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18 April 2016

Re: AM2014/223 AWU submissions on the Exposure Draft for the Exposure Draft for the *Dredging Industry Award* 2016

Background

1. On 23 March 2016 the President, Justice Ross published a Statement directing parties to file submissions on drafting and technical issues for Group 3 exposure drafts by 14 April.

2. The Australian Workers' Union (AWU) set out the submissions below in relation to the Exposure Draft for the *Dredging Industry Award* 2016 ('the Exposure Draft') as published on 15 January 2016.

Drafting and technical issues

Typographical error

3. Clause 3.3(a): There is a typographical error to be corrected – delete "by the covered" in the opening sentence.

Maximum weekly hours

4. Clause 6.3 We are invited to make submissions in relation the removal of the words "at least" at this clause. We support this amendment. The National Employment Standards (NES) creates prohibitions in relation to maximum weekly hours, but is silent on minimum weekly hours in relation to a full-time employee – see section 62(1) of the *Fair Work Act* 2009 (Cth) ('the FWA').

5. We note that a modern award must not exclude the NES as prohibited under section 55(1) of the FWA. The wording of this clause invites the construction that ordinary hours can be set higher than 38 hours per week. To prescribe ordinary hours in excess of 38 hours will exclude section 62 of the NES. The Full Bench considered this issue during the award modernisation proceedings in relation to the *Pastoral Award* 2010, where it held that maximum hours of work are not fixed by the Commission but by the NES.[1]

[1] *Award Modernisation* [2009] AIRCFB 345 at [57].

Notice of termination

6. Clause 6.5(a)(ii) We are concerned this clause purports to exclude the NES under section 117 of the FWA – requirement for notice of termination or payment in lieu. If an employee is engaged on a full-time or part-time basis, but then deemed a casual employee if they are dismissed on their first day (per subsection (i)), or within 4 weeks (per subsection (ii)), then they appear to have lost an entitlement to the prescribed period of notice – 1 week in either case. It should be removed.

Allowances for casual employees

7. Clause 6.5(b)(ii): This clause excludes the application of allowances for casual employees. This clause should be removed, or otherwise replaced with the same wording used in the *Building And Construction General On-Site Award* 2010 at clause 14.2:

   > *A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.*

   To supplement the above submission, we also seek the insertion of a definition of "ordinary hourly rate" to be included at A.4 in schedule A to ensure the all-purpose allowance is included when calculating casual wages. The same clause as set out at A.1.1 could be used again at A.4. It is understood that the Casual and Part-time Employment Full Bench will deal with both of these issues.

Span of ordinary hours

8. Clause 8.2(a)(ii): The Exposure Draft and current award set out the hours of duty as: 12 hours per day on each of seven days per week between 6:00 am and 6:00pm; or other starting and finishing times as may be mutually agreed. We are concerned that this clause allows workers to agree to work any number more hours than 12 at the ordinary rate of pay, and without regard to the nature of the clause being about "day workers".

9. The pre-reform awards – the *Maritime Industry Dredging Award 1998*[2], the *Dredging Industry (AWU) Award 1998*[3] and the *Marine Engineers (Non Propelled) Dredge Award 1998*[4] refer to the same span of hours and include the mutual agreement stipulation, but all include the accompanying clause:

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2 Part C, clause 2.1.
3 Part C, clause 2.1.
4 Part C, clause 2.1.

The aggregate wages and leave provided by this Part are based on the hours of work prescribed by this clause. Where the hours of work on a project significantly differ from those prescribed herein the parties may by mutual agreement vary the provisions of this Part to reflect the hours worked. Pending such agreement Part B of the award shall apply. Where the parties are unable to reach an agreement either party may refer the matter to the Industrial Relations Commission for determination.[5]

10. In coming to an agreement, these pre-reform awards allowed for the variation of the aggregate wage and leave entitlements to reflect the change in ordinary working hours. A clause of this nature should have been carried through to the current award as a valuable component of the modernised clause. It may be the case that the pre-modern awards draft the arrangement in too uncertain terms – that is, what would make up a "significantly" different span of hours, and what rates and leave entitlements should apply?

11. We suggest a clause similar to that used in the *Manufacturing and Associated Industries and Occupations Award* 2010[6] to bring into effect the meaning of "significantly differ" in the pre-modern awards:

    x) *the spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned and covered by this award, or, in appropriate circumstances, between the employer and an individual employee.*

    x) *Any work performed outside the agreed spread of hours must be paid for at overtime rates in accordance with 13.1.*

12. In support of submissions on this clause, we refer to three current enterprise agreements in this industry to which the AWU is party; including the *Dredging International Contract Dredging (Non-Propelled Dredges, AWU) Enterprise Agreement* 2012[7], the *Great Lakes Contract Dredging (Non-Propelled Dredges, AWU) Greenfields Agreement* 2013[8] and the *Van Oord Australia Contract Dredging (Non-Propelled Dredges) AWU Enterprise Agreement* 2011.[9]

13. Under all 3 agreements, the ordinary hours are 12 hours, and cannot be extended beyond 14 hours, at which point an employee is entitled to

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5 Part C, clause 2.3 *Dredging Industry (AWU) Award 1998*; Part C, clause 2.4 *Maritime Industry Dredging Award* 1998*; and Part C, clause 2.3 Marine Engineers (Non Propelled) Dredge Award 1998.*

6 See section 36.2(c) and (d).

7 AG2012/8578 ('*Dredging International Agreement*').

8 AG2013/5308 ('*Great Lakes Agreement*').

9 AG2012/8288 ('*Van Oord Agreement*').

10 hours off to avoid physical exhaustion.[10] We submit that 14 hours is the dredging industry standard for the extension of ordinary hours by agreement, and suggest the wording set out above at paragraph 11 be utilised to give effect to the standard.

Meal Break

14. Clause 9.2(a): We are invited to comment on the issue of clarifying which parties can agree to change the time of a meal break, in relation to this clause. We suggest an additional clause 9.2(b):

> *Parties to such an agreement include the relevant employee(s) affected by the agreement, together with the master, or the engineer, or their representative.*

15. Clause 9.2(d): This clause states: "the incidence of meal time will not interrupt the working of the dredge and attendant craft." It is unclear how this clause is to be observed. Does it render agreements made under clause 9.2(a) in relation to meal times – void? We suggest this clause be replaced, and directly refer to clause 9.2(a) and 9.2(c) as follows:

> *In coming to an agreement under clause 9.2(a), the working of the dredge and attendant craft should not be interrupted. If an alternative time cannot be negotiated in accordance with this sub clause, the appropriate payment under sub clause 9.2(c) or 9.2(e) applies.*

The wording of this variation is subject to our submitted variation below at paragraph 17, which merges the sub sections (c), and (d). If both variations are accepted, remove "or 9.2(e) applies" in the above variation.

16. Clause 9.2(c) 9.2(e) and 9.3: We are invited to comment on the interaction between these three clauses. Beginning with clause 9.3 which prohibits an employee from being compelled to work for more than five hours without a meal break – sub clauses 9.2(c) and (e) operate as exceptions to this rule. That is, if it is an "emergency", or if it is "impractical" in regards to the continuous operation of the dredge. The prohibition under clause 9.3 is supported in particular by sub clause 9.2(e) as the compensation deters an employer from compelling an employee to work without a meal break.

17. Sub sections (c) and (e) differ by method of calculation for the compensation of a denied meal break. If denied as a consequence of an "emergency" an employee is entitled to 30 minutes pay at the overtime rate, and if denied for reasons of "impracticability" the

[10] See, clause 14.2 of the *Dredging International Agreement*, above n 7, clause 14.2 of the *Great Lakes Agreement*, above n 8, and clause 12.7 of the *Van Oors Agreement,* above n 9.

entitlement is one hour of pay at the ordinary rate. In either case the employee is paid the same amount, as the overtime rate is 200% (although superannuation would be paid on the ordinary rate, but not the overtime rate). The fact that compensation under both sub sections is near identical reflects that an employee experiences the same hardship in either case. We are not able to provide an explanation for the difference in entitlement however. If there is no reason to be found, to simplify the clause, 9.2(e) could be removed and incorporated into clause 9.2(c) to read:

> *Where the dredge and attendant craft are in continuous operation and it is impracticable on any shift to allow the meal break, employees must be paid one hour at the ordinary time rates. The same payment applies in circumstances where the master/engineer or their representative decides, in an emergency, that the meal break cannot be taken.*

18. 9.2(e): This clause requires the words "an additional" to be added to read: "…employees must be paid [an additional] one hour at ordinary time rates."

19. Clause 9.3: This clause should be deleted as it is in conflict with clause 9.2, and creates ambiguity in relation to how those clauses under 9.2 operate. See discussion above at paragraphs 15 and 16.

Definition of "aggregated rate"

20. Clause 10.3: A definition of "aggregated rate" should be included to clarify how the final wage is calculated. In response to the Commission's invitation to comment, we agree that this will improve transparency when adjusting rates following the Annual Wage Review. We also query why there is no minimum wage for the positions "Trailer master" and "Chief engineer" shift workers.

Higher Duties

21. Clause 10.4: This clause entitles an employee to be paid at the higher rate where they "perform the duties of a position at a higher classification level". The current award has similar wording. We submit the alternative wording of "work" rather than "duties", to reflect that not *all* duties must be performed, but rather the work of that higher position, on that occasion. This is consistent with the wording in the three pre-reform awards mentioned above – which entitled the higher rate when "any duties carrying a higher rate" were performed. [11] The same amendment was made to the *Asphalt Industry Award* 2010[12] during the review of group 1A and IB awards.

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[11] *Dredging Industry (AWU) Award 1998*; *Maritime Industry Dredging Award* 1998*; and Marine Engineers (Non Propelled) Dredge Award 1998.*

[12] AM2014/66 at clause 18.

Interaction between “laid up” and “not-fully operational”

22. The use of the term “laid up” is used four times in the Exposure Draft at clauses 11.2(b)(i), 11.2(e) and in column 1 of the Table in Schedule B.1.1. This term means “not fully operational” as defined in Schedule E, and relates to other clauses that use the term “not fully operational” rather than “laid up”, including clauses 8.3 and 10.2, and in Schedule A at A.2.3, A.2.4 and A.4.2.

23. For consistency, we suggest defining the term “not-fully operational” instead of “laid up” in Schedule E. The use of “laid up” is still retained in the definition, but is no longer the defined term. Instead the proposed definition will read:

> ***not fully operational*** *means all times when a vessel is laid up, and includes periods when a vessel is laid up out of commission, or laid up under repair and maintenance between dredging contracts, or during scheduled breaks in the contract program where the vessel is not required, but does not include essential repairs and maintenance if required at the conclusion of a project.*

24. Using the above-named clauses in paragraph 22, the term “laid up” should be replaced with “not fully operational” to aid cross-referencing between clauses.

All-purpose allowance

25. Clause 11.2(b): We submit that the dual certificate allowance should also be expressed as an hourly rate at this clause. This reflects that the allowance will form a component of the ordinary rate, and encourage its correct use when calculating other entitlements that may only attach to a portion of an employee’s weekly hours, such as overtime. For these reasons, clause 11.2(b) should be amended as follows:

> *(i) A payment of $27.84 per week [($0.73 per hour)] will be made to an employee working on a vessel ~~laid up~~ that is not fully operational who…*
>
> *(ii) A payment of $59.21 per week [($1.60 per hour)] will…*

*Note, “laid up” at our proposed clause 11.2(b)(i) is replaced with “not fully operational” to match the wording at clause 10.2 – the applicable clause. See discussion above at paragraphs 22 and 23 in relation to the term “laid up”.

Cleaning Duties

26. Clause 11.2(h)(ii): The Exposure Draft invites clarification as to whether the cleaning duties allowance should be paid to a second cook on a daily

or weekly basis. We first note that the chief cook is paid an additional $55.15 per week to order stores and issue linen, which is quite clearly a one-off duty. On one construction, it appears appropriate that the second cook receives the payment of $39.35 for the performance of cleaning duties outside the galley and storerooms on *each* occasion, reflecting that the duty is onerous and could be performed on a number of occasions per week. The second construction, and perhaps the more likely, is that the cleaning duties, if they are allocated to the second cook (as opposed to some other person) entitles that employee to a weekly payment of $39.35.

Shiftwork

27. Clause 13.3(a): An employee is entitled to a shiftwork loading under this clause if they are "working shiftwork" and if their shift commences at or after 6pm on any Monday to Friday. This wording is confusing. "Shiftworkers" under clause 8.2(b) includes workers performing day shifts *and* night shifts on an interchanging weekly basis. However, the clause will clearly not apply to day workers. We propose the following replacement clause:

> *A shiftwork loading of $6.05 per hour (30% of the hourly standard rate) is payable to an employee ~~working shiftwork and which~~ [whose] shift commences at or after 6.00 pm on any ~~Monday to Friday~~ [day of the week]. ~~inclusive.~~*

The clause also appears to have overlooked the inclusion of the loading for shifts commencing after 6pm on Saturday and Sunday. As there are no other clauses in the Exposure Draft that provide penalties for employees performing night shift or otherwise on the weekends, the clause has been amended to correct this coverage issue.

28. Clause 13.3: The Exposure Draft invites parties to comment on whether shift work penalties should attach to an employees "ordinary rate", or the "standard rate" of "able seaman" as it is currently drafted. We say the shiftwork loading should be based on the "ordinary rate" in order to capture the all-purpose allowance, and to re-establish consistency with the pre-reform awards.[13]

29. Clause 14: In accordance with section 139 of the FWA, we seek the inclusion of an annual leave-loading clause in addition to the reference to the NES here at clause 14. This submission in accordance with our substantive claim for Group 3 and 4 awards in relation to this issue.[14] The entitlement to annual leave loading of at least 17.5% is a National standard in Australia, and the *Dredging Industry Award* 2010, along with the *Book Industry Award* 2010 and the *Alpine Resorts Award* 2010 are the

[13] See clauses 3.2.2 in each of the *Dredging Industry (AWU) Award 1998*; *Maritime Industry Dredging Award* 1998*;* and *Marine Engineers (Non Propelled) Dredge Award 1998.*

[14] See https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014223andors-sub-AWU-101215.pdf

only relevant[15] remaining awards that do not include annual leave loading. We note that the AWU and the Australian Ski Areas Association (ASAA) have agreed to this variation as part of a settlement package for that award.[16]

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[15] Some modern awards have more beneficial industry-specific leave conditions.
[16] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014198-report-071215.pdf