

FAIR WORK COMMISSION

Matter No: AM2016/13

s 156 – 4 yearly review of modern awards

**Annualised Wage Arrangements
Marine Towing Award 2010.**

OUTLINE OF SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

1. These submissions are advanced by the Maritime Union of Australia (**MUA**) in response to the **Decision** of the Full Bench ([2018] FWCFB 154), inviting submissions concerning whether:
 - (a) the terms of the above provisions are appropriate to be adopted as model annualised wage arrangement provisions;
 - (b) any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms (subject to the conclusions stated later in this decision concerning the specific claims advanced in these proceedings);
 - (c) any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; and
 - (d) annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end).
2. These submissions are confined to the annualised wage arrangements in the *Marine Towing Award 2010*. They only address paragraphs (b) and (d) above, noting that the current annualised wage arrangements in the *Marine Towing Award 2010* apply to part time employees.

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Current annualised wage arrangements in the *Marine Towing Award 2010*

3. The annualised wage arrangements in the *Marine Towing Award 2010* are contained in clause 13.2 and are in the following terms:

13.2 Option for aggregate wage or annual salary—full-time and part-time employees

- (a) As an alternative to being paid the minimum wage rate plus overtime and penalty payments (in accordance with clauses 22 and 26.2), an employer may agree to pay an aggregate wage or annual salary provided the employer obtains the agreement of a majority of its employees who are covered by this award.
 - (b) The aggregate wage or annual salary paid by the employer to employees must be based on a rate equivalent to an aggregate wage or annual salary of at least 40% above the minimum wage rate prescribed in clause 13.1.
 - (c) An employer will not be required to pay overtime and penalty payments provided that the aggregate wage or annual salary paid over the year was sufficient to cover what the employee would have been entitled to if the minimum wage rate plus overtime and penalty payments (as identified above) had been paid in that year.
 - (d) Where payment is adopted in accordance with this clause 13.2, the employer will keep a daily record of the hours worked by the employees which will show the daily date and start and finishing times of the employees. The record will be countersigned by the employee fortnightly, and will be kept at the place of employment for six years.
4. At [117] the Full Bench accepted that clause 13.2 satisfies the requirements of s 139(1)(f)(i) and (ii).
5. Section 139(1)(f)(iii) is satisfied, in particular, by the terms of clauses 13.2(c) and (d). In others words the employer is only excused from paying overtime and penalty payments if the annual salary is at least the equivalent of the minimum wage rate plus overtime and penalty payments. This is strengthened by the record keeping requirements in 13.2(d) and in particular that the daily records have to be countersigned by the employee. There is no lack of precision as to the precise steps an employer is required to undertake to fulfil their record keeping obligation.
6. We accept that in light of the Decision there are 3 improvements that could be made to clause 13.2:
- (a) Firstly the clause could specify that the agreement is to be in writing with the individual employee, as opposed to the majority of employees;

- (b) Secondly the clause could specify that the agreement is to be kept with the pay records; and
 - (c) Thirdly the clause could specify that the agreement can be terminated on 1 month's written notice;
7. In relation to the *Marine Towing Industry Award 2010* there is no evidence of a lack of compliance by any employer. No complaint is made by the MUA. The terms of the current arrangement are well understood by the award participants. AMMA in their submissions of 7 December 2016 (at [12]) submitted that no variation of the award should be made.
8. The MUA agrees and says:
- (a) It is to be assumed prima facie that the modern awards objectives were achieved by the making of the modern awards. (*Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24]);
 - (b) Section 134(1)(g) of the FW Act provides that the FWC "must ensure that modern awards provide a fair and relevant minimum safety net of terms and condition, taking into account: ... (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards." (my emphasis)
 - (c) The annualised wage arrangements have a long standing industrial history in awards. For example the *Tugboat Industry Award 1974* provided for annual salaries for work performed at the Port of Brisbane.
 - (d) The rights of employees in the Towing Industry are well protected by strong unions.
 - (e) There is no proponent seeking change.
 - (f) Even in a case where there is a posited variation the task of the FWC is to "come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net." (*CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [29]) (my emphasis); and
 - (g) In this case whilst improvements could be made to the clause, such changes are not necessary to achieve the objective of a fair and relevant minimum safety net.

CONCLUSION

9. It is respectfully submitted that the Full Bench should determine that the annual salary arrangements in the *Marine Towing Industry Award 2010* satisfy the requirements of s 139(1)(f) without amendment.



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