MARITIME INDUSTRY AUSTRALIA LIMITED

13 February 2017

Associate to Vice President Hatcher

Fair Work Commission

William Street

Sydney NSW 2000

Email: amod@fwc.gov.au

Dear Associate to Vice President Hatcher,

Re: 4 yearly review of modern awards – Seagoing Industry Award 2010 – Alleged NES inconsistencies (AM2014/243)

We refer to the conference before Vice President Hatcher on 16 January 2017 and subsequent directions issued on 17 January 2017 requesting parties to file full written submissions in relation to the alleged inconsistencies between the National Employment Standards (NES) in the *Fair Work Act 2009* (Fair Work Act) and the *Seagoing Industry Award 2010* (the Award) raised by the Fair Work Ombudsman's Office.

Background

1. MIAL represents employers who have employees performing work in the industry covered by the *Seagoing Industry Award 2010*.

2. The Fair Work Ombudsman (FWO) had received inquiries regarding the interaction of clause 27 of the award with the NES. It is not clear if this remains a live issue for the FWO. Clause 27 is contained in Part B of the Award, which covers prescribed ships operating under a temporary license under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) who have undertaken more than two journeys under such a license in a 12 month period.

3. As a result of these coverage provisions, employers covered by Part B of the Award can be overseas-based employers and the employees generally would be foreign nationals as well.

4. MIAL deals with enquiries from these companies with some regularity, sometimes via our member companies directly or on behalf of subsidiaries.

MIAL's position is as follows:

Reasonable hours

5. The ordinary hours stipulated in Part B of the Award are 8 hours a day, with overtime payable for hours worked beyond that, or on weekends (clause 27.2-3).

6. On 8 May 2016 AiG submitted that section 62 of the NES deals with reasonable hours and that hours beyond ordinary hours must be reasonable but do not automatically attract overtime. MIAL supports this submission.

7. The effect of section 62 of the NES is that 38 hours a week are ordinary hours and weekly hours worked beyond the ordinary 38 hours must be reasonable. Whether or not overtime is payable for these hours may impact on whether the hours are reasonable or not (clause 62(3)(d)) but is not the sole determining factor.

8. There are multiple elements contained in clause 62(3) of the Fair Work Act which an employer must consider when an employee works hours beyond their ordinary hours but this clause does not stipulate that overtime must be paid.

9. The effect of clause 27 in the Award is to require Part B employers to ensure any hours beyond 8 hours a day are reasonable to pay overtime for such hours.

10. MIAL submits that requirement for hours to be reasonable doesn't in and of itself give rise to an inconsistency between NES section 62 and the Award as the payment of overtime is not the only determining factor of reasonableness. However, it could be made more explicit in the Award if the Commission determines that there are valid concerns about the application of this clause.

Patterns of work

11. Additionally, it is evident that the 40 hour week that could result from working 8 hours a day from Monday to Friday is not prima facie inconsistent with the NES because employers covered by Part A of the SIA can undertake an averaging exercise as per 18.4 of the Award, which states:

> *18.4 For the purposes of the NES an employee's weekly hours may be averaged over a period of up to 52 weeks.*

12. Clause 18.6 of the Award also directly contemplates working on a swing cycle arrangement. For Part A employees, ordinary weekly hours may therefore be up to 40 hours without requiring a test for reasonableness. Section 62(3)(g) of the NES provides for the consideration of whether additional hours are reasonable in the context of: *the usual patterns of work in the industry, or the part of an industry, in which the employee works.*

13. Temporary licensed ships are only covered by Part B of the SIA during their third journey under a temporary license within 12 months. The point at which Part B SIA coverage starts could be mid-swing and may last for an indeterminate period which could be from days to weeks. These leads to challenges in the calculation of wages and employee entitlements.

14. In this industry context of intermittent coverage of employees with the Australian workplace relations system for a short period, it is MIAL's submission that payments under Part B of the

Award are likely to be calculated per day (and not per week or month) so it seems sensible to also have the assessment of whether additional hours are reasonable made per day.

Part B Industry Issues

15. Employees who are captured by the provisions of Part B of the SIA are not coverage-free employees. They may be covered by individual employment contracts, flag state or country of origin conditions of employment, an International Transport Federation (ITF) agreement, or some combination of the above. These may be more or less beneficial than Part B SIA requirements and employers need to assess these against Part B to determine the applicable conditions of employment.

16. MIAL has encountered challenges in the exercise of reconciling conditions of employment across multiple jurisdictions in the context of Part B. To date, a level of industry understanding of the application of Part B, including clause 27, has been achieved. Varying the clause has the potential to undermine this.

Proposed clause changes (MUA)

17. The Maritime Union of Australia's (MUA) proposed clause (MUA submission of 9 April 2015) does not introduce clarity but instead gives rise to a new requirement that all hours over 38 hours a week must be paid as overtime. MIAL strongly opposes this submission.

18. The change to add a new employment condition and require Part B employers to pay overtime after 38 hours would disturb the wage rates and leave provisions of the award, which have been calculated based on 40 hours a week being ordinary hours.

19. If the Commission were minded to accept the MUAs proposed clause, then MIAL would submit that changes should not be made to the overtime entitlements of Part B employees without also undertaking the necessary calculations and adjustments to the wage rates listed in Part B of the Award, which are calculated on a 40 hour week.

20. MIAL submits that there is no inconsistency between section 62 of the NES and clause 27 in Part B of the SIA and that no changes to the existing clause 27 should be made.

Yours sincerely,

Isabelle Guaran

Industry Employee Relations Manager

Maritime Industry Australia Limited