



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT WATSON  
DEPUTY PRESIDENT GOOLEY  
COMMISSIONER CAMBRIDGE**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2016/5)  
Ports, Harbours and Enclosed Water Vessels Award 2010**

**(ODN AM2008/49)  
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**Sydney**

**10.05 AM, MONDAY, 24 OCTOBER 2016**

PN1

VICE PRESIDENT WATSON: I'll take the appearances please. Mr Herbert?

PN2

MR A HERBERT: Yes, if it pleases the Commission, I appear in this matter for the applicant Sea Swift Pty Ltd.

PN3

VICE PRESIDENT WATSON: Thank you.

PN4

MR G FREDERICKS: If the Commission pleases, Fredericks - I appear for CSL.

PN5

VICE PRESIDENT WATSON: Mr Fredericks.

PN6

MS I GUARAN: If it pleases the Commission, Guaran initial I, appearing for Maritime Industry Australia Limited.

PN7

VICE PRESIDENT WATSON: Ms Guaran.

PN8

MR N NIVEN: If the Commission pleases, Niven N, appearing for the Australian Institute of Marine and Power Engineers.

PN9

VICE PRESIDENT WATSON: Mr Niven.

PN10

MR N KEATS: Good morning, my name is Keats - initial N, solicitor - I seek permission to appear for the Maritime Union of Australia.

PN11

VICE PRESIDENT WATSON: Mr Keats.

PN12

MR A HOWELL: And your Honour - Howell - H-o-w-e-l-l, initial A of counsel seeking permission to appear on behalf of the AMOU.

PN13

VICE PRESIDENT WATSON: Thank you, Mr Howell. I am not sure whether permission has been granted in this matter in the past. It appears not. Given the complexity of these matters we would grant permission to counsel in each case. Has there been an agreement at the Bar table as to how these matters will proceed? Mr Herbert?

PN14

MR HERBERT: I don't know about an agreement but as usual I'll bully my way to the front row. No, there has been a suggestion that of course that Sea Swift go

first in relation to the matter. I am indifferent as to who follows but seeing as how we're the only party with any witness evidence that would seem to be an appropriate course and then after that - - -

PN15

VICE PRESIDENT WATSON: Are witnesses required for cross-examination?

PN16

MR HERBERT: So far as far as we know two of them are. Mr Cooper we're not sure about yet. I haven't had time to speak to everybody yet about that but I haven't had anyone definitely suggest that Mr Cooper is required but the other witnesses are as we understand it, and all three are here. I won't call Mr Cooper unless obviously unless he is required for cross-examination.

PN17

VICE PRESIDENT WATSON: Yes. Well, unless anyone has a different view then perhaps we can start with your evidence. Mr Herbert?

PN18

MR NIVEN: Excuse me. Sorry, there was just one matter that we thought that we might try and deal with first before we get to that.

PN19

VICE PRESIDENT WATSON: Yes, Mr Niven.

PN20

MR NIVEN: And that was the proposal to refer the issue in relation to the AIMPE's application to insert an electrician - an electro-technical officer into the Seagoing Award. There has been some communication and correspondence between the parties in relation to that and the suggestion is, of course, we have issues with both of our witnesses not being available today to be able to refer - and the suggestion has been to refer that to a single member for a conference and then have a report back to this, this Full Bench on the outcome on what would be a rather technical and time-consuming process.

PN21

And so as the witnesses are not available today due to medical issues for the AIMPE witness we think this would be the best use of the Commission's time to deal with the other substantial issues and then receive a report back from the conference from a single member dealing with that issue and I believe that there's general consensus around this table for that process if the Commission was so minded to agree to that suggestion.

PN22

VICE PRESIDENT WATSON: And can I just clarify, Mr Niven, what exactly would be referred to the members for conciliation? Is it only the electrician electro technical officer classification?

PN23

MR NIVEN: Yes, that's correct.

PN24

VICE PRESIDENT WATSON: So all other classification issues and relativity issues that are raised by the applications would remain and be heard and determined today and tomorrow.

PN25

MR NIVEN: Yes, so they would be dealt with during these proceedings. So just the electro technical ones.

PN26

VICE PRESIDENT WATSON: Yes.

PN27

MR NIVEN: Would be referred off.

PN28

VICE PRESIDENT WATSON: Yes.

PN29

MR NIVEN: If the Full Bench was agreeable to that, your Honour.

PN30

VICE PRESIDENT WATSON: Yes. Is there any disagreement with that proposal?

PN31

MR FREDERICKS: I should indicate we don't disagree. But just to clarify indicate that our witness would be available. I think the fundamental point is - I think is witness because our witness statements was filed in response to theirs. So our suggestion was maybe it's better dealt with in conference.

PN32

VICE PRESIDENT WATSON: Yes.

PN33

MR HERBERT: Could I be heard in relation to that, your Honour?

PN34

VICE PRESIDENT WATSON: Yes.

PN35

MR HERBERT: Your Honour has put the question a little bit wider to Mr Niven than what we apprehended. We certainly have no difficulty with the matter to which Mr Niven refers being sent away. That's not a matter about which my client has any particular interest because that relates to what we would say as perhaps the other half of the industry.

PN36

But the question of matters being sent away to single members for some - the possibility of some further conferencing or conciliation ought not to be put to one side in relation to the other matters which are dealt with in the proceedings. And I say that because the awards that were made in the form that they exist were made

very much as a matter of agreement as between the parties. My client has raised an issue which we say hasn't really been properly addressed during the course of that process and at the end of these hearings, subject to the way in which the submissions fall out, it is likely that we will be asking the Full Bench to refer some of the matters away to see if agreement can be reached between the parties as to questions of relativities and things of that kind.

PN37

If the Full Bench accepts the proposition that there ought to be a separate category for the small ships to which we refer, the question of relativities et cetera on wage rates in that respect may well be a live issue, but one which might be better resolved by some conferences with all the relevant parties and before the Commission once a single member of the Commission, once the views of the Full Bench are known.

PN38

And I say that by reference to the submissions on the draft determination that we put up, drew upon the wage rates which are contained in the Ports Harbours and Enclosed Waters Vessels Award. We have also put on some material to demonstrate what the Self-propelled Barges of Small Ships Award would look like had it been - the rates of pay in that Award had been preserved - and there are some differences between them.

PN39

And in that respect it may well be that rather than the Full Bench determining the matter for itself that there be an attempt made to have issues of that kind where the wage rates might fall. And I understand, for example, AIMPE agrees with the notion there should be a small ships category, but disagrees with the wage rates that we propose.

PN40

Now, they're all matters, in my submission, that rather than being a matter that the Full Bench should attack at first instance but rather that the parties should be given the opportunity to see if they can reach some sort of a landing in relation to where that might be, if the Full Bench were able to determine the question of whether a small ships category was warranted and justified or not.

PN41

But can I leave open the question as to the wider question of whether there are not some other matters in addition to the matter that's been raised by Mr Christiansen's evidence adduced by AIMPE but that some other matters, in my submission, given the nature of this process that might warrant some addressing in that way.

PN42

VICE PRESIDENT WATSON: Yes, thank you for that. Yes, well the Bench is disposed to agree to the proposal that the Electrician Electro-technical Officer classification issue, whether such a classification should be inserted into the Seagoing Award, that issue be the subject of a separate conference of the interested parties and Commissioner Cambridge will be available for that process and liaison can occur with his Chambers in relation to such a conference.

PN43

And we will otherwise hear from the parties in relation to the matters that are listed today. Perhaps commencing now with your evidence, Mr Herbert?

PN44

MR HERBERT: Yes.

PN45

VICE PRESIDENT WATSON: The opening?

PN46

MR HERBERT: Before I do that there are - can I take the submissions which were filed in April of this year to be read or is it your Honour's practise to admit them as exhibits.

PN47

VICE PRESIDENT WATSON: No, we've had the chance to read those submissions - to do that. That was submissions on the 15 April?

PN48

MR HERBERT: Yes, and they had attached to them the draft - the three draft determinations - should have attached. I am advised they may have been filed separately but there should be three draft determinations which were - - -

PN49

VICE PRESIDENT WATSON: Yes, well I have a draft determination attached to the correspondence with your instructor's dated 12 April and that proposes variations to the Seagoing Award.

PN50

MR HERBERT: And - - -

PN51

VICE PRESIDENT WATSON: Then also separate determinations for the other two amendments, yes.

PN52

MR HERBERT: Yes.

PN53

VICE PRESIDENT WATSON: What I might do is mark the application being the correspondence of 12 April with the three draft determinations, exhibit H1.

**EXHIBIT #H1 APPLICATION - CORRESPONDENCE DATED 12 APRIL 2016 WITH THREE DRAFT DETERMINATIONS**

PN54

MR HERBERT: Thank you.

PN55

VICE PRESIDENT WATSON: It's in the form of a letter to the associate of Justice Ross. And the submissions dated 15 April 2016 I will mark exhibit H2.

## EXHIBIT #H2 SUBMISSIONS DATED 15 APRIL 2016

PN56

MR HERBERT: There is whilst the Bench have those determinations out there is a typographical error in the draft determination in relation to the Seagoing Industry Award. The new clause 3.5A does not have the full preparatory words which were intended to be there and are there in the Ports Harbours and Enclosed Waters determination and that's in 3.5A - the preparatory words should read, "This award does not cover employees engaged in the operation of." And I'd ask that that draft be amended accordingly by the Full Bench because that is in fact what we're seeking, and the award of course must refer relevantly both in inclusion and exclusion one would think to classes of employees. The full preparatory words appear in the new proposed 3.3A in the Ports Harbours Award but I ask that that amendment be noted by all concerned.

PN57

In exhibit H2, which is the written submissions there are two administrative errors in that. One is on page 11 at the top of the page. The second line at the top of the page there can be no cogent reason to reintroduce the category into the award sounds like my opponent's arguments. In fact, the word "not", should be after the word "argument". "No further argument not to reintroduce." That slipped through the filter. That's the first and would ask that the written submissions be taken as amended in that respect.

PN58

The other is at paragraph 54 there is a reference on the fourth line in paragraph 54 to the Tiwi Islander for the deadweight of 50 tons. In fact that should have been a reference to the Temple Bay as the rest of the evidence in the submissions refer. The Tiwi Islander is 204 tons but it's the Temple Bay that is 50 tons. And we'd ask that "Tiwi Islander" be substituted with the words "Temple Bay".

PN59

The order of witnesses that we propose will be Mr Ainscough first, followed by Mr Bruno and if anybody wants Mr Cooper and I haven't heard that anybody who does but if anybody wants Mr Cooper he will be the final witness.

PN60

There are two statements from Mr Bruno, and the first is 9 May 2016 and the second which largely incorporates some additional documents is in - I'm sorry I don't have the date. I think it's in late July 2016.

PN61

VICE PRESIDENT WATSON: 3 August.

PN62

MR HERBERT: Thank you. 3 August. Mr Ainscough has his statement headed "Further affidavit of Stephen Bradley Ainscough" which had caused confusion into the camp because it's the only affidavit of Mr Ainscough, and I apologise for that, and his affidavit was the affidavit on which we rely. It was sworn on 10

August 2016. Now, does your Honour require an opening in relation to the matter? I'm happy to do so but I don't want to do so if it's not required.

PN63

VICE PRESIDENT WATSON: It's a matter for you. We've had a chance to read the outline of submissions, Mr Herbert, so we don't require an opening.

PN64

MR HERBERT: Thank you. In that event, I won't detain the Full Bench. I will save my thunder for later. I call Stephen Bradley Ainscough.

PN65

VICE PRESIDENT WATSON: Mr Ainscough. Remain standing while my associate administers the oath or affirmation.

PN66

THE ASSOCIATE: Please state your full name and address.

PN67

MR AINSCOUGH: Stephen Bradley Ainscough, (address supplied).

**<STEPHEN BRADLEY AINSCOUGH, SWORN [10.22 AM]**

**EXAMINATION-IN-CHIEF BY MR HERBERT [10.22 AM]**

PN68

VICE PRESIDENT WATSON: Thank you, Mr Ainscough. Please be seated. Mr Herbert.

PN69

MR HERBERT: Thank you. Mr Ainscough, you've given your name as Stephen Bradley Ainscough, is that correct?---Yes.

PN70

And are you a Director of MER Solutions Australia Pty Ltd, which is a multidisciplinary maritime consultancy and specialist maritime law firm?---Yes.

PN71

Have you been asked to prepare an affidavit of some matters in respect of which you have been requested to comment and have you prepared an affidavit sworn by you on 10 August 2016 consisting of 44 paragraphs?---Yes.

PN72

And are the facts and circumstances set out in that affidavit to the best of your knowledge true and correct?---Yes.

PN73

And the opinions that you have offered in that statement are your own opinions?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XN MR HERBERT



PN74

I tender that statement or the further affidavit of Stephen Bradley Ainscough.

PN75

VICE PRESIDENT WATSON: That will be exhibit H3.

**EXHIBIT #H3 FURTHER AFFIDAVIT DATED 10 AUGUST 2016 OF  
STEPHEN BRADLEY AINSCOUGH**

PN76

MR HERBERT: Now, Mr Ainscough, you've indicated in your statement at paragraph 42 and 43. And 43, in particular, I'm sorry - "Domestic vessels up to 5,000 tons could be considered as ships that trade exclusively in Australian waters." Is that a straight line iron-clad rule or what is it? The 5,000 ton line is there a rule that above and below that line there is a differential in the operating area of vessels necessarily?---No, it's an indication. Typically, 5,000 tons it will be in Australia but it depends on what physically has been carried by the ship. And you can have smaller ships which are less than 5,000 tons carrying LPG or exotic chemicals which could trade internationally.

PN77

Yes?---Yes. But as a rule - as a guide - it's not that.

PN78

And it is only a guide?---Yes. Only a guide.

PN79

Thank you. That's the evidence-in-chief of Mr Ainscough.

PN80

VICE PRESIDENT WATSON: Mr Keats.

**CROSS-EXAMINATION BY MR KEATS**

**[10.25 AM]**

PN81

MR KEATS: Now, Mr Ainscough, do I understand correctly that you received some written instructions from a firm called Livingstone's that led to the preparation of your affidavit?---Yes.

PN82

And they're not attached to your affidavit, are they?---No. There's nothing here.

PN83

Can I show you this document and ask you whether these are the instructions you received?---Yes. That was received by my colleague but sent to me but it's not addressed to me.

PN84

Can I seek to tender that please?

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN85

VICE PRESIDENT WATSON: What is it, Mr Keats? A letter by Livingstone's to the principal of Cavanagh Law.

PN86

MR KEATS: Dated the 15 July, your Honour.

PN87

VICE PRESIDENT WATSON: Dated 15 July. We'll mark that exhibit K1.

**EXHIBIT #K1 CORRESPONDENCE DATED 15/07/2016 FROM LIVINGSTONE'S TO PRINCIPAL OF CAVANAGH LAW**

PN88

MR KEATS: Thank you, your Honour. Now, you'll see in that letter you were asked three questions?---Mm'hm.

PN89

And the last question is about preparing a list of vessels. Do you see that?---Yes.

PN90

Am I correct in understanding that that's not something that's found in your affidavit?---No. Well, no there's nothing in the affidavit, that's correct.

PN91

And I'm also correct in understanding you weren't asked to express an opinion as to what sort of tonnage vessels fall within Australian waters?---Can you repeat your question please?

PN92

You weren't asked in your letter of instructions?---Mm'hm.

PN93

To express an opinion?---Yes.

PN94

As to what size tonnage vessels operate in Australian waters?---No.

PN95

Now, this idea of tonnage pervades your entire affidavit as to the way the qualifications work, doesn't it? You say that the larger vessel the more complex the qualification is required?---No, what the affidavit says that's a guide.

PN96

Okay?---It doesn't say that's a hard and fast rule. I think if you read into the paragraphs, particularly - I can go back and find the exact ones for you but it mentions it has to do with the voyage it's on, the cargo it's carrying, the cargo containment systems. The complexity of the equipment on board. That's what the affidavit clearly outlines.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN97

One of the things you seek to rely upon is it's tonnage, correct?---No. We use it as a guide. We say typically - the larger the ship it's more complex - but that's not always the case.

PN98

But it's part of the guide though is what you're telling me?---It can be, depending on the type of ship.

PN99

Right. I'll go more slowly. You talk about classification and competency requirements under what you call the "International system"?---Yes.

PN100

You don't attach them but I understand they're the - for my client's membership - the Marine Order 73 for ratings. You're familiar with that document?---I know what it is but I haven't read the Marine Order 73 in relation to this.

PN101

All right. Can I seek to hand up a copy of that to you, so that you have one in front of you?---Yes.

PN102

And just to follow on your last answer, you say that in preparing your statement you didn't have regard to this document?---No. I had a glance of it. Well, actually I did. I looked at it but I didn't specifically write the document based on reading rule 73 for ratings. I had a - because the question was around STCW qualifications primarily for officers. So I did have a look at it but it was like - the focus of the affidavit was on the officer's qualifications, not the ratings qualifications.

PN103

Thank you. Can I get you to turn to page nine?---Mm'hm.

PN104

And perhaps for the members of the Full Bench if I could hand up a copy for each member. You accept that on page nine there's a table that sets out the types of grades of certificates and the functions you're allowed to perform?  
---Mm'hm.

PN105

And you'll see that, for example, an integrated rating?---Mm'hm.

PN106

When you get that certificate you can operate on vessels of any size in any area?---Mm'hm.

PN107

So there's no dependency for a rating as to its area of operation. Do you agree with that?---Yes. I agree with that.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN108

Right. And there's nothing to do with the complexity of the vessel either?---No, that's correct.

PN109

And that's true, also, for each of the four certificate of grades for the ratings. Correct?---That's correct.

PN110

Your Honour, I'm not sure whether your practise is to mark legislative instruments but I would ask that they're somehow noted in this.

PN111

VICE PRESIDENT WATSON: We'll mark this instrument K2.

### **EXHIBIT #K2 LEGISLATIVE INSTRUMENT**

PN112

MR KEATS: Thank you. You did have regard, however, to the crew competencies under the National Standards for Commercial Vessels. Is that correct?---In the affidavit?

PN113

Yes?---Yes. Well, there was - and for the officers - I mean your international ratings as well. I think they're mentioned in the table but just briefly, like I said, the focus of the document was on the officers' qualifications and it did touch only on the ratings qualifications but it is mentioned but mentioned briefly.

PN114

And, again, that's not attached to your statement - your affidavit?---Um - no - - -

PN115

The actual part?---I think it's in the document.

PN116

Well, can I suggest to you that Part D of the National Standard of Commercial Vessels itself is not attached to your affidavit?---That's correct.

PN117

Can I ask that the witness be given a copy and hand up three copies for the Bench? Now, I'd like you to go to page 25, if you could? Just let me know when you have found that?---Mm'hm.

PN118

You'll see there another schedule that sets out certificates and activities you're allowed to do on a certificate?---Yes. Mm'hm.

PN119

All right. And the classification for my client is a General Purpose Hand NC?---Mm'hm.

PN120

You'll see that they're allowed to work all the way out to the outer limits of the EEZ?---Mm'hm.

PN121

So that's 200 nautical miles, is that correct?---Yes, that's correct.

PN122

All right. And there's a delineation about the length of the vessel and a delineation of the capacity or proportion or power of the engine?---Yes.

PN123

All right. And if you look through that list for the Marine Engine Drivers?---Mm'hm.

PN124

Feel free to look down through that list?---Mm'hm.

PN125

Indeed, you can look through the whole list all the way up to Master?---Mm'hm.

PN126

The point I wish to make there's no linkage to tonnage is there?---No. There's no linkage for tonnage. It's all links for engine power that's correct.

PN127

Correct. So just to make it clear the classification certificates issued by either of the two schemes for my client's members?---Mm'hm.

PN128

Have no relationship between the size of the vessel and the type of certificate you need to get. Do you agree with that?---Go back a step? Say it again?

PN129

Take it one at a time?---Yes.

PN130

Under this system here, the National Standard for Commercial Vessels?---Mm'hm.

PN131

For the membership of my client, the Maritime Union of Australia?---Mm'hm.

PN132

If they want to go and get a certificate to operate on a vessel?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN133

They don't need to know the tonnage of the vessel to know that they get the right certificate do they?---No. However, when you start looking at kilowatts, when you start looking at length, these are also a very good guide to tonnage of the ship

because you can divide the length, multiply the length by the breadth, then you can get the tonnage. You can take the horse power - and turn that into - if it's a kilowatt and then go back to the overall surface area and develop a tonnage. So I could go back the opposite way if I felt like it, just from the - what's outlined within the power requirements, within the length requirements and give you a tonnage. The reason why I would think the Act - well, this is written in kilowatts and length is because it's a derivative. So I can do it - I can make a derivative or I can integrate and go back and develop a tonnage.

PN134

All right. Just go back - - -?---If I'm making any sense to you.

PN135

If you go back to my question now. It's true that the general purpose hand wants to work on the vessel he doesn't need to know the tonnage, does he?---No. He has to know the - as it says the length and the kilowatts.

PN136

Thank you?---However, it's related heavily to the - which it's directly connected to the tonnage.

PN137

But it's not tonnage is it?---As I said it's like saying - you know - a car's got four wheels but it doesn't have an engine. Okay? It's - this if you have a certain amount of kilowatts, the larger kilowatts, typically the larger the tonnage. The larger the length, the larger the tonnage. So it's a direct relation. It's connected. It's like having your hand in a glove. Right?

PN138

Do I find in the National Standard for Commercial Vessel a formula that tells me precisely how to go from the length or the propulsion to a precise tonnage?---In the NSCV?

PN139

Correct?---No.

PN140

Thank you. Can I ask that the Part D be marked?

PN141

VICE PRESIDENT WATSON: Yes, that extract from the National Standard for Commercial Vessels will be exhibit K3.

### **EXHIBIT #K3 EXTRACT FROM NATIONAL STANDARD FOR COMMERCIAL VESSELS**

PN142

MR KEATS: Thank you. Now, if I can just wander back to your letter of instructions, which is K1. Now, the third question that you were asked was about providing this list. Did you make any attempts to do that list?---Of the ships?

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN143

Correct?---Yes.

PN144

All right. And you would have found a large number of ships that are under 5,000 tons?---Well, if my memory serves me correctly there's a few hundred. But like when I say "ships" that was one of the problems with the list or off the website is it doesn't really differentiate whether it's a barge or whether it's what the function was. So we really went through all of that and sort of - I think - cut it away and it was down to sort of - less than 20 ships if my memory is serving me correctly.

PN145

And one such ship would have been something like the MV Island Trader?---Yes.

PN146

And when you looked at vessels like that, did you look at the nature of their voyages? Where they go and what they do?---Yes.

PN147

And that's material that would have been of assistance to this Commission, and working out whether or not a small ships schedule should be created, wouldn't it?---I can't answer that question because I didn't submit the material to the Commission. I submitted to the - - -

PN148

Since you know about the Island Trader, you're aware that that's a ship that goes to Lord Howe Island from Macquarie?---Yes.

PN149

And it basically takes their supplies to and from the mainland to that island?---Yes.

PN150

Did you go down further and see that it applies to Seagoing Industry Award for the purpose of the boot test for making its agreements? Or did you not go that far?---Did not go that far.

PN151

Did you look at the line hall vessels of Sea Swift?---Yes.

PN152

Well, first of all they go from Cairns to Weipa, is that correct?---Yes. To my knowledge.

PN153

And they're both less than 5,000 tons is that correct?---Yes, I believe so.

PN154

And they are vessels which you'd say would be in Australian waters?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN155

Where does Australian waters end for you? At the end of the territorial sea or at the end of the EEZ?---Well, actually I'm not qualified to answer that question.

PN156

Well, Mr Ainscough, you say at paragraph 43 of your affidavit?---Mm'hm.

PN157

That domestic vessels up to 5,000 tons could?---Mm'hm.

PN158

Be considered as ships trading exclusively in Australian waters?---Yes.

PN159

You must have made a decision. Where did you draw the line?---Well, I'd say typically for Australian waters for me it's I suppose it's definitely within the 200 nautical miles but that's going right out to the economic zone. So I'd say it was within 12 miles.

PN160

So do you give consideration of say the ships that go up to the alumina plant up at Newcastle to pick up alumina, that were larger than 5,000 tons?---Yes.

PN161

And the view you formed was that there were just not many of them?---There weren't many of them?

PN162

Is that the view you formed in reaching your conclusion?---There wasn't too many. That's correct.

PN163

How many?---Taking the alumina from Weipa to Newcastle? Is that what you're referring to?

PN164

No, how many vessels above 5,000 tons?---Yes.

PN165

Were you looking at? That were in Australian waters?---Again, without having the spreadsheet here in front of me - it's been a while since I did it. It wasn't that many. It was less than 20.

PN166

So a similar number is what you're telling us that are under the 5,000 tons?---Yes. There wasn't too many.

PN167

When you gave this opinion about the 5,000 ton line?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS



PN168

Did you have a regard to the history of the Seagoing Industry Award?---No. I just commented on it from a technical operation perspective.

PN169

I see. So are you aware that the divide of up to 19,000 tons has been in the Seagoing Award since 1990?---Yes.

PN170

And you're aware that that was put in there following a whole series of enquiries into the industry?---I wasn't aware how it got in there. I just knew it was there.

PN171

All right. But you're an advocate for changing that history since 1990 to make a new line. Is that correct?---Yes. That's correct.

PN172

I suggest to you that the 5,000 ton line is just merely arbitrary. What do you say?---It's merely arbitrary?

PN173

Yes?---Well, no. I think the 5,000 ton line is a reasonable guide depending on what's been carried on the ship and where it's going and it's a guide. So it's not arbitrary. It's not that we've come up with a number. I think it's a reasonable guide. You've got to start somewhere and I think 5,000 tons is a reasonable place to start. So it's not arbitrary at all.

PN174

But you accepted when asked questions by Mr Herbert that it could be higher or lower, correct?---It may well be but it depends on where the ship's going, what the ship's carrying. If you've got a 5,000 ton ship and it's carrying liquefied gas it's an extremely more complex piece of machinery both from a cargo operations point of view, both from a cargo containment point of view, both from a cargo equipment point of view than a 10,000 ton bulk carrier. It's completely different.

PN175

Going back to your affidavit - - -

PN176

MR HERBERT: Well, he was. He didn't finish the answer.

PN177

MR KEATS: Apologies?---Yes, so it's a guide like I keep saying.

PN178

When you give your guide at 43, though, you neglect which I take to mean exclude small gas and chemical factors which are extremely sophisticated in the operation there. So we're looking at the more basic ships are we not?---Yes. Well, it says that in the guide. It says, "As a guide neglecting small gas and chemical tankers", that's correct. Yes, that's correct. 43 is correct.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR KEATS

PN179

I have nothing further, your Honour.

PN180

VICE PRESIDENT WATSON: Mr Howell.

**CROSS-EXAMINATION BY MR HOWELL**

**[10.46 AM]**

PN181

MR HOWELL: Mr Ainscough, I won't keep you long. I'm going to ask you some questions specifically pertaining to Masters?---Yes.

PN182

Now can we start with the document K3? The NSCV Part D, have you got there still with you?---Yes. That's correct. I do have this with me.

PN183

Now, I'm going to take you to the same schedule in one moment?---Mm'hm.

PN184

That my friend Mr Keats took you to but before I do I just want to clarify some language?---Mm'hm.

PN185

The NSCV - the National Standard for Commercial Vessels has a series of parts to it. Part - I think "B" through to Part "E" - that's right?---Mm'hm.

PN186

Part B sets out what are described as general requirements. You're familiar with that?---Mm'hm.

PN187

That includes a series of definitions, doesn't it?---Yes.

PN188

And those definitions apply generally throughout the NSCV?  
---Mm'hm.

PN189

So just rather than provide the whole document to the Commission I might just confirm that your understanding of some of these terms?---Mm'hm.

PN190

Is what's contained in Part B?---That's right.

PN191

It's really just to ensure that I understand what is actually referred to in your affidavit?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN192

But also to inform what schedule - Schedule 2, to Part D - refers to. So could we start with the notion of a baseline. We're talking about the baseline for the mainland of Australia, Tasmania, and recognised islands off the coast of a State or the Northern Territory?---Mm'hm.

PN193

That has the same meaning as provided for in the Sea and Submerged Lands, Territorial Sea Baseline Proclamation?---Mm'hm.

PN194

Yes, that's in essence, the low tide mark?---Yes.

PN195

Around the coast of Australia?---Mm'hm.

PN196

Is that right?---Mm'hm.

PN197

And there are, what I'll call "imaginary lines", drawn across bays and harbours in order to try and identify the territorial baseline?---Yes.

PN198

All right. You've then got the notion of inland waters?---Yes.

PN199

Inland waters is non-tidal waters?---Yes.

PN200

You understand?---Yes, the rivers or whatever else. Sometimes they could be tidal - right.

PN201

Well, that's your understanding is it?---Yes.

PN202

All right. Well, if Part B - defines inland waters as meaning "non-tidal waters"?---Mm'hm.

PN203

Does that mean you have applied the wrong understanding when you have used the language of inland waters in your affidavit?---No, when I said "inland waters" it's lakes but it's sort of up-rivers as well. So, you know, that's how I've - when I've written it.

PN204

That's what you've thought it meant?---Mm.

PN205

All right. Then we come to in-shore operations?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN206

And when we're talking about in-shore operations we're talking about operations of a vessel that are conducted laterally on the coast?---Yes.

PN207

Either from the base or a regular port of departure of a vessel?---Yes.

PN208

That is within 15 nautical miles to seaward?---Yes.

PN209

From the baseline?---Yes.

PN210

Of the Australian mainland, the Tasmanian mainland?---Yes.

PN211

Or recognised islands?---Yes.

PN212

All within sheltered waters?---Yes.

PN213

So you understand me?---Yes.

PN214

So inshore operations?---Yes.

PN215

All right. Then we have off-shore operations within the NSCV?---Mm'hm.

PN216

And off-shore operations means vessels that are within 200 nautical miles seaward of the baseline?---Mm'hm.

PN217

And we have waters to the outer limits of the EEZ - the Exclusive Economic Zone - for Australia?---That's about the same, right. Two hundred miles is about the - is the economic zone. So it's the same thing.

PN218

Well, the economic zone is actually a defined thing under a schedule?---Mm - but  
- - -

PN219

Which is promulgated by the Federal parliament and - - -?  
---Yes.

PN220

- - -ultimately it swings in and out?---Yes. You've seen it's got - - -

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN221

So it's not necessarily just 200 nautical miles, that's right?---Yes, but it's approximately that line.

PN222

All right. And a nautical mile is about what - nearly 1.9 or 1.865?---Yes.

PN223

So when we talk about 200 nautical miles, we're talking about 360 plus kilometres offshore, that's right?---Yes, that's correct.

PN224

All right. When you describe "offshore operations" in your affidavit or voyages in the ocean?---Mm'hm.

PN225

Are you drawing some distinction between 200 nautical miles less or more?---No. I wouldn't say it. I think it's the intent of the voyage so if you're going sort of - when you say "off-shore" that means you're, for me, at least like - away from support.

PN226

Two hundred nautical miles is an awful long way that's away from support, wouldn't you accept?---Yes, but not as far away as like the middle of the Pacific Ocean. So it's all relative.

PN227

You won't hear me cavil with that proposition?---Mm.

PN228

But you wouldn't deny that 200 nautical - in order to properly operate a vessel?---Mm'hm.

PN229

Two hundred nautical miles away from shore you have to be reasonably skilled. Would you accept that as a broad proposition?---Depends on where it is. But, yes, I'd say more skilled than inshore.

PN230

All right. And the NSCV you'll happily know wouldn't disagree with you at least in that respect?---Mm'hm.

PN231

And we'll come to that in one second. Then we have sheltered waters?---Mm'hm.

PN232

So that's waters comprising designated smooth or partially smooth waters?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN233

And the notion of a smooth water is a defined beast again?  
---Mm'hm.

PN234

And it refers to waters that are designated by a State or Territory waterway management legislation as smooth waters?---Mm'hm.

PN235

All right. So, again, smooth waters doesn't necessarily build itself around any connection that is simply defined by reference to some State or Territory legislation?---That's correct.

PN236

All right. Now, with those things in mind can I ask you to go to Part D of the NSCV?---Yes.

PN237

And we'll come to the detail in one moment. Just so the Full Bench has an understanding of how this fits within the scheme of things?---Mm'hm.

PN238

As I understand it and tell me if I'm wrong in this, under the what I'll call the Domestic Commercial Vessels legislation in order for a seafarer to be able to perform duties?---Mm'hm.

PN239

On a domestic commercial vessel?---Mm'hm.

PN240

They have to be certified to be able to perform those duties?---That's correct.

PN241

To obtain those certifications?---Mm'hm.

PN242

Under the NSCV?---Mm'hm.

PN243

They have to meet the requirements that are outlined in Schedule 1 of the document that you have there. Just have a quick look at that for me for one moment. That's on page 18?---Right. Yes. That's correct.

PN244

All right. So to use an illustration relevant to my client's members if we're going to start looking at the Master categories or the classifications we start at page 21?---Mm'hm.

PN245

Clause 1.8 and we have a series of descriptors there - Master less than 24 metres NC?---Mm'hm.

PN246

NC - stands for Near Coastal doesn't it?---Yes.

PN247

All right. And then we have - and I should pause for one moment. You understand the concept of Near Coastal to be within the exclusive economic zone of Australia?---No. I would think it's near coastal is within your 12 miles of the shore.

PN248

That's your understanding is it?---Yes.

PN249

All right. I'll have to come back to that then?---Mm.

PN250

Have you ever Marine Order 70?---Not for a long time, no.

PN251

Would it surprise you to learn that near coastal operations is defined as anywhere within the Australian Exclusive Economic Zone?---It would surprise me actually.

PN252

All right. I'll come back to that then. So we have Master less than 24 metres?---Mm'hm.

PN253

And we have Master inland waters - Master less than 35 metres?---Mm'hm.

PN254

And over at 1.12, Master less than 80 metres?---Mm'hm.

PN255

Now, I pause for one moment. A ship of longer than 80 metres?---Mm'hm.

PN256

Is dealt with under a different scheme of regulation?---Yes.

PN257

Is that your understanding?---Yes.

PN258

So once you're over the 80-metre line as it were, you're into the international certifications?---Well, again, it depends on the ship.

PN259

Right?---It depends on the trade that it's in. It depends on the complexity of the vessel. It depends also on the requirements of the owner.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN260

All right. Pause for one second?---Yes.

PN261

Can you go to Schedule 2 for me? This is the duties that people may perform?---Mm'hm.

PN262

Can you show me anywhere where it contemplates someone with an NSCV based certificate doing work on a vessel that's above 80 metres long?---Well, it doesn't do in this particular document like you correctly indicated. It only allows for vessels up to 80 metres.

PN263

Right?---So otherwise then typically you move into the STCW document - qualifications.

PN264

Right. So if I'm a Master?---Mm'hm.

PN265

And I'm going to perform work on a domestic commercial vessel?---Mm'hm.

PN266

That is more than 80 metres long?---Mm'hm.

PN267

What certificate do I apply for? And what qualifications do I have to have?---Under this particular - reading it like this - you would have to have, typically, STCW qualification. However, I would think if you were wanting to go for a larger qualification then you'd have to seek something outside the ban, then you'd have to seek the dispensation or something with the AMSA. Right? Because there are cases where they'll go - you can go a bit bigger.

PN268

All right. Just to make that sense to get any of these certificates you've got to apply to - what I'll describe at least - standing here today as the relevant regulator?---Yes.

PN269

From the 1 January of next year the relevant regulator for all of the certificates - international or - - -?---Yes.

PN270

- - - domestic, commercial - becomes AMSA. That's right?  
---That's correct.

PN271

All right. So right now we're in a transitional phase?---That's correct.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN272



So the States and Territories?---Till next year.

PN273

But at the moment we're in a transitional phase so the certificates are still issued by the relevant State or Territory authority?---Yes.

PN274

All right. Except for the international tickets which are today, as they've always been - been issued by AMSA or its predecessor?---That's correct.

PN275

All right. Now - and again, just so we don't get confused on language?---Mm'hm.

PN276

You will see - the Full Bench will see in various of the affidavits - there's reference to Master Class Three or Master Class Four or Master Class Five, Mr Ainscough, they are older titles for older certificates. That's right?---That's correct.

PN277

And Schedule 3 of this document which starts on page 28?---Mm'hm.

PN278

Outlines what I might describe as the transitional scheme so that certificates that are presently held by people don't have to be immediately renewed and you identify what - for example - the Master Class Three is or the Master Class Four or the Master Class Five, under the certificates of competency required by this new scheme by looking at Schedule 3. Is that your understanding?---Yes.

PN279

All right. So just to use an illustration we go to item seven?---Mm'hm.

PN280

We have Master Class Four, Skipper Grade 2, Master Class IV Trading, Master Class IV Fishing?---Mm'hm.

PN281

They're titles of certificates issued by different State or Territory regulators?---Yes. Correct.

PN282

And the modern day equivalent, if I can use that expression?---Mm'hm.

PN283

Is the Master less than 35 metres?---Yes.

PN284

Near coastal?---Say the metric not Imperial.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN285

All right. Nonetheless, that's how the Full Bench would understand language like Master Class Three or Master Class Four when it comes to looking at this document. That's how it relates?---Yes.

PN286

All right. So can I then get you to go to Schedule 2? Which starts on page 25?---Mm'hm.

PN287

Now, you just had a quick look at this referable to the General Purpose Hand?---Mm'hm.

PN288

I just want to take you to the particular classifications relevant to a Master?---Mm'hm.

PN289

So they start on page 26, paragraph - or item 2.8?---Mm'hm.

PN290

So someone who holds a Master less than 24 metre certificate?---Mm'hm.

PN291

Can command a commercial vessel in waters to the outer limits of the EEZ?---Yes.

PN292

So again the starting point is it's not referable to tonnage directly is it?---No.

PN293

I'll come back to that - - -?---Like we just said before your length of your ship is proportionate to your tonnage.

PN294

No, let's just pause and deal with that right now, shall we? When you say "tonnage"?---Mm'hm.

PN295

And the proportion of length - the tonnage - what sort of tonnage are you talking about?---Deadweight.

PN296

Deadweight tons doesn't feature anywhere in the present scheme of regulation for international vessels or for national vessels, that's right, isn't it?---That's correct.

PN297

So when you - - -?---It's always kilowatts. It's usually length though.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN298

Right. So the existing scheme of regulation so far as - we're now talking about the International Scheme of Certificates and Regulation?---Yes.

PN299

That uses tonnage?---No. It always uses kilowatts if you're an engineer and length if you're a deck officer.

PN300

Sorry, I think we're at cross-purposes?---Yes.

PN301

So the scheme for dealing with regulated Australian vessels or foreign vessels?---Yes.

PN302

International vessels?---Yes.

PN303

The AMSA Scheme?---Yes.

PN304

If I can describe it that way. That uses gross tonnage, doesn't it?---Yes, but if you're an engineer it uses kilowatts.

PN305

Yes, sorry. Again, I'm looking through the prism of the Master here for one moment?---Yes.

PN306

But to the extent it uses a delineation other than kilowatts it uses gross tonnage. Now, gross tonnage is not actually a measure of weight at all?---No.

PN307

Is it?---No.

PN308

It's a measure of volume?---Yes.

PN309

Right. And that traces itself back to the 1969 international tonnage convention?---Yes. Yes.

PN310

Right. All right?---But again, they're all right. That's right. You've got one. You can work out the other. So if you need a deadweight, you know you're net tonnage but anyway we won't go into that. But yes to your question.

PN311

Right. The point being there is no necessary connection between deadweight tonnage?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN312

And the level of certificate that you have to have under either the International AMSA scheme of certificates or the NSCV scheme certificates. That's right, isn't it?---No. That's correct.

PN313

Yes. Right. So just coming back to the NSCV for one a moment?---Mm'hm.

PN314

We're just going to have a quick look at the Masters?---Mm'hm.

PN315

So we've looked at 2.8?---Yes.

PN316

So if I've got that particular certificate what used to be known as - let me look at Schedule 3 - - -?---Or four wasn't it?

PN317

Master Class Five?---Five - all right.

PN318

So item five on Schedule 3?---Yes.

PN319

I can define the Master?---Yes.

PN320

Command a commercial vessel of less than 24 metres all the way to the exclusive economic zone, 200 nautical miles offshore?---Yes.

PN321

At least 200 nautical miles offshore?---Yes.

PN322

If I uphold the 2.9 certificate Master Inland Waters, what used to be known as - - - ?---Yes.

PN323

If I can quickly find it, which I probably can't. Yes, here thank you - item 13?---Mm'hm.

PN324

That's the old Master Class Five?---Mm'hm.

PN325

So under the old scheme the higher number the smaller the operating area and the smaller the vessel, right?---That's correct.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN326

But the lower Master Class the higher the level of skill?---That's it, yes. That's right.

PN327

And knowledge?---Yes.

PN328

Item 2.10 commercial vessel less than 35 metres, I can command it as a Master in waters to the outer limits of the EEZ?---Mm'hm.

PN329

And, again, item 2.12, I can command a commercial vessel all the way out to - of up to 80 metres in length?---Mm'hm.

PN330

All the way out to 200 nautical miles off-shore?---Mm'hm. Yes.

PN331

So again no direct relationship to the concept of deadweight tonnage at all?---Mm'hm. That's correct. If you read it black and white. That's correct.

PN332

Is there another way to read it? This is a regulatory regime which requires certain levels of knowledge, skill and responsibility and the delineating feature it uses is the length of the vessel and its operating area. That is right, is it not?---It's the current legislation. That is correct. That's how you're reading it.

PN333

Thank you. And so to put the question again?---Mm'hm.

PN334

The notion of deadweight tons?---Mm'hm.

PN335

Does not directly regulate the certificate that I have to obtain if I am a Master does it?---No.

PN336

To use a simple, if perhaps slightly unrealistic illustration?---Mm'hm.

PN337

I could take - if I'm a Master?---Mm'hm.

PN338

I have to have the same level of knowledge, skill and responsibility to pilot a 79-metre vessel?---Mm'hm.

PN339

All the way out to the exclusive economic zone?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN340

If it was empty as opposed to if it was full?---No, I wouldn't say that. If it's loaded you've got different responsibilities, haven't you? So it's different - - -

PN341

What are the different responsibilities of me as Master?---Mm'hm. You have to load it and then you've got to discharge it.

PN342

Well, they might be different duties?---Yes.

PN343

But my responsibility as a Master?---But you're responsibility as a Master is for the safety of the ship all the time, not just when it's loaded or part-loaded.

PN344

Right. Quite. I'm ultimately the one responsible for the vessel when it's operating?---Yes.

PN345

Whether it be from inshore waters, whether it be within the EEZ waters?---Yes. Correct.

PN346

Or whether it be anywhere?---Yes.

PN347

And it doesn't matter the size of the vessel either. Does it?---No.

PN348

The Master is the Master is the Master?---Yes.

PN349

End of story?---Yes.

PN350

Their responsibility does not change?---That's correct.

PN351

Right. Now, I just want to ask you briefly some questions about the AMSA side of things - the international vessels?  
---Mm'hm.

PN352

Bear with me for one moment while I find the relevant documents. Sorry, excuse me for one moment. Now, I'll provide to you, Mr Ainscough, and I'll provide to the Bench copies of Marine Orders 70 and 71?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN353

I'll just take care of the Bench, firstly, if I might and then I've got a couple of spares for anybody on this side who wants one. To the witness for me please. Sorry, your Honour. Now, if we start with Marine Order 70 for one moment? To be fair to you I think I had asked you some questions a moment ago about the meaning of "near coastal"?---Mm'hm.

PN354

If you want to satisfy yourself about that can I ask you to turn to section 4 of the order which deals with definitions, in particular, page six?---Mm'hm.

PN355

Near coastal waters means the waters, landward of the outward boundary of the exclusive economic zone of Australia?---Yes.

PN356

All right. Nonetheless that's not what you understood near coastal waters to be when you prepared your affidavit, is that right?---No. As I mentioned "near coastal" for me - I understand there's a difference in your - what's in the legislation here but near coastal there's typically within the 13 miles of land. It doesn't have to be - all right?

PN357

Sorry, to cut you off. That's inshore operation isn't it?---Inshore, yes.

PN358

Right?---Near coastal would be - for me - within a hundred miles I'd say, yes. But, again, that's just a - - -

PN359

Why'd you pick a hundred?---Just because of the speed of the ship, how long it takes to get out there. Like just - - -

PN360

What's that got to do with a hundred miles. Sorry?---The distance you are from ports. Like - - -

PN361

All right?---Yes. I agree with what you're asking me.

PN362

And again in a similar structure to the document that I have just taken you to?---Mm'hm.

PN363

Marine Order 71?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN364

The next document which I have provided to you entitled Masters and Deck Officers, that provides the certificates. Sorry, I'll withdraw that. That provides

the permitted duties and the eligibility requirements to obtain the relevant certificates?---Yes.

PN365

Contemplated by that - what I'll call the AMSA Scheme?---Yes.

PN366

All right. So if we look firstly at Schedule 1?---Mm'hm.

PN367

This is the scope of permitted duties and I'll come back to that. I'll jump over Schedule 2?---Mm'hm.

PN368

Starting on page 11?---Mm'hm.

PN369

Here we only have Masters and other Deck Officers or Marine Order 73 which you have already seen deals with - what I'll call the others?---Mm'hm.

PN370

If we're dealing here with Masters this really illustrates, I think, the point that you were otherwise raising in your affidavit that if someone is operating in the international water space beyond the exclusive economic zone there are additional qualifications that they have to have?---Mm'hm.

PN371

And so, for example, to use the Master less than 24 metres?---Mm'hm.

PN372

Sorry, I'll use it - to use the perhaps a more realistic one - the Master less than 500 GT?---Mm'hm.

PN373

Which you will see starts on page 17?---Yes.

PN374

To be eligible to have the Master less than 500 gross tons?---Mm'hm.

PN375

You have to have an unrestricted - sorry, there are a couple of options for the eligibility requirements. You see that?---Mm'hm.

PN376

Option one, option two et cetera?---Yes. Yes.

PN377

Just to use option one as the illustration, you've got to have an unrestricted Masters less than 35 metres near coastal certificate?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL



PN378

Or one of those other identified certificates?---Yes.

PN379

And have completed qualifying seagoing service et cetera?---Yes.

PN380

Yes. So there are additional things you've got to do?---Yes.

PN381

To be able to operate in the international space?---Yes.

PN382

The point, however, is a delineating feature here is 500 gross tons?---Mm'hm.

PN383

For a Master right? And if we go over the page again the delineating feature, this is on page 19?---Mm'hm.

PN384

The next level up for Masters - - -?---Yes.

PN385

- - -is less than 3,000 gross tons?---Right. What page are you on now?

PN386

Page 19?---Yes. Yes, got it.

PN387

And again, over the page on page 20?---Yes.

PN388

We have the unadorned Master?---Yes.

PN389

That, if we go back to Schedule 1?---Yes.

PN390

You can see what these people can do?---Yes.

PN391

That's pages nine and 10 relevantly for Masters page 10?---Yes.

PN392

So someone with the certificate for less than 500 gross tons can operate as Master of a vessel up to that tonnage limit in any operating area?---Yes.

PN393

Not near coastal?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN394

Any operating area?---Depending on - yes, that's correct.

PN395

Five hundred gross tons?---Yes.

PN396

And, again, 3,000 gross tons is the next level up?---Mm'hm.

PN397

Sorry before we leave the 500 gross tons - 500 gross tons?---Yes.

PN398

"A" is in any operating area or I can operate a larger vessel in near coastal waters?---Yes.

PN399

So that is to say a vessel of less than 300 gross tons?---Yes.

PN400

Three thousand gross tons. It wasn't 300, sorry?---Yes.

PN401

Three thousand gross tons. So again, firstly, we're not talking about deadweight tons at all, are we?---No, it's gross tons.

PN402

It's gross tonnage? And again no reference at all to the concept of 5,000 deadweight tons or anything else?---No.

PN403

You'd accept that?---Yes.

PN404

Thank you. Sorry, excuse me for a moment. Sorry, there is one thing I should clarify with you and this is jumping around a bit. So I apologise for that?---Mm'hm.

PN405

I asked you some questions a little while ago about the transitional phase in the NSCV system?---Mm'hm.

PN406

And the different - certificates?---Mm'hm.

PN407

Under the new system which I took you to, which is Part D of the NSCV?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN408

Schedule 3 of which outlines the transition from the old tickets to the new tickets?---Mm'hm.

PN409

Or the old certificates to the new certificates?---Mm'hm.

PN410

There's also a savings and transitional measure so that if you had a particular certificate under a pre-existing scheme, if I can call it that which enables you to operate a vessel that was larger than what would be permissible?---Yes.

PN411

With the equivalent ticket under the new scheme, you're still permitted to do so until your old ticket expires or a particular date. That's right, isn't it?---Yes. That's how I understood it, yes.

PN412

So if someone has a vessel that is in excess of 80 metres?---Yes.

PN413

And is operating as a domestic commercial vessel?---Yes.

PN414

They have a certificate of competency under a pre-existing legislative scheme under a Territory or a particular State?---Yes.

PN415

They will only be required to obtain the next level of certification when the transitional scheme comes to an end?---That's how I understood it, yes.

PN416

Right. But before they do they will still have to qualify for the new certificate. That's right. Do you understand that?---Of course.

PN417

Which includes all of the knowledge, skill and responsibility components?---Yes. Of course.

PN418

Yes?---And the educational requirements.

PN419

And the educational requirements. Indeed, they'll have to undertake in all likelihood additional courses and the like?---Probably, yes.

PN420

Right. Thank you.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN421

Sorry, excuse me for a moment. Thank you, your Honour, I might just ask if Marine Orders 70 and 71 can be marked.

PN422

VICE PRESIDENT WATSON: Yes. We'll mark Marine Order 70, exhibit A1.

**EXHIBIT #A1 MARINE ORDER 70**

PN423

VICE PRESIDENT WATSON: And Marine Order 71 will be exhibit A2.

**EXHIBIT #A2 MARINE ORDER 71**

PN424

MR KEATS: Thank you, your Honour. Now, this is something where I'm in the Commission's hands. I have copies of Part B of the NSCV which I asked the witness some questions about. I'm just unsure whether we have meanings clear. I have copies of that if that would assist the Full Bench if you want to come back to those definitions at some later time.

PN425

VICE PRESIDENT WATSON: Well, if we don't there might be some gaps in our documentary material.

PN426

MR KEATS: Quite. So I might hand that up and ask that it be marked. To complete the legislative picture what I'll hand to the Full Bench is Marine Order 505 which is the Marine Order which gives force to the NSCV. I don't need to take the Full Bench to anything of that kind but you might see reference to it in some of the materials and it may be of assistance to you.

PN427

VICE PRESIDENT WATSON: We'll mark Marine Order 505 exhibit A3.

**EXHIBIT #A3 MARINE ORDER 505**

PN428

VICE PRESIDENT WATSON: And we'll mark the National Standard for Commercial Vessels Part B, exhibit A4.

**EXHIBIT #A4 NATIONAL STANDARD FOR COMMERCIAL VESSELS PART B**

PN429

MR KEATS: Thank you, your Honour. One last thing, Mr Ainscough?---Mm.

PN430

In your affidavit at various places you refer to the justification of the increasing skill certificates. Well, sorry, I'll start that again. You identify the justification in your understanding?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN431

For the increased level of certificates?---Mm'hm.

PN432

And upon - if I can call it - the larger ships and further away?---Mm'hm.

PN433

Is based on risk?---Yes.

PN434

So as I understand it there's nothing which - there's no instrument - no document which explains that connection, that's your understanding. That's right, isn't it?---Yes, but I think it would be fair to say it would be an understanding held by a lot of people, not just myself.

PN435

The point I'm rather illustrating though is it's not just about risk. It's also about the knowledge, skill and responsibility that's required. You would accept that? To operate vessels as they get larger?---Yes of course. Yes.

PN436

And, again, referable to the environment in which they would operate?---Yes.

PN437

And if I can then ask you this, on the flip side?---Mm'hm.

PN438

The certificates that are required to operate vessels exclusively within the ports?---Mm'hm.

PN439

Or the harbours?---Mm'hm.

PN440

Would be lower as a general rule?---Yes, as a general rule.

PN441

All right. Yes, nothing further. Thank you.

PN442

VICE PRESIDENT WATSON: Any cross-examination, Mr Niven?

PN443

MR NIVEN: Yes. Thank you, your Honour.

**CROSS-EXAMINATION BY MR NIVEN**

**[11.22 AM]**

PN444

MR NIVEN: I've just got a couple of quick questions for you?---Mm'hm.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR NIVEN

PN445

One of your answers before you mentioned that for engineers?---Mm'hm.

PN446

And as my friend said before his was through the prism of Masters?---Mm'hm.

PN447

My questions are sort of more through the prism of engineers?---Mm'hm.

PN448

You mentioned that for engineers it was based on kilowatts?---Yes.

PN449

Yes. I'm just clarifying that?---Yes.

PN450

So that's correct. Yes. Not on length. All right. In your affidavit you refer to tons?---Yes.

PN451

And there's been some discussion - questions and answers?---Yes.

PN452

And so we've got two types of tonnage?---Yes.

PN453

Deadweight and gross tons?---Yes.

PN454

But perhaps for clarification for everyone are you able to tell us the difference between those?---Yes. Your deadweight tonnage is the water that the ship displaces.

PN455

Yes?---Your gross tonnage, like you said, is a volume metric rate.

PN456

Right. Okay. Now, in your affidavit at paragraph 43?---Mm'hm.

PN457

Where you talk about 5,000 tons?---Mm'hm.

PN458

Could be considered a ships trade exclusively. Is that deadweight or gross?---I just used deadweight because that's typically what you usually go to see. But it's not - you use all of them of course but the ones that you normally talk about are deadweight tons or gross tons but like I had been relating if it's gross tons, if it's deadweight tons, if it's kilowatts, if it's length they're all inter-related. They're all inter-connected.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR NIVEN

PN459

Yes. It's just that in your affidavit you just say 5,000 tons?---Mm'hm.

PN460

So I guess my question - my question was were you referring to deadweight - - - ?---Yes, in the affidavit I was.

PN461

Or gross?---It was deadweight tons. Deadweight tons. Okay. All right. Thank you. I have no further questions?---No worries.

**RE-EXAMINATION BY MR HERBERT**

**[11.24 AM]**

PN462

MR HERBERT: Mr Ainscough, just taking that last matter again?---Mm'hm.

PN463

You were asked about the difference between deadweight tons and gross tons?---Mm'hm.

PN464

There are three general tonnages that might be described are there not?---Mm'hm.

PN465

The two you've mentioned and there's a net tonnage or a net registered tonnage?---Yes.

PN466

Is that right?---Yes.

PN467

Gross tonnage is sometimes referred to as gross registered tonnage?---Yes.

PN468

And in fact none of them are essentially the weight of the ship?---No, that's true.

PN469

The deadweight ton you asked about or deadweight and you say it's the amount of water?---Mm.

PN470

Displaced by the ship?---Mm'hm.

PN471

Is there another way of measuring that in relation to the weight that can be placed on the vessel?---In the cargo they place on there ultimately.

PN472

And is the weight that a ship can carry to bring it down to its load line, is that another - - -?---Yes. That would be a fair assumption. Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

RXN MR HERBERT

PN473

Yes. And that's the same as the amount of water it displaces?---Yes.

PN474

Is it?---Yes.

PN475

Now, a registered tonnage or you were taken to a number of examples of gross tonnage?---Mm'hm.

PN476

Situation. The gross registered tonnage you said it's a volume metric measure?---Yes.

PN477

And that's being volume metric it's the size of the enclosed space within the ship?---Yes.

PN478

Is that right?---Yes.

PN479

The total space?---Yes.

PN480

Now how do you convert the volume to tonnage for the purposes of expressing that?---Well, you don't now because it's a volume metric space.

PN481

Yes?---Yes.

PN482

But you express it with so many tons?---Yes.

PN483

How does that relate to the actual volume?---Well, it's the cargo carrying capacity of the ship usually - like, the - so it's the - so what's your - sorry, can you go back? I missed your question actually.

PN484

Yes. What is the multiplier? If you have a cubic foot measurement?---Yes.

PN485

How does that convert to tons?---Well, it doesn't typically. Or you might use one water - right? If you're going to do it that water.

PN486

One water?---Yes. One kilogram of water is one kilogram of - one litre of water is one kilogram.

\*\*\* STEPHEN BRADLEY AINSCOUGH

RXN MR HERBERT



PN487

Right?---Which is one - - -

PN488

So the enclosed space of the ship, that is below decks within the hulls?---Yes.

PN489

That's the gross tonnage?---Yes.

PN490

Is that right?---Yes.

PN491

So 500 gross tons?---Yes.

PN492

Is a vessel that has that amount of gross space within its hull?---Yes.

PN493

The net tonnage?---Yes.

PN494

What do you exclude to get from gross to net?---The net tonnage is also the engine room spaces and usually fuels and all your other bits and pieces on the ship.

PN495

They're excluded to get from gross to net?---Yes.

PN496

They're included in gross and they're excluded to reach a net figure?---yes.

PN497

So it's the amount actually available for cargo?---Yes.

PN498

Is that how it works?---Yes, that's how I understand it, yes.

PN499

Now, if the gross registered tonnage and the net registered tonnage have to do with the volume within the ship does a landing barge have a gross tonnage and a net tonnage? If it doesn't have space below the deck?---That's a good point - I've fleetingly looked into landing barges in that detail but, yes - in theory - yes, while it sounds correct it doesn't.

PN500

So a landing barge won't have to describe it in deadweight tons?---Yes, well because that's the cargo carrying capacity of the vessel, right?

\*\*\* STEPHEN BRADLEY AINSCOUGH

RXN MR HERBERT

PN501

Yes. And the cargo carrying you put on the vessel?---Yes.

PN502

To bring it down to its load line?---That's correct, yes.

PN503

And the load line is - - -?---The marks on the side of the ship.

PN504

Above which you can't have the water going above there?---No.

PN505

Or the vessel becomes unstable?---Well, yes. That's correct. That's a simple way of saying that.

PN506

Yes. All right. So if we're talking about the sort of landing barges that have been talked about in North Queensland and in the Northern Territory?---Mm'hm.

PN507

Can you have a gross tonnage or a net tonnage in the traditional sense? By measuring the volume within the vessel, if in fact it has not spaces for loading?---You can't, no.

PN508

Thank you. Now, you've used a figure of - you said - deadweight tonnage?---Mm'hm.

PN509

And when you talk about 5,000?---Mm'hm.

PN510

Or figures of that kind and you've said on a number of occasions when you were asked about length?---Mm'hm.

PN511

And kilowatts?---Mm'hm.

PN512

And deadweight tonnage that they're all connected?---Yes.

PN513

Are there formulated or is there a mathematical way in which you could take the length of the vessel?---Mm'hm.

PN514

And the kilowatts of its propulsion system and work out what the deadweight tonnage or the gross tonnage might be?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

RXN MR HERBERT

PN515

Assuming it's not a landing barge?---Yes. Okay. You could have a very good idea.

PN516

Within what sort of a margin of error?---Five percent. 10 percent. That sort of thing.

PN517

Yes. So if those - it appears that throughout all the materials you have been taken to, the new system - - -?---Yes.

PN518

- - -doesn't refer to one of the three tonnages?---No.

PN519

Other than a gross tonnage figure you were taken to?---That's correct.

PN520

It refers to length and in the case of deck crew?---Yes.

PN521

Kilowatts in relation to engineers?---Yes.

PN522

In each of those cases with the length and the kilowatts, if it were necessary for you to be able to calculate a tonnage, could you do that, within that margin you mentioned?---Likely.

PN523

If you knew the type of vessel it was?---Yes, if I knew the type of ship, likely.

PN524

You've referred in your statement to the fact that you've seen the classifications in the Seagoing Industry Award and the current classifications simply describe nought to 19,000 tonnes?---Yes.

PN525

Did you gain anything from that as to what sort of tonnage we're talking about? Whether that's talking about dead weight? The award doesn't say so, but do you have any understanding of what's being talked about?---I always just assumed - because it's difficult to use, that it was dead weight tonnes.

PN526

If you were talking about barges, from what you said, you couldn't talk about anything else; that's the only tonnage you could use. Is that right?

PN527

Thank you. I have nothing further for this witness at this stage. If he might be excused.

\*\*\* STEPHEN BRADLEY AINSCOUGH

RXXN MR HERBERT

PN528

MR HOWELL: Your Honours, there is one thing which I ought ask arising out of that re-examination. It's really just to be fair to the witness.

PN529

VICE PRESIDENT WATSON: Yes Mr Howell.

**FURTHER CROSS-EXAMINATION BY MR HOWELL [11.31 AM]**

PN530

MR HOWELL: Your Honour would recall that in answer to question from my friend Mr Keats, the witness had said that there was no formula or mechanism for converting length to tonnage and I think he gave a different answer in re-examination.

PN531

MR HERBERT: To be fair to the witness, that's now what he said; he said it's not in the document he was being shown by Mr Keats, was what he said. It was what my note of the answer was.

PN532

MR HOWELL: Do you still have part B with you? Part B of the NSCV?---Part D?

PN533

Part B, B for Bob. Part B the general requirements. B for Bob?---No I don't have part B.

PN534

Sorry, right.

PN535

VICE PRESIDENT WATSON: It wasn't part of the distribution of weight - the witness didn't have a copy.

PN536

MR HOWELL: Actually your Honours - I'll start with this proposition. In your understanding, there are occasions where in various parts of the regulatory regime that apply to domestic commercial vessels, domestic commercial vessels might be called upon or might be required to have the same standard as some of the international standard certificates and things of that kind?---Yes.

PN537

For example, you gave an illustration earlier about a domestic commercial vessel being required - if I'm to be the master of a domestic commercial vessel?---Yes.

PN538

I'm going to operate a domestic commercial vessel that's in excess of 80 metres long, I have to meet the ticket requirements of the AMSA stream?---Of the international stream - international AMSA.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN539

Right?---But then you move to that certificate then, right. So you no longer are using your certificate, you're using your new certificate on the larger vessel, not your old one.

PN540

I understand. Can I ask you to go clause 3.5 which is on page 11, part B?---Yes.

PN541

Just have a quick look at it?---Yes, finishing by length, by breadth, by depth. Yes.

PN542

Again, the only real purpose of this is to identify a gross tonnage relationship. But firstly, there's a formula for identifying how one goes about it?---Yes.

PN543

If you don't know the answer to this and that's fine, but that's - as you would understand it, there's something drawn from the 1969 International Tonnage Convention?---Yes.

PN544

Then there is provision for a connection between tonnage and certificates of competency based on length. Do you see that at item 3 on page 12?---On three, okay.

PN545

When we're dealing with certificates of competency, if we're trying to draw relationships between length and tonnage, that's what we look to?---Yes, okay, so what's your point?

PN546

It's really to clarify the matters which were being addressed there by my friend. To the extent that there's a relationship - for the purposes of a certificate of competency?---Yes.

PN547

Certificate of competency is what is required for a seafarer?---Yes.

PN548

It shows the level of knowledge, skill or responsibility - sorry, I'll withdraw that. The knowledge and skill that I have to have to hold that particular ticket?---Yes.

PN549

The relationship between tonnage and length is provided for here when one comes to look at what level of - what the relationship is between length and tonnage for the purposes of identifying those eligibility requirements?---Yes, but equally, I could give you a similar formula and we could generate a similar table and dead weight tonnage. That's what I've been telling you right from the - - -

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN550

Which would have nothing whatsoever to do with the knowledge and skill required of a master to operate a vessel with either an international scheme or the national domestic commercial scheme. That's right, isn't it?---Only because it's measured, at the moment, in gross tonnes. But equally - we've been saying right from the word go, they're all connected. Length, gross tonnage, kilowatts to gross tonnage and net tonnage - dead weight tonnage rather. I understand what you're driving at, to be perfectly honest, but.

PN551

Where am I driving at?---Well you're trying to say it's gross tonnage and the legislation says gross tonnage, but what I'll mention is that they're a guide. They picked gross tonnage historically for whatever reason, right. They could have equally perhaps picked dead weight tonnage historically speaking, but they didn't; they picked gross tonnage. But they have and I could equally generate you a similar table to give you a guide and like they've mentioned, you've got for different ships here, to generate dead weight tonnes. I could generate another table like that, blank whatever, the length and breadth and depth and generate you another document for kilowatts. So it's just whatever guide as whatever - whether you use gross tonnes, whether you use kilowatts, whether you use dead weight tonnes, it's all more or less the same thing. It's for you as - it's for the industry to decide well what measure do you want to use. Currently it's gross tonnes, you're correct, what you're showing me, it's in black and white here.

PN552

Has the international tonnage convention ever used anything else?---No, not to my knowledge.

PN553

No, so since 1969 gross tonnes has been the measure for the international scheme of regulation?---Yes, but like I keep saying, gross tonnes is related to dead weight tonnes; gross tonnes ultimately is related to length; gross tonnes is ultimately related to kilowatts.

PN554

I think you've made that point, thank you.

PN555

MR HOWELL: There's one matter arising out of that. We'll try and make this the last one Mr Ainscough. You said that they're connected and there is a formula which demonstrates that for the purposes of this legislation, you can actually convert length into gross tonnage by that use of the formula?---Yes.

PN556

That's the statutory formula. Are there other formula that can be used, or is that the - - -?---I imagine there are, yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN557

Just finally in relation to that, is there a formula from which one calculate dead weight tonnage to gross tonnage for the same vessel? What is the relationship

between that? Is dead weight tonnage normally higher or lower?---Dead weight tonnage is usually higher.

PN558

Dead weight tonnage is usually higher?---Yes.

PN559

By - and I understand I'm asking you to generalise, but is there a percentage on a vessel of say 5,000 tonnes dead weight, what would you expect a gross tonnage in general terms to be?---Depends on the ship type, but you know - - -

PN560

Dry cargo vessel?---Maybe half roughly. Just off the top of my head without looking at it.

PN561

About half?---Approximate. I'd have to go back and give you a definitive answer on it.

PN562

The gross tonnage, that is the volume inside the vessel, expressed in tonnage terms, would be about half of the weight of cargo necessary to bring the vessel down to its load line?---Yes, but if you give me a bit of a recess, I'll have a look on my - because I've got lots of numbers on this and I'll give you an exact answer.

PN563

VICE PRESIDENT WATSON: You said that was dependent on the ship type?---Yes.

PN564

For a barge, gross tonnage might be zero?---Yes, exactly.

PN565

There wouldn't be any multiplier?---No, exactly.

PN566

Different relationship altogether.

PN567

MR HERBERT: That's true, your Honour, the difficulty being there is a formula which gives in, I think it's part B that's been referred to by my friend, which gives a notional, in effect, completely artificial, gross tonnage figure by the use of that formula and that is the K block function which appears on page 12 of part B?---Yes.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN568

A barge, it's simply attributed at .84 and a sailing vessel at .5. A vessel not a sailing vessel or a barge, .67. Now that's obviously one of the multipliers which is added into the formula. But subject to what you said, you would be able to, in a

given situation, work out what the gross tonnage, what the volume would be?---Yes.

PN569

By reference to what the dead weight is?---Yes granted, knowing what the type of ship it is.

PN570

Yes, thank you. I might ask you to do that Mr Ainscough and if we get some time later today, Your Honour through you, if we might have perhaps leave to recall Mr Ainscough to deal with that discrete issue. I don't want this to drag on forever, but it is - and may turn out to be very important if focus is placed on various categories which express themselves in gross tonnes, but there are other vessel which - I means it's susceptible of that description, understanding what the translation values are, could be fairly significant. If they are half - in general terms if they were half, then 3,000 gross tonnes is equivalent to 6,000 dead weight tonnes on that formula, on that assumption and that there would be an equivalency there that might be very important in relation to the ultimate determination of this matter. So we would seek to recall to Mr Ainscough when he's done some figures. I think we should have time, given the speed or otherwise at which matters are progressing.

PN571

VICE PRESIDENT WATSON: This is not a matter that if there was a decision in principle the parties could reach some agreed translation or formula?

PN572

MR HERBERT: That is one of the matters, your Honour, but can I say, and I'll mention to the witness, the Seagoing Industry Award itself, simply refers to tonnes. It doesn't say what. Now, if Mr Ainscough is right and deadweight tonnes is the way one talks about these things, then there's no explanation provided so far in these proceedings as to what that means.

PN573

I must say, we proceeded on the basis that it's deadweight tonnes. The Self-propelled Barge and Small Ships Industry Award that we've talked about in the material that was terminated in 2010, it specifically said dead weight tonnes because one assumes because it was dealing with barges that only have a dead weight tonne measurement.

PN574

But the Seagoing Industry Award doesn't refer to any particular kind of tonnes and on that basis, the matter is, as it were, a little bit up in the air because it - - -

PN575

VICE PRESIDENT WATSON: it might have been a product of the parties' agreement.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN576



MR HERBERT: The parties might have known what they were doing, but unfortunately, my client was - and its predecessors weren't in the room, when they were deciding all of that. But it's a matter that will need to be worked out because if the parties are to proceed in relation to tonnage, we need to know what type of tonnage we're talking about because we may be speaking different languages it that regard.

PN577

But if we may, it is certainly a matter of - the question of what descriptors they are to making more certain as to what they are, is certainly a matter that the parties could work out between themselves, but it may be we would ask - and maybe we don't need to recall Mr Ainscough, I might be able to provide the Commission with the answer, but we'd like the opportunity to be putting that whatever that figure might be, to the Commission because it has significance in the way the matter has fallen out.

PN578

VICE PRESIDENT WATSON: Yes, thank you for your evidence Mr Ainscough, you can step down. You may be recalled later today for the limited purpose.

<THE WITNESS WITHDREW

[11.44 AM]

PN579

MR HOWELL: Your Honour, I just wish to say, it might ultimately transpire that he's not required, but we'll see how it plays out, but I want to reserve my client's right to cross-examine, because I think we were not happy with some of what has just been said and if I should do more at this than just simply do that. If he's to be recalled - the reason I raise it, is it might create a practical difficulty because I think some of the material we might want to rely upon for the purpose of cross-examine on that new space, that new territory, this new information needs to be obtained and I'm not sure that we'll be able to do that in such short order, that is to say - today. Probably do it overnight, but we might have difficulty doing it, if he is to be recalled later today.

PN580

MR HERBERT: I do agree with that. You can stand down, thank you. I've received no indication from the Bar table that anyone wants to cross-examine Mr Cooper. Is that correct, your Honour? As a house-keeping matter, might I tender the two affidavits of Mr Cooper? Might I tender both of them, without calling Mr Cooper?

PN581

VICE PRESIDENT WATSON: First is the affidavit of 10 May.

PN582

MR HERBERT: Yes.

PN583

VICE PRESIDENT WATSON: That will be exhibit H4.

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

**EXHIBIT #H4 AFFIDAVIT OF BEN COOPER DATED 10/05/2016**

PN584

VICE PRESIDENT WATSON: The further affidavit is dated 4 August and that will be exhibit H5.

**EXHIBIT #H5 FURTHER AFFIDAVIT OF BEN COOPER DATED 04/08/2016**

PN585

MR HERBERT: Can I indicate - and I'll deal with this in submissions, but to be fair to the other parties, primarily what Mr Cooper has done, or one of the things he's done is to extrapolate out the wage rates out of the Self-Propelled Barges and Small Ships Award and offered a comparison as between what they would be, had that award remained and those rates had been brought up to date, and as against the Seagoing Industry Award that applies to employees - in effect the same employees and what the difference has been.

PN586

There is, it appears, there is another aspect to that story and I'll be dealing with it in submissions, but it is this. Under the Seagoing Industry Award, there is an allowance which is expressed in percentage terms for cargo handling and lashing etcetera, which is payable on top of the salaries which are referred to by Mr Cooper in his spreadsheet.

PN587

Under the Self-Propelled Barges and Small Ships Award, there is a note against the wage rates to say that they include - and I think off the top of my head the figure is about \$7,500 of that order, for cargo handling duties, etcetera. They are included within the rates. So the actual net rate under the Self-Propelled Barges and Small Ships Award is or was, as at 2010, \$7,5000 less if you exclude the cargo handling allowance.

PN588

I'll provide those amended figures in my submissions so that what occurred by the placing of those employees under the Seagoing Industry Award, was not only did their wage rate go up very significantly, but which included a cargo handling allowance, but under the Seagoing Industry Award, they also acquired a cargo handling allowance on top of, so that the difference between the two rates is quite significantly more than the depicted, as it appears in Mr Cooper's comparison.

PN589

VICE PRESIDENT WATSON: Are the two awards based on the same rosters and working arrangements?

\*\*\* STEPHEN BRADLEY AINSCOUGH

XXN MR HOWELL

PN590

MR HERBERT: The Self-Propelled Barges and Small Ships Award as a matter of history, unlike what Mr Keats has said, that it was made - that Sea Swift in its bygone days, Mr Keats in his submissions has put a submission to the effect that Sea Swift tried very very hard to get out from under that award and resisted and

he's put some history in there about some proceedings back in the 1980s before Commissioner Fogarty and a Full bench. I was very pleased to have a little trip down memory lane; I didn't realise I was that old.

PN591

In fact that award didn't exist then. So Sea Swift for whom I acted in those days, were not trying to get away from the application of Self-Propelled Barges and Small Ships Award because it was only made in 1991. Those proceedings - there was a 1991 award and I can tell the Commission the award that was being sought to be imposed on Sea Swift was the MISA award, in those proceedings, which I laboured long and hard.

PN592

On that basis, and I understand that the Self-Propelled Barges and Small Ships Award was in its previous emanation was made in 1991 and then remade I think in about 2000. But that wasn't a process, as I understood it, that Sea Swift was involved in.

PN593

That award excluded the operation of Maritime Industry Seagoing Award and it technically didn't need to because under the based system that operated in those times, Perkins was not a respondent to the MISA award - Perkins Shipping, but it was a respondent to the Self-Propelled Barges and Small Ships Award.

PN594

Sea Swift, as I say, was defending an application that it be - that the MISA award be extended to it, and I'll deal with that in the submissions. There are similar rostering arrangements that there is an even-time roster under the Self-Propelled Barges and Small Ships Award. But the salary rates were significantly lower and included - they were bulked up so as to include a cargo handling payment, was the point that I endeavoured to make.

PN595

VICE PRESIDENT WATSON: The even time roster is not part of the Ports, Harbours and Enclosed Water Vessels Award that is part of the Seagoing Industry Award. We're talking modern awards.

PN596

MR HERBERT: Yes.

PN597

VICE PRESIDENT WATSON: The comparison of wage rates between those awards, doesn't give you the full picture.

PN598

MR HERBERT: It doesn't - you're correct your Honour, that there isn't an even time roster arrangement under the Ports, Harbours and Enclosed Water Vessels Award. But that award does cover vessels which proceed to sea. That was in fact the purpose of the closing words in the application, to cover vessels which proceeded to sea and cruise ships and things of that nature - passenger vessels, as

we understand it, are generally understood to operate under that award, as distinct from the marine.

PN599

VICE PRESIDENT WATSON: I'm just asking questions for the purpose of understanding the comparisons that you're making.

PN600

MR HERBERT: Yes, yes.

PN601

VICE PRESIDENT WATSON: I do recall that different basis of the modern awards, is a significant factor in terms of comparisons. But you say that the pre-modern awards, the ones that are subject to the comparisons in Mr Cooper's affidavit, are based on the same even-time rosters.

PN602

MR HERBERT: That's my understanding your Honour. I can check that, but that's my understanding of the position. There is obviously, in preparing this matter, we were faced with a number of possibilities, one of them being that the equivalent vessels operating as passenger vessels were operating under the Ports, Harbours and Enclosed Water Vessels Award at sea, going to sea. A cruise liner going from Cairns to Thursday Island, as does the Newcastle Bay or the Trinity Bay, would operate under the Ports, Harbours and Enclosed Water Vessels Award. There were no even time rosters for the crew of the cruise liners; for the passenger vessels.

PN603

Similarly, as we understand it, there are a number of passenger vessels around the Australian coast which leave ports and harbours and go to sea and arrive at other places which use the Ports, Harbours and Enclosed Water Vessels Award as the award for the purpose of the boot test.

PN604

VICE PRESIDENT WATSON: Such as whale watching vessels out of Sydney Harbour and the like.

PN605

MR HERBERT: And the vessel - there is a vessel which is - there is an EBA which was produced in the proceedings which culminated in the appeal over which your Honour presided. There was an EBA with SeaLink to deal with a cruise liner that cruises off the Queensland coast and that used the Ports, Harbours and Enclosed Water Vessels Award. The area in which travelled is somewhere from Hervey Bay to the Whitsundays and there was an EBA that used that award for the boot test.

PN606

Any kind of vessel that leave port which isn't a cargo vessel of the kind described in the Seagoing Industry Award, but nonetheless goes to sea - and your Honour has given the whale watching. That might be a marine tourism situation, might be

a little bit difficult there, but in any event, the Marine Tourism Award doesn't have even time rosters.

PN607

The only award which has an even time roster is the Seagoing Industry Award. All of the other maritime awards - the main Towage Award where vessels routinely leave ports and go to sea on long towage voyages which are contemplated under the award to be undertaken, doesn't have even time rosters and it does have casual employees.

PN608

There are a number of relevant points of potential comparison which the Ports, Harbours and Enclosed Water Vessels Award is but one. The difficulty being all others such as the Self-Propelled and Small Ships Award were terminated and it was an arbitrated Federal standard up till 2010 for precisely what Sea Swift does for a company which Sea Swift is in the process of now acquiring. It's to become its successor in relation to that precise same business. It was one which is expressed in terms of deadweight tonnes; it dealt with barges and things of that kind, and Mr Bruno's affidavit deals with exactly what vessels were there.

PN609

He would be very familiar with them because he's in the process of buying some of them now. It was the award which the arbitrated Federal standard for the kind of work which Sea Swift does, and it disappeared in the award modernisation process for reasons which we'll develop in submissions - or for lack of reasons which we'll develop in the submissions.

PN610

In seeking to put in a wages schedule for the purpose of the variation we seek, there were a number of comparative points. In the submissions we've referred to the Ports, Harbours wages schedule. Mr Cooper has put on evidence to show what the Self-Propelled Barges and Small Ships Award would say if it was still alive now to provide the Commission with the comparators.

PN611

But that's one of the reasons - because of that polyglot - that's one of the reasons why I submitted earlier, that the precise level of wages for a small ships provision in an award, ought to be the subject of some discussion and conferencing with the Commission, because there are a range of varieties with historical factors and it might be more useful to do it that way rather than by the Commission picking one or picking one in the middle of two, as it were, because of the differences that your Honour's referred to. But I'll develop more of that in my final submissions.

PN612

Unless there are any other questions, your Honour, I seek to call Mr Bruno.

PN613

VICE PRESIDENT WATSON: Yes, Mr Bruno.

PN614

MR HOWELL: Your Honour, this is not really a time to start playing ping pong and I don't intend to do so, but my friend put submissions which cavil with some of the things in Mr Keat's submission. No doubt that will come to be dealt with in due course, but I thought I might rise very briefly to short-circuit hopefully some of that to assist my friend. But the small ships - the Self-Propelled Barges and Small Ships Award was made for the first time in 1980 and Perkins was a party to it. It is reported at 247 CAR 406. It was made again in 1981 - that was what was ultimately dealt with by Commissioner Fogarty.

PN615

No doubt my friend will give that some consideration before we come to deal with the submissions. But it's not right to say that the proceedings which Mr Keats refers to that involve Sea Swift was an attempt to create the small ships and small barges award. It's just not right.

PN616

MR HOWELL: I didn't say it was an attempt to create it. It was an attempt to apply the MISER award, was the way the case - as I recall it.

PN617

VICE PRESIDENT WATSON: I'm sure we can deal with all of this later.

PN618

MR HERBERT: Yes.

PN619

VICE PRESIDENT WATSON: Is Mr Bruno in attendance?

PN620

THE ASSOCIATE: Please state your full name and address.

PN621

MR BRUNO: My name is Lino Bruno, (address supplied).

**<LINO BRUNO, SWORN**

**[12.00 PM]**

**EXAMINATION-IN-CHIEF BY MR HERBERT**

**[12.00 AM]**

PN622

VICE PRESIDENT WATSON: Please be seated Mr Bruno.

PN623

MR HERBERT: Mr Bruno, is your full name Lino Bruno?---Correct.

PN624

Are you the Chief Operating Officer for Sea Swift Pty Ltd and you've held that position for approximately six years?---That's correct.

\*\*\* LINO BRUNO

XN MR HERBERT

PN625

You have prepared two affidavits setting out the evidence you're able to give in these proceedings. Is that so?---That is so, yes.

PN626

The first one is dated 9 May 2016?---Yes.

PN627

The second is dated 3 August 2016?---Yes.

PN628

Are the facts and circumstances set out on each of those affidavits to the best of your knowledge, true and correct?---They are, yes.

PN629

The opinions you've expressed in there are your own opinion?---Yes.

PN630

I tender those two statements with their attachments.

PN631

VICE PRESIDENT WATSON: The statement dated 9 May 2016 will be exhibit H6.

**EXHIBIT #H6 WITNESS STATEMENT OF LINO BRUNO DATED 09/05/2016**

PN632

VICE PRESIDENT WATSON: The further statement dated 3 August 2016 will be exhibit H7.

**EXHIBIT #H7 FURTHER WITNESS STATEMENT OF LINO BRUNO DATED 03/08/2016**

PN633

MR HERBERT: That's the evidence in chief of Mr Bruno.

PN634

VICE PRESIDENT WATSON: Mr Keats you can be next.

PN635

MR KEATS: Thank you, your Honour.

**CROSS-EXAMINATION BY MR KEATS**

**[12.01 PM]**

PN636

MR KEATS: Can I take you to paragraph 18 of your statement, if I could? Your first statement in time. Do you have that Mr Bruno?---Yes I do.

\*\*\* LINO BRUNO

XXN MR KEATS

PN637

Starting about half way along the second line, or maybe a bit further, you say "required crew qualifications to be found in the NSCV". Do you see that?---Yes.

PN638

From later on in that paragraph, you're making reference to part D of that system, is that correct?---Correct.

PN639

Because it's part D that sets out the competencies, whereas part B sets out some definitions and other helpful material. Is that correct?---Yes I recall part B entailed more around the vessel survey and so forth.

PN640

Thank you. In the next sentence you say - sorry, in that sentence you say that the NSCV applies considerations or length, tonnage and location of operations. Do you see that?---Yes, it does, yes.

PN641

My client is concerned with the general purpose hand which is the type of certificate under the NSCV. Are you familiar with the requirements for that position?---I'm not overly familiar with it, no. But enough to answer some questions.

PN642

Can I suggest to you that for the general purpose hand near coastal, that the legislative requirements doesn't refer to change?---I don't have part D with me, so I can't comment on that, no.

PN643

When you were writing paragraph 18, you didn't actually get out part D and look at it at the same time?---I would have at the time, but this goes back to May on this year, so I don't have it handy with me, no.

PN644

Can the witness be shown part D?---Thank you.

PN645

Can I trouble you to turn to page 25. Can I just ask you to - first of all, is this the page or schedule that you familiarised yourself with at the time you wrote your affidavit?---Yes, it looks like it, yes.

PN646

At 2.1 towards the top of the page there's the certificate of general purpose hand NC. Do you see that?---Yes.

PN647

NC stands for near coastal, is that right?---That's correct.

\*\*\* LINO BRUNO

XXN MR KEATS

PN648



Near coastal you'd understand from part B is up to 200 nautical miles?---Yes, that's correct.

PN649

Now that you've had a chance to familiarise yourself with the activities of the general purpose hand NC, do you accept that this legislative requirement in front of you, doesn't apply consideration of tonnage?---No, it just has there in front of me, less than 18 metres, or propulsion power less than 3000 kilowatts.

PN650

Thank you. Sea Swift's operation it's fair to describe it as unique?---Yes it is.

PN651

It's unique in the sense that it has vessels that proceed to sea beyond bays, harbours and rivers, like your line haul vessels, as well as tug and barge operations as well as mother shipping operations. Is that correct?---It's unique by the diversity of the operations we have, correct. Unique in the types of vessels that we operate and in the area that we operate in. Additionally unique from the point of view of the tasks that are involved in each of those vessels and the breadth of those tasks.

PN652

During your statement, you say quite a bit about this thing called the Self-Propelled and Small Ships Industry Award 2001?---Yes.

PN653

If you need to familiarise yourself, you could look for one example at paragraph 40. There are a multitude in your statement?---Yes.

PN654

At paragraph 41, you suggest that that award would apply to you if it wasn't terminated. Do you see that?---Yes.

PN655

Are you aware of the full history of Sea Swift going back to the 1980s?---I know enough - well I joined Sea Swift in 94 and as far as I'm aware, we operated under a state award throughout the majority of my tenure until such time as the 2009 agreement was struck.

PN656

Have you seen the submissions that my client the MUA filed in the proceedings?---No, I haven't, no.

PN657

You're not aware of our submission that suggests that you went to great effort to not have that award apply to you in the 1980s?---I wasn't aware of that, no.

\*\*\* LINO BRUNO

XXN MR KEATS

PN658

I'll just ask one last question about that then. You're not aware that to avoid those proceedings and being roped into a Federal award, you ceased to employ anyone

at that time?---Again I commenced work at Sea Swift in 94. I don't have a history prior to that, so no, I'm not aware of that.

PN659

It follows that you're not aware that you can't say it didn't happen?---Again, I'm not aware of it, so obviously you're correct in what you're saying.

PN660

Thank you. Now to come closer to the modern day, in about 2005 you were operating in the Queensland system, is that right?---I believe so, yes.

PN661

You had an enterprise award under that system?---I believe so, yes.

PN662

What happened in about 2009, they started an award modernisation process. Is that correct?---Yes, that's correct.

PN663

Sea Swift as an organisation could have participated in that?---We could have.

PN664

And you chose not to?---We were basically going from a State award to a Federal award and we commenced negotiations with our employees around that time.

PN665

You chose not to participate in that process?---We weren't operating under the Federal award at that stage, so we chose not to, yes.

PN666

You also had an opportunity to seek a modern enterprise award. Is that correct?---I'm not overly familiar with that, no.

PN667

I'll ask you this question then. You chose not to apply for a modern enterprise award?---Again, I'm not overly familiar with that at all, unfortunately.

PN668

But you're not aware of Sea Swift applying for such an instrument?---No.

PN669

In 2012 there was something called the 2012 Transitional Review. Did you choose to participate in that?---I don't believe so.

PN670

When this four yearly review commenced, you didn't choose to participate in that either?---What year was that, sorry?

PN671

It started in 2014?---No, I don't believe so.

\*\*\* LINO BRUNO

XXN MR KEATS

PN672

And we're still in it. Can I suggest to you that the catalyst for this application of Sea Swift today is nothing to do with the unfairness of the award itself, but the fact that you lost a Full Bench decision in February this year. Is that correct?---It's true that we lost - well the appeal got up, clearly. Now that we're certainly bound by the Seagoing Industry Award, we're trying to look at how our business operates within that award.

PN673

I take that as a yes, you agree with my proposition?---Well we're here today, yes.

PN674

Were you involved in the drafting of the determination?---From recall now, I don't believe so.

PN675

I'll just ask you the factual questions then. You have two line haul vessels?---In Queensland, yes.

PN676

They travel from Cairns, they go outside the harbour of Cairns, proceed past the Territorial Sea and up to Weipa, correct?---They follow the coast on the way up to Weipa, yes.

PN677

But at some stage they proceed to sea, correct?---Well they go from Cairns to Weipa, so - - -

PN678

Yes? No?---They travel from Cairns to Weipa, yes.

PN679

Take it slowly then. Do you accept the finding of the Full Bench that found that they proceeded to sea?---Sure, yes.

PN680

We would describe them as dry cargo vessels, those two line haul vessels?---They're multipurpose cargo vessels, yes.

PN681

In drafting the determination, is it correct that the aim is to have a situation where the Seagoing Industry Award ceased to apply to Sea Swift and its vessels and employees?---Just repeat that again. So when you refer to determination, you're referring to what exactly?

PN682

The determinations you've sought, or the company's sought changes to the coverage of the three awards?---Yes.

\*\*\* LINO BRUNO

XXN MR KEATS

PN683

In doing that application, is it the aim of Sea Swift to have the Seagoing Industry Award not apply to Sea Swift?---As part of our determination, if you like to use that terms, at the time we felt that the Ports, Harbours and Enclosed Water Vessels Award, best suited our operation.

PN684

Again, my proposition you would agree with?---Just repeat that proposition again, sorry.

PN685

That Sea Swift - I'll say it this way - is seeking to have a situation that the Seagoing Industry Award doesn't apply to it?---I'm a little bit confused now, because the FB has advised that it does apply and here we are today.

PN686

Sea Swift's made an application to this Commission to vary the Seagoing Award?---Correct.

PN687

To vary the Ports, Harbours and Enclosed Water Vessels Award? Yes, no?---No we're here to discuss the Seagoing Industry Award and the modernisation of it.

PN688

You're not aware that you've also made application to change the coverage of the Ports, Harbours and Enclosed Water Vessels Award?---No.

PN689

I gather from your answer you're not aware that you've also sought to change the coverage of the Marine Towage Industry Award?---Well if we are that's great. Our operation is diverse.

PN690

To take one step at a time, you're not aware of that?---No, I'm not.

PN691

You're the only witness that we've been given the advantage to cross-examine about this case from Sea Swift?---I am here today.

PN692

You're described as the Chief Operation Officer, that is correct?---I am, yes.

PN693

I assume you're given instructions from Mr Fred White the Chief Executive Officer who is in the back of the court?---No.

PN694

Pardon?---No, not at all.

\*\*\* LINO BRUNO

XXN MR KEATS

PN695

So you don't report the Chief Executive Officer?---I do report to Fred, but I haven't been given instructions today to - - -

PN696

I don't mean in relation to your role in the witness box today, I mean generally in your everyday - - -?---I do report to Fred White, yes.

PN697

If a decision's made by the CEO, you'd follow the decisions of the CEO?---On a day to day basis, yes.

PN698

Yet, such a significant decision as to change award coverage, you're not aware for both Ports, Harbours and Enclosed Water Vessels Award and Marine Towage?---Again, as far as I'm aware, the Full Bench handed down the Seagoing Industry Award to apply to Sea Swift. Our operation is clearly diverse with a whole host of operations in certain areas of Australia, northern Australia, near coastal, inshore and it's that agreement I suppose that I'm aware of that we're attempting to, I guess, be more applicable to our operation.

PN699

Perhaps if I ask this question. What Sea Swift would like out of this application being granted is the Ports, Harbours and Enclosed Water Vessels Award apply to its vessels and its employees on those vessels?---That's what we attempted to do, yes.

PN700

That's what you - thank you. At paragraph 42 and following, there's a discussion about the casuals you employ. Can you see that?---Yes.

PN701

If you can just turn to your second affidavit, attachment B at page 111?---Sorry, I don't have that, page 111.

PN702

It's just headed attachment B on the copy I was served. It's a big fat statement. First of all has - you don't have that, this one?---No, sorry.

PN703

Apologies. Can the witness be shown exhibit H7? Do you have that now?---Yes I do. What page please?

PN704

It's the very last page is probably the easiest way I'm thinking. Do you have that?---Yes.

\*\*\* LINO BRUNO

XXN MR KEATS

PN705

I first just want to understand the table. If I look at the deck hand line, do I understand that you have a total of 62 employees as deck hands and 10 are

permanent and 52 are casual. Do I read that correctly?---That doesn't sound right, no.

PN706

Well, can you, on the line for deck hand, tell me how many permanents you have and how many casuals you have?---I'm just comparing it to the others to get more of a bearing on what this is - - -

PN707

No problem?---Yes look, this may have been associated certainly with our Northern Territory growth, looking at these figures now where we did have a higher component of casuals in the Northern Territory. Whether that's factual as of today, I'm not so sure, but the way that reads it says 62. As it says, total number of employees in category and total number of employees in casual, employees in category, 52. That's a fairly sized casual pool of deck hands.

PN708

You're not sure of the precise numbers today, but the idea of the table is to say that 52 of the total 62 were casuals?---Correct.

PN709

That includes casuals working on your line boat vessels, is that right?---Line haul vessels?

PN710

Correct?---There would possibly be some casuals certainly across our fleet, but I think the majority would be straight from the Northern Territory. It was a growth period for us in the Northern Territory.

PN711

Can I trouble you to look at paragraph 43(e) and can I ask whether that paragraph - whilst it puts line hauls and landing craft together, assists you in giving that answer?---Sorry, I'm just looking at - so when you say paragraph 43, what page is that on please?

PN712

It's on your first statement, apologies. It's on page 8 of 9. It's about two thirds of the way down?---That's right, so the rest of the fleet would be all other vessels outside of projects and mother shipping which would include line haul vessels and landing craft.

PN713

That there would be a number of casuals for example, in the line haul vessels that work on those line haul vessels?---There would be casuals that would operate in the line haul vessels, yes.

\*\*\* LINO BRUNO

XXN MR KEATS

PN714

It takes about six to seven days to go from Cairns up to Weipa, is that correct?---Not quite - we're back to Cairns. So Cairns, Weipa, Cairns in a six day period. We do weekly services to all communities.

PN715

If my math is right, three or four days to get up to Weipa?---You'd have to look at three days, yes, plus a little bit of port time.

PN716

During that time, the casuals can't leave the vessel and go off into the shops and do something else?---When the casuals are in port in Cairns, they could possibly have that opportunity.

PN717

But whilst the vessel is at sea, it doesn't pop in each night or anything like that?---Clearly not.

PN718

You're aware that Sea Swift seeks to have casuals paid - like land based casuals on board vessels, like your line haul vessels?---We've got casuals on our line haul vessels, like you stated, yes. So please ask that question again for me?

PN719

Are you aware that Sea Swift is asking for casuals to be a classification or a way of employing someone on the line haul vessels?---That's correct.

PN720

That they'd be paid only for the hours they actually work?---They'll be paid as a casual, so the hours are contact hours, correct.

PN721

That the rest of the time they're on the vessel doing nothing, they don't receive any disability or further payment?---They would get paid as casuals on board our vessels. We don't stop payment because they're not working, no. When you're on board the vessel, you're working, so you're paid as a casual.

PN722

Are you aware that you're seeking that they be paid for a minimum of three hours of work?---When it comes to seagoing crew, they get paid by the day as far as I'm aware; we don't do pro-rata.

PN723

It's your company's application and it seeks to say that they be paid pro-rata. Are you saying that that's not something Sea Swift wants?---Pro-rata in the sense of the contact days that you're on board. The three hours I'm not clear on, so I'd need to go back and refer to that. Casual crew on vessels don't get paid by the hour; they get paid daily engagement.

PN724

So you're not aware that Sea Swift is seeking to change that to make them paid by the hour?---No, I'm not aware of that.

\*\*\* LINO BRUNO

XXN MR KEATS

PN725

Just to finalise that, so you're not aware that they'd be paid a minimum for three hours' of work, regardless of how long they're on the vessel?---As far as I'm aware, we pay by the day.

PN726

I have no further questions.

PN727

VICE PRESIDENT WATSON: Mr Bruno, just clarify the position with regard to casual employees?---Yes.

PN728

In your first affidavit on page 7, paragraph 43, you say currently, so it currently was made May 2016. You had approximately 80 casual employees on your books?---Correct.

PN729

With the table schedule B to the second statement they had the number of casual employees in the right hand column. If those figures are correct, then there's a greater number. Are you able to explain that?---No, I can't unfortunately, no. The statement of - the one that refers to the 80, sounds to me right.

PN730

It may be an error in the figures, or there may be - as a result of the Northern Territory temporary situation?---Could be. There was a lot of growth certainly in C15, the Northern Territory. I'm not too sure whether that growth and the number of casuals we had at that time influenced certainly those numbers and why there's a discrepancy of 80 to what's listed there. I'd need to go back and consult.

PN731

Your impression is that 80 would be approximately the current figure?---Certainly my gut feel. The current figure, again, that's moved as well. We have put quite a few employees on permanent. There's quite a few employees that prefer to stay casual, that's their choice. But certainly in the NT, there's been a concerted effort to obtain permanency in our crew list.

PN732

Have you any idea what approximately the current figure would be?---Unfortunately I don't.

PN733

Anything arising from that Mr Keats?---No, your Honour.

PN734

Mr Howell?

PN735

MR HOWELL: Sorry, can you bear with me for one moment?

**CROSS-EXAMINATION BY MR HOWELL**

**[12.27 PM]**

\*\*\* LINO BRUNO

XXN MR HOWELL



PN736

MR HOWELL: I'll be very brief Mr Bruno. Can I ask you to open your first affidavit, the larger one, at page 6 of 9, paragraph 38?---Yes.

PN737

What's a seagoing vessel?---What's a seagoing vessel?

PN738

In my experience, there's no real comparison between self-propelled barges and small ships, as operated by Sea Swift and the larger sea going vessels?---I would assume that a seagoing vessel is a vessel - - -

PN739

Don't assume, tell me what you meant - what did you mean?---I would have meant there, I guess, that the larger vessels that would proceed on longer voyage.

PN740

What's a longer voyage?---Certainly greater than three or four days.

PN741

Within the exclusive economic zone of Australia, not a long voyage?---I think you won't be on much of a long voyage if you were to stay within the EEZ and travel around the coast. I would have been referring to the larger vessels that would proceed past the EEZ in that situation there.

PN742

All right, well look, I'll see if I can do this in a general way, because I think I have to do this to you to be fair to you. You've given some evidence about this. But whether you accept these propositions or not, is really a note for submission. I'll put the propositions to you, but I won't spend too much time going through them?---Sure.

PN743

Firstly, crew size, 38(a). The crew size of a national standard or commercial and domestic vessels, the crew size minimum is set by regulation. Is that right?---On the most part, yes.

PN744

What I want to suggest to you is that the crew size bears no relationship to the tonnage of the vessel?---As far as I interpret it, under the DCV, domestic commercial vessel, part of the NSCV to complicate things, is effectively 80 meters and less. That's the vessels that fall under that particular legislation or what you might like to call it.

PN745

You're talking there specifically about the crew qualifications?---Well, under DCV, your vessel has to be a certain size to be able to fall under that particular pact. You can't have a 120 meter vessel; as far as I'm aware, you can't have 120 meter vessel operate under that regulation.

\*\*\* LINO BRUNO

XXN MR HOWELL

PN746

I'm not going to cavil with that proposition. What I'm getting at though is, to the extent that it regulates the crew size, the manning requirement, it bears no relationship to tonnage? If there is relationship to the classification that the vehicle - vehicle, I'll start that again?---The size of the vessel and the area of operation.

PN747

Yes, but not the tonnage?---Not the tonnage, not explicitly, no.

PN748

I'll get this sooner or later, I apologise?---Yes.

PN749

Crew qualifications again, same proposition, bears no relationship to tonnage, that's right?---Again, under the DCV that's correct, yes. If I could just add there, I do recall at part B, or somewhere, the last time I looked at that regulation, there is a table that gives you an indication of a vessel size and what the nominal tonnage is, just to give a bit of a link between the past and the new.

PN750

Alright, might the witness be shown - just to make sure we're on the same page, can I ask the witness to be shown part B, B for Bob, which is one of the - the number of which escapes me, sorry. If I can get you to flip over to page 11, clause 3.5, just to make sure we're on the same page here. This is entitled Determination of Vessel Gross Tonnage. Do you see that?---Yes.

PN751

I think the table you're talking about is over the next page. Is that what you're referring to?---That's what I'm referring to, yes.

PN752

Again, it relates to gross tonnage, not dead weight tonnes?---That's correct. There's a lot of confusion around gross tonnage and gross net tonnage and dead weight tonnage.

PN753

Correct. Just so I understand that what you understand the difference between dead weight tonnes and gross tonnes to be?---Gross tonnage in essence, is the internal capacity of the vessel. The dead weight tonnage is the carrying weight of the vessel. Each of them have different regulations, and to be honest with you, you need to be a naval architect to really explain the in detail.

PN754

The essence is, one is a measure of weight; one is a measure of volume?---Effectively.

\*\*\* LINO BRUNO

XXN MR HOWELL

PN755

I should say carrying weight and one's a measure of volume?---Probably over-simplified, but that's effectively what it is.

PN756

Can I get you to go back to your original affidavit, 38(c), Crew Duties. Count forward there for one moment. By crew duties - sorry, I'll withdraw that. You then go on to say less onerous for masters and engineers?---Yes.

PN757

Pause there for one moment. In terms of the duties of a master. The duties of a master, can I suggest to you, they've actually changed - sorry, I'll withdraw that. The responsibilities of a master don't change, depending upon the size of the vessel at all, do they?---The core responsibilities of safety of the vessel and safety of the crew and safety of third party property, in essence are the same.

PN758

Correct. The knowledge and skill required to pilot or - I shouldn't use the word 'pilot' in this context - to drive a particular vessel will be different, but nonetheless, the master is ultimately the master; he's the one in charge?---Yes, that's correct.

PN759

The buck stops with him, as it were. What do you mean when you say less onerous?---I can provide an example, I suppose. If you look at the engineering space.

PN760

Sorry to cut you off - I'm talking. I didn't make this clear at the outset, I apologise. I'm interested in masters, so when you say less onerous for a master, what do you mean?---Certainly from a vessel size point of view, even though I haven't necessarily got experience - or the company hasn't got experience in larger vessels, larger vessels have certainly systems that require a lot more skill set, I would suspect. A larger crew would require a lot more people management and certainly, the area that we operate in, I appreciate it's not related to the size of the vessel, but the area that we operate in, we can't operate these large vessel. There's always this support, land site support at very short notice. So you're not outside of an area where there's no support at all, and that applies to the engineering space as well as the master space.

PN761

Sorry, won't be a moment. Yes, those are the questions, thank you.

PN762

VICE PRESIDENT WATSON: Mr Bruno, you refer to paragraph 38 of your first statement?---Yes.

PN763

Is an example of a larger seagoing vessel, 5,000 to 19,000 tonnes, bauxite carrier that travels between Weipa and Gladstone?---I believe that would fall in that category, yes.

\*\*\* LINO BRUNO

XXN MR HOWELL

PN764

Are you familiar with the route that was taken by that vessel?---I'm not overly familiar with it no, but it does go from Weipa to Gladstone clearly. I'm not sure whether it actually goes through, or travels or traverses through the Great Barrier Reef or not, nor whether the masters would require a pilot in that particular area of operation. I'm not a 100 percent familiar with it, no.

PN765

That particular - it might be more than one vessel travelling between those two ports, but that's the main means by which bauxite is taken from Weipa?---Yes.

PN766

And the main route. You say that if you took that example, you're not aware of the route that's taken, that there would be differences in each of those factors (a) to (h)?---I would expect each of those crew size, crew qualification most definitely. Crew duties certainly. Certainly from a - even from a port duties point of view, it would be different. Locality of voyages, where they're further south from what Cairns is. I don't think duration would be longer.

PN767

Do vessels travel with cargo from Weipa and empty back to Weipa?---Our vessels?

PN768

No the bauxite carriers?---Yes, they would be empty back to Weipa, correct yes. I can't comment on the overall economics of that operation in particular.

PN769

Yes, thank you. Mr Niven?

PN770

MR NIVEN: No questions, your Honour.

PN771

VICE PRESIDENT WATSON: Mr Herbert.

**RE-EXAMINATION BY MR HERBERT**

**[12.37 PM]**

PN772

MR HERBERT: There are some questions about general purpose hands, things of that nature by Mr Keats, you might remember. Does Sea Swift engage general purpose hands or integrated ratings on its vessels - on its barges?---No, no we don't.

PN773

What do you engage for deck duties?---They're called deck hands on our vessels.

\*\*\* LINO BRUNO

RXN MR HERBERT

PN774

You were asked questions about the casuals figure. As I see your statement - when you filed your initial statement in May, you said there were 80 casuals on

your books, and then when you filed your next statement in August, there's a total of 113 on my math, math not being my strong suit?---Yes.

PN775

His Honour asked you some questions about that, but was there anything that happened between May and August that you recall that may have caused an increase of that kind?---Between May and August we asked to finally secure the Toll acquisition.

PN776

You've put a copy of the determination against your second - annexured to your second statement?---Yes.

PN777

That was confirmed in June or July?---July.

PN778

Did that have an effect on your acquisition of casual workers?---It would have, yes.

PN779

How long would it take you to find out exactly how many casual workers you have on the books now?---If I were to go away and find out?

PN780

Yes?---It shouldn't take too long, no.

PN781

I might ask you to do that if you wouldn't mind so as to put this issue - because I think you've mentioned in other questions that you made an endeavour to put a lot of employees on as full time?---That's correct.

PN782

As part of the bedding down acquisition?---The security on the business sale we were able to be confident, yes.

PN783

Yes, all right. I wonder if you could just obtain that figure for the Commission please? Subject to that, your Honour, I have no further questions towards me obtaining that answer from Mr Bruno.

PN784

VICE PRESIDENT WATSON: Thank you for your evidence Mr Bruno. I will make sure we get back your second statement there and you may be recalled in relation to that supplementary material, or there may be an alternative way of putting that before the Commissioner. You can step down now.

<THE WITNESS WITHDREW

[12.40 PM]

\*\*\* LINO BRUNO

RXN MR HERBERT

PN785

MR HERBERT: That's the witness evidence, your Honour.

PN786

VICE PRESIDENT WATSON: It may be a convenient time to adjourn for lunch. We'll adjourn until 2pm.

**LUNCHEON ADJOURNMENT** [12.40 PM]

**RESUMED** [2.10 PM]

PN787

VICE PRESIDENT WATSON: Mr Herbert?

PN788

MR HERBERT: In the adjournment, your Honours and Commissioner, we made enquiries as to the total number of casual employees who are registered on the books of the company as being available for casual employment as we speak and the number is by reference to the schedule attached to Mr Bruno's second statement, has increased slightly.

PN789

The number of masters - I may read them onto the record. The number of masters is 14. The number of engineers is 19. The number of mates is 36.

PN790

VICE PRESIDENT WATSON: Sorry, was that 26?

PN791

MR HERBERT: 36, as opposed to 27 as it was in August. The number of deck hands is 56 compared to 52. The number of cooks is four, as it was, and the number of cadets is zero. Cadets are all full time.

PN792

VICE PRESIDENT WATSON: That's higher again.

PN793

MR HERBERT: Yes, yes. But they are - the number of - from the evidence of Mr Bruno's statement is that a significant number of the casuals are engaged for the purposes of things like the prawning seasons and fishing seasons and things like that. Whether they are currently at work, depends on the season and demands and things of that nature.

PN794

VICE PRESIDENT WATSON: Yes. That's the number of casuals on the books.

PN795

MR HERBERT: That's the number of casuals on the books. That's all one can realistically do, because the figure alters significantly.

PN796

Could I also, to deal with one submission that's been made by the - written submission by the AMIEU dealing with the question of the current industrial

regulations Sea Swift. Can I hand up copies of the Sea Swift Collective Agreement 2009 which is a collective agreement made under the Federal Act, as it then was, together with Certificate of Approval of that agreement. That is the current regulation applying to Sea Swift, as a consequence of which the modern award has never applied to the company. The comparative award recited in that agreement was a Queensland State instrument.

PN797

VICE PRESIDENT WATSON: We'll mark that exhibit H8.

**EXHIBIT #H8 SEA SWIFT COLLECTIVE AGREEMENT 2009**

PN798

MR HERBERT: Thank you. The written submissions set out in large part what we have to say about most of these matters. I'll endeavour to speak to them and provide some further illustrations and I would also then seek to deal with some responses to some of the written submissions that are made, though I understand the written submissions are to be elaborated upon by those to my left.

PN799

The question of coverage is raised commencing on page 3 of the written submissions and the question of coverage in my submission is absolutely clear. What has occurred, is that as the Full Bench decisions in relation to this matter recite and most of these matters recite, is that there was a high degree of consensus between and amongst certain of what one might call the big players in the industry as to the form of the relevant awards.

PN800

There is no suggestion that there was any representation or any submissions or anything else made by any of the maritime industry operators who were operating within the scope of what was then the Self-Propelled Barges and Small Ships Award. In the case of Sea Swift operating under the auspices of the agreement that I've just handed up and before that a State Award.

PN801

The difficulty with all of that is that the Full Bench, it appears was informed, because the various schedules show that the Self-Propelled Barges and Small Ships Award was included in the list of awards which were sought to be taken into account. The only submission that was made in that regard was the submission which is referred to in the material on behalf of the AMOU, as I understand it, and possibly the MUA as well, in that there was a very brief reference in a submission made by two of the union that the Self-Propelled Barges and Small Ships Award had not been included within the scope of the Seagoing Industry Award.

PN802

It was said to be of note that it only had one respondent, Perkins Shipping and that was the end of the reference that was made. That was all that was said about that issue in the submissions that were put to the Full Bench. Obviously those of us who weren't sitting on the Full Bench can't and don't know what went on behind the scenes in relation to consideration of those issues. But what happened as a

result, is a matter of significant complaint on the part of my client and has led to the consequences that we've seen here.

PN803

Those consequences include - there are two primary consequences. One is that the cross connection as between the three awards in respect of which determinations are sought in these proceedings by the applicant, were not given, in my submission, attention that would be necessary to deal with the situation of an operator who was engaged in more than one of those spaces, or more than one of those sectors of the industry.

PN804

If one was engaged in a siloed sector of the industry such as the seagoing industry, then the terms and conditions in the Ports Harbours Award and the Marine Towing Award would be of no concern whatever. However, if one was, as Perkins was, and Sea Swift was, and a number of other operators at that time were, engaged in both marine towage as it is described in the Marine Towage Award, and also had vessels operating within the scope of the - coverage of the Ports, Harbours and Closed Waters Vessels Award, then the question of the relevant coverage clauses and their interplay was of critical importance.

PN805

Much has been said about the fact that Sea Swift could have turned up and said something and didn't. Of course, that's self-evidently true. But that's not actually the remit for the Commission to determine whether people turned up at the time, because if what happened, by reason of a failure for the Commission to be fully informed about these things, or for these things to be pointed out by parties who may become interested in such things a little later in their careers.

PN806

If it has led to a situation where there has been something in the nature of an error that has occurred, then the modern award principles - and we've referred to them later in the submissions - but the modern award principles to require that it be remedied. The principle that if you don't speak up you lose, ought, in my submission to be trumped by the principle it's better to be eventually right than consistently wrong. In my submission, to maintain a situation which causes a significant difficulty for a number of operators, including my client in particular, is one which - - -

PN807

VICE PRESIDENT WATSON: Where are the other operators?

PN808

MR HERBERT: The other operators - if the Full Bench looks at the second statement of Mr Bruno, there is the - I'll see if I can find it. The material that is attached consists largely, the bulk of it, is the determination of the Competition Review Tribunal, chaired by a Federal Court Judge, in which it sets out a range of findings in respect of these matters.

PN809



At page 95 and 96 of that decision, is annexure two. They're findings of the Competition Review Tribunal based on evidence given before it, which we haven't sought to replicate that evidence, but we have sought to bring the findings of that Tribunal before the Full Bench as being a reputable means by which the Full Bench might inform itself. There are nine operators set out there who are said to actually be competitors.

PN810

VICE PRESIDENT WATSON: But only in Far North Queensland.

PN811

MR HERBERT: No, on the next page, the Northern Territory.

PN812

VICE PRESIDENT WATSON: And in the Northern Territory.

PN813

MR HERBERT: There's four in the Northern Territory. There are details there of the services they provide. Whether or not they provide charter services, their meeting facilities for the number of vessels suitable for coastal community services.

PN814

VICE PRESIDENT WATSON: What's the extent of similar operations elsewhere around the coastline?

PN815

MR HERBERT: Elsewhere around the coastline - similar operations to this elsewhere around the coastline?

PN816

VICE PRESIDENT WATSON: Yes.

PN817

MR HERBERT: We have no - there is no evidence before the Full Bench as to the extent of similar operations elsewhere around the coastline. One might surmise that the main reason for that is that the travelling to sea to service land based communities from a vessel, would only occur across the northern fringes of Australia because pretty well everywhere else in Australia is accessible by road. There would be no necessity to go by sea, other than across the top from the Pilbara, across to Far North Queensland. Those areas are serviced by vessel, either because they're offshore or because the mainland based communities are not accessible by road - certainly not for significant parts of the year and their remoteness in that respect.

PN818

There are nine operators between Darwin and Far North Queensland there who are conducting similar types of operations and that's leaving aside what was happening with TOLL until very recently, and that's dealt with elsewhere in the report, but TOLL had a significant operation which is now in the process of being

closed and a number of the assets being taken over - being purchased by Sea Swift. That was the whole purpose of these proceedings.

PN819

This a comprehensive report of the whole structure of the industry in that part of the world. Mr Bruno has dealt with it in his statement, very briefly that the determination made by the Competition Tribunal provided very significant conditions upon the authority to purchase assets of TOLL as it went out of business, and thereby become a very significantly a majority operator in that area. Those conditions involve such things as capping prices and giving undertakings to back community service and a range of those matters.

PN820

That particular report, the reason why we brought that report in is because it provides an extensive survey of the way in which the industry conducts itself in that part of the world, with an emphasis on the questions of competition as between those operators.

PN821

If one sees, for example, the third one on the first page, Carpentaria Contracting, it operates in Cairns adjacent to Sea Swift and there's three dumb barges and four tugs which is very similar to - and it's right next door to Sea Swift in Cairns. There are a range of other operations there which run tug and barge sets and landing craft and throughout much of the area where Sea Swift operates.

PN822

Each of them was considered in the decision of the Competition Tribunal as to whether they were potential acquirers of any part of the business, or whether there was a possibility that they could have taken over part of the business of TOLL as it exited the business, in order to determine questions related to competition.

PN823

The point about it is, the way in which the awards were structured - and this relates to the determinations that we've sought to be made. The way in which the awards were structured as was determined by the Full Bench in the MUA matter, was that the Seagoing Industry Award contemplated that there would be an exclusion in relation to its operation in that, in clause 4.4 it says the award does not cover employers covered by the following awards. One is the Marine Towage Award and the other is the Ports, Harbours and Enclosed Waters Vessels Award.

PN824

It contemplated this award yielding to those awards. However, because of the wording of both the Ports Harbours Award application clause and the Marine Towage Award, that, in the case of any business which was substantially covered by the Seagoing Industry Award, for example, then the Marine Towage Award could not apply. Clause 4.1 of the Marine Towage Award for example says that the industry award covers employers throughout Australia in the Marine Towage industry and their employees. The classifications etcetera of the award does not cover employers and employees wholly or substantially covered by the following awards and one of those is the Seagoing Award.

PN825

It followed, and it was the decision of the Full Bench in relation to the identical clause - it specifically addressed the identical clause in the Ports, Harbours and Enclosed Waters Vessels Award that the coverage clause did not apply to cover an employer who was in the marine towage industry, in the sense that it participated in the industry.

PN826

It had employees; it operated vessels that go in areas and ways that the marine towage industry applied to. But if it was substantially covered by another award, then its participation in the marine towage industry was nullified for the purposes of award coverage or participation in the Ports, Harbours and Enclosed Waters Vessels industry was nullified for award coverage purposes.

PN827

The whole of its business was covered by the Seagoing Industry Award, and that in the case of Sea Swift meant that all of the components of its business were covered by the Seagoing Industry Award for the purposes of the application of the boot test.

PN828

That derived from the fact that - and we put the figures in evidence in these proceedings, about 30 percent of the Sea Swift fleet are tugs and dumb barges which in the marine towage business, squarely falls within the coverage, if it was a stand-alone business, squarely fell within the coverage of the Marine Towage Award, generated about 14 percent of the revenue of the company.

PN829

Now if Carpentaria Contracting who lives next door were to tender, for example, or to employ people with its marine towage business, then it would be covered by the Marine Towage Award but Sea Swift in the next shed, would be required to employ its marine towage employees under the Seagoing Industry Award. The two stand out differences there is that the Seagoing Industry Award has effectively an even time roster and it has the capacity under that award to employ casuals. Under the Seagoing Industry Award there is no capacity to employ casuals by that name and there is an even time roster.

PN830

Under the Marine Towage Award, neither of those things exist, so that the difference in the terms and conditions in employment of marine towage employees who might be wholly dedicated to a marine towage operation, a tug and a barge and pushing or pulling as the case may be around the coast doing contract towage work, depending upon the majority work in which the employer is engaged, those employees will either be under the Seagoing Industry Award or the Marine Towage Award.

PN831

It's not because of any difference in the nature of the work they're doing; it's because of a difference in the nature of the work that their colleagues in other parts of the business are doing that the Seagoing Industry Award applies to a marine towage operation. On that basis, in my submission, it's of course trite that

an employer can be in more than one industry at the same time. It can be in the towage industry and it can be in the seagoing industry and it can be in the ports harbours industry, depending on different aspects of the business and the way it conducts itself.

PN832

The wholly or substantially provision in the Marine Towage Award and in the Ports Harbours Award governs the coverage of those two awards to the extent of excluding them if the employer is more in the Seagoing Industry Award than in either of the other two. More in the Seagoing Industry than in the other two industries. Of course, the difficulty with that is that that's a situation which as we've seen in recent history in this part of the world, that's a situation that can wax and wane over time.

PN833

It may be that if Sea Swift were to acquire a number of extra barges, dumb barges, as part of its acquisition from TOLL for example, or just otherwise, because there were opportunities of a major mining project, it might acquire more barges and tugs and sell some of its landing barges to pay for it. In which case, the predominant part of its business may well be within a matter of weeks or months, marine towage.

PN834

VICE PRESIDENT WATSON: It might be a matter of corporate structures as well.

PN835

MR HERBERT: There would be a capacity to divest that business out of Sea Swift to another entity so as to silo the marine towage business into another entity. At the moment, the application is made on the basis that Sea Swift as an entity is in three different industries, but the seagoing industry trumps the other two in terms of award coverage because of the wholly and substantially provision in the other two awards.

PN836

VICE PRESIDENT WATSON: I understand when you say that that's arbitrary and unfair and puts your client at a disadvantage. The question I was raising earlier is should the Commission be considering a variation to awards without understanding the full impact of variations, you may speculate as to what other operations may exist around the coast line. I would have thought there might be significant coastal shipping in northern Western Australia, perhaps emanating from some port along the coast line further south.

PN837

There are no other companies in such operations, or no one who is able to say authoritatively what comparable operations exist; how will they be affected and have input into the proposed award changes. Is that a desirable situation given that the notion of modern awards is that they applied uniformly to all operations of a similar type?

PN838

MR HERBERT: Yes. Two things to say about that. Firstly, the way in which award modernisation has proceeded is that parties who wish to make applications to change anything, are required to present their material to the Commission and every syllable that's presented, everything that happens in relation to that is put on the award modernisation website. It is available for every maritime operator in this country to consult that material and this is an alternative to inter partes litigation where one is required to serve the parties that might be interested in the matter.

PN839

The matter is published to the world, and every singular ward on the website has its own list of material that has been - it is published and republished, there are advertisements, notice of listings, summaries of submissions etcetera, etcetera. It's extraordinarily well published and well documented that these proceedings are occurring and what they're about. Every maritime operator in the country can read our submissions, our witness statements, look at all our exhibits and determine for themselves if they wish to become involved.

PN840

We have a number of entities here who have decided that they wish to become involved and some more that I note from the website who have communicated such as the AiGroup who have communicated - or I think it is that they've said that well we don't have a big interest in this matter and we won't be appearing and there are others who have turned up, CSL and MIAL etcetera.

PN841

It's not a situation where - and hasn't been a situation as I understand the way in which these matters have been progressed, where parties have had to go out and dig up anybody who may possibly be involved in these matters who may well be my client's competitors and cross-examine them about the nature of their businesses with a view to bringing that material in here in order to show that they're not prejudiced, even if they would talk to us as their competitors.

PN842

VICE PRESIDENT WATSON: Is there any other source that objectively - any material that might be publicly available to shine some light on the incidents of these issues?

PN843

MR HERBERT: There is published material about registered ships. There's very little published material about what it is exactly they do and how they do it and when they do it. None of them - if there are operators out there who would be affected by this thing, then they have every ability in the world to come and speak for themselves if they are prejudiced by what's happened.

PN844

That is the very accusation that's been pointed at my client, the fact that they ought not to have relief granted in these proceedings because there was a chance two years ago and four years ago to do so, and it's an opportunity that wasn't taken up, so they should be denied that. My client wasn't served with any material about this matter. They had known that the proceedings were on, and it was being

suggested against us in these proceedings as a case to speak up or shut up, which is essentially what we're being told is the standard to be applied to such things.

PN845

That's the first thing. The second thing is that the only possible consequence of what is proposed is that companies which operate in more than one aspect of the maritime industry, will be entitled to apply the award which fits the aspect of the industry in which they operate. Now, it's extraordinarily difficult to suppose how that might be a disadvantage to anybody.

PN846

DEPUTY PRESIDENT GOOLEY: Well it may be a disadvantage to the employees who see their wages reduced.

PN847

MR HERBERT: In those circumstances then, one would have thought - other situations that we would expect to hear from the unions representing the interests of those persons. We understand in general terms that's what they're saying. We haven't heard a shred of evidence at all, not one syllable of evidence to suggest that there are any such persons in that circumstance.

PN848

The situation - and if that were to occur, then that's a situation that could be dealt with by way of some transitioning arrangements as between what we propose and the ultimate - well, between the current situation and that ultimate outcome. In the circumstances, we don't know of the existence of any such persons. As I say, speaking of persons who could possibly be business competitors around the coast or whatever the case may be, is highly unlikely to be productive of anything. We had very great difficulty even getting a list, as you heard from Ainscough. We had very great difficulty getting a list from anybody of what vessels might be out there and relevant sizes.

PN849

That information - the reason why it's not before the Commission is because it is extremely difficult, if not impossible to obtain in any form that might assist the Commission. The fact that the awards were made in the form they were, in circumstances which could have seriously disadvantaged a number of employers in the way that we say it potentially disadvantaged my clients, who were to ultimately be bound by that award - again, that occurred without them being notified of the proceedings or there being any other process in that regard.

PN850

The matter has been the subject of very great publicity on the website. All the relevant parties one would expect who needed to know about this, know that it's occurring and we have no control over who might appear here in that regard. We don't know of any other operators who are in a similar situation who are operating currently and are applying the Seagoing Industry Award to a marine towage business. We're unaware of any such operator doing that thing. Again, that's a situation that would only occur if they had a seagoing business which was the predominant part of a mixed business that contained both seagoing and marine towage operations and the seagoing was the predominant feature.

PN851

On ordinary principles, one would expect the relevant awards only to apply to the sorts of businesses one was conducting and not apply in any other way. The mere fact that my client can show that it is likely to cause in due course a very serious disadvantage to my client, doesn't mean they should be denied because they're unable to rope anybody else into the difficulties that they face, is no reason to deny my client the relief that they seek. It doesn't need to be any more than one significant employer disadvantaged by the arrangements for the relief to be granted.

PN852

VICE PRESIDENT WATSON: What about the operation that I think was mentioned this morning. It might be SeaLink that operates a vehicle ferry to Kangaroo Island.

PN853

MR HERBERT: Yes.

PN854

VICE PRESIDENT WATSON: And also operations in the Port of Sydney. How would you say that operation is affected in terms of its award coverage?

PN855

MR HERBERT: I don't have the details of the preponderance of the various parts of that business, but as I understand it, SeaLink has enterprise agreements covering all of its operations. In terms of the award that might apply for the purpose of the boot test, one would need to know what the corporate structure was. Whether they had different entities operating different aspects of the business and the preponderance of one part of the business over the other.

PN856

VICE PRESIDENT WATSON: The scope of agreements. The scope of the agreement would be critical.

PN857

MR HERBERT: Yes, but the question of the number of employees and the number of vessels and other things. The point about it, one shouldn't have - the point we make is that one shouldn't have the award coverage over one part of your business dictated by what's going on in another part of your business altogether. If you had a big business, passenger carrying business in Sydney Harbour, for example, and a small cargo operation at Kangaroo Island, then the exclusion would apply. The Ports Harbours would apply to the passenger vehicles and the Seagoing Award would apply to the other.

PN858

But if in terms of scale, the opposite were true, well then the Seagoing Award would apply in Sydney Harbour.

PN859

VICE PRESIDENT WATSON: Can you assist me in this regard Mr Herbert. The fleet of vessels that your client has mentioned in paragraph 5 of Mr Bruno's first statement, exhibit H4.

PN860

MR HERBERT: Yes.

PN861

VICE PRESIDENT WATSON: What is the effect of the determinations you are seeking in relation to those vessels?

PN862

MR HERBERT: The effect of the determination would be - I'm sorry, paragraph your Honour?

PN863

VICE PRESIDENT WATSON: Paragraph 5.

PN864

MR HERBERT: The tugs and the non-self-propelled barges would be covered by the Marine Towage Award because the exclusion in that award in favour of the Seagoing Industry Award would no longer apply. The landing craft would be covered by the Small Ships coverage, whatever that might be, as would the two line haul vessels.

PN865

VICE PRESIDENT WATSON: Covered by the Seagoing Award?

PN866

MR HERBERT: They would be covered by, yes, the Small Ships - part of the Seagoing Award.

PN867

VICE PRESIDENT WATSON: Part of the Seagoing Award.

PN868

MR HERBERT: Yes. Should I say because we've been accused of simply bringing this application because we lost the other case, we have accepted and haven't sought to challenge the meaning of seagoing as determined by the Full Bench. We've accepted that as a premise and if that be the premise on which we must act, we've accepted that those self-propelled barges are seagoing and that therefore we've sought, rather than try to reinvent that wheel, to have their size and their standing and skills and abilities of the crew etcetera, etcetera to be recognised.

PN869

The two line haul vessels would fit under the 5,000 tonne cap and the dead weight tonne cap as would the two fisheries support vessels. The importance of the two fisheries support - all of them would fit under the 5,000 tonne dead weight cap. The fisheries support vessels would have the added benefit, as would some of the other vessels under the Seagoing Industry Award of having the capacity to employ



casuals because they operate on a strictly seasonal basis and the casuals are a very big part of what they do. Casual employment is big part of what they need to do.

PN870

The only exception to that may well be that one of the tugs and one of the barges on the first two dot points, actually operates within Port Kennedy which is the two nautical miles between the wharf at Horn Island and the wharf at Thursday Island. It's within the bay of what's called Port Kennedy between those two and it runs backwards and forwards on a two nautical mile run within the confines of that port. That's the Komel(?) 3 and one of the tugs that's mentioned in the material. That one would be covered by the Ports, Harbours and Enclosed Waters Vessels Award because it just does a little ferry run between the two wharfs. The other five tug and barge sets would be under the Marine Towing Award and the rest would be under the Seagoing Industry Award with the Small Ships addition.

PN871

VICE PRESIDENT WATSON: Which vessel were you just talking about? Which category is it? It's a self-propelled barge, is it?

PN872

MR HERBERT: No, there is one vessel which - the vessels are described in paragraph 7, 8, 9 as to what they do. There are port and harbour operations in paragraph 13. There's Komel 3 and Cossack, that's a tug and barge combination. It operates the two nautical mile run, as I say, from Horn to Thursday. It's about 20 minutes, six knots and it's just a little daily through run.

PN873

The Temple Bay, I should have mentioned is a 50 tonne barge which lives at Lockhart River in Cape York. It's either in the river or in the bay outside the river and all it does was run a mile or two out to pick up cargo from one of the passing line haul vessels and go back to the beach and backwards and forwards, and it does that about twice a week.

PN874

We have contended that the Temple Bay, referred to on page 13, would be in the Ports Harbours Award with what it does. It would be either that or it would be under the Small Ships version of the Seagoing Industry Award. The Komel 3 and the Cossack would be within the Ports Harbours because it never leaves the port. The rest of those which are referred to in paragraph 7 through to 12, they're landing craft and the two fishing vessels are in eight and the two line haul vessels in seven.

PN875

The only vessels which would change the award coverage would be the tug and barge sets except for the Komel 2 and one of the barges being at Lockhart River.

PN876

VICE PRESIDENT WATSON: That's Temple Bay.

PN877

MR HERBERT: Otherwise the others would remain within the Seagoing Industry Award on the proposal we put, but they would all be small ships.

PN878

COMMISSIONER CAMBRIDGE: The line haul would be small ships? They're over 80 metres long.

PN879

MR HERBERT: They're under 5,000 dead weight tonnes, well under. They're about 3,000 and 2,700. The dead weight tonnage is on attachment A. The Newcastle Bay is a 2,768 dead weight tonnes and the Trinity Bay is 3,200 dead weight tonnes.

PN880

Can I add in relation to that, we've got some information which is publicly available information over the luncheon adjournment that is illustrative of the point made earlier in evidence and that is the Newcastle Bay's dead weight tonnes is 2,768. It is listed on the website as having gross registered tonnes of 1,964. When Mr Ainscough said he thought it was about half; that's slightly more than half.

PN881

The Trinity Bay, the dead weight tonnes are 3,200. The gross registered tonnes are 1,594, so in fact that is less than half. The gross registered tonnes are less than half the dead weight tonnes. Just by way of illustration.

PN882

MR HOWELL: I should object to that. If my friend is going to start putting from the Bar table what is in essence, evidential material, he should at least put all of the gross registered tonnes of the Sea Swift fleet so that the Bench can actually see how this notion of gross registered tonnes and dead weight tonnes, interacts depending upon whether you're a barge or whether you're a notionally small ship or some other kind of a vessel.

PN883

My friend is right in saying that this material is publicly available, but the Bench should have a picture, not a little piece of it when one looks at the notion of dead weight tonnes as opposed to registered tonnes. Because it is important fundamentally to the idea of knowledge, skill, responsibility and the certificates which attach to these sorts of things.

PN884

MR HERBERT: I'm happy to do that. We were engaged in some other things. I've told my friend about this material, but as I say, it's publicly available and we'll arrange to have it presented, provided to the Full Bench later this afternoon if we might. It's easily extracted. By way of illustration, like Mr Ainscough was saying, I've just simply taken those two numbers in relation to the two line haul vessels, so that it is important to understand what one is talking about in relation to tonnage and I'll come to that in due course when we talk about the small ships area.

PN885

So far as the coverage questions are concerned, in my submission, for the reason we put out in the written submission that an award which regulates a substantial towage business, which is in light of the acquisition of a number of the assets from TOLL, likely to be significantly larger in the near future without being more particular than that. It is able to be regulated by the employer by reference to the awards which have been adjudicated as applying appropriate safety net standards to employees engaged in that class of work,

PN886

If employees have award standards applied to them by reference to work being done by others and not by them, ipso facto it cannot be that an award which achieves that outcome in circumstances of this kind, meets the modern award objectives, because it actually applies a standard different from that which the Commission has adjudicated elsewhere to apply to those employees for entirely arbitrary reasons.

PN887

That is by reference only to the proportion of the employer's business which is engaged elsewhere. Particularly in circumstances where that proportion can change over time, or overnight, and so that the award coverage can change backwards and forwards depending on what the employer is doing in relation to the other part of their fleet as distinct from the part which has a particular award coverage which the Commission has applied to it.

PN888

That primarily is the coverage issue. I rely on the written submissions that we made in relation to that. In those circumstances it would be quite wrong to maintain coverage in that way in circumstances where it would require an employer who engages in several discrete aspects of the maritime industry to actually cease to become an employer of other parts or in other parts of the industry such as marine towage, for example, simply in order to erect corporate structures which would avoid the unfair application of one award to the whole of the business, when other aspects of the business are separately recognised by this Commission in modern awards as warranting a different standard.

PN889

Of course the unfairness that applies in those circumstances is manifest in the sense that it would allow a range of other difficulties in the market place and would prevent it from being able to properly compete as they are expected to do and as the modern award principles recognise they should be able to do.

PN890

The other issue in my submission is the question of the small ship employment classification. I did mention earlier that we proposed to produce the figures which allow for the - Mr Cooper produced some figures comparing the Small Ships Industry Award with the Seagoing Award at various points in history. I said they were not, as it turned out, 100 percent reflective of the true position because the Self-Propelled Barges and Small Ships Industry Award wage rates incorporated a cargo allowance at clause 14.2 and 14.3 whereas the Maritime Industry Seagoing Award applied a cargo allowance on top of the wage rates.

PN891

We've redone the figures and can I hand up a schedule which reflect what I told the Full Bench earlier that we intended to do. In historical terms the Self-Propelled Barges and Small Ships Industry Award was in force at the time the Seagoing Industry Award was made. Although by that stage it only had one respondent. I had had a number of respondents earlier, the number doesn't matter; the history of that doesn't matter much other than to say that that award applied to a barge operator in operating in the Northern Territory within areas very close to and in some cases, overlapping to the areas operated by my client and where my client operated at that time.

PN892

What occurred in that respect was, as I submitted earlier, the existence of that award was adverted to. The significance of that award, in my submission, when one looks at the submissions and I recounted the effect of the submissions earlier. The significance of that award and what it stood for and what it accommodated was not adverted to in the process of making the award. The award was agreed to by a number of the major players in the unions and the fate or otherwise of persons and employers working in the small ships and self-propelled barges industry in North Queensland and in the Northern Territory, was not adverted to.

PN893

That's nobody's fault; it's just simply a fact. What occurred was that the Seagoing Industry Award was made in circumstances where the lowest classification of worker was between zero and 19,000 tonnes. That is a single classification in that award. That classification, as Mr Ainscough's evidence demonstrates, covers everything from the lowest grade deckhand or cook on a 200 tonne barge, doing a two or three day trip around the Torres Strait up to and including a fully qualified foreign going master with the equivalent of 18 to 20 years' service and a four year university degree in order to be able to do his job.

PN894

The appendix to Mr Ainscough's statement, sets out the relevant requirements of various people - and I'll come to that shortly, but one can't help but be impressed by the fact that zero to 19,000 tonnes covers everything from a kindergarten teacher to a university professor in an educational sense.

PN895

DEPUTY PRESIDENT GOOLEY: You were going to run that line to suggest that kindergarten teachers have less skills, capacity etcetera than the university academic, are you?

PN896

MR HERBERT: A university professor with a masters or doctorate. The equivalent in my submissions, whatever be the analogy and I don't seem to have struck nerve somewhere, that there can be no comparison between a cook and a deck hand who requires a few weeks' experience in order to be able to do their job and a Grade I foreign going master who has undertaken about 18 years of study and service, as Mr Ainscough details in his affidavit.

PN897

He starts at 18, he won't acquire those qualifications until he's about 30, even if he passes all his exams at the first time. He will have the equivalent of about a four year university degree or will have a university degree, or at the lowest an advanced diploma and that he needs all of that education including full paramedical studies and a range of other skills, simply in order to perform the job that he's engaged to do.

PN898

Within the same classification, there is what used to be called a Grade 4 Master driving a 200 or 300 tonne barge around the Torres Strait with a crew of about three or four and doing two and three day trips rather than six months around the Pacific or around the world, as the case may be.

PN899

Both of those ends of the spectrum are covered by the same classification. Then the classifications step up from 19,000 to 39,000 and 39,000 and above. They step up in relation to tonnes. The award doesn't say what kind of tonnes. One assumes dead weight tonnes, then you are talking about very significant vessels and the pay scales are expressed by reference to - if they are dead weight tonnes.

PN900

They do so in a way which includes within the scope of the classification a massive range of actual expertise, knowledge, experience, training and responsibility and a massive range of localities and dangers and other things associated with those localities. Everything from, as I say, chugging around the Gulf of Carpentaria on the one hand and then taking a full size cargo ship or tanker from Sydney to the West Coast of America or Japan or Manila.

PN901

All of them are covered by the same safety net provision. One would look long and hard and probably fail to find a breadth of coverage of a single classification in an award of the type described by Mr Ainscough in his evidence. It simply wouldn't occur anywhere else.

PN902

It would be a different thing altogether, if this award only covered international jet pilots and you said well the bottom classification is everything from no seats to 200 seats in the aircraft. Well, there's no such thing as a five seat international passenger jet. So it wouldn't matter; you'd only be playing with the top end of that scale. But it's a different thing here, because at the lower end of the scale, there is actually an entire sub-industry operating in which all they have are very small vessels. All they have and all they do is operate vessels which have miniscule cargo carrying capacity, and we put the figures in, in Mr Bruno's statement, the relative cargo capacity.

PN903

Some of the vessels they operate and the vessels that are at the top end of the 19,000 scale, there are multiples of 20, 30 and 40 times the capacity. The crew size, 18 seems to be a fairly standard crew size in that classification of the Seagoing Industry Award. Then you've got a crew size of four, maybe five on these vessels that go out for two or three days in many instances; that go round a

few islands in the Torres Strait, no more than a hundred miles or so and then return.

PN904

To include that kind of voyage and the skills of the classification etcetera that are necessary in order to undertake those vessels, with the other ones that go on international journeys, is in my submission, plainly wrong. It either grossly undervalues the work of the people at the top end of that scale or it grossly overvalues the value of the work of the people who are at the bottom end of that scale.

PN905

One of the primary reasons for that, one can see in the evidence of Mr Ainscough, is the amount of time, effort, study and expertise required by the statutory authorities before one could even engage in such work. There are two distinct classes and that's the class which is the domestic commercial vessels on the one hand, and they're the STCW, on the other hand. There is, if you'll pardon the expression, an ocean of difference between the two.

PN906

Without going into the detail of it, they're set out in the schedule to Mr Ainscough's statement in which he says that, for example, the sea time required at the lower end is measured in days and at the upper end, is measured in years. There are qualifications which are significantly above and beyond anything that - in the case of STCW qualifications, significantly above and beyond anything that the DCV qualified persons are likely to ever encounter.

PN907

He concludes that in the case of the larger vessels - and he said on a number of occasions, 5,000 tonnes is a point at which the changeover occurs from one to the other in approximate terms, but that at that point, you get to a position where the DCV qualified mariners, even if they were legally entitled to operate the larger vessels, could not do so with their skill and training they had. Their licence certainly wouldn't cover it if it's more than 80 meter, but he's utilised the 5,000 tonnes standard because of reasons that we're obviously dealing with an award which is regulated by reference to what we believe to be dead weight tonnage in order to do as little violence as possible to the current award structure, we've adopted a similar standard.

PN908

It seems that there is - in my submissions, there is a very clear divide in the middle of this group that are encompassed within what Mr Ainscough calls the bandwidth and that significant divide is the divide between the domestic commercial vessels on the one hand and the STCW qualifications on the other hand. For all the reasons that he sets out in his schedule, his schedule gives very significant details as to what people can do with the various qualifications; how long it takes them to get what they have to study, what standard they need to acquire etcetera.

PN909

One would have thought that in ordinary circumstances that the distinction between those two levels of qualification would be a very prominent point of departure for the purposes of calculating or setting up classification structures in an award such as this. One would also have thought, had the submission been put that there is a whole class of these small vessels operating in Northern Australia with these lowly qualifications that don't employ integrated ratings, they employ deck hands in these sort of circumstances. The Masters don't have four year university degrees, they have an equivalent of a Certificate III or Certificate IV qualification and that their journeys are measured in a few days, rather than weeks or months.

PN910

That the Commission would, at that point, determined that an award or award classification which reflected the Self-Propelled and Small Ships Award would then have been made in order to accommodate the circumstances of those operators.

PN911

If they are to be determined to be involved in the seagoing industry - and again, we don't cavil with that, in light of the decision of the Full Bench. Then if the seagoing industry is to be the point of distinction, they should not be thrown into the pot with - and should not have been thrown into the pot with the other very large operators that have very highly qualified powers, in circumstances where the employers are not large operators, the vessels are not large vessels and the qualifications of the crew are dramatically lower for all the reasons that Mr Ainscough talks about and the STCW people.

PN912

The point of distinction because, as I say, the current award - we've heard much from cross-examination about the fact that tonnage has got nothing to do with skill and ability and qualifications and everything else. Which is a little difficult to understand given that the award itself is broken up by reference to tonnage in terms of pay rates. The pay rates are between zero to 19, 19 to 39 and 39 and above and there are significantly different pay rates by reference to those tonnages.

PN913

But apparently from the sound of it, what's to be put is that those tonnages are quite irrelevant to the skills, abilities and responsibilities of the crew which means then, they're there just because they were there by agreement. But of course, that can't regulate the correctness or otherwise of a classification that is inserted by agreement which turns out to cover up a situation where there are some significant group of employees and their employer who are not operating at that level and the imposition of the same safety net entitlements to the two groups of people, would appear to be manifestly incorrect.

PN914

VICE PRESIDENT WATSON: Mr Herbert, you accept that if there's to be different wage rates for different employees under an award, the differences must be justified on work value groups.

PN915

MR HERBERT: Yes.

PN916

VICE PRESIDENT WATSON: The schedule to Mr Ainscough's statement indicate the different training required for particular classifications.

PN917

MR HERBERT: And the skills and abilities, yes.

PN918

VICE PRESIDENT WATSON: And different types of vessels. But of course, that's only part of the work value consideration. What evidence is there as to what we have before us, as to the skills and responsibilities required to be exercised by the employees on the different types of vessels, sizes of vessels it might come down to.

PN919

MR HERBERT: Yes the skills and abilities that are required to be exercised are those which they must demonstrate in order to obtain the relevant qualifications that they receive. The statutory authorities that regulate these things to the N'th degree require that they have training in those various matters that are listed by Mr Ainscough. That they demonstrate competency in those matters, and it is those matters, they are the skills and abilities which must be exercised as a part of their work.

PN920

VICE PRESIDENT WATSON: Is there evidence to support that proposition?

PN921

MR HERBERT: It's self-evident in my submission that the statutory authorities require those skills and abilities to be demonstrated as a condition of obtaining the qualifications to be able to operate vessels of that kind in that space.

PN922

VICE PRESIDENT WATSON: In order to be certified to fulfil that particular role, you would need certain qualifications. But where is there evidence that those same skills are actually required to be exercised in the day to day operation?

PN923

MR HERBERT: The only evidence that is available in that respect is the requirements - I'll withdraw that and put this another way. The safety net which is provided under the award is said to be the same for the two classes of employees that we've identified, being the DCV employees and the STCW trained employees. That safety net is said to be the same, irrespective of whether you've obtained your qualifications in a matter of weeks and you've undertaken training for a matter of a year or so, or it's taken 15 years and all the advanced studies that are required.

PN924



The point we make is that a safety net that covers both of those areas cannot be a safety net consistent with the requirements of a modern award because, as I submitted before, because of the dramatic difference between the qualifications required just to be able to do the job in each situation. There must be a disparity - because one is either over-valued or the other one is under-valued, but they can't both be entitled to the same safety net in the circumstances of what it is that they need to go through in order to obtain those qualifications.

PN925

The question of the valuation of the - if the higher qualification - if the safety net is appropriate to the higher qualification, it cannot be appropriate to the lower qualification because of the nature of the training they receive and the nature of the much lower standard of work that they are entitled to do. They simply can't go internationally; they can't operate vessels bigger than a certain size. There are various things that they can't do. The same safety net applies to people who can do all of those things.

PN926

That's the point we make about the small ships - and there was an arbitrated Federal standard that reflected that in the Self-Propelled Barges and the Small Ships Award. It was applied by the Commission in the same space as the Maritime Industry Seagoing Award existed, in circumstances where it was applied to vessels which are, for all relevant intents and purposes identical to those which are being operated by my clients and that that arbitrated standard - - -

PN927

MR HOWELL: Your Honour, I'm sorry. I hate to rise in my friend's submissions, but he has done this throughout the submission and this one is a particular bug bear. There is no evidence before this Commission that the standards set in the Small Ships and Barges Award which was terminated in the course of the award modernisation process, was ever an arbitrated standard. Never. At the time it came to its natural end, it applied to one employer. There is no evidence that at any stage over its life, since its creation back in 1980, that it was ever an arbitrated standard.

PN928

VICE PRESIDENT WATSON: Did it undergo the minimum rates adjustment process?

PN929

MR HOWELL: I've not seen any decision in which - it presumably must have; it was still in existence in 2007. But I've not seen a decision which specifically dealt with it.

PN930

VICE PRESIDENT WATSON: If it went through that process and my assumption is that every award did, then there must have been some assessment of comparative work value for a minimum rates award or maybe it was a paid rates award converted to a minimum rates award. There must have been some process which equated the classifications on work value grounds to ultimately a base tradesperson, somewhere along the line.

PN931

MR HOWELL: No, I'm sorry.

PN932

VICE PRESIDENT WATSON: I hope you're going to assist us in that regard in relation to this history.

PN933

MR HOWELL: In that respect, that's for him, not me, but what I should say though, is even if that be right, and one would assume that there must have been some form of assessment of that kind, that doesn't it mean it could not have been done by consent. It doesn't necessarily mean that there was an arbitrated determination to that effect.

PN934

VICE PRESIDENT WATSON: No, but the Commission must have been satisfied either by arbitration or consent that the relativities in assuming it's a minimum rates award, were properly fixed minimum within the minimum rates award concepts.

PN935

MR HOWELL: For those to whom it applied, yes. Keeping in mind that as at 2007, it only applied to one employer.

PN936

VICE PRESIDENT WATSON: This would appear to be - putting this material before us and putting the argument before us, it puts those issues into play, does it not?

PN937

MR HOWELL: It does, and again, I'm interrupting my friend's submission which I'm loath to do and I apologise to my friend for doing that, but there is simply no basis upon which it can legitimately be said that this was an arbitrated standard and that's the only point I wanted to make at this point, your Honour.

PN938

VICE PRESIDENT WATSON: Yes. Thank you for making that point. Mr Herbert, are you going to assist us in relation to this history to make good the proposition of a work value comparison?

PN939

MR HERBERT: Yes, it's in the award. You have a copy of the award under Mr Cooper's first affidavit.

PN940

VICE PRESIDENT WATSON: Sorry, where is it?

PN941

MR HERBERT: It's his first affidavit and there's a copy of the award and the history appears in 14.2, 14.3 and 14.6. 14.6, the rates of pay in this award include the arbitrated safety net adjustment part one, safety net review, June 2005

decision. There are a number of - the print numbers of the relevant variations at that time. We can bring the decisions up which we understand are matters to which your Honour referred.

PN942

VICE PRESIDENT WATSON: I think the reference to arbitrated safety net adjustments relate to those increases in 2005, but the relevant application for the minimum rates adjustment would have been much earlier than that, in the 90's sometime. Arising from the 1989 National Wage Case decision, but it occurred over, in some cases, over a number of years after that.

PN943

MR HOWELL: No doubt there's some history in the award that discloses the application of the minimum rates adjusted process.

PN944

MR HERBERT: It was certainly subject to award simplification but that history - the award superseded the 1991 award but whether that award went through that process, we will need to research, your Honour. As the award itself recites, there are a number of arbitrated increases in relation to the award after that time, but we'll have to research that aspect of the matter.

PN945

We've no reason to believe that it alone, evaded that process because the award was in existence at that time and would have been subject to that process, one would have thought.

PN946

VICE PRESIDENT WATSON: So you say it should be inferred from the fact that there was a 1991 award?

PN947

MR HERBERT: The 1991 award was replaced and it was then, this award was, we are told, was in existence before that time. We haven't gone back any further than that, but this award replaced the 1991 award. The 1991 award replaced a previous award. It may be the 1991 award was the award that reflected changes that came out of the minimum rates adjustment process, but we would need to research the Commission's file in that regard. We didn't think that was - - -

PN948

VICE PRESIDENT WATSON: We would be assisted by any further detail. You say it should be inferred that the award has that longevity.

PN949

MR HERBERT: Yes.

PN950

VICE PRESIDENT WATSON: At some point along the way, the minimum rates adjustment process was applied and these rates were regarded as properly fixed minimum rates as were the rates in the Maritime Industry Seagoing Award.

PN951

MR HERBERT: They were both fixed by the same process, one assumes. Again, we can research the history of that. But we had assumed that because of the existence of the awards throughout that period that minimum rates were properly fixed with relativity by the same process and that the relativity fixed in relation to the Self-Propelled Industry and Small Ships Industry was represented by the award to which there was only one respondent left standing. There were earlier respondents to it, but they had progressively, as it were, fell off the tree.

PN952

But that was a relativity that applied to the very much lower quadrant of what was generally known as the seagoing industry then. This award reflects - the Self-Propelled Barges and Small Ships Award reflected many of the conditions in the Seagoing Industry Award, but the wage rates were significantly lower. There was a cargo handling allowance, on the sheet I've handed up a few moments ago - there was a cargo handling allowance incorporated within those rates.

PN953

The leave component, I think, was slightly higher. It's 190 days in the Self-Propelled Barges and Small Ships Award. I think it's 190 days per annum leave, rather than .982 component of the Seagoing Industry Award, but it confirms the answer I gave earlier, it was in effect, it didn't provide for even time rosters, but with that leave component that's pretty much all one could do in relation to it.

PN954

The other aspect to it, interestingly, is it doesn't provide for integrated ratings for general purpose hand. The wages classifications and the minimum rates of pay there may be an ordinary seaman in the higher classification; in the higher classification there's an AB. There were two classifications within that - or two levels within that award. Interestingly this award refers to 500 tonnes dead weight which the Seagoing Industry Award doesn't, but given that the majority of operations under this award, according to Mr Bruno who has named the vessels and what they were at the time, these vessels were mostly self-propelled barges. There was a vessel less than 500 and a vessel more than 500.

PN955

One would image that if another company was made a respondent to this award and it had vessels of another size, bigger than the ones which were then being operated by Perkins, that would have been addressed in the award. But as it turned out, as at the time this award was rescinded, that doesn't seem to have occurred. But there is no top on the size of the vessels, so long as they're more than 500 tonnes dead weight.

PN956

The practical facts of the matter as Mr Bruno has said, that you can't run vessels around those sorts of areas in the shallow bays and areas and run them up on beaches and in sort of reef areas where they run their vessels for their cargo runs, any larger than the ones that they currently run.

PN957

The line haul vessels are of a slightly different situation because they run up the coast and back again. All of the others that are the small ships that are in this sort of operation here, really can't be much bigger than that, so it's a self-limiting size. It would matter if - - -

PN958

DEPUTY PRESIDENT GOOLEY: I don't understand that because this award simply provided that the award applied to self-propelled barges and small ships, which I don't think are defined, that proceed to sea.

PN959

MR HERBERT: Yes.

PN960

DEPUTY PRESIDENT GOOLEY: So if they could be more than 500 tonnes, you could be the size you're very much saying require greater skill, responsibility etcetera, but I would only be paid at the greater than the 500 tonne rate. It does suggest that at least the classification didn't meet the model you're proposing.

PN961

MR HERBERT: The largest vessel, Mr Bruno has dealt with in his - - -

PN962

DEPUTY PRESIDENT GOOLEY: I know, but it might have been the largest vessel that did operate under the award, but it certainly wouldn't have been the largest vessel that could have operated under the award, because despite the use of the expression small ship, it didn't have a maximum tonnage.

PN963

MR HERBERT: No, it didn't have a maximum tonnage. The maximum tonnage was, in effect, enforced by the nature of the locality in which they were operating. You couldn't be much bigger than what they were actually operating. We've not -  
- -

PN964

DEPUTY PRESIDENT GOOLEY: I just want to ask you. In relation to the work value question which is the question that arises out of 156(3) of the Act which says if we're going to adjust the minimum rates, we've got to do it on work value grounds.

PN965

MR HERBERT: Yes.

PN966

DEPUTY PRESIDENT GOOLEY: You simply rely on the evidence of Mr Ainscough?

PN967

MR HERBERT: And all the regulations which have been tendered in relation to the proceedings as the regulations applicable to that work. But there's another factor here and it's a matter of very great difficulty having regard to the Act in my

submission, and that is this, that what occurred is that employees who had been assessed, assuming the relativities etcetera had been addressed and they did go through the minimum rates adjustment process etcetera, that on the scale of the material that we've produced, employees who's assessed work value was reflected in the wages that appeared in this award at the time, received a dramatic uplift I their wages by virtue of nothing more than the fact that their small ships operations were placed in a category with some very much larger ships.

PN968

Those rates didn't change; the rates in the Seagoing Industry Award that applied to big ships stayed where they were. The small ship employers and employees were added to that without any recognition of the fact that there was a very substantial increase occasioned by virtue of nothing more than they were thrown into a bigger category of ships where they have never dwelt before. The difficulty that confronts us and we put it squarely, is that there having been no work value assessment that justified that increase at all, it was simply done as part of the award modernisation process. It is now incumbent, doing the best we can to show that there is a work value reason why they should be put back - work of that kind should be back to where it was before this process occurred.

PN969

We point to things such as the evidence of Mr Ainscough on the qualifications; we point to the fact that the properly fixed minima, we assume, have these employees sitting at a significantly lower level than the others prior to the award modernisation process and that nothing happened that might warrant an increase of the kind that we're now being asked to provide doesn't exist. They have never been assessed, employees at this level, have never been assessed by arbitral authority as warranting the rates of pay that were awarded in the process of the award modernisation conversion. They were simply put there, without demur conceded, but my client was living in North Queensland under State regulation at the time.

PN970

DEPUTY PRESIDENT GOOLEY: I mean that's just not the case is it? Everybody knew that the corporation's power was going to extent the coverage. The arguments you used about the current process applied equally to that process.

PN971

MR HERBERT: Applied equally to my client, that is so.

PN972

DEPUTY PRESIDENT GOOLEY: And the exposure drafts were published and your client could have come along and said this is not appropriate. Now we want to make submission as to why.

PN973

MR HERBERT: Yes, that is so.

PN974

DEPUTY PRESIDENT GOOLEY: We also don't know what occurred - or well I certainly know, because I wasn't there, what occurred within the Full Bench

because this wasn't an inter parte matter. The Full Bench did have that award before it. It knew it was abolishing it. You can't make the presumption that it just took what the parties put to it and just said yes, fine, if that's what you think, then we agree with it.

PN975

MR HERBERT: Your Honour, I said we have a very great difficulty about it; that's part of the difficulty in that my client wasn't here to deal with the issue for all the reasons I said before in relation to other parties. They had the opportunity to be here and I said before, it's not anyone's fault; but it did happen; it's a fact.

PN976

Now that the fullness of what has occurred is now brought to bear against my client's business and there is a review process under way and my client is entitled to raise these issues and say in a review, there was a mistake from our perspective. Again, nobody's fault. If anybody's fault, it was our fault for not turning up and pointing this out, the same as other people who are affected such as Perkins who didn't turn. But this isn't about fault; it's about making a correct assessment at the end of the day.

PN977

If at any point my client can demonstrate that there was a very substantial uplift, a non-arbitrated, non-assessed uplift from one set of relativities to another, without any case having been made for that other than that the award process went forward. We have to put forward as an assumption because we don't know any better, because we obviously weren't present in the places where these decisions were made.

PN978

But there was certainly no public statement made that a decision had been made that people operating in this part of the industry in this part of the world warrant a much higher rate of pay than they are currently receiving. That the standards in Self-Propelled Barges and Small Ships Award ought not to be kept in currency. There was no statement of any kind that went anywhere near any proposition like that. So that there was, what might be said to be a substantial and unjustified uplift - unjustified in the sense that there was no work value assessment made as to whether that was an appropriate thing to do.

PN979

We rely on that as forming part of the matrix from which it can be said, that on work value principles what was the properly adjusted assessed minimum standard for employees engaged in that area with a relativity to the Seagoing Industry Award, ought to be restored to where it was on the basis that what was not justified on the way up, requires much less justification to come down.

PN980

VICE PRESIDENT WATSON: In that regard, can you clarify this for me? You've handed up a comparison figure to table of documents. The figures for the Maritime Industry Seagoing Award appear to adopt the total rate for the dry cargo vessels up to 19,000 tonnes. In that award, there was an identified overtime component, that's a minimum rate and an overtime component, giving the total.

PN981

MR HERBERT: Yes.

PN982

VICE PRESIDENT WATSON: The rate of pay in the Self-Propelled Barge and Small Ships Industry Award had a total rate which was said to include all overtime and disabilities, but no identified components.

PN983

MR HERBERT: It's an annual wage.

PN984

VICE PRESIDENT WATSON: Pardon?

PN985

MR HERBERT: It's identified as an annual wage with 190 days leave.

PN986

VICE PRESIDENT WATSON: Well, 190 days of duty each year?

PN987

MR HERBERT: Yes.

PN988

VICE PRESIDENT WATSON: How do we know that the overtime disabilities comprehended within the Small Ships Award was the same as the overtime component in the Maritime Industry Seagoing Award? If they're not the same, it's not comparing apples with apples.

PN989

MR HERBERT: It's 190 - I haven't worked out the factor of 190 days, what the percentage is; whether that is how that equates to the 982 figure in the Seagoing Industry Award.

PN990

VICE PRESIDENT WATSON: Well, it's a matter of what rosters are worked for the particular operations, one would assume.

PN991

MR HERBERT: Yes.

PN992

VICE PRESIDENT WATSON: Somewhere along the line, probably when the minimum rates adjustment process was done, there would have been some explanation.

PN993

MR HERBERT: Yes, the point that we make about that is that these were the rates - these rates were reflective of the circumstances in that part of the seagoing industry in which it was to operate and it's a different part of the seagoing industry to the part where people go away for weeks and months at a time on long sea voyages and don't come back to their families or to Australia for a very long time.



PN994

All the evidence is in relation to the Sea Swift operations which are said to be in the same part of the world and conduct similar operations is that the voyages are anything from a couple of days to a week or two at the most and that there are, depending on whether it's the prawn season, then in that situation, I think we've said six days from Cairns to Weipa and back to Cairns. The evidence of Mr Bruno is that when the crews get back to Cairns, if they live in Cairns they can go home for a few days and have a couple of days at home before they have to take off again.

PN995

Those are a collection of circumstances which operate in this part of the Seagoing Industry Award that don't operate in the other - - -

PN996

VICE PRESIDENT WATSON: Those differences may well have been occurring back then when these rates were set, which gave rise to different overtime and disability components.

PN997

MR HERBERT: Yes, yes. That's why we say the fact that they're different reflects the fact that those components of the industry are different.

PN998

VICE PRESIDENT WATSON: But the comparison you've produced doesn't show a like for like comparison without producing the answer to the different bases or an explanation on the bases for the overtime and disability components.

PN999

MR HERBERT: The bases for the overtime and disability components in the Seagoing Industry Award I think are set out in that award.

PN1000

VICE PRESIDENT WATSON: Yes.

PN1001

MR HERBERT: The basis for those payments here, they're not differentiated, but it's a total figure and it's said to be on account of 190 days of duty each year. "Carrying periods of duty, travelling to and from vessel and periods of standby to join a vessel." It's not broken into two parts.

PN1002

VICE PRESIDENT WATSON: I haven't done the comparison and I'm not particularly minded to do it for myself, but don't we need to understand or neutralise any differences in overtime and disabilities between the two awards to determine the different work value components for the minimum rates in the award?

PN1003

MR HERBERT: If I understand your Honour correctly, that in order to understand what the minimum rate is, one would need to know how the total

salary was reached in terms of taking out the overtime component from the minimum rate.

PN1004

VICE PRESIDENT WATSON: With the Seagoing Award, that's easy because you disregard the overtime component.

PN1005

MR HERBERT: Yes.

PN1006

VICE PRESIDENT WATSON: I take it that any disability payments for loading, discharge or lashing of cargo are separately payable under the Maritime Award and not incorporated into the vote.

PN1007

MR HERBERT: No, that's correct.

PN1008

VICE PRESIDENT WATSON: That's the assumption I make. So the missing - you've taken off the disability loading on the salary you've quoted for comparative purposes. But you haven't taken off the overtime component. You've included the overtime component for the seagoing and you've included the overtime component for the small vessels. But we don't know whether they're the same overtime component or there is some other different basis, based on the different nature of rosters and working.

PN1009

MR HERBERT: The overtime component can only be deduced from the fact that the payment is for 190 days of duty and that employees are required to remain on vessels for the length of the voyage, whatever that might be. Again, without having all of the transcripts and all the history of how that was put together, the only point that we can make about that, is that we know that under the Seagoing Industry Award, and the award itself is reflective of the requirements of, in effect, long sea voyages where people have to stay on board, for as I say, weeks and months at a time.

PN1010

Whereas we also know that in this kind of situation, that that's unlikely to have occurred. So that the overtime picture will be different, but it will also be different from vessel to vessel and run to run and time to time.

PN1011

VICE PRESIDENT WATSON: That emphasises my point that that may well mean that the overtime component in the Maritime Industry Seagoing Award is likely to be higher because of the difference in operations.

PN1012

MR HERBERT: Yes.

PN1013

VICE PRESIDENT WATSON: Without trawling back into the history and finding the relevant minimum rate for both awards, we can't make the sort of comparison based on the figures you've produced.

PN1014

MR HERBERT: That history, I'm not sure if that history is available, your Honour. I mean, it's certainly a matter that will need to be looked at, but we've done the comparison here for relevant purposes to show, because we have put in the application that we derive the rates of pay that we were seeking from the Ports Harbours Award, relevantly, just for the purposes of the application. But we produced these rates of pay to show that the rates that we are seeking have a relativity to the rates that were in existence when extrapolated out to present time.

PN1015

The difficulty in dissecting them so as to find an ordinary rate for the purposes of assessing the relativity of that ordinary rate, are at the moment, as I understand it, largely insurmountable because in terms of this award, because the Commission did not, when making this award, break it up in the way that they did in relation to the Seagoing Industry Award.

PN1016

VICE PRESIDENT WATSON: Well it replaced the 91 award, and there are no doubt various considerations of wage rates along the way, including when a minimum rates adjustment was applied. Why can't you undertake additional research?

PN1017

MR HERBERT: We can; we certainly can your Honour. But as I stand here, I don't have that information.

PN1018

VICE PRESIDENT WATSON: No, I understand that. Speaking for myself I would be assisted by that further detail because it does appear to me that the comparison you put up may well not be a proper comparison.

PN1019

MR HOWELL: Your Honour, I can assist in that respect. The award simplification decision was a decision of Commissioner Eames made on 31 August 2001. Print reference for my friend's benefit is PR908398 and it confirms that it was an agreed position; it was a consent award simplification process.

PN1020

DEPUTY PRESIDENT GOOLEY: What about the - what I often refer to with the minimum rates adjustment process is the award restructuring process.

PN1021

MR HOWELL: Yes I understand. Immediately, I can't go beyond that, that is what I just have to that extent.

PN1022

DEPUTY PRESIDENT GOOLEY: No.

PN1023

VICE PRESIDENT WATSON: We welcome any other volunteers to help. But it may be that nobody can answer them today. We've always got tomorrow.

PN1024

MR HERBERT: What was that number - PR908398.

PN1025

MR HOWELL: That's the one.

PN1026

MR HERBERT: Yes, it's referred to in the order.

PN1027

MR HOWELL: Yes.

PN1028

MR HERBERT: To make it clear your Honour, then, your Honour indicated you would be assisted by understanding the ordinary time rate, the minimum rate that was included so as to make up the total salary in that award. That would go back probably pre-1990.

PN1029

VICE PRESIDENT WATSON: Yes.

PN1030

MR HERBERT: For comparison purposes to find out the appropriate relativities one would need to go back to the same process that was undertaken in relation to the Seagoing Industry Award to get a point in time comparison of that. We'll undertake to attempt to do that overnight, your Honour.

PN1031

VICE PRESIDENT WATSON: Thank you.

PN1032

MR HERBERT: Mr Cooper will have plenty to do.

PN1033

VICE PRESIDENT WATSON: It's not as easy to research these things these days, but certainly I would be assisted.

PN1034

MR HERBERT: Just to recap. These not being, as your Honour's pointed out, not in the ordinary de partes proceedings, but proceedings conducted by and through the Commission. The process by which the evaluation was made in order to elevate the relativities of persons engaged in this kind of work in these kinds of locations, are shielded from our view, but we're not aware of any case that was put or justification that was proffered for increases of that kind in relation to those kind of employees.

PN1035

The increase was very substantial and because no such justification was provided, it's a little difficult to attack the justification itself. That said, we've done what's reasonably doable in my submission in relation to pointing out that the sheer breadth of the two, of the one classification and the two types of employees and the dramatic differences between the two types of employees it covers, suggest in the strongest possible terms that the relativity was elevated in the course of the award modernisation process well in excess of that which it justified.

PN1036

That assuming there is such a thing as the award process did deliver appropriate relativities as between the two awards, then that is, in my submission, cogent evidence itself as to the appropriate relativities between those persons by reference to the work values that had been assessed at about that time. Subject to looking at that information the Commission has asked for, we can't take the matter much higher than that.

PN1037

VICE PRESIDENT WATSON: Perhaps we might mark the comparison that you have handed up as exhibit H9.

#### **EXHIBIT #H9 WAGES COMPARISON**

PN1038

DEPUTY PRESIDENT GOOLEY: As somebody new to this area, what is an AB?

PN1039

MR HERBERT: Able seaman. Able bodied seaman.

PN1040

VICE PRESIDENT WATSON: Is that what it is?

PN1041

MR HOWELL: Yes.

PN1042

MR HERBERT: OS is ordinary seaman.

PN1043

VICE PRESIDENT WATSON: Yes they've spelled that out in the Small Ships Award but the AB just sits there by itself.

PN1044

MR HERBERT: I only know that your Honour, because my father used to be one in the Navy.

PN1045

DEPUTY PRESIDENT GOOLEY: Right.

PN1046

MR HERBERT: In relation to the - I've dealt with the Marine Towage Award and the Ports Harbours and Enclosed Waters Vessels Award in terms of the alterations

that we say should be made in relation to the coverage. I don't understand the parties to suggest that the alterations that we seek to make will not achieve the objective that we seek. I do understand there's some criticism about the objectives that we seek, but the alterations that we seek will allow for the siloing of those awards.

PN1047

There will be no issue in relation to our reduction in wages for any of my client's employees because none of them have been covered by any of these awards.

PN1048

DEPUTY PRESIDENT GOOLEY: I'm just curious about that, maybe because this was an agreement that existed prior to the making of the modern award. But doesn't the Fair Work Act have a provision in it that provides that you can't get paid more than the minimum rate applicable in the relevant modern award?

PN1049

MR HERBERT: Can't be paid less.

PN1050

DEPUTY PRESIDENT GOOLEY: Can't be paid less.

PN1051

MR HERBERT: As I understand it, all my client's employees are paid - - -

PN1052

DEPUTY PRESIDENT GOOLEY: More than the current rate in the modern award.

PN1053

MR HERBERT: But I'd have to take further instructions in relation to that. The point is, they've never been covered by the award, because the modern award has not applied to them at any time because the agreement that I handed up earlier was made in September 2009 and has not been set aside.

PN1054

DEPUTY PRESIDENT GOOLEY: I know, but I just thought - I'll have to have a look. I thought there was a provision in the Act that provided that the one thing that was picked up were the minimum rates.

PN1055

MR HERBERT: Yes, I'd need to check that as well.

PN1056

DEPUTY PRESIDENT GOOLEY: You couldn't get paid less than the minimum rate or the transitional rate in the modern award. So that while you might have had an agreement that was made ten years ago, if the minimum rate for a retail worker was \$16 an hour, you had to get at least \$16 an hour, even if your agreement said it was \$15.

PN1057

MR HERBERT: I would need to check that. I know obviously in the case of existing awards under the current legislation, that's certainly the case.

PN1058

In paragraph 69 and following in the submissions we've set out pretty much everything that we need to say about the application of the modern award principles. The relevant authorities in that regard - Mr Keats was good enough to provide some authorities to the Commission which saved me having to do it, but the relevant authority that we refer of course, is the statement by the Full Bench summarising and collecting the award modernisation principles. It's [2014] FWCFB 1788 and it's the preliminary jurisdictional issues decision which was handed down on 17 March 2014. Mr Keats has provided that authority we understand, to the Commission. Do the members of the Commission have that?

PN1059

VICE PRESIDENT WATSON: Thank you.

PN1060

MR HERBERT: The summary of the principles is set out from paragraph 60 and following. Of course, we must adopt those principles in the course of these proceedings. At paragraph 2 of the summary, the last sentence emphasises that the Commission may inform itself in relation to the review in such manner as it considers appropriate.

PN1061

That feeds into the terms of paragraph 3. The Commission is obliged to ensure that modern awards together with the NES provide a fair and relevant safety net taking into account amongst other things, the need to ensure stable modern award system. In my submission a safety net where one adjudicator, as I put it, arbitrated safety net subject to us researching the history of the matter being picked up and applied in a totally different environment in my submission, in not the same thing as providing a fair and relevant minimum safety net.

PN1062

*The need for a stable modern award system suggests that a party seeking to vary a modern award in the context of the review, must advance a merit argument in support of the proposed variation. The extent of such argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed, it must be supported by a submission which addresses the relative legislative submissions to be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*

PN1063

Stopping there, I've put it that the situation in my submission is perhaps less onerous on an applicant seeking a change in circumstances where an applicant can demonstrate that they are seeking to reverse a change which in all relevant circumstances, was not appropriate to be made in the first place. That is the onus that we obviously seek to discharge firstly. Secondly, we sought to back that up with some significant evidence as to the discrepancies in the bandwidth, as Mr Ainscough put it, of the coverage of the lower classification in the industry award.

PN1064

*In conducting the review, the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue.*

PN1065

We rely on those passages as supporting the position. The relevant and contextual issues suggest that it is a change that was not warranted at the time.

PN1066

*Previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so. The Commission will proceed on the basis of prima facie the modern award being reviewed to achieve the modern award's objective at the time that it was made.*

PN1067

Much reliance is placed by our opponents on that passage but it is really only a prima facie presumption and it doesn't take parties very far at all. The other important passages without reading them are in 5 and in particular, 6, which - if I may read.

PN1068

*There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of them which may be said to achieve the modern award's objective.*

PN1069

We rely on those passages that the one size fits all situation is not necessarily the case at all.

PN1070

*The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent, the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows the application of the modern award's objective may result in different outcomes between different modern awards.*

PN1071

There are different outcomes sought to be achieved between different modern awards - between the Marine Towing and the Ports Harbours and the Seagoing Award because of the different historical and contextual issues and the economies of those different industries being different. That historically, the work of marine towing has been viewed by the Commission in the making of the Marine Towing Award in a completely different light by way of not providing for things like even time rosters and for actually providing for concepts such as casual employees and minimum hours of engagement and things of that kind.

PN1072



Similarly, with the Ports Harbours and Enclosed Waters Vessels Award, despite the fact that both of those awards also fall into the Maritime Industry. With the Seagoing Award, they serve different purposes and different sectors of the industry. That in my submission supports the demarcation of the Marine Towage and Ports Harbours operations away from the Seagoing Industry Award in circumstances where they're only sought to be joined to that award by reference to, as I submitted earlier, not their work, but the work of others. But otherwise we adhere to what we said in the written submissions in respect to those matters.

PN1073

Can I now briefly turn to a couple of matters that are dealt with in the written submissions of some of the other parties? The MUA submissions, at paragraph 11 and 12, it is said that no further clarity is required in relation to the decision of the Full Bench. We haven't come here for clarity. The Full Bench gave its opinion and Commissioner Simpson reinforced that opinion when the matter was directed back to him and we're crystal clear what it is that the Commission is telling us the awards mean.

PN1074

But what we say, is if they mean that, then the reason why we're here at all, is that if they mean that, then they should be altered so as not to mean what they were originally expressed to mean. Again, we have no cavil with what it is that the interpretation is, other than that the outcome we submit is unfair and illogical and simply by the way that those matters are written. There appears to be no suggestion from any of the material before the Full Bench that there were any diverse maritime businesses before the Full Bench making any issue at all about the cross-over between the various awards.

PN1075

The submissions made in paragraph 14 that there is, at the urging of the Maritime Unions and without objection from any of the employer bodies, a hierarchy between various maritime awards. That's a sort of a winner take all concept, as we understand it. That if the majority of what you do fits within the Seagoing Industry Award, then that trumps everything else. Well if that's what was intended, I don't understand reading the various submissions, that that actually was intended, but that certainly seems to be the way that it's turned out.

PN1076

There is simply no basis in the award modernisation principles for a hierarchy of that kind, where one award trumps others, presumably because it's got the highest and best conditions in it. You'd have to have an even time roster on a little tug and barge going backwards and forwards between Thursday Island and Hall Island. You could almost throw a rock from one jetty to the other and yet it is suggested there need to be even time rosters and no casual employment and things like that in an operation like that within a port or harbour of that kind, just because the same employer operates a number of vessels that go to sea.

PN1077

The casual employees' claim is the next issue that's dealt with and that is that what is said is MISA did contain a category of casual relief employee and we put this in our written submissions. I haven't gone to it because they're fairly complete.

Somewhere in the process, without submission from any party, as I understand it, or as I read the submissions, the word 'casual' was simply dropped off that descriptor in the MISA award, either in the journey from being the MISA award to being the Seagoing Industry Award. Nobody asked for that to occur, but it occurred in any event. It was not a matter that was addressed to the Full Bench decisions.

PN1078

It's a concept that existed without objection for very many years in the MISA award. There was no reason why it would not have travelled across to the Seagoing Industry Award. When you look at the fact that the Seagoing Industry Award now applies across a vast range of seagoing operations, everything from the massive bulk ships down to little 50 tonne, 100 tonne barges, then the concept of casual employment being available in little sorts of journeys and the fishing vessel support operations, mother ships that go out with fishing vessels, etcetera, etcetera.

PN1079

If they're to be covered by the Seagoing Industry Award, we haven't cavilled with that because they go to sea to meet the fishing vessels, then accommodation should be made for the nature of what it is that they're doing. The breadth, without prejudicing anyone else in the industry, the capacity to employ casual employment in that regard is something which is contained in the Ports Harbours and Enclosed Waters Vessel Award, the Marine Towage Award, the Marine Tourism Award and essentially every other maritime award but the Seagoing Award has provision for casual employment and with three hour minimum in some cases. So we've taken the Ports Harbours provision and we've simply adopted it across so as to allow for casual employment.

PN1080

It is said, not in these submissions, but in others I think, that there is no 25 percent leave penalty. Well, there's no 25 percent penalty in the other awards where pro rata entitlements are paid because there's no necessity for a 25 percent penalty if there's no loss of leave entitlements. The 25 percent casual penalty is ordinarily to compensate employees for the fact that casuals ordinarily don't get the relevant leave entitlements and the 25 percent is to compensate them. But all entitlements under this provision are pro rata, therefore, there's no loss of entitlements.

PN1081

DEPUTY PRESIDENT GOOLEY: Does that include redundancy?

PN1082

MR HERBERT: There is a special redundancy provision in these awards, as I understand it, but the answer is I don't think redundancy is pro rata-ed as such. I would need to - but casual penalty usually isn't expressed to be in lieu of redundancy provisions. The 25 percent redundancy is a separate topic. It's usually expressed to be in lieu of various leave entitlements, in my experience.

PN1083

DEPUTY PRESIDENT GOOLEY: Might have to go back and look at the test case which looked at the 25 percent; how it calculated the 25 percent.

PN1084

MR HERBERT: There's no endeavour in any of this to seek to reduce any of the conditions, but simply to allow my client who's got now over 100 persons on their books and a significant number of casuals that they use during the year, given the nature of the operations they have. Particularly, the most important part of all, is the fisheries mother ships that go out to the trawlers and the prawning season only operates for a few weeks or a month and there are a couple of different seasons, depending on the species of prawn, and they operate on both sides; some in the gulf and some out in the Coral Sea. It's making me hungry just thinking about it.

PN1085

Those seasons are only for a matter of a few weeks and as Mr Bruno's affidavit makes it clear, the length of the season, the number of times they have to go out, when the season starts and when it finishes, are subject to a range of climatic and other issues, and they simply can't predict it in advance. They just simply keep going until the prawns have to stop and then they come home again. On that basis, the utilisation of casual employees is a very important part of my client's business. That alone is sufficient reason, in my submission, without the capacity of prejudicing anybody, to reintroduce the concept of casual employment into the award.

PN1086

DEPUTY PRESIDENT GOOLEY: Can I just push in? Would anything about the way you have drafted the clause prevent somebody engaging somebody for three hours on a boat that was sailing for say three days. In other words, I only need this work done for three hours, but in fact for you to do it, I need you to be on the boat so that when you get to then of three hours you can work.

PN1087

Where is it in the award, as the evidence was given by the witness, which was that all time on the boat is work?

PN1088

MR HERBERT: Yes.

PN1089

DEPUTY PRESIDENT GOOLEY: Where would I find that in relation to your proposal about casual employers? They are paid for all the time on the boat.

PN1090

MR HERBERT: Yes, it's not written in the provision possibly because it wasn't considered conceivable that you could turn the clock on somebody who's on the vessel steaming down the coast and say well you're on the boat but you're off the clock. That's not a concept that exists as I understand it and it may be that a suggestion of that kind is so far wide of anything that anybody thought of that it is the reason why it hasn't been there. It's not in the - there is a three hour minimum in the Ports Harbours Award.

PN1091

I don't understand that practical difficulty is said to have arisen, because Ports Harbours vessels can quite commonly go to sea for long periods of time. There

are special towage penalties is you are leaving one port and going to another port elsewhere in Australia, there are penalties that apply to that, under that award. Tourist vessels that go out for a week or two cruising around the Great Barrier Reef. I don't understand that there are any three hour minimum in relation to that could have a problem.

PN1092

If for example, you had somebody that you brought down to join a crew for a three hour period to help with some unloading of loading operation and that's all that you required them for; when the prawns come back and you need to get them from that freezer to that freezer. Engaging a person to work on the vessel for a purpose when it's tied up to the wharf for three hours would be feasible. But the three hour minimum is something which has - as Mr Bruno said, if the vessel is at sea, they're paid by the day they're at sea. But if that turned out to be an issue with the - if the Full Bench was concerned about that as an issue, there certainly wouldn't be any difficulty with drafting a clause around dealing with that practical difficulty.

PN1093

Then the surprising submission is made by the MUA in paragraph 20. "The only justification offered by Sea Swift for this claim, is that they currently employ casuals and consider work performed by those employees to be of a casual nature. No consideration is given to the nature of the industry." With all due respect, that is the nature of that part of the industry. The submission is directed to another part of the industry where they go to sea for three months or whatever that period it might be. Not this part of the industry where they go to sea for two days or three days.

PN1094

It said no cogent reasons are provided for the change, chiefly ignoring the fact that they currently employ many casuals in a season type industry for a couple of weeks or months a year in order to perform the very valuable work of bringing the fishing catch back to shore.

PN1095

In the circumstances to say that's not a cogent reason for the change, given that there was no cogent reason for the change in the other way offered, then in my submission that is quite sufficient. The fact that people working in this part of the industry have a need for that thing.

PN1096

If the business were divided up in the way that I've suggested earlier, amongst the three different awards for some reason, then two parts of the business would be entitled to have casual employment; it would only be the seagoing aspect of the business that wouldn't. One of the aspects of the seagoing part of the business, namely the fishing mother ship is the one which has the most need.

PN1097

Paragraph 23, I was there during that period. I don't understand what the point of that is. It was 26 years ago when the company was owned by very significantly

different interests than today. I'm not sure why that has been brought up and no doubt Mr Keats will tell us.

PN1098

Secondly, it said the Full Bench was aware of the award at the time of modernisation, then I've dealt with that. Significantly, the award applied only to one employer. There was only one employer who was under the Federal system at that time, so it would appear. That doesn't mean that all the rest were disentitled to fair treatment when they do come within the Federal system.

PN1099

Thirdly, the Self-Propelled Barges award provided for annual salaries for employees and vessel less than 500 and employees and vessel for more than 500. We've applied for a classification on dry cargo vessels up to 5,000 tonne which is said to be a very different group of vessels. It incorporates all of the vessel which are incorporated under the Self-Propelled Barges Award and in the circumstances, if the Full Bench is not persuaded that 5,000 tonnes is a relevant cut-off point, then the Full Bench has the capacity to do what the Full Bench considers appropriate in that regard. But that's the level we seek.

PN1100

If I could say this, many submissions have been put, or cross-examination has been undertaken in relation to the question of whether tonnage has anything to do with skills and qualification. As I said earlier, we're dealing with to a certain extent, the deck we've been dealt. The deck we've been dealt, which is the Seagoing Industry Award, does divide up salary rates by reference to tonnage and we sought to in effect, adopt that standard.

PN1101

Tonnage was also adopted in the Self-Propelled Barges Award; it's adopted in the Seagoing Award. It is a standard which applies in awards. Rather than adopting the revolutionary tactic of coming in here and blowing that all up and saying all of that's completely irrelevant and making a case for the next six months, we've sought to adopt a relevant standards that currently apply in the award, by reference to the unanswered evidence of Mr Ainscough, that 5,000 tonnes is the point at which effectively one can generally say that vessels morph from the DCV category to the NSCV category in relation to the STCW category in terms of the qualifications required to operate them.

PN1102

There is no evidence being sought to be adduced in these proceedings as to why 19,000 tonnes or 39,000 tonnes is an appropriate cut-off point, in the circumstance. It exists and appears to have an arbitrary existence. The 5,000 tonne provision we have sought to justify with the evidence of Mr Ainscough, and it's my submission we have done so.

PN1103

Paragraph 31 "There are no different marine qualifications requirements for IRs, GPHs, when working on vessels up to 5,000 tonnes to 19,000 tonnes." Except for this; at the lower level of the landing barges operated by Sea Swift, they don't use

IRs or GPHs at all. They have probably deck hands which is a much lower category. ABs were those in the Self-Propelled Barges Award.

PN1104

To say that there is no difference in qualifications working on the vessels, if they're not even employed on the vessels, then that is self-evidently a serious indicator that that classification of vessel and people working on that classification vessel in terms of IRs and GPHs, ought not to be included. But the smaller vessel that don't employ that class of employee ought not to be covered by a level of award that does so.

PN1105

In effect, the deck hand who doesn't reach the level of a GPH or an IR, would be award free. They're entitled to be employed under State law and will continue to be entitled to be employed. There's certainly no suggestion that they're not in any of the proceedings and as a result of that, it would appear that the award regulation which only allows for GPHs and IRs is not one which is appropriate to a vessel which doesn't employ those; which employs employees at a lower category.

PN1106

VICE PRESIDENT WATSON: Is it a convenient time Mr Herbert?

PN1107

MR HERBERT: Yes, I'm sorry. I didn't notice the time, thank you.

PN1108

VICE PRESIDENT WATSON: We'll adjourn until 10am tomorrow.

PN1109

MR HERBERT: Thank you.

**ADJOURNED UNTIL TUESDAY, 25 OCTOBER 2016**

**[4.24 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

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