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BY EMAIL

Associate to the Hon. Justice Ross
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3000
chambers.ross.j@fwc.gov.au

Dear Associate,

AM2014/90: Revised Exposure Draft of the *Stevedoring Industry Award 2015*

We act for Qube Ports Pty Ltd, Qube Bulk Pty Ltd and the employing entities of the DP World group of companies (collectively, the **Stevedoring Employers**) in relation to the review of the *Stevedoring Industry Award 2010* (**Award**).

The Stevedoring Employers have set out below their submissions in relation to the revised Exposure Draft published by the Fair Work Commission (**FWC**) on 2 November 2015. These submissions are made in accordance with the directions of the Full Bench made on 23 October 2015 as part of its decision in *Re 4 yearly review of modern awards* [2015] FWCFB 7236 (**October Decision**).

Agreed changes not made in the revised Exposure Draft

In the October Decision, the Full Bench indicated at paragraph [258] that it would make each of the changes which were marked as agreed between the parties in the Revised Summary of Submissions published by the FWC on 17 November 2014 (**Revised Summary**). However, a number of changes which were agreed between the parties have not been made in the revised Exposure Draft. The changes which have not been made are as follows:

1. Clause 5.2 of the original Exposure Draft contained an incorrect cross-reference to clause 8.3. This cross-reference has been amended in the revised Exposure Draft, but now refers to clause 8.4 generally rather than clause 8.4(b) specifically. Reference should be to clause 8.4(b), as clauses 8.4(a) and (c) are not facilitative provisions.

   As is indicated in Item 1 of the Revised Summary, this position was agreed between the Stevedoring Employers and the Australian Industry Group (**Ai Group**). The Maritime Union of Australia (**MUA**) opposed the insertion of clause 5 altogether, and did not comment on the cross-referencing in the section, so the item was not marked as 'agreed' in the Revised Summary. Subsequently, however, the Full Bench has determined in *Re 4 yearly review of modern awards* [2014] FWCFB 9412 that a facilitative provisions clause should be inserted into all modern awards. As such, the Stevedoring Employers submit that clause 5.2 should be amended as proposed above.

2. Clause 11.1(a) of both the original and revised Exposure Drafts contains what is in effect a definition of the phrase '*all purpose*'. However, this definition is:

   (a) inconsistent with the decision of the Full Bench in relation to how the term '*all purpose*' should be defined in *Re 4 yearly review of modern awards* [2015] FWCFB 4658 (**July Decision**); and

   (b) superfluous and confusing, because Schedule H (*Definitions*) contains a different definition of the term '*all purpose*', which is consistent with the Full Bench's decision.

   The first sentence of clause 11.1(a) should therefore be deleted. As is reflected in item 12 of the Revised Summary, this issue was broadly agreed between the Stevedoring Employers, the MUA and the Ai Group.

3. Clause 22.2 of the both the original and revised Exposure Drafts provides that to terminate their employment, an employee must give a period of notice equivalent to the notice that their employer would have been required to give under the National Employment Standards (**NES**), but without the additional week of notice for employees with two years' service who are over the age of 45. The clause goes on to provide that if an employee does not give the required notice, the employer may:

   > *withhold any money due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by the NES, less any period of notice actually given by the employee.*

   The underlined words in the part of clause 22.2 reproduced above are incorrect, as it is the Award rather than the NES that requires employees to give notice. As such, the underlined words in the passage reproduced above should be deleted, and the words '*required by this award*' should be inserted in their place. As is reflected in Item 28 of the Revised Summary, this amendment was agreed between the Stevedoring Employers, the MUA and the Australian Workers' Union.

Drafting errors in the revised Exposure Draft

The Stevedoring Employers have also identified a number of drafting and typographical errors in the revised Exposure Draft. These issues are as follows:

4. Clause 10.1 of the Award has been amended to delete the column setting out the casual hourly rate. As a result, reference to the casual hourly rate should be removed from the note at the bottom of the table, so that it reads only:

   > *Minimum hourly rate is based on a 35 hour week.*

5. In *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729, the Full Bench decided that what was then clause 25.3 of the *Stevedoring Industry Award 2010* should be deleted. A note to clause 19 of the revised Exposure Draft indicates that the FWC has flowed through this change by deleting clause 19.5 of the Exposure Draft. However, the wrong subclause has been deleted. The former clause 23.5 of the current award in fact corresponds to what is now numbered as clause 19.3 of the revised Exposure Draft. As such:

(a) clause 19.3 of the revised Exposure Draft (which provides an extra day of leave to employees who work on four specified public holidays) should be deleted; and

(b) clause 19.5 of the revised Exposure Draft (titled 'Rostered day off for a shiftworker on a public holiday', and which provides an additional payment where a shiftworker's rostered day off falls on a public holiday) should be reinstated.

6. The same definition of '*Maintenance Tradesperson*' has been inserted in both Schedule A (at A.4.2) and Schedule H (*Definitions*) of the revised Exposure Draft. The definition need only appear once, and the Stevedoring Employers submit that it most appropriately appears only in Schedule H.

7. In Schedule H of the Revised Exposure Draft, the previous definition of '*ordinary hourly rate*' has been deleted, and a new definition inserted. The new definition:

(a) refers to an '*industry allowance*' which the Award does not contain; and

(b) is not consistent with the July Decision, which provided at [47] that '*...definitions of "all purpose" and "ordinary hourly rate of pay" will be inserted into all affected awards based on the wording in paragraphs [35] and [91].*'

While paragraphs [35] and [91] of the July Decision both in fact deal with a definition of the term '*all purposes*', the Full Bench set out at paragraph [42] the definitions of '*ordinary hourly rate*' which it had inserted into Exposure Drafts of various awards, and later stated in [47] that it had not been persuaded to change its approach. Given that the Award contains all-purpose allowances, but not an industry allowance, the Stevedoring Employers consider that the definition of '*ordinary hourly rate*' in Schedule H of the Award should be as follows:

> ***ordinary hourly rate*** *means the hourly rate for the employee's classification specified in clause 10, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes.*

8. Clause 14.6(c) of the revised Exposure Draft contains a grammatical error. The word '*attached*' should be deleted and the word '*attaches*' should be inserted in its place.

Yours sincerely

Ben Dudley
Partner

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