



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 Yearly Review of Modern Awards—Seagoing Industry Award 2010, Ports, Harbours and Enclosed Water Vessels Award 2010, Marine Towage Award 2010

(AM2016/5)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, 24 DECEMBER 2019

4 yearly review of modern awards – Seagoing Industry Award 2010, Ports, Harbours and Enclosed Water Vessels Award 2010, Marine Towage Award 2010

[1] On 21 August 2019 we issued a statement¹ attaching a draft determination containing proposed variations to the coverage provisions of the *Seagoing Industry Award 2010* (Seagoing Award), the *Ports, Harbours and Enclosed Water Vessels Award 2010* (Ports Award) and the *Marine Towage Award 2010* (Marine Towage Award). This determination was intended to give effect to our decision of 30 April 2019,² which was directed at the resolution of problems concerning the interaction of the coverage provisions of the three awards. Parties were given a period of 21 days to file any written submissions they wished to make.

[2] Submission were received from:

- the Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU);
- Maritime Industry Australia Pty Ltd;
- Sea Swift Pty Ltd; and
- the Australian Institute of Marine and Power Engineers.

[3] Apart from some typographical errors identified in the CFMMEU's submissions (which will be corrected to the extent still relevant), the submissions all advanced a common proposition, namely that the draft determination for the Marine Towage Award should be amended to include an exclusionary provision to the effect that the award does not cover

¹ [2019] FWCFB 5596

² [2019] FWCFB 2910

employees in respect of their operations covered by the Seagoing Award. This is said to be inconsistent with the fact that, in the draft determinations, the Seagoing Award and the Ports Award both contain provisions excluding operations covered by the other two awards.

[4] The submissions are rejected. In the draft determination for the Seagoing Award, clause 4.1 provides that it covers employers in respect of their operations in the “*seagoing industry*” and their employees within the award’s classifications. Clause 4.2 defines “*seagoing industry*” to mean “*the operation of vessels trading as cargo vessels, passenger vessels or operated as Research vessels which, in the course of such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers)*”. Thus clauses 4.1 and 4.2 read together relevantly provide that the Seagoing Award covers the operation of cargo vessels which proceed to sea. Clause 4.1 and 4.2 however operate subject to clause 4.5(e)(i), which provides that the Seagoing Award does *not* apply to employers in respect of their operations covered by the Marine Towing Award. The relevant effect of this exclusion is that, to the extent that the Marine Towing Award is expressed to cover the operation of any cargo vessel which proceeds to sea, the Seagoing Award does not cover such work,

[5] Clause 4.1 of the draft determination for the Marine Towing Award provides that it covers employers in respect of their operations in the “*marine towing industry*” and their employees within the award’s classifications. The existing definition of “*marine towing industry*” in clause 4.3 is retained. It provides:

Marine towing industry means:

- (a) any work on tug boats, in conjunction with ship-assist operations and voyages, at or about, or to or from, a port in Australia (**harbour towing operations**);
- (b) movement of contract cargoes by combined tug and barge (up to a maximum of 10,000 tonnes) between different ports or locations in Australia (**tug and barge operations**).

[6] It is apparent that “*tug and barge operations*” under clause 4.3(b) could involve the use of barges as cargo vessels going to sea, where the tonnage is 10,000 tonnes or less. That is a cargo operation which would fall within the coverage of the Seagoing Award as provided in clause 4.1 and 4.2 of the draft determination for the Seagoing Award. However because of clause 4.5(e)(i) of the draft determination for the Seagoing Award, the Seagoing Award does not apply to that work, and accordingly the Marine Towing Award covers it in accordance with clause 4.1 of the draft determination for that award and the existing clause 4.3. That is the intended result, and no further provision is required to achieve that result.

[7] The addition in the Marine Towing Award of an exclusionary provision for the Seagoing Award, as proposed in the parties’ submissions, would frustrate that clear result. It would create a circularity whereby, for “*tug and barge operations*”, the work is covered by clauses 4.1 and 4.2 of the Seagoing Award but then excluded by clause 4.5(e)(i) in favour of the Marine Towing Award, but when one turns to the Marine Towing Award, the work is covered by clauses 4.1 and 4.3 but then excluded in favour of the Seagoing Award by the provision proposed the parties. That would recreate one of the problems which the draft determination was intended to resolve.

[8] As earlier stated, the parties point out an inconsistency in the above approach with the exclusions of the other two awards in the draft determinations for the Seagoing Award and the Ports Award. The exclusion from coverage of the Marine Towing Award in clause 4.5(e)(i) of the Seagoing Award is necessary for the reasons discussed. The exclusion of the Ports Award in clause 4.5(e)(ii) of the Seagoing Award is necessary to ensure that vessels which substantially operate in harbours or ports but which might incidentally go to sea (and thus fall within the coverage of the Seagoing Award in clause 4.1 of the draft determination) are covered by the Ports Award and not the Seagoing Award.

[9] However the position with respect to exclusions is different with the Ports Award. Clause 4.4(a) of the draft determination for the Ports Award provides for an exclusion from coverage of operations covered by the Marine Towing Award. This is necessary to ensure that “*harbour towing operations*” and “*tug and barge operations*” as defined in clause 4.3 of the Marine Towing Award are covered by the Marine Towing Award and not the Ports Award, notwithstanding that such operations are conducted substantially within a port or harbour.

[10] Clause 4.4(b) of the draft determination for the Ports Award also contains an exclusion of work covered by the Seagoing Award. On reflection, this is both unnecessary to achieve the intended result referred to in paragraph [8] above and may frustrate that result for the same reasons as set out in paragraph [7]. The better course is to remove this and include, in the definition of “*ports, harbours and enclosed water vessels industry*” in the proposed clause 4.2 of the Ports Award, an exclusion for the “*seagoing industry*” as defined in the proposed clause 4.2 of the Seagoing Award.

[11] Draft determinations to give effect to this decision are attached. Interested parties will have a final opportunity to comment upon these draft determinations on or before 31 January 2020.



VICE PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards

(AM2016/5)

MARINE TOWAGE AWARD 2010

[MA000050]

Port authorities

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, XX XXXX 2020

4 yearly review of modern awards – Marine Towage Award 2010 – Coverage of Award.

A. Further to the Full Bench statement [[\[2019\] FWCFB 5596](#)] issued on 21 August 2019 and the Full Bench decision [[2019] FWCFB 8721] issued on 24 December 2019, the above award is varied as follows:

1. By deleting clause 4.1 and inserting the following:

4.1 This industry award covers employers throughout Australia in respect of their operations in the marine towage industry and their employees in the classifications listed in clause 13.1 to the exclusion of any other modern award.

2. By renumbering clauses 4.4 to 4.8 as clauses 4.6 to 4.10, clause 4.2 as 4.5 and clause 4.3 as 4.2.

3. By inserting new clauses 4.3 and 4.4 as follows:

4.3 This award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the *Dredging Industry Award 2010*; or

(b) the *Maritime Offshore Oil and Gas Award 2010*.

4.4 This award does not cover employers in respect of their operations covered by the *Ports, Harbours and Enclosed Water Vessels Award 2010*.

4. By updating cross-references accordingly.

B. This determination comes into operation from XX XXXX 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XXXX 2020.

VICE PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards (AM2016/5)

PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010 [MA000052]

Port authorities

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, XX XXXX 2020

*4 yearly review of modern awards – Ports, Harbours and Enclosed Water Vessels Award
2010 – Coverage of Award.*

A. Further to the Full Bench statement [\[\[2019\] FWCFB 5596\]](#) issued on 21 August 2019 and the Full Bench decision [\[\[2019\] FWCFB 8721\]](#) issued on 24 December 2019, the above award is varied as follows:

1. By deleting clause 4.1 and inserting the following:

4.1 This award covers employers throughout Australia in respect of their operations in the ports, harbours and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award.

2. By renumbering clauses 4.2 to 4.9 as clauses 4.6 to 4.13.

3. By inserting new clauses 4.2, 4.3 and 4.4 as follows:

4.2 For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline or at sea on activities not covered by the awards listed in clauses 4.3 and 4.4, but does not include operations in the seagoing industry.

- 4.3** For the purpose of clause 4.2, **seagoing industry** means the operation of vessels trading as cargo vessels, passenger vessels or operated as Research vessels which, in the course of such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers).
- 4.4** This award does not cover employers or employees wholly or substantially covered by the following awards:
- (a) the *Dredging Industry Award 2010*;
 - (b) the *Marine Tourism and Charter Vessels Award 2010*;
 - (c) the *Maritime Offshore Oil and Gas Award 2010*;
 - (d) the *Port Authorities Award 2010*; or
 - (e) the *Stevedoring Industry Award 2010*.
- 4.5** This award does not cover employers in respect of their operations covered by the *Marine Towage Award 2010*.
4. By updating cross-references accordingly.
- B. This determination comes into operation from XX XXXX 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XXXX 2020.

VICE PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards

(AM2016/5)

SEAGOING INDUSTRY AWARD 2010

[MA000122]

Maritime industry

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, XX XXXX 2020

4 yearly review of modern awards – Seagoing Industry Award 2010 – Coverage of Award.

A. Further to the Full Bench statement [[\[2019\] FWCFB 5596](#)] issued on 21 August 2019 and Full Bench decision [[\[2019\] FWCFB 8721](#)] issued on 24 December 2019, the above award is varied as follows:

1. By deleting the definition of “**seagoing industry**” in clause 3.
2. By deleting clause 4 in its entirety and inserting the following:

4. Coverage

- 4.1** This industry award covers employers in respect of their operations in the seagoing industry and their employees in the classifications listed in clause 13 and clause 25—Classifications and minimum wage rates to the exclusion of any modern award.
- 4.2** For the purpose of clause 4.1, **seagoing industry** means the operation of vessels trading as cargo vessels, passenger vessels or operated as Research vessels which, in the course of such trade or operation, proceed to sea (on voyages outside the limits of bays, harbours or rivers).
- 4.3** This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

4.4 This award covers employers which provide group training services for trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

4.5 Exclusions

This award does not cover:

- (a) employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;
- (b) employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees;
- (c) an employee excluded from award coverage by the Act;
- (d) employers covered by the following awards:
 - (i) the *Coal Export Terminals Award 2010*;
 - (ii) the *Dredging Industry Award 2010*;
 - (iii) the *Maritime Offshore Oil and Gas Award 2010*;
 - (iv) the *Port Authorities Award 2010*;
 - (v) the *Stevedoring Industry Award 2010*;
- (e) employers in respect of their operations covered by the following awards:
 - (i) the *Marine Towage Award 2010*;
 - (ii) the *Ports, Harbours and Enclosed Water Vessels Award 2010*; or
- (f) maintenance contractors covered by the *Manufacturing and Associated Industries and Occupations Award 2010*.

4.6 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

3. By updating cross-references accordingly.

B. This determination comes into operation from XX XXXX 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XXXX 2020.

VICE PRESIDENT

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