

15/12/2017

Fair Work Commission
Level 10, terrace Tower
80 William Street, East Sydney, NSW, 2011

To Whom it May Concern

**RE: Professional Diving Industry (Industrial) Award 2010 [2017] FWCFB 5749
Statement**

Fremantle Commercial Diving Pty Ltd (FCD) makes the following submission relating to Statement FWCFB 5749, and the associated, preceding Correspondence from the Maritime Union of Australia (MUA) dated 1 September 2017. FCD would like to submit the following points for consideration:

1. Factual inconstancies in the MUA submission dated 1st September 2017

The submission provided by the MUA dated 1st September 2017 states at point 2 "*The Full Bench at paragraph [104] is inaccurate where it says that the proposed award provided for a 38 hour week....*" This is referring to the draft Diving Award proposed by the MUA on the 24th of July 2009 which states in section 10.4 (a) "*A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer*". It is clear from this statement that a 38 hour week for casual inshore divers was indeed proposed in a draft Award provided by the MUA during the Award modernisation process in 2009.

2. Misleading language in the MUA submission dated 1st September 2017

The submission provided by the MUA dated 1st September 2017 implies in several sections that the decision by the full bench to retain the 38 hour week prescribed in section 10.3 (c) of the Modern Award is actually a departure from an existing 33 hour week, rather than a retention of the status quo. The Modern Award has been clear since its introduction in 2010 that the divisor to be used for casual employees is "1/38th of the relevant minimum wage ...plus a loading of 25%", with overtime payable after 6 hours and 36 minutes. The retention of this 38 hour divisor in no way represents a change and should not be construed as such.

3. Modern relevance of a 33 hour week

Further to our previous submissions, the 38 hour week has been in effect since 2010 and the argument for reverting a 33 hour working week is based on the pre-modern MUA Award, written in 2002, likely-based on equipment from the 1970's, and superseded in 2010. The old pre-modern Award also refers to a 20% loading for casuals, rather than the current 25% loading.

The return to the 33 hour week in a pre-modern MUA Award (whose application in the current workforce was recognised as limited in 2008) remains unjustifiable, except for historical reasons to superseded Awards.

4. Social Media

The MUA's correspondence (1 September 2017) states: *"the Union has been inundated with messages on social media from professional divers" who "cannot understand how or why the Full Bench made a decision that resulted in a reduction in the casual hourly rate from \$35.64 to \$31.98"*.

In any type of professional communication the use of non-emotive and quantitative language is integral to effectively communicate, without posturing, in order for all parties to gain a common appreciation for the scale of the relevant topic. FCD respectfully requests that the MUA quantify the qualitative term 'inundated'.

Furthermore, if the MUA are citing social media as a legitimate platform for this discussion, the MUA's position on the 33 hour or 38 hour week, as well as pay rise or pay decrease, is unclear or appears to be contentious internally.

Advice from an MUA National Officer on the 21 July 2017 to a group of Divers on social media (Facebook) states that: *"... the rate of pay for the classification of Inshore Diver was \$940.90/wk. Under the Divers Award casuals are paid 1/38th of their ordinary pay plus a 25% loading which means **the casual hourly rate for an Inshore Diver is \$30.95**. A Link to the 2016 rates of pay is below:"* The communication thread from the MUA National Officer then goes on to describe the 3.3% pay increase effective 1 July 2017, resulting in *"the hourly rate of pay for a casual Inshore Diver is \$31.98 which is an increase"*. To date, this statement has not been edited or retracted by the MUA on Facebook.

5. FWO Pay Guides

FCD identified an issue¹ related to the calculation of the casual rate of pay (as shown in the Pay Guide) and raised it with the FWO on 4 August 2015. Communications from the FWO (Alex Wolfson | Assistant Director (A/g) | Internal Advice and TLO) to FCD (6 August 2015) stated that:

¹ Where the Award states a casual employee will be paid 1/38th of the relevant minimum wage, plus a loading of 25%; the FWO pay guide and online calculators assumed a 33 hour week (likely based on 6 hours and 36 minutes) rather than following what the Award clearly states.

*"Because there's a decision pending on this issue that will clarify it beyond doubt, we are not keen to make any changes to our pay tools. We would only do this if we had made a clear error. The discussions before the FWC suggest that there *is* genuine ambiguity in the award and we feel that the best course at this stage is not to make a change that may need to be reverted back."*

The FWO then (29 June 2016), republished the 2016 pay guide (which was initially published one day earlier on the 28 June 2016) and updated online calculators recognising the weekly divisor should be 38 hours², rather than the 33 hours incorrectly published previously.

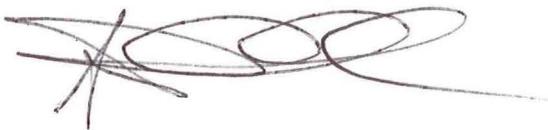
This strongly indicates that in 2016 the discussions between the FWC and the FWO (quoted above) resulted in identification of the error and correcting this to a 38 hour week as per the Award.

In summary, Fremantle Commercial Diving's understanding of the review and its progress indicate that previous errors were recognised and rectified.

- First in 2016, by the FWO in consultation with the FWC, when the 2016 Pay guide was re-issued to refer to a 38 hour week, and
- Secondly, formally rectified within the Award by the FWC in 2017 to coincide with the annual wage review process.

FCD strongly believe that all evidence throughout this review supports that the current 38 hour week as stated in the Award is correct as it reflects a modern diving context, rather than historic limitations based upon use of antiquated equipment.

Yours Sincerely



Antony Old
Managing Director
Fremantle Commercial Diving Pty Ltd

² The revised 2016 pay guide states that an inshore casual diver has an hourly rate of \$30.95, effective from 13 June 2017; rather than the previously publicised rate of \$35.64.