



REPORT TO THE FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS: VARIOUS AWARDS — REPORT TO THE FULL BENCH

(AM2014/84) *Professional Diving Industry (Industrial) Award 2010*

COMMISSIONER BULL

SYDNEY, 2 JULY 2015

Four Yearly Review of Modern Awards: Professional Diving Industry (Industrial) Award 2010 - Conference between parties, Report to the Full Bench.

[1] Following a hearing before the Full Bench on 18 November 2014, the *Professional Diving Industry (Industrial) Award 2010* (the Award) was referred to me by the Full Bench in April 2015 to facilitate discussions between the relevant parties to resolve any outstanding issues arising from the 2014 Exposure Draft.

[2] At the hearing of 18 November 2014, parties were directed to file written submissions with respect to the *summary of submissions* document prepared by the Fair Work Commission (the Commission) to clarify the propositions of each party, and the extent of any agreement in relation to those propositions. Submissions with respect to the exposure draft were received from the *Australian Workers' Union* (the AWU) and the *Maritime Union of Australia* (the MUA).

[3] A conference in relation to the 2014 Exposure Draft was held on 13 May 2015. The following organisations were represented at the conference:

- i. The Maritime Union of Australia (the MUA);
- ii. The Australian Workers' Union (the AWU); and
- iii. The Australian Mines and Metals Association (AMMA), whose representatives appeared via telephone link.

[4] The conference initially proceeded with AMMA requesting to file submissions in the Commission within a week following the conference. This was not opposed. Written submissions were received on 11 June 2015.

[5] A summary of the issues discussed, and their outcomes are summarised in Tables 1 and 2 of this Report.

Key Issues

[6] The MUA submitted that the ordinary hours of work for inshore divers are 33 hours per week, as opposed to a 38 hour week for offshore divers, which it submits is not accurately reflected in the current award or the Exposure Draft. It is also submitted by the MUA that the Award provisions should be split between offshore and inshore divers, and referenced the *Professional Divers' - Maritime Union of Australia Award 2002* (the 2002 Award), where there are separate provisions for offshore and inshore divers¹.

[7] It is submitted by the MUA that a consequence of the amalgamation of the Award *Hours of Work* provision is that the casual loading for inshore divers is incorrectly calculated at 1/38th of the weekly rate, as it should be based on a 33 hour week.

[8] AMMA submit there are 2 key issues with respect to the Exposure Draft; hours of work and the divisor for the casual rates of pay. In support of its submissions, AMMA also provided material comparing the terms and conditions between the 2002 pre-reform award, 2010 award and the 2014 Exposure Draft.

[9] The tables below summarises the issues discussed and the positions taken by the parties, with Table 1 highlighting the issues that were agreed between the parties, and Table 2 being the issues that were disagreed.



COMMISSIONER

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¹ Part 2 of the 2002 Award applies to offshore divers, and Part 3 of the 2002 Award applies to inshore divers.

Table 1 - Agreed Issues

ITEM	PARTY	CLAUSE (Exposure draft)	SUMMARY OF ISSUE	Outcome
1	MUA Response to exposure draft	5	Opposed to introduction of facilitative provisions clause.	<p>Facilitative provision to be retained, consistent with the wording proposed in the Full Bench Decision of 24 December 2014 at paragraph 42.</p> <p>All parties accepted this position.</p>
2	AWU Submissions on exposure draft	8.2(a)	Daily limit may not be relevant - likely there would be strict regulation of working hours.	<p>Parties understand that the maximum working hours are prescribed by relevant safety legislation.</p> <p>AMMA proposed the reference to “greater than atmospheric pressure” be deleted from clause 8.2 on the basis that this is regulated by fatigue and safety considerations.</p>
3	MUA Response to exposure draft	10.2(a)	The word ‘adult’ is redundant and may be removed.	<p>Parties agree that the word ‘adult’ is redundant and should be removed as there are no junior rates paid.</p> <p>AMMA commented in their written submissions that the word ‘adult’ has some relevance to the extent that the prerequisite for acquiring the necessary certification to work under the Award requires the person to be over 18 years of age.</p>

4	AWU Submissions on exposure draft	10.3(d)	Support proposal to include electronic funds transfer (EFT) as a means of payment on termination.	Parties agree that on termination employees wages may be paid by EFT on the day of termination.
5	MUA Response to exposure draft	10.3(d)	Payments should be made on day of termination.	See above
6	MUA Response to exposure draft	11	Provision to be redrafted to clarify that casual employees are entitled to all allowances.	All parties understand that allowances are payable to casual employees where they meet the requirements.
7	MUA Response to exposure draft	12	Provision to be redrafted to clarify that casual employees are entitled to all allowances.	See above
8	AWU Submissions on exposure draft	Schedule B.3	Offshore diving rates are calculated on a daily basis and hourly rates are not relevant.	Parties agree to leave as is.

Table 2 - Issues Disagreed

ITEM	PARTY	CLAUSE (Exposure draft)	SUMMARY OF ISSUE	Outcome
1	Australian Workers' Union Submissions on exposure draft	6.2	<ul style="list-style-type: none"> • Whether separate provisions for inshore and offshore divers; • Ordinary hours for inshore divers are 33 per week ; • Ordinary hours for offshore divers should not be expressed as weekly. 	<p>All parties agree that separate provisions for offshore and inshore divers should be retained.</p> <p>Issue whether the 38 hour week at 6.2(a) should only apply to offshore divers with a 33 hour week applying to inshore divers (see 6.2(a)).</p> <p>This in turn impacts on 6.2(a)(c)(i) as to whether the casual loading should be expressed as 1/33 of the minimum weekly rate of inshore divers.</p> <p>AMMA submitted in their written submissions that the 38 hour week should apply to both inshore and offshore divers based on the award modernisation objectives.</p> <p>Accordingly, AMMA submits that the divisor for inshore casual rates should remain, being 1/38th of the weekly rate plus 25% loading.</p>

2	Australian Workers' Union Submissions on exposure draft	6.3	<ul style="list-style-type: none"> • Whether separate provisions for inshore and offshore divers? • Hourly rate not relevant as minimum engagement period is 1 day; • Inshore casual rate is 1/33rd of weekly rate plus 25% interest ; and • Offshore rate has been significantly understated. 	<p>The MUA and AWU submit that the casual offshore rates at 10.2(a) have been incorrectly calculated at the minimum weekly rate as opposed to the aggregate weekly rate.</p> <p>AMMA proposes maintaining the definition of full time employment based on 38 ordinary hours per week, and therefore the calculation of the offshore casual hourly rate as being 1/38th plus 25%.</p> <p>AMMA submits that this approach is appropriate as it is consistent with the overarching award modernisation objectives.</p>
	Maritime Union of Australia Response to exposure draft	6.3(c)	Casual rates should be based on a 33 hour week.	<p>Opposed by AMMA.</p> <p>AMMA also noted that where 8.1(c) states the ordinary hours of work for casuals will be in accordance with 6.3, there is no reference to hours of work at 6.3</p>

3	Maritime Union of Australia Response to exposure draft	9	Meal break for inshore divers should be paid.	MUA and AWU reference to a half hour meal break should be inserted for inshore divers. AMMA maintains that the break should be unpaid. However, any subsequent breaks in a shift taken in accordance with the clause should be a paid break.
4	Maritime Union of Australia Response to exposure draft	10.1 10.3(c)	Hourly rates should be based on a 33 hour week. Payment of waiting time for wages	This relates to whether inshore divers should receive a 33 hour week. AMMA submitted that cl.10.3(c) be deleted as it does not reflect modern payroll operations.
5	Australian Workers' Union Submissions on exposure draft	Schedule B.2	Once issue of clause 6.3 has been resolved, overtime rates for casuals should be included to apply when they work in excess of, or outside the span of, ordinary hours. Overtime rates would be the same as full-time employees but based on the ordinary casual rate.	This issue will be resolved upon resolution of whether inshore divers work a 33 or 38 hour week.

6	Australian Workers' Union Submissions on exposure draft	Schedule B.4	Casual hourly rates appear far too low compared with pre-reform award and casuals should have the benefit of the aggregate weekly factor.	<p>This issue concerns whether the casual rates are calculated on either the aggregate weekly rates or the weekly rate.</p> <p>AMMA's position is that rate is 1/38th plus 25%.</p>
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