loaded hourly rate" which makes it obvious that it includes any loadings or penalty payments. The absent employees rate is still the employee's "ordinary hourly rate", thereby excluding loadings and penalties.

[116] The current clause 3.4(e) in the current Agreement also contains a reference to the employee's "loaded hourly rate", which includes any loadings or penalty payments, and is unchanged. Reference to the absent employee's rate is now the employee's "ordinary base hourly rate", thereby excluding loadings and penalties. Transdev tendered a marked up copy of the negotiating draft for the current Agreement which includes a comment in relation to clause 3.4(e) that the term "base" in that clause was "suggested to emphasize the ordinary base rate".

[117] Transdev submitted that inclusion of the term "base", in the clause confirms that the calculation of Dual Duties Rates is on the hourly wage rates contained in clause 3.3 and excludes loadings and penalty rates. Transdev also referred to s. 16 of the FW Act which defines base rate of pay as follows:

"16 Meaning of base rate of pay  
General meaning

(1) The **base rate of pay** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary rates;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts."

[118] Further, Transdev submitted that the current Agreement assists in understanding the term "*ordinary time*" or "*ordinary hours*" and in this regard, referred to Clause 2(a) which contains the following definition of "*Full Time Employee*":

"'Full Time Employee' means an employee paid at the weekly rate of pay, on a permanent basis working **38 ordinary hours** (emphasis added) per week, in accordance with this agreement."

[119] Paragraphs (b) and (c) of clause 2 also reference 38 hours for part-time and casual employees, respectively. Clause 3.3 of the Enterprise Agreement provides for *Hourly Wage Rates* which is obviously for working ordinary time, and on which overtime, loadings and penalties are calculated. Clause 4.1 Hours of Work provides at sub-clause (g) that:

- (g) Ordinary hours worked on a Saturday or Sunday shall be paid as follows:
  - i. Saturday: All ordinary hours worked on a Saturday shall be paid for at the rate of one and one-half times the ordinary rate (x1.5).
  - ii. Sunday: All hours worked on a Sunday shall be paid for at the ordinary rate of double-time (x2.0).

[120] Transdev submitted that this clause is merely stating how ordinary hours are to be paid for working on a day of the weekend. Transdev also submits that the provisions of the 2019 –

2022 Agreement at clause 3.4(e), are clear and precise and a literal interpretation does not result in an ambiguity or unfairness. Although it is not required to interpret the Agreement or to resolve any ambiguity or unfairness, a review of past enterprise agreements makes clear that the entitlement is not to the absent employee's "loaded rate". Transdev reiterated:

- a. The 2009 agreement provided that the rates would equate to the payment the absent CSO would have received plus the employee's own "*hourly rate*".
- b. References to the present employee's rate in each agreement since the 2009 enterprise agreement have morphed to the current provision but references to the absent employee's rate have remained as the employee's "*ordinary hourly wage rate*" with the current agreement including the word "*base*".
- c. These factors support the argument that the rates does not include loadings or penalties but is at the 38 hour (unloaded) rate.

[121] Transdev submitted that the reference by the Unions to the settlement of issues regarding employees undergoing training on a Sunday, is a matter that should bear no weight in relation to the current dispute. That dispute related to clause 6.3(c) of the Agreement, and the wording of that clause is completely different to the wording of clause 3.4(e) which is the subject of the present dispute. As indicated by Ms Daffy's evidence, the current method of calculating entitlement to and calculation of Dual Duties Rates, has been consistent since at least 2014.

[122] Transdev submitted the Commission should find that:

- a. There is no entitlement to payment of Dual Duties Rates, outside of the current practice; and
- b. The calculation of any entitlement should be based on the employee's ordinary time hourly wage rate.

[123] In its closing submissions at the hearing, Transdev conceded that while there was a period of time when incidences of dual duties went beyond what was deemed to be suitable, Transdev has since recruited additional CSOs to reduce such incidences. Transdev submitted that the rostering process has been demonstrated to be such that if dual duties are being paid, it is by default rather than by design, and there is no conscious effort by the Company to financially benefit from the payment of dual duties.

[124] There is no direction from the Company that during transit time, if an employee is undertaking dual duties that they should do certain tasks that may usually be performed by a CSO. Transdev confirmed the *only* additional task is that the deckhand is required to perform is ticketing and that cleaning is already part of the deckhand's role.

[125] Transdev submitted that on the clear wording of the relevant provisions, the Commission should find that the approach currently taken by the Company is correct, that dual duties is at the hourly rate of pay as per the Agreement and only payable in circumstances where the Deckhand and the Master have been directed or required to undertake work normally undertaken by a CSO, in the CSO's absence. Accordingly, Transdev submits that the questions for arbitration should be answered as follows:

*“Question 1: Should the Dual Duties Rates in clause 3.4(e) of the Agreement be paid on every minute the Customer Service Officer is rostered on that particular shift in the event that they are unexpectedly absent?”*

No. The payment is limited to those times when the crew are actually performing the duties otherwise undertaken by the Customer Service Officer (CSO). These times are limited to:

- Recovery time; and
- In-Service time.

Should the Commission find that the entitlement does exist outside of the times above then, given:

1. The fact that the company has consistently (since at least 2014 and with no objection) interpreted the agreement with the rates being paid during recovery and transit times; and
2. The practical difficulty of identifying all circumstances when an entitlement may have arisen;

any finding should be that the entitlement be prospective, from the date of this application by the unions.

*Question 2: If Dual Duties Rates in clause 3.4(e) of the Agreement do not have to be paid on every minute of the absent Customer Service Officer's shift, under what circumstances should those rates be paid?*

The payment is limited to those times when the crew are actually performing the duties otherwise undertaken by the CSO. If no work is required, by the company, to be performed, there is no entitlement to payment.

*Question 3: Where employees are undertaking dual duties on weekends, are the Dual Duties rates in clause 3.4(e) of the Agreement calculated with reference to the rates for ordinary hours worked on a Saturday and Sunday prescribed by clause 4.1(g) of the Agreement?*

No. Dual Duties are calculated on the Hourly wage rate contained in clause 3.3(a), Hourly wage rates.”

## CONSIDERATION

**[126]** The issues raised by the Union parties concern the proper construction of a number of clauses of the Agreement and determination of whether those clauses are applicable, on the basis of the facts. The approach to the task of construing an enterprise agreement was most recently set out in a Decision of a Full Bench of the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*” known as the *Australian Manufacturing Workers’ Union (AMWU) v Berri Pty Ltd* as follows:

“1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:

- (i) the text of the agreement viewed as a whole;
- (ii) the disputed provision’s place and arrangement in the agreement;
- (iii) the legislative context under which the agreement was made and in which it operates.

2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.

3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the ‘parties’ to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are ‘covered by’ such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement ‘with the employees who are employed at the time the agreement is made and who will be covered by the agreement’. Section 182(1) provides that an agreement is ‘made’ if the employees to be covered by the agreement ‘have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement’. This is so because an enterprise agreement is ‘made’ when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901 (Cth)* applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

- (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
- (ii) notorious facts of which knowledge is to be presumed; and
- (iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties’ intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding.”

[127] In *CFMEU v Endeavour Coal Pty Ltd T/A Appin Mine*<sup>1</sup> a Full Bench of the Commission held that the context of an agreement provision is significant. In this regard, the Full Bench set out the explanation of this point by the NSW Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurtey SA*<sup>2</sup> emphasising the following matters:

- Until a word or phrase is understood in the light of the surrounding circumstances, it is rarely possible to know what it means<sup>3</sup> and there is always some context to any statement;<sup>4</sup>
- Language considered in its context will often have a clear meaning and context will often not displace that meaning – “but not always”;<sup>5</sup>
- To state that a legal text is clear reflects the outcome of an interpretation process and means that there is nothing in the context that detracts from the ordinary literal meaning and cannot mean that context can be put to one side;<sup>6</sup>
- The phrase used by Mason J in *Codelfa* “if the language is ambiguous or susceptible of more than one meaning” does not mean that the susceptibility of the language to more than one meaning must be assessed without reference to the surrounding circumstances and in order to determine whether more than one meaning is available it may be necessary to turn to context;<sup>7</sup> and
- Context has also been described as surrounding circumstances and the meaning of terms normally requires consideration not only of the text, but of the surrounding circumstances known to the parties and the purpose and object of the transaction<sup>8</sup>

[128] The case law in relation to the approach to the construction of enterprise agreements makes it clear that context and purpose are relevant to the construction of provisions in an enterprise agreement and must be considered even where the words of the provision being construed appear, on their face, to have a clear and unambiguous meaning. The following observations of Madgwick J in *Kucks v CSR* are also apposite in the present case:

“It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.”<sup>9</sup>

## CONSIDERATION

[129] I turn now to apply the principles relating to the construction of enterprise agreements to the relevant provisions in the present case. As the Full Bench of the Commission set out in *Berri*, the construction of an enterprise agreement begins with consideration of the ordinary meaning of the relevant words. Question 1 concerns clause 3.4(e). That clause provides for

the payment of Dual Duties Rates to “*employees required to perform the duties of another employee, as well as their own because [the] other employee is unexpectedly absent or all or part of their rostered time.*” The dispute has arisen with respect to the entitlement of Masters and Deckhands to be paid the Dual Duties Rates in the absence of a CSO.

[130] It is common ground that Transdev pays the rates to Masters and Deckhands in circumstances where they are actually performing work that would be undertaken by the CSO if the CSO was present and that payment is limited to times when the vessel is in service (ie. with passengers on board) or where the crew are engaged on recovery activities at the end of a service. The Unions claim that the rates should be paid for all time that a CSO is rostered on a shift but is not present including transit time when there are no passengers on board the vessel.

[131] In my view, the plain meaning of the words sub-clause 1 of clause 3.4(e) is that the rates is payable when the Master and the Deckhand are “*required to perform the duties*” of a CSO who is unexpectedly absent on the shift. That the Master and Deckhand are required to actually perform the duties of the absent CSO in order to be entitled to the payment of the rates is also emphasised by the additional requirement that those duties be performed “*in addition*” to the duties of the Master and Deckhand concerned. Further, the requirement for actual work to be performed is indicated by the fact that the rates are payable when the additional duties are performed because the other employee is unexpectedly absent for all or part of their “rostered work time”. If more support for this construction is required, it is found in subclause 3 of clause 3.2(e) which excludes the rates where the employees concerned are “*rostered to perform duties that fall under more than one classification in clause 3.2*” or the employee and the absent employee were rostered to perform the same duties.

[132] It is also relevant that the third paragraph in clause 3.4(e) provides that Dual Duties rates do not apply where an employee is rostered to perform duties that fall under more than one classification in clause 3.2 or where the employee and the absent employee were rostered to perform either the same duties or duties that fall within the same classification in clause 3.2. Clause 3.2 is structured so that a Level 1 employee is an entry level employee primarily engaged to perform ticket selling or cleaning duties while a Level 2 employee is engaged to perform Level 1 duties in addition to Deckhand duties. These exclusions emphasise that the rates is paid for additional duties to those that the Deckhand would be expected to perform on the shift or duties that are additional to those that are encompassed in the Level 2 classification.

[133] In short, the clause makes clear that the rates are payable to an employee who is required to perform work that is in addition to the work that he or she would usually perform, because of an unexpected absence of the third crew member. The additional duties the Unions contend are being performed by Masters and Deckhands in the absence of a CSO can be broadly grouped as:

- Duties in cases of emergency including assisting persons who have fallen into the river while the vessel is alongside or who are encountered while the vessel is operating or transiting;
- Inspections of the vessel (workplace inspections);
- Specific circumstances such as:
  - start up;
  - shutdown;

- recovery at the end of a service; and
- transiting in the vessel when there are no passengers on board.

**[134]** Transdev accepts that Dual Duties Rates are payable in circumstances where a vessel is in service, by virtue of passengers being on board, and a CSO is absent. It is not in dispute that Transdev pays Dual Duties Rates in such circumstances. The dispute centres on whether the Dual Duties Rates are payable while a vessel is transiting.

**[135]** Accordingly, the question can be answered by determining whether, while a Master and a Deckhand are transiting in a vessel and there are no passengers on board, they are performing the duties of a CSO in addition to their own duties when the CSO is absent. I have concluded that Masters and Deckhands are not performing the duties of a CSO in addition to their own duties while in transit.

**[136]** In cases of emergency, the duties described by the witnesses for the Unions upon which the claim for Dual Duties Rates is based, are not additional duties to those they would usually perform. In relation to Mr Barker's evidence, I accept that if a CSO and a Deckhand are aboard a transiting vessel, there are two sets of eyes to assist the Master of the Vessel in a case of emergency. However, in the absence of a CSO, a Deckhand while providing "*an extra set of eyes*" for the Master in case of emergency, is not undertaking the duties of a CSO in addition to his or her own duties. There is no evidence that the task of keeping watch is more onerous in the absence of a CSO than it would be if a CSO was on the vessel. The Deckhand can only keep watch to the extent of his or her individual capacity and does not develop a further set of eyes because a CSO is not on the vessel.

**[137]** I am also of the view that if there is an actual emergency, the Master and the Deckhand on a transiting vessel, are not performing additional duties that would otherwise be undertaken by a CSO, in addition to his or her own duties. Because the vessel is transiting, there are no passengers to manage or keep clear of the emergency and there is no requirement for those duties to be performed at all. Whether a CSO is present or not, the crew do not lift a person who has fallen into the river on to the vessel. Rather, the deckhand deploys a ladder and if necessary, secures the person to the ladder using a mooring line. I do not accept the proposition put by the AMOU that the fact that a CSO would normally hold the lifejacket of the Deckhand while the Deckhand undertakes these tasks, means that the Deckhand is assuming that responsibility in the absence of the CSO. Quite simply, the Deckhand cannot hold his or her own lifejacket. While this may create an added safety risk, it does not involve the Deckhand performing an additional duty. If the vessel is in service, the Dual Duties Rates would be paid in any event, including in a man overboard incident if the vessel was alongside or if the vessel responded to an emergency while it was in service.

**[138]** In relation to conducting workplace inspections, if the vessel is in service, Dual Duties Rates are paid if a CSO is absent in any event. Otherwise I do not accept that a Deckhand or Master are performing any additional duties associated with inspecting the vessel, in circumstances where the vessel is transiting and a CSO is not in attendance. I accept Ms Daffy's evidence, supplemented by the VSMS in relation to white inspections, that this is the responsibility of the Deckhand regardless of whether the CSO is absent. The vessel is not broken up into separate sections for the purpose of the inspections and there is no basis for finding that the Deckhand is undertaking additional inspection duties in the absence of the CSO while the vessel is in transit. I do not accept that a Deckhand checking voids on a vessel

is undertaking dual duties even if the CSO is absent. Such duties are part and parcel of the work of a Deckhand, regardless of where the voids are located on the vessel.

**[139]** In relation to getting the vessel into service for the first time on a day, if the Deckhand is present he or she will assume additional duties associated with signing on to the ticket machine, selecting the trip number and preparing the float for the shift and also assists with the loading of the vessel. As the vessel is in service the Dual Duties Rates are paid. If the vessel is not at the start location, the deckhand is arriving with the vessel and is not undertaking additional duties 5 minutes before the start of the shift. When the vessel arrives, it is in service and the Dual Duties rates are paid. The Deckhand is on the arriving vessel and is not on the pontoon assisting passengers and therefore performs no additional duties until the vessel arrives and is in service at which point the Dual Duties rates is paid, in my view, correctly.

**[140]** Selling tickets, engaging with passengers, calling stops and ensuring passenger safety, are duties that are not performed while a vessel is in transit. If a Deckhand is required to perform these tasks on an in service vessel, and the CSO is absent, he or she will be paid the Dual Duties Rates in any event because of Transdev's position that it is payable when the vessel is in service and the CSO is absent.

**[141]** In my view, this approach as set out in the submissions of Transdev is correct and there is no requirement that the Dual Duties rates be paid on the basis that a Deckhand and a Master are simply transiting in a vessel. I also accept Ms Daffy's evidence that deckhands are not directed to undertake any additional cleaning during transit time and nor are they required to re-stock timetables. Further I accept Ms Daffy's evidence that the only activity that Deckhands are instructed to undertake in the absence of a CSO is ticketing. This activity would be undertaken while the vessel is in service and Dual Duties Rates would be payable. Similarly, if a recovery was required to be undertaken by a Master and a Deckhand, in the absence of a CSO, Dual Duties Rates would be payable according to Transdev's practice. Further, it is appropriate for Transdev to pay Dual Duties Rates to Deckhands who are required to count takings at the end of a shift, on the basis that this is an additional duty.

**[142]** It follows that I accept that the approach of Transdev of paying Dual Duties Rates to employees in Recovery time and while they are on a vessel that is in service is correct.

**[143]** I do not accept that there is evidence of a common intention with respect to the payment of Dual Duties rates sufficient to contradict the plain meaning of the terms of clause 3.4(e). The fact that the Unions may have intended to discourage Transdev from operating services with a crew of less than three persons, does not justify construing the clause so as to maximise the payment of the penalty in circumstances which are clearly outside the plain meaning of the term, by requiring Transdev to pay the Dual Duties Rates to transiting Masters and Deckhands who are not performing additional duties.

**[144]** The Dual Duties Rates are plainly not just a disincentive to Transdev operating with two person crews. It is also paid to recognise that members of two person crews may be required to perform duties additional to their own, which would be performed by the absent person. If the absent CSO would not be required to perform duties if present, the Master and the Deckhand do not become entitled to payment of Dual Duties rates simply by virtue of the absence. For example, where the CSO is rostered and paid for 5 extra minutes at the end of a shift so that he or she does not have to walk alone to a car, the Master and the Deckhand are

not entitled to be paid Dual Duties rates where the CSO is absent and is not there for that 5 minutes. This is because if the CSO was present he or she would not be required to perform duties.

[145] The use of the term “required” means that the duties must be required by Transdev to be performed by the Master and Deckhand in the absence of the CSO. To attract the payment of Dual Duties Rates, the duties must be additional to the duties of the Master and Deckhand and not duties that they are ordinarily responsible for performing. The question is not whether the CSO assists with the duties when present, but whether the CSO is required to assist so that the absence of the CSO places an additional burden on the Master and the Deckhand in relation to performing the duties of the CSO in addition to their own duties.

[146] Finally, I also accept that the impact of the COVID-19 Pandemic has made it more difficult to fill crewing numbers, particularly at the time this dispute arose. I note that Transdev acknowledges that the number of occasions when a third crew member could not be rostered was not acceptable. I also note that the effect of the Pandemic is easing and that Transdev has taken steps to rectify this situation by hiring additional CSOs. While these matters gave rise to the dispute, they are not determinative of the proper construction of the terms of clause 3.4(e) of the 2019 – 2022 Agreement.

[147] In relation to the rate at which Dual Duties Rates are required to be paid, clause 23.4(e) provides that the quantum of the Dual Duties Rates are calculated by reference to the absent employee’s “ordinary base hourly wage rate” which is split 50/50 between the two crew members who are present. The question for arbitration centres on the meaning to be given to the term “ordinary base hourly wage rate”. The Unions contend that the term means the amount that the absent employee would be paid if at work, including loadings and penalties. Transdev contends to the contrary that the rates are calculated by reference to the ordinary time rate of the absent employee.

[148] In my view the interpretation advanced by the Company is correct. Starting with the text of the disputed provision, the term “ordinary base hourly rate” has a plain meaning. The term “ordinary” in the context of hours of work, generally means without a special addition such as a penalty rate. The term “base” means the rate upon which penalty rates and other additional amounts are calculated and to which they are added. This can be contrasted with the fact that the provision specifies that the Dual Duties Rates, calculated by reference to the “ordinary base hourly wage rate” of the absent employee, is paid in addition to the “loaded rate of pay” of the employee who receives the rates.

[149] If the Dual Duties Rates was intended to be calculated by reference to the loaded hourly rate of the absent employee, it would have been simple to say so and the fact that the method of calculation is expressed in a starkly different manner than the provision which requires it be paid in addition to the loaded hourly rate of the employee who is to receive the rates tells against the construction advanced by the Unions.

[150] Turning to the context of the 2019 – 2022 Agreement as a whole, the term “ordinary base hourly rate” is not defined in that Agreement. However, the definition of Full Time Employee refers to an employee who works 38 ordinary hours per week. The definitions of Part Time Employee and Casual Employee also provide for an hourly rate for hours worked to be calculated by dividing the weekly rate for a full time employee, by 38. In my view, the resulting amount is the “ordinary base hourly rate” for the purposes of calculating penalty

rates and other loadings prescribed by the Agreement. This is clear from the provisions of the 2019 – 2022 Agreement in relation to Annual Leave, Personal/Carers Leave, Statutory Holidays and Overtime which are discussed below.

[151] The hours of work provisions in the 2019 – 2022 Agreement make clear that “*ordinary hours of work*” may be worked on any day of the week including on Saturdays and Sundays. Ordinary hours worked on Saturdays and Sundays attract a penalty rate with ordinary hours on Saturdays paid for at the rate of “*one and one-half times the ordinary rate*” and Sundays “*at the ordinary rate of double time*”.

[152] The manner in which the Saturday rate is expressed makes it clear that the loading is not part of the ordinary rate, but rather is calculated by reference to it. The manner in which the Sunday rate is expressed is ambiguous and leaves open the possibility that the ordinary rate on Sunday is double time. However, when the Sunday rate is considered in the context of the Agreement as a whole, it is clear that it comprises the ordinary hourly rate plus a loading and the loading is not part of the ordinary rate but rather is paid in recognition of the day of the week the ordinary hours are worked.

[153] This is clear from the provisions of clause 5.1(g) that the ordinary wage rate excludes shift premiums and weekend penalty rates. This is also indicated by clause 5.3(d) which provides that Personal/Carers Leave is paid at ordinary rates for rostered hours on the particular day of approved absence and clause 5.2 which makes clear that weekend penalty rates are not paid in addition to public holiday rates. Finally, clause 4.2 Overtime, provides that overtime rates are calculated by reference to the ordinary rate and are paid in substitution for, and not in addition to, penalty payments for ordinary hours on weekends.

[154] If the Dual Duties Rates were required to be calculated by reference to the actual rate of pay that the absent employee would have received had he or she worked the shift, it would have been easy to indicate this. Further, it would not have been necessary to include the term “*base*” and that term as it appears in paragraph 2 of clause 3.4(e) would have no work to do. The construction I favour is also supported by previous iterations of the provision. In the 2009 – 2011 Agreement, the Dual Duties Rates were set by reference to the “*equivalent payment*” that would have been received by the absent employee. In the 2011 – 2014 Agreement this method of calculating the Dual Duties Rates was altered, and the rates were set by reference to the absent employee’s “*ordinary hourly rate*” paid in addition to the ordinary hourly rate of the employee receiving the rates. In the 2015 – 2017 Agreement this calculation method was altered, and the method of setting the Dual Duties Rates was retained and there was a change in that it was to be paid in addition to the loaded hourly rate of the employee receiving the rates.

[155] There is no evidence to suggest that there was an intention by either party to alter the method of calculating the Dual Duties Rates by using the actual loaded rate of the absent employee. The fact that the method of calculating the rates continued to be by reference to the absent employee’s “*ordinary hourly rate*” paid in addition to the “*loaded hourly rate*” of the employee receiving the rates, indicates that there was no such intention.

[156] Finally, I do not accept that the fact that Transdev has altered its pay and rostering arrangements so that overtime hours are allocated to weekends, changes the proper construction of the Agreement. The Agreement allows for ordinary hours to be worked on any day of the week Monday to Sunday, and the overtime provisions in the Agreement simply

define overtime as time worked outside or in excess of the already rostered ordinary hours for the day. By virtue of clause 4.1 of the 2019 – 2022 Agreement, ordinary hours for full time employees are a minimum of six hours and a maximum of 11 hours and 24 minutes per day and by virtue of clause 4.1(b) ordinary hours to a maximum of 38 per week may be worked. Clause 4.1(h) enables the Company to roster overtime provided that the additional hours are reasonable.

[157] It is open to Transdev to roster all ordinary hours, between Monday and Sunday, provided they are within the parameters in clauses 4.1(a) and (b). It is also open to Transdev to roster employees so that ordinary hours are worked between Monday and Friday. It is open to Transdev to roster all ordinary hours from Monday to Friday and to roster overtime on weekends, so that the penalty rates for ordinary hours worked on weekends are not paid and overtime rates are paid instead. I accept that the outcome of this could be that the number of days in a week that attract penalty payments is reduced. However, this is permitted by the terms of the 2019 – 2022 Agreement and is not a basis for construing clause 3.4(e) in a different way.

[158] Accordingly, the proper construction of the Agreement is that the Dual Duties Rates are calculated by reference to the base hourly wage rate for the absent employee and loadings for weekend work are not included in that rate.

## CONCLUSION

[159] For these reasons, I answer the Questions for arbitration as follows:

*Question 1:* Should the Dual Duties Rates in clause 3.4(e) of the Agreement be paid on every minute the Customer Service Officer is rostered on that particular shift in the event that they are unexpectedly absent?

*Answer:* No.

*Question 2:* If Dual Duties Rates in clause 3.4(e) of the Agreement do not have to be paid on every minute of the absent Customer Service Officer's shift, under what circumstances should those rates be paid?

Dual Duties Rates are paid for all time during which the Master and Deckhand on a shift are actually performing the duties of a CSO who was rostered on that shift but is unexpectedly absent for all or part of their rostered shift, where those duties are in addition to the duties of the Master and the Deckhand and are not within the exclusion in clause 4.3(e) 3.

*Question 3:* Where employees are undertaking dual duties on weekends, are the Dual Duties Rates in clause 3.4(e) of the Agreement calculated with reference to the rates for ordinary hours worked on a Saturday and Sunday prescribed by clause 4.1(g) of the Agreement?"

*Answer:* No. The rates for ordinary hours worked on Saturdays and Sundays prescribed by clause 4.1(g) are not included in "the absent employee's ordinary base

*hourly wage rate*” for the purposes of calculating Dual Duties rates as provided in clause 4.3(e) 2.



## DEPUTY PRESIDENT

### *Appearances:*

Ms T Ellis for the AMOU.

Mr J Miners for the MUA.

Mr M Stokes for the Respondent.

### *Hearing details:*

28 September.

2020.

Brisbane.

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<sup>1</sup> [2017] FWCFB 4487.

<sup>2</sup> [2014] NSWCA 184 at [71] – [85].

<sup>3</sup> *Manufacturers’ Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75-343.

<sup>4</sup> *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKPC 6; [2005] 1 All ER 667 at [64].

<sup>5</sup> *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [78].

<sup>6</sup> *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391 per Lord Hoffman, approved in *Campbell v R* [2008] NSWCCA 214; 73 NSWLR 272 at [48] (Spiegelman CJ, Weinberg AJA and Simpson J agreeing)

<sup>7</sup> *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603 at [17] cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR at [71] – [85].

<sup>8</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40].

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<sup>9</sup> Kucks v CSR Limited (1996) 66 IR 182 at 184.