DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010
SEAGOING INDUSTRY AWARD 2010
MARINE TOWAGE AWARD 2010

(AM2016/5)

Port authorities

VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER CAMBRIDGE MELBOURNE, 24 FEBRUARY 2017

Four yearly review of modern awards – Ports, Harbours and Enclosed Water Vessels Award 2010 – Seagoing Industry Award 2010 – Marine Towage Award 2010 – Coverage of Award – Changes to classifications – Fair Work Act 2009, ss. 134, 138, 156 and 163.

Decision of Vice President Watson

Introduction

[1] On 23 March 2016 the President directed that a Full Bench hear and determine the substantive issues raised during the 4 yearly review of modern awards in respect of the *Ports, Harbours and Enclosed Water Vessels Award 2010* (the PHEWV Award) and the *Seagoing Industry Award* 2010 (the Seagoing Award).

[2] On 26 April 2016 the President issued directions that the Full Bench also hear and finalise the substantive issues raised in correspondence from Sea Swift Pty Ltd (Sea Swift) on 15 April 2016 in relation to the PHEWV Award, the Seagoing Award and the *Marine Towage Award 2010* (the Towage Award). A hearing on these matters was held on 24 & 25 October 2016 in Sydney.

[3] On 21 October 2016 The Australian Institute of Marine and Power Engineers (AIMPE), The Australian Maritime Officers' Union (AMOU) and Sea Swift consented to CSL Australia Pty Ltd's (CSL) proposal to refer AIMPE's application to add the Electrician/Electro Technical Officer classification at the Second Mate/Second Engineer grading in Part A of the Seagoing Award to a conference before Commissioner Cambridge sitting as a single member. That conference was convened on 29 November 2016. The Commissioner subsequently provided a report on those matters to the Full Bench.

[4] Other claims originally made by AIMPE by email of 2 March 2015 were not pursued. These included a claim for parity between the Engineer Classification at 100% relativity to the Master under the PHEWV Award, the inclusion of two Passenger Vessel schedules of classifications into the Seagoing Award and the inclusion of classifications for Fitters and Boilermakers in the Dry Cargo schedules of the Seagoing Award.

[5] An initial draft of this decision was provided to the other members of the Full Bench in early December 2016. As at the date of publishing this decision the other members have not provided their decision to me for publication or advised me of when they will be able to publish their decision.

[6] The award review is required to be conducted in accordance with s.156 of the *Fair Work Act 2009* (the Act). Other provisions of the Act are also relevant including s.138 and the modern awards objective in s.134.

[7] A number of Full Benches have set out the approach to matters of this type in relation to the 4 yearly review.[1] I apply the approach outlined in those decisions to the determination of the issues in relation to this Award.

[8] In reviewing each award the Commission must have regard to the modern awards objective in s.134 of the Act. The modern awards objective is to "ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions", taking into account the particular considerations identified in ss.134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.

[9] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[10] Section 138 of the Act emphasises the importance of the modern awards objective in these terms:

> "A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[11] What is "necessary" in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the submissions and evidence directed to those considerations.

Issues to be determined

[12] The issues that the Bench has been directed to determine concern the following:

1. Coverage Issues

Sea Swift's Proposed Amendments to the PHEWV Award

(a) Clause 3.2

Delete: "above" and insert "following".

(b) Clause 3.3

Delete "(f) the Seagoing Industry Award 2016; and",

and re-number "(g)" as "(f)".

(c) Insert new clause 3.3A:

"3.3A The Award does not cover employees engaged in the operation of

(a) vessels as described in clause 3.2 of the Seagoing Industry Award 2016, and who are employed in the classifications in clause 10 and clause A.1.1 of that Award;

(b) vessels engaged in operations as described in clause 3.2(b) of the Marine Towage Award 2016".

Sea Swift's Proposed Amendments to the Seagoing Award

(a) Clause 3.5(d)

Delete:

"(iii) the Marine Towage Award 2016;"

and:

"(vi) the Ports Harbours and Enclosed Water Vessels Award 2016".

and re-number Clause 3.5(d) accordingly.

(b) Insert new Clause 3.5A:

"3.5A This Award does not cover the operation of:

(a) vessels as described in clause 3.2 of the Ports, Harbours and Enclosed Water Vessels Award 2016;

(b) vessels engaged in operations as described in clause 3.2(b) of the Marine Towage Award 2016."

Sea Swift's Proposed Amendments to the Towage Award

Clause 3.3(a)

Delete:

"(iii) the Ports Harbours and Enclosed Water Vessels Award 2016; (iv) the Seagoing Industry Award 2016; "

2. Small ship classification under the Seagoing Award

Sea Swift's Proposed Amendments

(a) Clause 10.1(a)

Delete "(a) Dry cargo vessels of up to 19,000 tonnes (D.C. Cat 1)"

Insert: "(a) Dry cargo vessels of up to 5,000 tonnes

Classification	Minimum salary	Aggregate overtime component	Aggregate annual salary
Master	46,587	17,630	64,217
Engineer	44,372	16,792	61,164
Mate	44,372	16,792	61,164
General Purpose Hand, Deckhand, Greaser, Passenger Attendant, Turnstile Attendant, Boating Attendant, Host, Fireman, Trimmer, Linesman, Cook, Sailor, Able Seaman, Leading Hand	41,990	15,890	57,880

Insert "(b) Dry cargo vessels of between 5,000 and 19,000 tonnes (D.C. Cat 1)" and re-number subclauses (b) to (g) accordingly.

AIMPE's Proposed Amendments

(a) Clause 10.1(a)

Insert:

"(a) Dry Cargo Vessels of up to 6000 tonnes

Classification	Manning	Minimum salary	Aggregate overtime component	Aggregate annual salary
Master				
Chief Engineer				
First mate/First engineer				
Second				

mate/Second engineer				

3. Casual classification under the Seagoing Award

Sea Swift's Proposed Amendments

(a) Clause 7.1(a)

Insert "(iii) Casual employment".

Clause 7.1(b)

Delete "or relief" and insert "relief or casual".

Clause 7.4

Insert:

"7.4 Casual Employees

(a) A casual employee is an employee specifically engaged as such.

(b) A casual employee receives, on a pro-rata basis, equivalent pay and conditions to those of full time employees.

(c) Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

(d) On each occasion a casual is required to attend work they are entitled to a minimum payment for three hours' work."

4. Electrician/Electro Technical Officer classifications

AIMPE proposes the insertion of two additional classifications. The Electrician is proposed to be equated with the rate for Third Mate/Third Engineer and an appropriate definition is proposed. The level and definition are agreed by employer representatives. The Electro Technical Officer is proposed to be set at the same level as the Second Mate/Second Engineer level. The rate and definition is also agreed with employer representatives.

[13] Evidence was led by the following persons:

- Stephen Bradley Ainscough (Director – MER Solutions Australia Pty Ltd)
- Ben Cooper (Associate Director – Livingstones Australia)
- Lino Bruno (Chief Operating Officer – Sea Swift)
- Henning Christiansen (Director of Professional Development – AIMPE)
- Ian Ives (Director, Transhipping & New Business Development – CSL)

[14] I consider each of the above matters in turn.

Coverage Issues

[15] Sea Swift makes this application arising out of a Full Bench decision in *MUA and others v Sea Swift Pty Ltd.*[2] It submits that the decision reveals a significant anomaly in the coverage provisions of the maritime awards. Sea Swift conducts various types of maritime activities under a single corporate umbrella. If the activities were carried out separately, they would be covered by the awards applicable to each type of operation. Because the predominant part of the business has been found by the Full Bench to be covered by the Seagoing Award, that award applies to all of its operations. Sea Swift submits that this outcome was not intended by the Full Bench in the award modernisation process and it places Sea Swift at a competitive disadvantage in conducting the operations other than seagoing operations.

[16] Other employers support these variations. They submit that where an employer conducts an operation that falls within a particular award, that award should apply to the employees in that operation regardless of whether other awards may apply to different parts of the employer's operations.

[17] The maritime unions oppose the variations and submit that the outcome of the Full Bench decision is not illogical, unfair, nor contrary to the modern awards objective.

[18] The Full Bench decision in the Sea Swift case considered the legal effect of the various coverage clauses. It did not express a view as to the appropriateness of the outcome it held flowed from the wording of the provisions. There are significant differences in the terms of the various maritime awards reflecting the different nature of the operations and the different requirements of employees. For example, the Seagoing Award is premised on lengthy voyages. Employees under that award do not operate from a port and return to the port and their homes each day.

[19] In my view, it is appropriate that an employer that conducts various types of maritime activities be covered by the award that is relevant to each of those maritime activities. If an employer conducts different types of operations, then different award safety nets should apply to each of those different operations. Reflecting that principle in the coverage clauses of the relevant awards is in my view consistent with the modern awards objective. I consider that the variations are necessary to achieve the modern awards objective.

Small Ships Schedule

[20] Sea Swift and AIMPE seek variations to the classification structure of the Seagoing Award to provide for a different schedule of wage rates for vessels below a certain level of tonnage. Currently the lowest schedule is for ships of less than 19,000 tonnes.

[21] Sea Swift submits that prior to the introduction of modern awards, a previous award, known as the *Self-propelled Barge and Small Ships Industry Award* (Small Ships Award) covered a company that operated small vessels of this type and other operators, such as Sea Swift, operated within State jurisdictions. Sea Swift led evidence to the effect that it operates small vessels involved in local cargo transport to various small ports that do not have

maritime infrastructure or shore-based maritime employees. The duties of its employees are different to other maritime employees and the qualifications such employees are required to hold are different to those required to be held by seagoing maritime employees. It currently operates 12 vessels ranging from 50 tonnes to 3200 tonnes.

[22] AIMPE submits that the termination of the small ships award and the resultant lowest category of vessels of up to 19,000 tonnes have resulted in an anomaly for vessels which are much smaller. These include ferries that perform cargo operations between the Australian mainland and islands and trans-shipment vessels operating in the Gulf of Carpentaria and Spencer Gulf. AIMPE submits that now the coverage of the Seagoing Award is clarified for such small vessels, the inclusion of a small ships schedule would rectify the anomaly arising from the establishment of modern awards.

[23] Other employers support the inclusion of a schedule that more properly reflects the different characteristics of ship operations and the duties and responsibilities of employees engaged on such vessels.

[24] The MUA and the AMOU oppose the variations. They submit that:

- Sea Swift has sought to avoid coverage under the Seagoing Award and the Small Ships Award;
- the award modernisation Full Bench was aware of the Small Ships Award when it settled the scope of the Seagoing Award; and
- the schedule now sought differs from that previously reflected in the Small Ships Award and there is no work value basis for justifying a lesser level of minimum salaries.

[25] Supplementary submissions were filed by Sea Swift and the MUA on the history of the wage levels in the Small Ships Award. That history reveals at least two substantial reviews of wage rates in the award. In 1991, arising from several conferences before Commissioner Fogarty, revised wage rates were struck by agreement with the express intention of severing any nexus with the *Maritime Industry Seagoing Award*. In 2001, when required to ensure that the rates in the award were properly fixed minimum rates, Commissioner Eames approved the agreed wage rates that were lower than the rates in the *Maritime Industry Seagoing Award*. It appears that at all relevant times the award only applied to named respondents which were companies within the Perkins Shipping Group.

[26] As most issues regarding the scope and classifications under this award were subject to widespread agreement during the award modernisation stage, and small ship operators such as Sea Swift did not participate in the proceedings, the appropriateness of the under 19,000 schedule for much smaller vessels was not considered by the Full Bench. The review provides a basis for a consideration of that issue.

[27] In my view the different nature of operations such as those dealt with in evidence and the different qualifications required to work on such vessels provide a justification for a separate schedule for small ships in the Seagoing Award. There is a history of lower minimum rates for smaller ships based on agreed work value comparisons. In my view, the justification for lower rates still exists, and there is no case to alter the recognition of the lower work value. Although agreement on the lower rates is now confined to one of the maritime unions, it is appropriate that the historical position be continued.

[28] For these reasons I consider that the variations are necessary to achieve the modern awards objective. I would grant the applications in principle and require further submissions as to the details of the small ships schedule including the setting of wage rates on work value grounds. If the other members of the Full Bench do not agree with my conclusion such a process would have no utility.

Casual Employees

[29] Sea Swift seeks the insertion of a classification for casual employees in addition to the relief classification rate in the award. It submits that under previous award coverage the classification was described as "casual/relief employees" and it seeks to employ persons as casuals who operate towage or prawn trawler mother ship activities on a seasonal basis. The variation is generally supported by employers and opposed by the unions. However the unions acknowledge that employment of persons on a seasonal or other temporary basis is able to occur under the award.

[30] In my view a case for the amendments has not been made out. The intentions of the company can be fulfilled under the current award provisions. The variation is not necessary to achieve the modern awards objective.

New Classifications

[31] I agree that the new classifications, as agreed between the parties, are necessary to achieve the modern awards objective and should be reflected in the award.

Orders

[32] Orders reflecting the conclusions of the Full Bench should be made by Commissioner Cambridge.

Decision of Deputy President Gooley and Commissioner Cambridge

Coverage, Casual Employees and New Classifications

[33] We agree with the conclusions reached by Vice President Watson in relation to the coverage of the awards, casual employees and the new classifications. We agree with the reasons for his conclusions except that we do not accept his assumption that the *Seagoing Industry Award 2010*[3] was premised on lengthy voyages. This part of his reasoning is not supported by the evidence before the Full Bench nor the history of the award. However this difference in reasoning does not impact on our conclusions.

Small Ships Schedule

[34] Vice President Watson in his decision has set out the details of the applications by Sea Swift and AIMPE to vary the *Seagoing Award* to incorporate a small ships schedule for dry cargo vessels and we do not repeat those details here.

[35] Sea Swift's proposed rates are derived from the rates in the *Ports, Harbours and Enclosed Water Vessels Award 2010* as they were at the date of the application. AIMPE does not propose specific rates but seeks rates based on the *Self-propelled Barges and Small Ships Award 2001*[4] adjusted in accordance with the relevant national wage adjustments.

[36] Currently employees engaged on vessels in the proposed small ships schedule would be classified and paid in accordance with clause 13.1(a) of the *Seagoing Award*.

[37] Sea Swift is proposing that employees' rates of pay be significantly reduced. For example a master excluding the overtime component would have his or her base rate reduced from $65,576 per year to $46,587 per year. Sea Swift submitted that if there were any employees affected by the change then transitional arrangements can be put in place.

Legislative Framework

[38] In addition to the general principles[5] applying to the 4 yearly review, s.156(3) of the Act provides that in the 4 yearly review of modern awards the Commission may only vary minimum rates of pay if the Commission is satisfied that the variation is justified by work value reasons.

[39] Work value reasons are reasons related to any of the following:

(a) The nature of the work;
(b) The level of skill and responsibility involved in doing the work;
(c) The conditions under which work is done.

Sea Swift's Evidence

[40] In support of its submissions Sea Swift relied upon the evidence of Mr Lino Bruno the Chief Operating Officer of Sea Swift, Mr Stephen Ainscough the Director of MER Solutions Australia Pty Ltd and Mr Ben Cooper Associate Director of Livingstones Australia.

Mr Lino Bruno

[41] Mr Bruno gave evidence that the qualification of a master can vary depending on the area the vessel operates in.[6] It was his evidence that the National Standards for Commercial Vehicles determines the qualifications required to be held by crew based on length, tonnage and location of operations of the vessel.[7] He said that a key factor in determining the level of qualifications in parts B and D of the National Standards is whether the vessel is engaged in "inshore operations" which allows for a lower level of qualifications.[8] He said all Sea Swift's seagoing cargo operations are conducted as "inshore operations." It was his evidence that the qualifications required for the self-propelled barges was a Master Class 4 and for the chief engineer a Marine Engine Driver 3.[9]

[42] Mr Bruno said that the nature of "the work undertaken by Sea Swift marine staff is different to that of other marine employees (particularly sea-going marine employees), due principally to the nature of [their] operations, which require employees to perform a wide range of shore-based duties in the loading and unloading of vessels in port, and the delivery of goods and services to the small outlying communities upon arrival at those locations."[10]

[43] Mr Bruno said that the deckhands are required to hold any of the following: "forklift ticket, doggers' ticket and/or crane driver's ticket."[11] Typical duties can included "customer service functions, forklift operation, handling frozen goods, freight handling and consolidation, including required documentation, operation of a crane, re-packing of freight, handing of live seafood (fish and crayfish), delivery of sea freight on shore by forklift from a barge and handling of bulk liquids using hoses and cargo pumps."[12] Crew may also be required to drive a fuel truck or a truck or all terrain forklifts.[13] In addition two of the cargo vessels carry passengers and all employees are required to perform a multitude of tasks.[14]

[44] Mr Bruno said that the vessels operated by Sea Swift require smaller crews; lower crew qualifications; duties for masters and engineers are less onerous; duties for deckhands include shore side duties; the locality and sea conditions encountered differ to larger vessels as they are inshore and near-coastal at all time; crew spend less time away from the home port; and the vessels have lower cargo carrying capacity and hence lower income generating capacity.

Mr Stephen Ainscough

[45] Mr Ainscough is the Director of a multidisciplinary maritime consultancy and specialised maritime law firm. He gave evidence about the training and certification of seafarers.[15]

[46] It was his evidence that the "qualification requirements for seafarers are characterised by increasingly difficult training, experience and examination requirements for seafarers to comply with as vessels increase in size, complexity and operational area."[16] It was his evidence "the larger the ship and the further the ship is from shore, the greater the risk to life and property.[17] This means that skill levels increase. It was his evidence that there are different requirements for commercial seafarers engaged on international voyages and those engaged on domestic commercial vessels.[18]

[47] The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) sets the minimum standards relating to training, certification and watchkeeping for seafarers on merchant ships. Australia has given effect to this convention by the *Navigation Act 2012* (Cth.). The certification of Domestic Commercial Vessels is given effect to by the *Maritime Safety (Domestic Commercial Vessels) National Law Act 2012* (Cth).[19]

[48] Both systems follow a similar process. Seafarers must meet medical and educational requirements, have practical experience and pass an oral examination.[20] However the qualification requirements may vary. Mr Ainscough gave evidence that DCV certificate holders are awarded a certificate 3 or 4 level qualification whereas STCW Class 1 certificate of competency holders are awarded a degree or advance diploma qualification.[21] Holders of STCW qualifications can be engaged on vessels that trade internationally, in contrast those who hold DVC qualifications can only crew vessels that operate in Australia territorial waters.[22] It was his evidence that the *Seagoing Award* classification class of 0-19,000 tonnes is "an extremely wide class which would encompass a large range of vessels as well as vessel types."[23] It was his evidence that as a guide[24], domestic vessels up to 5000 tonnes excluding small gas and chemical tankers "could be considered as ships that trade exclusively in Australian waters" and could be managed and operated by officers with DCV qualifications.[25] He accepted that this was a guide and "although there is no clear line based purely on

tonnage, once the size of the vessel exceeds that level, the complexity and size of the vessel and other factors [he has] identified render it unlikely that a DCV qualified seafarer would be able to operate such a vessel, even if it were legal to do so."[26]

[49] In cross examination Mr Ainscough accepted that under the *Navigation Act 2012* for Ratings the certification requirements are independent of the size of the ship and the area of operation of the ship.[27]

[50] He further accepted that general purpose hands are able to work on deck or in the engine room if the vessel is less than 80 metres long in waters to the outer limits of the Exclusive Economic Zone (EEZ) which is approximately 200 nautical miles from the coast and in the engine room only if the propulsion power is less than 3000 kW.[28] Further for all classifications up to Master there is no linkage to tonnage as the link is to engine power.[29] Mr Ainscough argued that engine capacity is correlated with length of the ship.[30]

[51] It was his evidence that the 5000 tonne cut off was "a reasonable guide depending on what's been carried on the ship and where it's going."[31]

[52] The certificates required of masters are determined by the length of the vessel except for those vessels operating on inland waters. The lengths are less than 24 metres, less than 35 metres, less than 80 metres.[32]

[53] Those vessels operate near coastal, which is defined as being within the EEZ.[33] Mr Ainscough did not consider this definition when preparing his evidence and only had regard to vessels which operate within 12 miles of the shore.[34] Similarly while Mr Ainscough uses dead tonne weight as his discriminator the certification requirements under the *Navigation Act 2012* uses gross tonnage which Mr Ainscough accepted is not a measure of weight but a measure of volume.[35] However it was Mr Ainscough's evidence that these measures correlate.[36]

[54] Mr Ainscough was asked to prepare a list of cargo vessels currently trading on the Australian coast which are under 5000 DWT excluding those operated by Sea Swift.[37] No list was provided to the Full Bench. It was his evidence that there were a "few hundred" such ships but if certain vessels were excluded, like barges, then there were less than 20 such vessels.[38] For the purpose of this exercise Mr Ainscough only considered vessels operating within 12 miles of the coast.[39]

Mr Ben Cooper

[55] Mr Cooper exhibited a number of documents and provided a comparison of the salaries paid under the *Small Ships Award* and the *Seagoing Award*.[40]

Sea Swift's submissions

[56] Sea Swift submitted that prior to the making of the *Seagoing Award* work of the kind performed on its vessels was within the scope of the *Small Ships Award*. At the time of the making of modern award only Perkins Shipping Group, which was subsequently taken over by Toll, was a respondent to the *Small Ships Award*. Sea Swift submitted that it operated barges and small ships in many of the same areas as Sea Swift and in very similar vessels.[41]

[57] The *Small Ships Award* applied "in or in connection with the operation of self-propelled barges and small ships, which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers)."[42]

[58] For ships of less than 500 tonnes dead weight the classifications included Master, Chief Officer, Chief Engineer and AB. For ships of more than 500 tonnes the classifications were Master, Chief Officer, Second Officer, Chief Engineer, Second Engineer, Bosun, AB, Ordinary Seaman and Seaman/Cook.

[59] Sea Swift was not covered by the *Small Ships Award*.[43] It submitted that at the time of award modernisation and the making of the *Seagoing Award* the Full Bench was not informed that there was a fleet of ships operating in Northern Australia outside of federal award coverage.

[60] Sea Swift has two line haul vessels of 3,200 tonnes and 2768 tonnes respectively and a small vessel of 50 tonnes engaged in regular cargo. It has self-propelled barges of between 230 to 608 tonnes and one barge of 1284 tonnes. It has fishery support vessels which are 884 and 1208 tonnes respectively.[44]

[61] It submitted that the vessels operate in in-shore and inter-island seas and that the nature of its employees' work is significantly different to other marine employees on significantly larger vessels. Sea Swift staff are required to perform shore based duties such as loading and unloading vessels in part and the delivery of goods and services to small outlying communities.[45]

[62] Sea Swift submitted that the qualifications required of crew members varies significantly as the vessel size reduces. It submitted that a Master for a 19,000 tonne vessel requires a Master Class 1 qualification whereas for its vessels the highest qualification it requires is a Master Class 3.[46]

[63] It submitted that there was a similar reduction in qualifications for engineers and other crew by reference to the size of the vessel.[47]

[64] It submitted that the *Seagoing Award* recognised the differences in salary levels by reference to tonnage of the vessels and it is appropriate to restore a category for small ships for salary purposes. This it says would accommodate the existence of ships which are dramatically smaller and less productive than the lowest category in the current award.[48]

[65] It submitted that scope of the classification structure in the *Seagoing Award* covers a "massive range of actual experience, knowledge, experience, training and responsibility and a massive range of localities and dangers."[49] It was submitted that the current award either grossly undervalues the work of people at the top end of the scale or it grossly overvalues the work of people who are at the bottom end of the scale.[50]

[66] It was submitted that there is a significant difference between those who are required to have DCV qualifications and those who are required to have STCW qualifications and that the cut off point for this difference was 5000 tonnes.[51]

[67] It was submitted that the current classifications which are independent of the qualifications required by DCV or the STCW cannot meet the requirements of a modern award.[52]

[68] It submitted that the award modernisation process saw a significant increase in the rates payable to those employed on small ships and that increase was not arbitrated. There was, it said, no assessment of appropriate work values at that time.[53] It relied on this submission to submit that a less onerous burden was placed on Sea Swift to support the change it proposed as it was seeking to reverse a change that should not have been made in the first place.[54]

[69] The salary rates proposed by Sea Swift are drawn from the minimum rates in the *PHEWV Award* which it submitted also applies to passenger vessels that go to sea in the course of their operations.[55] It submitted that it was also appropriate to include, in addition to the proposed minimum rates, an aggregate overtime component.

[70] In its oral submissions, Sea Swift proposed that the Full Bench could make an in principle decision as to whether a small ships classification should be included in the *Seagoing Award* and then permit the parties to have discussions to see if there could be an agreement about the appropriate rates.[56]

[71] In its supplementary submissions Sea Swift noted that, in 1991, the maritime unions applied for and were granted the second structural efficiency increase[57] arising from the August 1989 National Wage Case for the *Small Ships Award*.[58] The parties at that time advised that they were in negotiations for a new award.

[72] At this time the *Small Ships Award* named specific ships and the rates applying to those ships varied. [59]

[73] It submitted that a clause in the *Small Ships Award* which required a review of wage rates on the same basis as applied under the *Maritime Industry Seagoing Award* and an application of any variation to the *Maritime Industry Seagoing Award* to the *Small Ships Award* was deleted.[60] These changes were made by consent.

[74] It was submitted that the wage rates were required to be determined by reference to work value criteria applying to the work undertaken by employees. It said that by breaking the nexus with the *Maritime Industry Seagoing Award* from 1991, the *Small Ships Award* "assumed the standing of a properly fixed minimum rates award applicable to a range of small self-propelled barges and vessels trading in the same waters and in some cases applying to the same ships as are currently in contention in these proceedings."[61]

[75] It submitted that "there was no ongoing relativity as between those wage rates and the *Maritime Industry Seagoing Award*."[62]

[76] The 1991 *Small Ships Award* was said to be an industry award which remained in force until it was rescinded under the award modernisation process.

[77] Sea Swift submitted that the decision of the award modernisation Full Bench decision to not include a small ships reference in the *Seagoing Award* was both erroneous and anomalous.[63] It therefore submitted that in contrast the circumstances considered by the Full

Bench[64] when reviewing the *Vehicle Manufacturing Award*, this case does not involve a mere disagreement as to a previous decision but "rather the erroneous presumption on the part of the Full Bench that for the purposes of a safety net modern award for all vessels engaged in sea-going activities as defined, the lowest level of classification in the *Maritime Industry Seagoing Award* as it then stood was sufficient and appropriate."[65]

[78] Sea Swift's submissions in respect of the modern award objective focused on the coverage of the Awards and did not address how its proposal in relation to the small ships schedule was necessary to meet the modern award objective. [66]

AIMPE's submissions

[79] It submitted that its application differed from Sea Swift's in relation to tonnage and proposed wages. It submitted that Sea Swift's proposal was not accurate for engineers. It submitted that engineering qualifications are based on propulsion power of the vessel rather than size of the vessel. It rejected Sea Swifts submission about the passenger vessels and the *PHEWV Award*. Sea Swift had submitted that the *PHEWV Award* applied to Australian passenger vessels which nonetheless go to sea to support its application that the rates drawn from the *PHEWV Award* are the appropriate rates for the small ships category.[67] AIMPE submitted that the *Seagoing Award* applied to vessels of similar size to that operated by Sea Swift performing similar functions. The Sealink ferries operating between Kangaroo Island and the mainland was an example given by AIMPE.[68]

Martime Industry of Australia Ltd's submissions

[80] Marine Industry Australia Ltd supported the inclusion of small ships schedule in the *Seagoing Award*.[69] It submitted that it was anomalous that the smallest category of seagoing dry cargo vessels was up to 19,000 tonnes. It submitted that the decision of the Full Bench in *Maritime Union of Australia and ors v Sea Swift*[70] had altered a previous industry understanding about the interaction of the *PHEWV Award* and the *Seagoing Award*. It submitted that the proposed variations would satisfy the modern award objective in particular it would impact on productivity, employment costs and the regulatory burden. It relied on the submissions of Sea Swift and AIMPEE. In its oral submissions MIA submitted that reliance on the technical details in the AMSA NSCV Part D may not be of much assistance. It said that "the small ships award is a really good reflection of the wage rates in the industry and levels of different qualifications and skills that are required at different sized ships." MIA called no evidence to support is submissions

The Maritime Union of Australia's submissions

[81] The MUA opposed both applications.[71] It submitted that the Full Bench was aware of the *Small Ships Award* during the award modernisation process.[72] At that time the *Small Ships Award* had one respondent.[73] It submitted that Toll, which took over the business of that respondent, had made enterprise agreements and the award used for the BOOT assessment was the *Seagoing Award*.[74]

[82] It further submitted that the *Small Ships Award* applied to vessels of less than 500 tonnes dead weight and over 500 tonnes dead weight. It submitted that the new classification structure applies to very different vessels. It submitted that that the category of up to 500 tonnes was used in the *Small Ships Award* because these vessels did not need safe manning

certificates if they operated with 30 nautical miles of a designated port. This, it said, did not describe the work of Sea Swift's line haul vessels which carry the majority of Sea Swift's marine freight.[75]

[83] It further submitted that Sea Swift had not provided any work value reasons as to why the minimum rate for this work should be reduced.[76] It submitted that the evidence of Mr Bruno was that employees in the classification GPH in fact performed a greater range of duties.[77]

[84] It submitted Sea Swift had not provided evidence that compared the work performed on vessels of up to 5000 tonnes and those between 5000 and 19000 tonnes. It submitted that there was no different marine qualification for IRs/GPHs when working on these vessels.[78] It submitted that AIMPE's application was premised on the existence of the *Small Ships Award* and was not supported by any evidence of a work value nature as required by the Act.[79]

[85] In its supplementary submissions in reply to the final submissions of Sea Swift, it rejected the submission that the rates were properly fixed minimum rates in 1991. It submitted that the *Small Ships Award* was converted from a paid rates award to a minimum rates award in 2001 and at that time it only applied to Perkins Shipping.[80]

[86] It rejected the submission that the use of the term industry in the award title converted the award into an industry award.[81]

[87] It relied upon the decision of the Full Bench in the 4 yearly review of the *Vehicle Manufacturing Award* and submitted that Sea Swift had not "placed before the FWC anything that suggests that the AIRC did not intend the SPB Award to be terminated and for employees to be covered by the *Seagoing Award*."[82] It submitted that there was no evidence of a mistake by the AIRC.

The Maritime Officers' Union's submissions

[88] The AMOU opposed both applications.[83]

[89] It submitted that the award modernisation Full Bench was aware of the *Small Ships Award*.[84] It submitted that there was no work value evidence about Masters. Further it submitted that neither Sea Swift or AMPIE have provided work value evidence that justifies the gross delineations in the pay rates below and above 5000 tonnes or 6000 tonnes.[85] It submitted that there was no evidence to show how the proposed new classification structure would meet the modern award objective. It submitted that the evidence of a single employer does not support a variation to an industry award. [86]

CSL Australia Pty Ltd's submissions

[90] CSL did not oppose either application.[87]

The history of award regulation.

[91] The Award Modernisation process which commenced in 2008 saw the creation of 5 maritime industry awards, including the *Seagoing Award*. Prior to the making of this award relevantly for this part of the decision there were 2 federal awards regulating commercial

shipping namely the *Maritime Industry Seagoing Award 1999*[88] and the *Self-propelled Barge and Small Ships Industry Award 2001*[89].

[92] Both Awards were binding on named respondents with the *Small Ships Award* having one respondent namely Perkins Shipping Group.

[93] The early maritime industry seagoing awards provided for rates of pay for employees based on the category of vessels on which work was performed. The awards, until the making of the *Maritime Industry Modern Award 1989*, provided that named vessels were in particular categories. The awards provided for a process to be followed if new vessels owned by the respondents to the Award commenced operating.

[94] The 1989 Award provided for the first time for classifications for dry cargo vessels based on the ship tonnage namely up to 1900 tonnes, over 1900 tonnes and up to 39,000 tonnes and over 39000 tonnes.

[95] As a result of the review of Awards conducted under Item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth.), the Commission made the *Maritime Industry Seagoing (Interim) Award 1998* which replaced the *Modern Ships Award* and the *Maritime Industry Seagoing Award 1983*. The Interim Award continued to provide for classifications for dry cargo vessels based on tonnage.

[96] As part of that process the Commission was required to review the rates of pay because the predecessor awards had been paid rates awards. The parties to the Interim Award put a joint submission to the Commission about the appropriateness of the rates.[90]

[97] In the Paid Rates Review decision[91] the Full Bench said:

> "We have decided that in principle all awards which provide for rates of pay which are not operating, or not intended to operate, as minimum rates and which do not bear a proper work value relationship to award rates which are properly fixed minima, should be subject to a conversion process so that they do contain properly fixed minimum rates of pay."

[98] The parties jointly submitted that the starting point was the decision of the Commission in the review of the *TugBoat Industry (Consolidated) Award 1990* where Commissioner Wilks determined that for that award the rating classification was 92.5% of the *Metal, Engineering and Associated Industries Award 1998* C10 classification.[92] This was increased to 97.5% having regard to the nature of the industry. The Paid Rates Review then required internal relativities to remain unchanged.

[99] In his decision reviewing the *Masters and Deckhands Award 1992*, Vice President Ross, as he was then, accepted that the general purpose rating was the appropriate classification and it had been properly set at 92.5%. He then accepted that a general purpose rating in Freemantle was entitled to a loading of 5% for the nature of the industry while a general purpose rating in Port Hedland was entitled to 10% loading for the nature of the industry.[93]

[100] The parties in their submissions in relation to the relativities in the Interim Award took the Commission to the relevant Marine Orders and the additional qualifications required of a

rating on a vessel covered by the Interim Award, compared to the rating on a tug boat, to justify a higher relativity and those submissions were accepted by the Commission. The end result was that the Commission accepted that the appropriate relativity was 97.5% with an additional 10% having regard to the nature of the industry.

[101] The *Small Ships Award* was a paid rates awards and the award was also converted to a minimum rates award in 2001. We do not accept the submissions of Sea Swift that because structural efficiency increases flowed to the predecessor awards arising from the 1989 National Wage Case[1] that the rates were properly fixed minimum rates at that time. The principles established at the time set out how the structural efficiency principle applied to paid rates awards.[2] There is nothing in the *Small Ships Award* files that would support Sea Swift's submissions.

[102] Further while we accept that at this time the clause requiring a nexus with the other maritime awards was removed, it should be noted that when this occurred the following statement was made by Mr Saundry from the Northern Territory Confederation of Industry and Commerce:

> "and then, finally, at the last paragraph of clause 7, which refers to the relationship with the maritime industry, "Seagoing Award" is deleted. However I should place on the record that it is the agreement of the parties that the normal equation for adapting national wage increases to the unique structure of calculation of wages and allowances within the seagoing industry, is not opposed by the employers, and will be utilised for those purposes."[3]

[103] The *Self-Propelled Barge and Small Ships Award 1991* was reviewed by the Commission as part of the Award Simplification decision. The 1991 award provided for annualised salaries for particular ships and applied to named ships. For certain ships the rates incorporated an allowance for working cargo.[4]

[104] The 2001 decision of the Commission records that the position put by the parties was agreed. There is no reference in the decision to the relativities adopted in the award and no submissions were put to this Full Bench about this matter.[5] An examination of the file does not shed any light on what the agreed relativities were.

[105] Correspondence from the AMOU on the file advised that the unions and Perkins would prepare a draft version of the simplified Award "in line with the simplification of the "parent" Award the Maritime Industry Seagoing Award, which was approved by Comm Wilks".[6]

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[1] 30 IR 81

[2] Ibid at p105-106

[3] C No 20701 of 1991 Application by the AIMPE and others to vary re National Wage August 1989 – second increase - Transcript25/9/91 at page 18

[4] S0013

[5] PR908398

[6] Letter to the Commission dated 21 August 2000 from the AMOU.

[106] The AMOU then advised that it had prepared draft submissions re the correct salary for the key classification to all the parties.[94]

[107] The MUA sent an email in which Mr Giddins advised that he had not "formed any decided view concerning the application of the Minimum Rates Adjustment process other than [he agreed] to the calculation of the overtime component and [he] would not oppose the suggested relativity of 107.5%." [95]

[108] In further correspondence to the Commission, Mr Giddins said "[he had] applied the minimum rates adjustment at clause 14 consistent with the methodology used in other Maritime Awards. [He had] also applied the reasoning from the Clerks Breweries Decision of VP Ross, this has resulted in a compression of relativities. [He had] also included certain notations with respect to the Wage Rates." [96]

[109] The reference to the Clerks Breweries Decision is a reference to the award simplification decision of Vice President Ross.[97] In that decision he set out the principles set by the Full Bench in the "Paid Rates Review decision."[98] The Commission was required to fix appropriate minimum rates by making a comparison between the rate for the key classification within the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach. The starting point was the relationship between the key classification in the award and the metal industry fitter and internal award relativities established, agreed or determined should be maintained. If there was any residual component above the identified minimum rate it was required to be identified and would not be subject to any further increases.

[110] On 31 July 2001 Mr Giddins provided to the Commission and the parties with a final draft of the simplified award which provided that "the wage rates have had the overtime component removed and included into the minimum rate as in the other maritime awards."[99] Perkins Shipping advised that they agreed with the proposed draft.[100] In transcript on 5 July 2001 Perkins Shipping made reference to the fact that Mr Giddins had provided a conversion to minimum rates.

[111] The final simplified award provided for a minimum salary for employees which included an overtime component. No residual amount was identified.[101]

[112] It is not possible to determine from the simplification review the overtime component of the wages in the simplified award; the key classification; what its relativity was; or what amount was determined, if any, to have regard to the nature of the industry.

Consideration

[113] It is clear the *Small Ships Award* and the *Seagoing Award* always had the potential for overlapping coverage. Despite the submissions of Sea Swift the predecessors to the *Seagoing Award* has since 1989 specifically covered vessels of less than 19000 tonnes.

[114] Sea Swift submitted that the rates of pay in the *Small Ships Award* were properly fixed minimum rates. However it is clear from the transcript of the proceedings before Commissioner Wilks in the 1999 review of the *Maritime Industry Seagoing Award 1983* that the conversion of the rates of pay in that award from paid rates to minimum rates also

involved the proper fixing of minimum rates. It is also clear that at all times that award applied to vessels of less than 19000 tonnes.

[115] The Full Bench in the award modernisation process had before it the *Small Ships Award*. Just because no party made submissions that the award continues it cannot be presumed that the Full Bench did not have regard to it. Further the Full Bench had before it detailed submissions from CSL Australia Pty Ltd[102] about the appropriateness of the relativities in the *Seagoing Award.*

[116] The Full Bench when publishing its exposure draft said as follows:

> "[117] CSL Australia Pty Ltd (CSL), submitted that some key features of the current pre-reform award are inappropriate. These include annualised rates comprehensive of overtime, certain penalties and the leave factor. The current award reflects the outcome of the award simplification process and includes features of predecessor awards that have applied in this industry for many decades. Annualised salaries comprehending a range of components and the lengthy periods of leave recognise the nature of an industry where seagoing employees are required to remain on a vessel even when they are not physically working. It is a unique working environment and these award provisions reflect that fact. At this stage we are not persuaded that we ought to depart from current provisions."[103]

[117] In response CSL filed additional submissions[104] in which it made detailed submissions about the appropriateness of the calculation of the aggregate rates of pay. There was no change to the position adopted by the Full Bench.

[118] Because of our decision in relation to the scope of the awards, these reasons only deals with the application to vary the *Seagoing Award* to include an additional classification for vessels under 5000 tonnes.

[119] The impact of our decision on the coverage of the awards means that some of the Sea Swift vessels will be covered by the *Marine Towing Award* 2010 or the *PHEWV Award*.

[120] We do not accept the submission that the decision of the Full Bench which made the *Seagoing Award* was in error in not including a small ships classification in the Award.

[121] We are satisfied that that Full Bench had before it not just the relevant federal awards but the state awards and state enterprise awards including the *Sea Swift Pty Ltd Enterprise Award – State 2005*.[105]

[122] We are satisfied that the starting point of our consideration is that the *Seagoing Award* met the modern award objective at the time it was made. We accept the submissions of Sea Swift that this is the prima facie position and it can be displaced. However, in addition to Sea Swift and AIMPE being required to satisfy us that the proposal meets the modern award objective, they must satisfy us that there are work value reasons for making the change proposed.

[123] We do not consider the submissions and evidence about Sea Swift's failure to engage in the award modernisation process or the two yearly review or the steps it took to avoid

federal award coverage are relevant to this application. This application must be determined on the merits of the case based on the evidence before the Commission.

[124] What is being sought in this application is a significant reduction in the minimum wages paid to employees who are engaged on vessels of less than 5000 tonnes. All employees engaged on the Sea Swift vessels that would remain covered by the *Seagoing Award* would be within the scope of the new proposed classification as all the vessels are less than 5000 dead tonne weight.[106]

[125] There is evidence before the Commission that the qualification requirements of employees except for general purpose hands varies depending on either the length of ship, the gross weight of the ship or the size of the engine.

[126] There is insufficient evidence before the Commission to support the proposition that those qualifications are different for a vessel below 5000 dead tonne weight and vessels over 5000 dead tonne weight but below 19,000 tonnes. For example a number of the Sea Swift vessels are over 24 metres in length but have a dead tonne weight below 5000 tonnes. It is clear that the qualifications for masters will be different for these vessels compared with a vessel of less than 24 metres. Further in relation to engineers no information about engine size is provided so it is not possible to make an assessment of the qualifications required of engineers.

[127] Further we do not accept the submission that the award modernisation process provided a substantial increase in wages for employees who worked on vessels of less than 5,000 dead weight tonnage. The predecessor awards to the *Seagoing Award* always applied for vessels operated by respondents to the award that were less than 19000 tonnes. To the extent that the making of the award increased the rates of pay for employees previously covered by transitional instruments this was addressed through the transitional provisions in the award.

[128] Further there were no submissions or evidence that the relativities fixed for the predecessor awards to the *Seagoing Award* were inappropriate. There was no evidence before us that the additional 10% applied having regard to the nature of the industry was no longer appropriate or not appropriate for vessels of less than 5000 dead tonne weight. Further there was no evidence about the amount of overtime worked such as to make the overtime component inappropriate.

[129] Despite the submissions before us in relation to the *Small Ships Award*, Sea Swift is not proposing a classification structure based on that award. Sea Swift propose that the new classification is up to 5000 dead weight tonnes and AIMPE is up to 6000 tonnes. This was not the delineation in the *Small Ships Award*.

[130] Sea Swift proposes rates from the *PHEWV Award* with no explanation as to why these are appropriate rates. We note that Sea Swift propose that if we agree that there should be a small ships classification we should ask the parties to confer for the purpose of reaching an agreed position. However we are unable to agree that this is the appropriate outcome as we are not satisfied on the evidence before us that the current classification structure is not appropriate. We do so, noting that the submissions of the Unions that despite the classification structure of the *Seagoing Award* being based on tonnage, the qualifications are not so simply categorised.

[131] We are unable, on the basis of the evidence before us, to conclude that there are work value considerations which mean that the rates of pay for persons who work on vessels of less than 5000 tonnes should be reduced. Insufficient evidence was put before us about the nature of the work; the level of skill and responsibility involved in doing the work; or the conditions under which the work is done to support on work value grounds a reduction in the minimum rate of pay. Further we are not satisfied that the current classification structure prevents the *Sea Going Award* from meeting the modern award objective.

[132] As such we dismiss the applications by Sea Swift and AIMPE to include a small ships schedule in the *Seagoing Award*.

VICE PRESIDENT

Hearing details:

2016.

Sydney.

24, 25 October.

Final written submissions

CSL Australia Pty Ltd on 10 June 2016

The Australian Institute of Marine and Power Engineers on 10 June 2016.

The Australian Maritime Officers' Union on 14 June 2016.

Sea Swift Pty Ltd on 12 December 2016.

The Maritime Union of Australia on 22 December 2016.

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[1] See [2015] FWCFB 620, [2014] FWCFB 1788, [2015] FWCFB 616, [2016] FWCFB 8025.

[2] [2016] FWCFB 651.

[3] MA000122.

[4] AP810149.

[5] *4 Yearly Review of Modern Awards; Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[6] Exhibit H6 at [17].

[7] Ibid at [18].

[8] Ibid.

[9] Ibid at [19].

[10] Ibid at [20].

[11] Ibid at [21].

[12] Ibid.

[13] Ibid at [22].

[14] Ibid at [23].

[15] Exhibit H3.

[16] Ibid at [6].

[17] Ibid.

[18] Ibid at [9].

[19] Ibid at [6].

[20] Ibid at [16].

[21] Ibid at [22].

[22] Ibid at [31]-[32].

[23] Ibid at [38].

[24] Transcript PN 76.

[25] Exhibit H3 at [43].

[26] Ibid.

[27] Exhibit K2 and Transcript PN 104-109.

[28] Exhibit K3 and Transcript PN120-121.

[29] Exhibit K3 and Transcript PN 126.

[30] Transcript PN 133-137.

[31] Ibid PN 173.

[32] Exhibit K3.

[33] Exhibit A4.

[34] Transcript PN 247.

[35] Ibid at PN 306 -308.

[36] Ibid PN 310.

[37] Exhibit K1.

[38] Transcript PN 144.

[39] Ibid at PN159.

[40] Exhibit H5 at BC4(A).

[41] Exhibit H2 at [52].

[42] Ibid at [9].

[43] Ibid at [53].

[44] Ibid at [54].

[45] Ibid at [55].

[46] Ibid at [56].

[47] Ibid.
[48] Ibid at [58].
[49] Ibid at PN 900.
[50] Ibid at PN 904.
[51] Ibid at PN 907.
[52] Ibid at PN 923.
[53] Transcript at PN 977.
[54] Ibid at PN 1063.
[55] Exhibit H2 at [59].
[56] Transcript PN 39-40.
[57] Submissions of Sea Swift 12 December 2016 at [9].
[58] [1989] 30 IR 81.
[59] Submissions of Sea Swift 12 December 2016 at [11]-[12].
[60] Ibid at [13].
[61] Ibid at [17].
[62] Ibid at [23].
[63] Ibid at [20].
[64] [2016] FWCFB 4418.
[65] Submissions of Sea Swift 12 December 2016 at [21].
[66] Exhibit H2 at [69]-[84] and PN 1058-1071.
[67] Exhibit N3 at [17].
[68] Ibid.
[69] Exhibit G1 at [6].
[70] [2016] FWCFB 651.
[71] Exhibit K4.
[72] Ibid at [24].
[73] Ibid.
[74] Ibid at [25].
[75] Ibid at [26].
[76] Ibid at [27]-[28].
[77] Ibid at [29].
[78] Ibid at [30]-[31].
[79] Ibid at [32].
[80] Supplementary submissions for the MUA 22 December 2016 at [2].
[81] Ibid at [3].
[82] Ibid [7].
[83] Exhibit A5.
[84] Ibid at [36].
[85] Ibid at [38].
[86] Ibid at [40].
[87] Exhibit F1 at [17]-[20].
[88] AP788080.
[89] AP8100149.
[90] Transcript 19 August 1999 C No. 00107 of 1998.
[91] Q7661.
[92] Print R1723.
[93] S9495 at [8]-[12].

[94] Letter to the Commission dated 14 September 2000.

[95] Email to the parties from MUA dated 4 December 2000.

[96] Letter to the Commission dated 7 June 2001.

[97] R9120.

[98] Ibid at [28]-[29].

[99] Email to the Commission from MUA dated 30 July 2001.

[100] Email to the Commission from Perkins Shipping dated 31 July 2001.

[101] PR908400.

[102] Submissions of CSL dated 6 March 2009 in AM2008/41.

[103] [2009] AIRCFB 450 at [117].

[104] Supplementary submissions of CSL 15 June 2009.

[105] [2009] AIRCFB 100 Award Modernisation Attachment A.

[106] Transcript PN 878-881.