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
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Ports, Harbours and Enclosed Water Vessels Award 2010

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Sydney

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Continued from 24/10/2016

PN1110

VICE PRESIDENT WATSON: Mr Herbert.

PN1111

MR HERBERT: Your Honour, we've made inquiries of the registry in relation to the material that was referred to yesterday relating to the genesis of the Self-propelled Barges and Small Ships Award rates and apparently it is locked away in the archives in the central registry in Melbourne, and it doesn't exist electronically we have been told, and we have been unable to access it overnight, and we would ask that we be given an opportunity to get that material and forward it to the Full Bench after the conclusion of the proceedings today, because it's not able to be electronically searched and it doesn't exist in the registry here.

PN1112

VICE PRESIDENT WATSON: Yes. Thank you.

PN1113

MR HERBERT: Thank you, your Honour. Your Honour, I had finished with what I had to say about the MUA's submissions yesterday. Can I now deal very briefly with the written submissions on behalf of the AMOU? The submissions are insofar as they relate to these matters they commence at about paragraph 18, and insofar as the submissions refer to Sea Swift not complying with its obligations under the Seagoing Industry Award to date, and the submissions that says that the arrangements, and that's, for example, in paragraph 27:

PN1114

The enterprise award based transitional instrument terminated by operation of law on 31 December –

PN1115

Et cetera, and that Sea Swift has been bound by the Seagoing Industry Award that had applied to it and it hasn't been observing it, all of those submissions, in my submission, demonstrated to be misplaced by the fact that the agreement, which I handed up yesterday, which remains in force.

PN1116

Otherwise the submission seems to suggest in a number of occasions that what is being attempted to be done by Sea Swift in relation to this matter is simply to meet a matter of, as it were, minor inconvenience on the part of the company because it chooses to operate a mixed business, and they are the words that are used in paragraph 25 of those submissions. Sea Swift is covered by, et cetera, the Seagoing Industry Award because it has chosen to operate a mixed business via a single corporate umbrella, et cetera, et cetera. Well, the fact of history is Sea Swift chose to do that thing 30 years ago before these awards were dreamed of, and the modern award system has been placed upon the system and upon the structures that Sea Swift has had in place, and the employment arrangements it's had in place for many years. Now, that's a matter of fact in history but to suggest that somehow or other Sea Swift has come along after the making of these awards in effect and chosen to behave in a way which is inconsistent with the scheme of

the awards as they are based and therefore can't complain about making a choice of that kind, is simply wrong. It was a matter of fact in history.

PN1117

What is also said is in the coverage clauses of the three modern awards it reflects the fact that the substantial character of the business, despite the fact that it is a mixed business, continues to be the operation of vessels trading as cargo vessels and that this goes on to say this is not an anomaly and that the situation is a matter, as I say, of one of mere inconvenience. At a practical level can I restate something that we put in our primary submissions as to why it is that this is not a matter of mere inconvenience. This is a matter that goes in a number of respects to the core of the modern award principles. The way that the matter has been put in those submissions and also in the MUA's submissions is that there is a hierarchy of awards in the sense that if an employer conducts a marine cargo operation it is covered by the Seagoing Industry Award in relation to the whole of its business irrespective of whether it has some other elements which might otherwise, as a stand-alone operation, be covered by the Marine Towage Award or the Ports Harbours Award because the Seagoing Industry Award comes over the top and it regulars the whole of the business. That's the essence of the submission by the AMOU in those pages. And that's not an anomaly. That's a very common thing to happen, that if you are operating in that business all of the aspects of the business are covered by that award.

PN1118

We put it in our written submissions, but it bears re-stating, in my submission, in response to what's put here. If a company operates a cargo business in the north of Australia, for example, out of Darwin where it's running small amounts of cargo on landing barges up to islands, and a business opportunity comes along in which it has the option to conduct a contract towing business alongside it, and it buys a tug and barge for the purposes of servicing contract towing opportunities as they come up because of the synergies between its marine cargo and its towage business, that towage business, so long as it remains proportionately smaller than the cargo business, will be covered by the Seagoing Industry Award. It's competitor in the next yard is competing for the same business opportunities under the Marine Towage Award because it only has a tug and a barge doing contract work. Two marine towing businesses side by side, one operating under the Seagoing Industry Award and one operating under the Marine Towage Award.

PN1119

Given the differences in the rates of pay and the leave arrangements and things of that kind it wouldn't be hard to understand which of those two businesses are likely to win the contract work. In effect, a Seagoing Industry Award participant cannot commence a contract towing business under the same corporate umbrella and hope to compete with a contract towing company which is operating as a standalone business. Now, that's not a matter of mere convenience or inconvenience, that's a matter of real practice substance, because the marine towage business, which the cargo company wishes to adopt, will have the same vessels, the same employees, the same conditions, the same everything as the competitor next door but a totally different industrial regime merely by virtue of the fact that it also has a cargo operation. Now, that's the practical impact of this

situation and my client's contract towing business. It's contract towing business, and I took you to the references, they actually have a next-door neighbour in Cairns who has a contract towage business which that's all it does, which means it would be covered presumably by the Marine Towage Award whereas Sea Swift would not in relation to exactly the same type of business.

PN1120

Now, the modern award objective was supposed to achieve a fair safety net of wages and conditions. If it achieves a safety net of wages and conditions for Sea Swift's marine towing business which is dramatically different from their neighbour, when the work and the conditions and the equipment is the same then the safety net has failed in its objective. And, as I submitted that is not a matter of mere convenience or peak or anything of that kind, it is a matter of real practical substance in the way in which the safety net works by the interaction of these awards.

PN1121

When one has, and again when one looks at the detail of the competition Tribunal's very, very recent discussion of the way that the competitive framework is operating in that part of the world with the number of competitors there are and deep and lengthy examination of the consequences of competition in the way that it works in this area and the fact that there are nine competitors to Sea Swift whose circumstances were considered in that competition Tribunal decision. This is not a matter of hypothesis, this is a matter in which my client would, if it was a new starter in the industry and were wishing to extend its business out of the marine towage industry, it could not do so economically without being required to operate under a dramatically different environment. The similar considerations but in a slightly different context apply in relation to the mother-shipping operations. Those operations, I think I can say without fear of contradiction, are absolutely unique. It appears they are probably, as far as we know, the only operator in Australia conducting it's corporation so they don't have any competitors as such but operating in circumstances where they do not have the capacity to employ casual labour, and when virtually every other award which covers seasonal, agricultural type, fishing type industries of that kind grants the capacity to employers to engage casual labour because of the episodic and the seasonal nature of that work.

PN1122

VICE PRESIDENT WATSON: Why does it have to be casual? Why can't it be seasonal?

PN1123

MR HERBERT: Well, if there'd be a difference. There's no reference in the award to seasonal. It's either full time or relief whatever that means.

PN1124

VICE PRESIDENT WATSON: Can employ someone full time for a fix term for the season.

PN1125

MR HERBERT: Well, the evidence of Mr Bruno is there is no – you can't fix a term because the length of the season upon – well, last year was the biggest season in 25 years. It went on for quite a bit longer than one expected because of the size of the catches, et cetera.

PN1126

VICE PRESIDENT WATSON: A task rather than a term. Why can't you employ someone for the season for as long as it goes?

PN1127

MR HERBERT: Well, if the season goes for a period of, say, six weeks then in those circumstances if it is scheduled to go for that period, and one would need to know in advance, but in fact it goes longer because there are more catches or whatever then one would need to renew those arrangements. If one has casual employment, one doesn't need to do any of those things.

PN1128

DEPUTY PRESIDENT GOOLEY: But that's a feature of seasonal employment everywhere. I mean, you can't necessarily tell when the tomato season is going to come to an end.

PN1129

MR HERBERT: No.

PN1130

VICE PRESIDENT WATSON: It might come to an end for a whole variety of reasons but people are employed seasonally in the tomato industry in Australia and have been for years.

PN1131

MR HERBERT: And equally they've been employed casually in those industries for years. There's - - -

PN1132

VICE PRESIDENT WATSON: So why is it necessary to have the casual category if it is possible to employ someone for the season even if the term is not set in concrete?

PN1133

MR HERBERT: I'm reminded that in addition to the fishing industry the contract towage industry, which is covered by Marine Towage Award, it has already has a casual arrangement in it in that award. So under the contract towage arrangements casual employment is permitted which allows the employer to conduct maritime operations for the period that is required by the engagement of casuals they may be working noting for a month, all the vessels tied up, and then have every single vessel running for another month after that. The use of traditionally that in this industry, in every award, every maritime award other than the Seagoing Award, those sorts of circumstances are catered for by use of casual arrangements.

PN1134

I should mention that I've been instructed that in light of the way things transpired yesterday that the three hour minimum engagement provision which has been sought in the application is not pressed. You understood the evidence of Mr Bruno that, in effect, three hours would never be used. It exists in the Ports Harbours Award and that was taken from that award but a minimum engagement of a day would be the very minimum that anyone would ever be engaged on my instructions in relation to the Seagoing Industry Award, and that a minimum daily engagement would be all that would be sought in that respect. But the casual engagement in all other maritime awards is the way in which this matter is dealt with. There was a casual engagement provision in the Maritime Industry Seagoing Award. It was removed for reasons, as I say, that don't appear on the public record, and we simply say that because of the fact that it is now known to the Commission that there is an operation within the Seagoing Industry Award scope which does involve work which is of an episodic nature which is uncertain as to its duration which requires bringing people on and off as and when they are required. That is quintessentially a matter which is required to be done or most conveniently done by casual employment arrangements. The resistance to that by the other unions is not – the basis of it is simply that well, it's not there and it shouldn't be there even though it was there. No merit reasons have been given as to why casual engagement ought not be in the Seagoing Award as it is in all of the other maritime awards.

PN1135

VICE PRESIDENT WATSON: You're the one that bears the onus to mount the merit case.

PN1136

MR HERBERT: Yes. The merit - - -

PN1137

VICE PRESIDENT WATSON: Or a change and if you are successful in the scope issues so that the marine towing operations of your client are covered by the Marine Towing Award for example.

PN1138

MR HERBERT: Yes.

PN1139

VICE PRESIDENT WATSON: And you have access to the casual provisions for the peaks and troughs that apply.

PN1140

MR HERBERT: In the Martin Towage, yes.

PN1141

VICE PRESIDENT WATSON: The only issue with casual employment for the seagoing part is the prawn trawlers, and if that can be dealt with by engaging someone on a seasonable basis then what's the basis for further amendments on casual?

PN1142

MR HERBERT: In that case in the event that the contract towing is taken out of the equation what you say about the mother-shipping is the remaining area in which strictly casual employment is distinct from replacing reliefs and crews which is still there. What you say about the mother-shipping is correct, that is, that's the only remaining difficulty. If my client is not able to utilise the Marine Towage Award for the marine towage operations and remain under the Seagoing Award then that problem remains for them. The inability to engage casuals is a difficulty because there is no season as such in relation to the marine towage.

PN1143

But to answer your question, your Honour, in relation to the arrangements of the mother-shipping on a seasonal basis unlike a number of agricultural awards of which I'm aware there is no reference in the award to seasonal engagement as such. It would need to be a formulation the parties would need to reach that's simply based on a length of permanent employment, that is, persons who would be engaged as permanent employees for - - -

PN1144

VICE PRESIDENT WATSON: Contractual, wasn't it?

PN1145

MR HERBERT: I beg your pardon?

PN1146

VICE PRESIDENT WATSON: It says to contractual issues.

PN1147

MR HERBERT: Yes. Yes. For an indeterminate period which would need to be predicted. The difficulty is if one makes a contractual arrangement for an expected season of six weeks and a cyclone comes through in week number 2 and shuts the season down it may well be contractually that the employer is bound to continue to pay wages for six weeks and couldn't end the engagement of the employees as they could if the employees were casual at the time when the work was no longer required.

PN1148

VICE PRESIDENT WATSON: Surely there's a way of dealing with that in a contract.

PN1149

MR HERBERT: By casual employment in the award, your Honour, is the simplest and traditional way to deal with that. And if the matter were of concern that it may have wider than intended consequences, the casual arrangement can be confined if needs be to circumstances in which the intended work is only available on a seasonal or other episodic basis. Now, that would preclude the possibility that is of a concern. The casual employment would then be taken out into the wider cargo carrying fleet under this Seagoing Award because of the vast spread of its application. It would only be casual employment would, as my clients have said, is only fundamentally used in the contract towing part and the fishing mother-ship operation, if the use of casual employment were confined to circumstances of the fishing mother-ship operation, if the towage were to be

separated from that award, then that would serve the interests of those who do have seasonable need for that kind of work. They would be able to use casual employment for that purpose and it wouldn't be able to be used generally for regular cargo operations because it is not work that would only be available on a seasonal basis.

PN1150

VICE PRESIDENT WATSON: Can you remind me of the loading that you would be seeking to apply to the casual relief employees?

PN1151

MR HERBERT: The casual relief employees the provision that we took from the Ports Harbours Award is one which is they're entitled to be pro rata to the rates of permanent employees.

PN1152

VICE PRESIDENT WATSON: No loading?

PN1153

MR HERBERT: Well, if they're paid pro rata in those circumstances a number of the leave accruals would be entitled to be paid. But there's no loading in the Ports Harbours Award. As I say we've brought the provision across and there's no loading, as I understand it, in the Marine Towage Award.

PN1154

DEPUTY PRESIDENT GOOLEY: So the only difference between the permanent employees and the casual employees is their minimum core and the notice of termination.

PN1155

MR HERBERT: In effect, yes. The term, yes. Yes. It may well be, given the length of time that they would never become entitled to redundancy, but that would be the case if they're only engaged on a seasonal basis anyway. The length of service would not qualify them. I stand to be corrected about the casual arrangements in the – I'll need to check that in relation to the Marine Towage Award, but the provisions that we put in the determinations, as I say, were taken from the Ports Harbours Award. That was done deliberately on the basis that the Ports Harbours Award was also designed to cover a number of seagoing operations. As I say, such as, cruise ship operations and anything that goes to sea that isn't a cargo or a research vessel is covered by the Ports Harbours Award when it goes to sea. So that there are – that award was intended to cover episodic going to sea type arrangements that are not regular cargo runs, which is another way of characterising what the fisheries operations are, and so we simply brought those casual arrangements across, they being a standard that's been adopted by the Commission in relation to an analogous maritime award in a very closely related industry that covers the going to sea of vessels in particular types of circumstances.

PN1156

As does the Martine Towage Award. With the Marine Towage Award it involves the definition of the marine towage industry involves the carriage of contract cargos by sea from one port of Australia to another, and so:

PN1157

Movement of contract cargos by combined tug and barge up to a maximum of 10,000 tonnes between different ports and locations in Australia.

PN1158

So between different ports and locations would, particularly between different ports, it involves going to sea, and it has a casual provision in it.

PN1159

So the - - -

PN1160

VICE PRESIDENT WATSON: But we don't know any of the incidents of casual employment and the passenger cruise ship industry I don't think is regulated by Australian awards.

PN1161

MR HERBERT: There are small cruise vessels that cruise up and down the Queensland Coast from ports in Australia to ports in Australia, and Seal Link has an enterprise agreement covering a cruise operation between the Whitsunday and a goodly part of central Queensland which the BOOT award is based on the – and that was an agreement that was tendered in the MUA proceedings. The BOOT award was the Ports Harbours and Enclosed Water Vessels Award.

PN1162

VICE PRESIDENT WATSON: And there would be similar small ones in Western Australia as well?

PN1163

MR HERBERT: Yes. There are a number in Queensland. The Riverside Marine Group based out of Brisbane also has at least one small cruise liner I'm aware of that has operated on the Queensland Coast and there is a regular cruise operation from Cairns to Torres Strait as I understand it, and I don't know who operates that.

PN1164

VICE PRESIDENT WATSON: We don't know the incidents of casual employment in those?

PN1165

MR HERBERT: No. No, but the case we make is simply that as the mother-shipping operations now appears to be covered by the Seagoing Industry Award, and the award doesn't make provision for an ordinary incident of the employment which has over many, many years been a feature of that uniquely seasonal maritime operation that if – and the casual employment is something which is of very great utility to that operation, in fact, arguably may struggle to survive without it. In those circumstances there is no argument against, much to be said for it, including casual employment so that it is uniform with the other maritime

awards and provides that operator with the same facility that other equivalent maritime operators do have. And there is nothing to be said by way of a prejudice against it.

PN1166

Now, that would make the award modern and useful and make employment and flexible operation of the business possible without any downside being able to be pointed to by any party. No-one has said why it's going to be a problem, particularly if it's limited to operations which are seasonable in nature, and even those connected with the fishing industry, for example, if they were limited in that way, that would certainly suit my client's purposes, leaving aside the towage issue, that would certainly suit it, and that could never infect any other part of the business. And it's critical, as the evidence suggests, critical to the survival of that part of the business as it's the only one in Australia doing it. It's a vital link for the fishing industry itself, and anything that would assist that part of the industry to survive and employ persons in that part of the world for four or five months of the year is of very great value and there is simply no disutility in it at all.

PN1167

VICE PRESIDENT WATSON: I think in terms of prejudice I think I can anticipate submissions to the contrary about the spread of casual employment in the seagoing industry so your proposition is somewhat contestable.

PN1168

MR HERBERT: I'm sure there will be some in terrorem submissions about how far this might go which is why I've suggested it can be confined in the way that I've mentioned. It can be confined as seasonal operations, and, if necessary, seasonal operations connected with operations of the fishing industry in Australia. And if it's confined in that way it can't go anywhere because nobody else is doing that who would be covered by the Seagoing Industry Award, because to be covered by this award and therefore not have the capacity to have casuals it's necessary to carry cargo to sea, which they carry fuel and supplies and they bring back prawns and product from the vessels. That's why they become covered by the Seagoing Industry Award. Trawlers don't have that. Fish processing vessels under the various fishery awards don't do that. None of them are covered by the Seagoing Industry Award but they all have the capacity in as much as there's employment on fishing vessels, they all have the capacity to have casual engagement. But the vessel that takes the product out - - -

PN1169

VICE PRESIDENT WATSON: There are mother ships associated with the fishing industry, are there not?

PN1170

MR HERBERT: I beg your pardon?

PN1171

VICE PRESIDENT WATSON: There are mother ships associated with the fishing industry in southern waters.

PN1172

MR HERBERT: Not any which are not engaged in fishing. Some of the fishing companies may have vessels of that kind but independent operators. Sea Swift does no fishing. Some of the big fishing companies may have their own, but, as far as we know, Sea Swift is the only company in Australia - - -

PN1173

VICE PRESIDENT WATSON: They're covered by the fishing industry – their shipping operations are covered by the Fishing Industry Award.

PN1174

MR HERBERT: Yes. Yes. We looked hard to find a fishing industry award that might cover Sea Swift's operation but it does no fishing. Perhaps it should take up fishing. Put a tri-net on the back of the mother-shipping, call itself a trawler, but - - -

PN1175

VICE PRESIDENT WATSON: So do we have material about the comparison with provisions of the Fishing Industry Award?

PN1176

MR HERBERT: No. No, the comparisons we make are with the other maritime awards for those which are carrying other people's goods such as the Ports Harbours Award and Marine Towage Award. We resorted to those awards without going to the fishing awards. But the fishing industry awards they can be readily obtained. We can do that in a few minutes but these vessels are not covered by any of the fishing industry awards. We determined that some time ago.

PN1177

VICE PRESIDENT WATSON: Right. We're looking for consistency across awards.

PN1178

MR HERBERT: Yes.

PN1179

VICE PRESIDENT WATSON: Including the availability of labour flexibility.

PN1180

MR HERBERT: Yes.

PN1181

VICE PRESIDENT WATSON: Shouldn't we really be looking at that award as well?

PN1182

MR HERBERT: Mr Cooper will look it up immediately and I will have it to you in a moment what might be found in a fisheries award, but my recollection is they had a significant degree of flexibility in them given the nature of the business but I won't say any more about that because I don't have them to hand.

PN1183

But we, as I say, were looking, perhaps to our prejudice, we're looking for comparisons in relation to other cargo type operations which, in a sense, of course it's a bit of a hybrid in that it's more closely connected with the fishing industry than it is with the cargo industry, but nonetheless the Seagoing Industry Award definitions do appear to cover those vessels because, as I say, they're not actually themselves involving fishing. But we'll arrange to have that before we leave the room today for the assistance of the Commission.

PN1184

I don't think I have much more to say about the balance of the AMOU's submissions. From paragraph 38 on and there are some rather brief submissions about the particular situation in relation to the new classification scale for small ships. As I indicated to the Bench we have yet to find out what has occurred in relation to the way in which the pay rates for the Self-Propelled Barge and Small Ships Award were structured, but can I say this, that as a matter of fact and history what occurred prior to the making of the modern Seagoing Industry Award and the other maritime awards was that there was the Maritime Industry Seagoing Award, which was a respondency based award and the respondency list of which included a number of the major players, and all of the major players in the maritime industry in Australia over a period of years. As has been pointed out - - -

PN1185

VICE PRESIDENT WATSON: And the registered employer organisation.

PN1186

MR HERBERT: I think so. Yes, I think that might be right. Now, so to the extent that the award had an extended operation by reference to membership of those organisations there was an extended operation which was, as was always the case, and very problematically so it was a bit hard to know who was bound from time to time by those awards by reason of the binding effect of membership of employer organisations without having access to the membership list of those employer organisations. But the Self-Propelled Barges and Small Ships Award as a matter of history has only had a small number of respondents to it over the years. Perkins was one for a period. There was another company called barge express. I've obtained an electronic copy of the 1991 award and there was also a company called Barge Express was a respondent to it. Because we haven't been able to go back any further than that in relation to the award we're not too sure how many other respondents there were though we believe there were more than that who were respondents to the award.

PN1187

There were, however, and have been throughout a significant period, as was mentioned in the history of the matter that's disclosed in the competition Tribunal report, a number of companies operating in the similar space as small operations with two tugs and three barges or two landing barges or whatever operating who were not respondents to the Self-Propelled Barge and Small Ships Award, and so far as we're able to ascertain were not covered by the Maritime Industry Seagoing Award. And that list included Sea Swift which was much bigger than most of them, and that what occurred then was that all of those small players became bound by the Seagoing Industry Award not because there was a merit

determination that their operations warranted the admission of those conditions upon their businesses, but simply because of the common rule nature of the modern award when it was made, and it's common feature throughout Australia. I don't cavil with it other than to say that as a matter of fact that's what occurred. So that a very wide range of those businesses had this award imposed on them by that nature - - -

PN1188

MR KEATS: Well, I might object to giving this evidence from the Bar table. There's no evidence that each of these became a respondent to a particular award or what happened to the individual companies. They might have formed part of the Marine Towage Award. There's no evidence about these things and I object to it being given from the Bar table.

PN1189

MR HERBERT: Well, I haven't named any company other than the companies that are the actual respondents on the record to the Self-Propelled Barge Award. I'm speaking in general terms that companies which operated in that space which had seagoing operations of the kind that are described in the competition Tribunal report throughout this part of Australia in particular which was relevant to the report that they made would have this award, to the extent that they had seagoing – and you can tell from the list of the vessels that they have, that by the common rule operation of this award, the Seagoing Industry Award was imposed upon them but, as I say, not because there was a merit determination that that was something that ought to happen, but because of the common rule operation of the award. Now, I'm not – I haven't named - - -

PN1190

MR KEATS: That's my actual objection.

PN1191

MR HERBERT: Please. Well, make it later, not now.

PN1192

MR KEATS: You're making – no you're giving evidence from the Bar table that as a matter of fact, in your words, they became covered by the Seagoing Industry Award. There's no evidence that that happened at all. Indeed, that's contrary to some of your earlier submissions that this company, which was a competitor, is only a tug and barge operation and it applies in the Marine Towage Award. I maintain the objection.

PN1193

MR HERBERT: Your Honour, may I finish?

PN1194

VICE PRESIDENT WATSON: Yes, I think you're on notice that if you make assertions of fact from the Bar table, and I understand you are talking about the necessary incidents of the award modernisation process.

PN1195

MR HERBERT: Yes. Yes.

PN1196

VICE PRESIDENT WATSON: Rather than any particular example.

PN1197

MR HERBERT: Exactly.

PN1198

VICE PRESIDENT WATSON: So it's a hypothetical in that sense.

PN1199

MR HERBERT: It's hypothetical but - - -

PN1200

VICE PRESIDENT WATSON: Yes. If you assert any fact from the Bar table it's challenged and therefore we wouldn't be making any findings in relation to such assertions.

PN1201

MR HERBERT: I'm not asking for any findings to be made in relation to what I'm saying. I haven't got the report yet. I'm talking about the way in which the modern awards system and the fact that there had been no, and Sea Swift was a classic example of this, there was no merit determination made that the Seagoing Industry Award was an appropriate safety net for the nature of their particular operations. It's a matter that it simply happened as a matter of law that that award was made in a way that when the current regulation expired that is the award that would cover their operations.

PN1202

Now, the only point of reference that the Commission has, and this follows on from the point that I was attempting to make yesterday in relation to the Self-Propelled Barges Award, the only point of reference that the Commission has as to whether that was an appropriate outcome so far as safety net is concerned is the Self-Propelled Barge and Small Ships Award where - - -

PN1203

DEPUTY PRESIDENT GOOLEY: Isn't the reality this that if you come to this Full Bench asking us to include a classification below the minimum rate that's in the Seagoing Award at the moment, you have to establish the work value reasons for doing it?

PN1204

MR HERBERT: Yes.

PN1205

DEPUTY PRESIDENT GOOLEY: And as I understand it, it's put against you in relation to masters for example is that the competencies and the certificate requirements that are set out in the documents that we have been given are determined by the length of the ship not the weight, so, for example, in relation to I think it's the Newcastle which is, I think it might even be over, 80 metres.

PN1206

MR HERBERT: It's about 81 metres, I think.

PN1207

DEPUTY PRESIDENT GOOLEY: Yes. There's certain competencies required.

PN1208

MR HERBERT: Yes.

PN1209

DEPUTY PRESIDENT GOOLEY: And that's not a feature of – so the skill for a person sailing that ship, there are different requirement for persons sailing a smaller ship, and it's your obligation, before this Full Bench, irrespective of what's happened in the past, to establish that there are work value reasons as to why a master on such a ship should get paid less than they're getting paid now.

PN1210

MR HERBERT: Yes.

PN1211

DEPUTY PRESIDENT GOOLEY: I mean, whatever happened in the past the Act makes it clear that if we're going to change the minimum rates in a modern award there has to be work value reasons for it, and that's what you're asking us to do in effect.

PN1212

MR HERBERT: Yes. Yes. I understood I made submissions about that yesterday as to the basis upon which we say that they could be made out. I'm simply making, and seeking to emphasise, an additional point, that an additional point of reference in relation to the question of work value of the combined effect of persons working on vessels of this size that they're talking about in the sort of locations we're talking about, and the skills and abilities and conditions and disabilities that are associated with that is the fact of the wage rates and conditions in the Self-Propelled Barge and Small Ships Award on the assumption that, which we haven't yet established, that actually went through the minimum rates process, and that there are properly fixed minimum relativities in relation to those awards. On the schedule that I handed up yesterday, which is exhibit H9, there was, if one removes the cargo handling arrangements, the over 500 tonnes figure was 53,000 at the same time that the minimum rate in the Seagoing Award was 72,000. There's a $20,000 differential between the two, and that that was in accordance with properly fixed minimum rates in the Federal Commission as at that point in time, and that was in a relativity that was established by those rates.

PN1213

Now, that is an additional point of reference to confirm the correctness of what Mr Ainscough said and described in his affidavit saying, not only are these the qualifications people need to have, and I remind you of what Mr Ainscough said, that people driving vessels under 5000 tonnes need a much lower level of qualifications. The reason why they need them at a much lower level, and they're able to go to sea with a much lower level of qualifications and a much lower level of training is that the conditions that they meet and the work they do and the dangers they encounter and the responsibilities they assume are commensurately

that much less than the people who are having in the STCW qualifications, and that the work value is absolutely connected to the material that Mr Ainscough has produced saying that it's not just a matter that that's what you need to do to get the ticket, the reason why you only need that to get that ticket is because that's all that's required of you in order to perform the work of loading and navigating and unloading ships of that size and that quality.

PN1214

That is the work value component of the evidence from Mr Ainscough. It's clear and concise and based on expertise and experience. But if that's all there was then the Full Bench might look for other points of reference, and all I'm endeavouring to do, at this stage, is to say that the Self-Propelled Barge and Small Ships Award rate of pay is yet another point of reference that the Commission had determined many years ago, and according to the schedule as at October 2007, that there was close enough to a 40 per cent differential in the minimum pay rate between the minimum rate available in the respondent's Maritime Industry Seagoing Award and the maximum rate available in the Self-Propelled Barge and Smalls Ships Award operating vessels between 500 and, I think the figure was, close enough to 2000 tonnes which limited vessels, the Perkins, then had.

PN1215

VICE PRESIDENT WATSON: Well, until we get the answer to the extra research you're doing we don't know the accuracy of that figure.

PN1216

MR HERBERT: Yes. No, and I caveat everything I say by that. But it - - -

PN1217

VICE PRESIDENT WATSON: If the inclusion of an overtime component in the smaller ships is minimal the difference may well be minimal.

PN1218

MR HERBERT: Yes.

PN1219

VICE PRESIDENT WATSON: Because the base rate for a master, 52,460 at the time might compare with, in fact, the rate in the small ships might be slightly higher.

PN1220

MR HERBERT: Yes.

PN1221

VICE PRESIDENT WATSON: Quantum-wise it's an unknown for us at the moment.

PN1222

MR HERBERT: That's right. And we have obviously compared the annual salaries with the annual salaries. We've taken out the cargo allowance in H9 in relation to the smaller vessels because under the Seagoing Industry Award there was a cargo allowance on top of that. So that in those circumstances, again

subject to the research, we would say that that is a point of reference as to what is an appropriate rate of pay having regard to the conditions, the work value, the patterns of work involved, et cetera, because as you point out, your Honour, the overtime rate might be significantly lower simply because if the vessel is going out to sea for three days and coming home for four days and the crew spend four days at home and just commuting backwards and forwards from the ship then overtime for that four days would not be the same issue that it would be if they're away on an overseas trip for three or four weeks, with no home time at all. And the evidence is, in this case, that that's, depending on which vessel it is, that's roughly the pattern that the Sea Swift vessels work when they do two and three and four day trips around the Torres Strait and then come back to the home base again. In Cairns in six days from Cairns to Weipa to Cairns, and with time at home, on the evidence, so that you would expect the overtime component to be less which is why the original comparison we did is probably unfavourable, but it is a reflection of the fact that the working conditions between this end of the industry and the top end of the industry are sufficiently significant to be factored into the work value insofar as that indicates that a lesser salary is attracted to that position.

PN1223

Unless there's anything further, I don't think I have anything more to say about those matters without repeating myself. Unless there's anything further those are the submissions of the applicant.

PN1224

VICE PRESIDENT WATSON: One applicant, Mr Herbert. Mr Niven, your organisation is another applicant, and you've been very patient waiting there. Perhaps we should hear from you next. And you filed three submissions, I believe?

PN1225

MR NIVEN: Yes. That's right.

PN1226

VICE PRESIDENT WATSON: Perhaps we could mark the outline in relation to the Seagoing Industry Award dated 10 May exhibit N1.

EXHIBIT #N1 OUTLINE OF SUBMISSIONS OF AIMPE IN RELATION TO THE SEAGOING INDUSTRY AWARD DATED 10/05/2016

PN1227

VICE PRESIDENT WATSON: The outline in relation to the Ports, Harbours and Enclosed Water Vessels Award dated 10 May exhibit N2.

EXHIBIT #N2 OUTLINE OF SUBMISSIONS OF AIMPE IN RELATION TO THE PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD DATED 10/05/2016

PN1228

VICE PRESIDENT WATSON: The submissions in reply dated 10 June, exhibit N3.

EXHIBIT #N3 OUTLINE OF SUBMISSIONS IN REPLY OF AIMPE DATED 10/06/2016

PN1229

MR NIVEN: Thank you, your Honour. I thought I might start on a different topic to give everyone a break from small ships for a moment.

PN1230

VICE PRESIDENT WATSON: We're grateful for that.

PN1231

MR NIVEN: I'll get to small ships, but I thought I might just start with the Ports and Harbours in relation to our claim or our application for wage relativities. I'd refer and rely upon our written submissions of that which is now N2, and in particular the attached spreadsheet which provides a breakdown of the transitional instruments that went into the making of the Ports, Harbours and Enclosed Water Vessels Award.

PN1232

The modern award objective, section 134(1)(e) is concerned with the principle of equal remuneration for work of equal or comparable value. It is AIMPE's submission that in the making of the Ports and Harbours Modern Award the relativity of engineer to master is 95.25 per cent which equates to the same rate of the classification of a mate. The AIMPE submission at attachment (1) in N1 lists those transitional instruments. The average relativity of those transitional instruments was 99.08 per cent. Fourteen of the 15 transitional instruments contains a relativity between master and engineer greater than the Ports and Harbours Award relativity of 95.25 per cent. Ten of the transitional instruments contain a 100 per cent relativity and two contained a relativity of 99.5 per cent, one at 98.6 per cent and one at 97 per cent.

PN1233

The Seagoing Award, as a comparable seagoing ward, marine award, contains similar classifications and the relativity between the master and chief engineer is 98.35 per cent. The CSL submission refers to the chain of command and that the existing wage relativity should be retained to recognise that chain. The CSL submission is that the current relativity recognises additional responsibilities. Those responsibilities existed for the transitional instruments where the relativity was 100 per cent. In particular in relation to the work value AIMPE submits that the making of the Ports and Harbours Award did not maintain the work value of engineers, and this is the anomaly that AIMPE is seeking to be redressed. AIMPE submits that there is no reasons to revisit the nature of the work or justify the work value arguments of the AMOU, with respect, as the transitional instruments represented the true nature of the work and applied equal remuneration for the master and engineer. AIMPE submits that it is self-evident that the officer responsible for engineering the responsibilities are beyond the comparable responsibilities for the mate which is the second officer in the hierarchy.

PN1234

The making of the Ports and Harbours Award has effectively demoted the work value of the responsible engineering officer to that of the number 2 in the deck department. The work value of the engineers was not maintained in 2010 and it is AIMPE's submission that the modern award objective was not met in 2010. This is more than an assertion, as submitted by the AMOU, it is a demonstrable fact as evidenced by the spreadsheet attached to N2. I should say that - - -

PN1235

VICE PRESIDENT WATSON: It's said against you that it's in part attributable to the submissions and relativities advanced by AIMPE represented by a well-respected law firm.

PN1236

MR NIVEN: Yes. That's right. That's right. I recognise the difficulty with that submission made back then. Made before our time, or my time, and I've been advised that in that time perhaps sufficient attention wasn't applied to the miniature detail at that point in time and that it just simply wasn't the priority issue or it didn't stand out when considering the other issues in the making of that award. I should also say that the chief engineers and engineers similar to masters and mates are also liable for a range of offences relating to safety and marine pollution and have responsibilities that are punishable by law.

PN1237

The award only contained the one classification for an engineer. A number of vessels in this area, of course, have more than one engineer on board, so that is why we make the alternative submission that one other way to possibly resolve this anomaly, as we see it, would be to reinstate a position of chief engineer which would be at the same rate as the master which would leave then the mate and engineer at the same rate. And then that would recognise the difference between the callings and the responsibilities between a chief engineer and an engineer. With only having the one classification of engineer presents some difficulties for BOOT analysis and so forth and the formulating of agreements when there is only the one classification when quite often there are two or three engineers on the vessel.

PN1238

VICE PRESIDENT WATSON: When you say reinstate the chief engineer, which of the three reform awards had a chief engineer classification?

PN1239

MR NIVEN: Yes, that's probably the wrong terminology, probably just to instate to it and that would - - -

PN1240

VICE PRESIDENT WATSON: To insert the recognition of the - - -

PN1241

MR NIVEN: To insert, sorry. Yes, and that would align it with the classification structures within the Seagoing Award. So that's all I wanted to say in relation to that matter.

PN1242

If I could turn now to small ships I have a number of attachments to hand up. The first one is a copy of Marine Order 72.

PN1243

VICE PRESIDENT WATSON: We'll mark that exhibit N4.

EXHIBIT #N4 COPY OF MARINE ORDER 72

PN1244

MR NIVEN: I'll hand these up all at once I guess.

PN1245

VICE PRESIDENT WATSON: A bundle.

PN1246

MR NIVEN: As a bundle, yes. There's more. That's the last one.

PN1247

VICE PRESIDENT WATSON: That's the bundle?

PN1248

MR NIVEN: That's it, yes.

PN1249

VICE PRESIDENT WATSON: The bundle of documents being the Australian Government Publications including a guidance notice and certificates of competency for engineers, other fact sheets documents will be exhibit N5.

EXHIBIT #N5 BUNDLE OF DOCUMENTS INCLUDING AUSTRALIAN GOVERNMENT PUBLICATIONS INCLUDING GUIDANCE NOTICE, CERTIFICATES OF COMPETENCIES FOR ENGINEERS AND FACT SHEETS

PN1250

MR NIVEN: And, sorry, there is one more. This is sort of separate to the bundle so the document could be marked separately.

PN1251

VICE PRESIDENT WATSON: What's this?

PN1252

MR NIVEN: This is some information about a couple of ships that I'll be referring to. It's four pages and if it could be marked as a - - -

PN1253

VICE PRESIDENT WATSON: Where did it come from?

PN1254

MR NIVEN: This comes from a website known as Marine Traffic which provides information on the positioning of vessels and it also just provides the details of the gross tonnage and the registration details, and I'll be referring to

them just as examples of the types of vessels that we would see that would be potentially captured by a small ships schedule.

PN1255

MR HOWELL: Your Honour, I should formally object. Those documents, having a quick look at them, on their face by themselves and without any additional evidence which describes where the vessels operate that they actually go to sea rather than operate within a particular port or something of that kind or perhaps they're engaged in the marine towage industry do not advance these proceedings at all, and in the absence of that evidence, frankly they are irrelevant. If my friend is now going to stand there at the Bar table and provide a whole lot of evidence about the operation of these vessels of this particular size and matters of that kind we should have been on notice of it. We should have had the opportunity to respond to it if it was considered necessary and we should have the chance to cross-examine whoever it is who is going to be given that sort of evidence because that's critical. This is the sort of territory which is fundamentally at the heart of the small ships case. Doing it in this way is, with the greatest of respect to Mr Niven, highly improper, inappropriate, inconsistent with the directions that are made today and denies us procedural fairness. For that I object.

PN1256

VICE PRESIDENT WATSON: Is that able to be remedied if you have the opportunity, if not today at another time, to respond to it in a more considered matter?

PN1257

MR HOWELL: It may or it may not. I'm objecting in advance in anticipation of what my friend has just said but the real vice is in the absence of the evidence and an opportunity to test it then we are at a disadvantage and a disadvantage we shouldn't have been placed at given the directions that were made. So I'm happy to, as your Honour seems to be suggesting, play it by ear and see where it goes, and reserve our positon in that respect, but I should say at the outset that there's an immediate reaction which I think is perhaps understandable that we might have a problem with it, but see where we go.

PN1258

VICE PRESIDENT WATSON: Yes. Well, Mr Niven, I think you should note that objection and if there is any evidence from the Bar table that's contested it's not something that we could have regard to, and there may be a need to permit further responses. So I think it's a matter of caution as to what reliance might be placed on it. Mr Keats, do you wish to add to the concern?

PN1259

MR KEATS: I wish to join with my friend, Mr Howell, in case there is a need to put on further, either evidence or submissions, depending what flows.

PN1260

VICE PRESIDENT WATSON: Yes. Yes, indeed.

PN1261

MR NIVEN: Yes. Thank you, your Honour. I note the objection and I must say I did anticipate that that would probably be a controversial document to hand up. Now - - -

PN1262

VICE PRESIDENT WATSON: Well, nevertheless you wish to put these into evidence?

PN1263

MR NIVEN: I'd still like to have them handed up.

PN1264

VICE PRESIDENT WATSON: Yes.

PN1265

MR NIVEN: If you make the calling that they're to be omitted then I'll accept that, of course.

PN1266

VICE PRESIDENT WATSON: Well, noting the qualifications and foreshadowed concerns I think it's appropriate to allow the document in on that provisional basis. So it's the extracts from Marine Traffic we'll mark exhibit N6.

EXHIBIT #N6 EXTRACTS FROM MARINE TRAFFIC

PN1267

MR NIVEN: Thank you, your Honour. At the outset in relation to small ships, and our application to insert a small ship schedule into the award, it should be noted that the seagoing industry in Australia is going through a profound transformation. When the original award was made back in 2010 at that point the industry was still dominated by large vessels and large employers. Over the past 12, 18 and 24 months the nature of the industry has changed and unfortunately the number of large ships that were covered by the award and underpinned in agreements has dramatically reduced and we've seen the, I guess, the growth of the smaller operators.

PN1268

There has been within the industry until a recent decision in the Sea Swift MUA matter considerable confusion as to which award applies.

PN1269

MR KEATS: I might rise just to remind my friend about our objection about evidence from the Bar table.

PN1270

VICE PRESIDENT WATSON: In the nature of a submission.

PN1271

MR NIVEN: Yes. Yes, in the nature of a submission, yes. There have been a number of cases presented in the Commission dealing with which award should apply. Our submission is that if a small ships or a small schedule was to be inserted in to the award it would assist with meeting the modern award objectives

of reducing the potential overlap and confusion within the industry of these matters. The small - - -

PN1272

DEPUTY PRESIDENT GOOLEY: I don't understand that submission, as the Seagoing Award has a provision for ships up to 19,000. If you're a small ship and you meet the criteria under the award, what's the confusion? I mean, it's a different argument to say that there should be – you know, the argument that's been put by Sea Swift which is that the coverage of the award should be clarified so that if you're performing work in the ports harbour sector then that part of your business should be covered by that award and the other part of your business should be covered by that award, but I don't understand the idea that there could be any confusion if you're seagoing that the seagoing award applies to you irrespective of the size of the ship you operate because that was a decision when they made the modern award and your organisation was a party to it, and I didn't understand that your organisation put any submissions that the small ships award should continue.

PN1273

MR NIVEN: No. No, but with the benefit of the operation of the award AIMPE submits that there has been some unintended consequences as a result of that, and some of those unintended consequences has been this confusion between the Ports and Harbours Award applying or the Seagoing Award applying. The - - -

PN1274

DEPUTY PRESIDENT GOOLEY: So do I understand your submission that people who work on small ships, however defined, engineers do work of lower work value and therefore are entitled to lesser pay than those who perform the engineering work on larger ships?

PN1275

MR NIVEN: Yes. That's correct. That's correct.

PN1276

DEPUTY PRESIDENT GOOLEY: Well, where's AIMPE's evidence of that?

PN1277

MR NIVEN: That's the bundle that I handed up contains the different duties and qualifications required for the various classes of engineers. The engineer watch keeper, engineer class 2 and engineer class 1 are the STCW regulated classifications or qualifications, and they are able to perform work on larger ships with a propulsion power greater than 3000 kilowatts. The engineer class 3 near coastal is the national system standard for commercial vessels, and it is a slightly different ticket and certificate of competency, and it only enables engineers to work on ships with a propulsion power which is less than 3000 kilowatts and there are also limits on the length of the vessel. It must be less than 80 metres and can only go beyond the EEZ with a permit or with an endorsement.

PN1278

Part of that bundle had the career path options which shows the engineer class 3s with additional study and sea experience can move in to the engineer watch

keeper for engineer class 2 and that really depends on their trade backgrounds and their seagoing experience and the study that they undertake.

PN1279

So the class 3s are the engineers that predominantly perform work on these smaller vessels, and of course from time to time companies are lucky enough to have an engineer class 1 want to work on the smaller vessels, but they're only still paid, not by their ticket, but by the classification on which they're working at the time. But it's the smaller vessels are dominated by the class 3s and so we say that there is a work value difference between the value of their certificate compared to the higher certificates of class 1 and class 2.

PN1280

DEPUTY PRESIDENT GOOLEY: So under the proposal being put forward by Sea Swift the Newcastle, which is more than 80 metres, would come under the small sips category but under the engineer class 3, if I'm reading this correctly, you can only work in the engine room of a vehicle of less than 80 metres with a propulsion of less than 3000 kilowatts power.

PN1281

MR NIVEN: Yes.

PN1282

DEPUTY PRESIDENT GOOLEY: So are you endorsing the submission of Sea Swift that somebody who is on a boat of more than 80 metres should get a lower rate of pay than the engineer class 3?

PN1283

MR NIVEN: Yes. From the prism of the engineering perspective it's the propulsion power and the complexity or otherwise of the engines that is the importance rather than the length. The conditions about the near coastal for less than 80 metres is a condition applied by AMSA, and - - -

PN1284

VICE PRESIDENT WATSON: Yes, but how do we read that? If we look at that first sheet, paragraph (d) is unlimited in relation to the waters that it can apply, so the holder of that certificate can work in an engine on a vessel less than 80 metres and with a propulsion power of less than 3000 kilowatts in an unlimited sense, but the other paragraphs appear to be alternatives, so a holder of this certificate can work as chief engineer on a vessel with propulsion powers less than 3000 kilowatts in waters to the outer limits of the EEZ irrespective of the length of the vessel. Is that the way we should read it?

PN1285

MR NIVEN: Yes. But it's the propulsion power which is the determining factor.

PN1286

VICE PRESIDENT WATSON: Yes. Well, it's a combination of different things.

PN1287

MR NIVEN: Yes.

PN1288

VICE PRESIDENT WATSON: Paragraphs (a), (b), (c) and (d) are alternatives as to what can be done by the holder of the certificate.

PN1289

MR NIVEN: That's right. So this may go to the definition of what a small ship is. I was going to suggest that the various details – because I wanted to note and also bring to the attention of the Full Bench that, in our submission, in the proposed schedule that we put forward it did not contain any rates of pay, and the reason for that is that when we looked at the rates we recognised that we could do a calculation on the small ships and apply the various percentages and bring that up to date, but it was missing a key element which was briefly touched on yesterday, that the awards had been revised to take into account the 38 hour working week, and that therefore we weren't able to apply that calculation to the rate.

PN1290

So the rates that formed part of Mr Cooper's submission, which I think was H4, would be roughly the ball park figure that we think that they would be but that would be subject to subjecting those rates to the proper calculations that were applied when the modern awards were made and revised for the 38 hour weeks.

PN1291

COMMISSIONER CAMBRIDGE: Mr Niven, whatever that might be, in terms of the way you might strike a rate, isn't it going to be less than what someone would be getting today?

PN1292

MR NIVEN: Possibly. Most likely that would be the case.

PN1293

COMMISSIONER CAMBRIDGE: It's a strange proposition that you're really advancing a schedule that would in effect reduce the amount of money that a member of your organisation would currently be receiving.

PN1294

MR NIVEN: Yes. But the Act provides for - - -

PN1295

VICE PRESIDENT WATSON: It would be covered by the award, and paid in accordance with the award

PN1296

COMMISSIONER CAMBRIDGE: Well, obviously.

PN1297

VICE PRESIDENT WATSON: Well, it could be paid in accordance with a different instrument rather than the award.

PN1298

MR NIVEN: Yes. The award basically provides the basis for the BOOT test. Most of our members working in the seagoing area including some of the vessels that I'm going to refer to are already covered by enterprise agreements, but the Act also provides that there can be transitional arrangements to protect their current rate of pay until the award would catch up. But - - -

PN1299

COMMISSIONER CAMBRIDGE: It might only be a bench mark but you want a lower bench mark?

PN1300

MR NIVEN: That's correct. That's our basis of our application.

PN1301

DEPUTY PRESIDENT GOOLEY: And just so that I'm clear because it was raised yesterday, you talk about 6000 tonnes. What kind of tonnes are you referring to? What do you understand the 19 and what is the six?

PN1302

MR NIVEN: Our application was for 6000 tonnes.

PN1303

DEPUTY PRESIDENT GOOLEY: But what kind of tonnes? Dead weight tonnes?

PN1304

MR NIVEN: Dead weight. Dead weight tonnes.

PN1305

DEPUTY PRESIDENT GOOLEY: Dead weight?

PN1306

MR NIVEN: Yes, sorry. Dead weight tonnes, yes.

PN1307

DEPUTY PRESIDENT GOOLEY: And do you say that that's what the rest of the award refers to?

PN1308

MR NIVEN: Sorry, the award?

PN1309

DEPUTY PRESIDENT GOOLEY: Well, the rest of the award has a provision up to 19,000 tonnes.

PN1310

MR NIVEN: Yes, and then - - -

PN1311

DEPUTY PRESIDENT GOOLEY: And Mr Herbert yesterday said it's not clear from the award whether they're dead weight tonnes or gross tonnes and, as I say, somebody who's coming to this award are fresh I've got no idea either, so I'm

asking whether you're using dead weight tonnes and that's consistent with the award or you're using dead weight tonnes for this and the award refers to different kinds of tonnes?

PN1312

MR NIVEN: No, it is our view that the industry practice is death weight tonnes. Now, I was going to suggest that should the Full Bench be of the view that a small ship schedule is required and if the tonnage proposals of ourselves, of AIMPE, is 6000 plus tonnes if this is controversial then AIMPE would – it's self-evident that it is.

PN1313

DEPUTY PRESIDENT GOOLEY: Yes.

PN1314

VICE PRESIDENT WATSON: Yes, we're with you.

PN1315

MR NIVEN: Then AIMPE would support the details of the schedule, being the tonnage and the wages, be referred to a conference of the parties to arrive at a more consensual outcome in relation to that because we note that the Sea Swift application is for 5000 tonnes. We considered, when formulating our proposal, we considered the 5000 tonnes but that there are – 5000 tonnes we thought there are a number of vessels that are just over the 5000 tonnes, and we thought that the 6000 tonnes was perhaps a better line in the sand to draw to capture the differences that can also occur just between what some vessels are able to carry in different seasons.

PN1316

VICE PRESIDENT WATSON: How does the 6000 tonnes compare with the measure of propulsion of 3000 kilowatts?

PN1317

MR NIVEN: That's where we also drew the line; that vessels operating up to 6000 tonnes are most likely, there can always be some exceptions, are most likely to be in the less than 3000 kilowatt propulsion range.

PN1318

VICE PRESIDENT WATSON: Going to 6000 dead weight tonnes doesn't take the ship beyond the 3000 kilowatt propulsion power in the usual situation.

PN1319

MR NIVEN: Not in the ordinary circumstances.

PN1320

VICE PRESIDENT WATSON: The ordinary circumstances.

PN1321

MR NIVEN: Now, the type of vessels, and I'm mindful of my friend's objections, that I handed up in six, these vessels operate in different localities around Australia. The Statesman is a landing craft that services King Island. The Aburri

is a trans-shipment vessel that operates in the Gulf of Carpentaria. It operates under an enterprise agreement, so there'd be no reduction in pay for those employees. But the debate has been that the enterprise agreement for the Aburri is, for the purposes of the BOOT test, has been the Ports and Harbours Award and that has been the subject of some considerable debate. The Toll Investigator operates in the northwest of WA servicing the communities on Barrow Island. And the Spirit of Kangaroo Island is another vessel that is covered by an enterprise agreement and it services Kangaroo Island and again the Sea Link Agreement, and the reference number is the AG2016\5795.

PN1322

VICE PRESIDENT WATSON: There's the photo on the bottom of that page is not the Spirit of Kangaroo Island.

PN1323

MR NIVEN: No. No, no, no, that's right. That's right. That's right.

PN1324

DEPUTY PRESIDENT GOOLEY: I think the white pointers might get to you if you took that across.

PN1325

MR NIVEN: Just goes to see how quick you can get a licence to drive a boat. I'll withdraw that. Now, with the Kangaroo Island the debate has always been again because sometimes these ferries, and I can compare and contrast, and I'm a Victorian so it's perhaps a bit easier in the southern States, that in Victoria there's a line across Port Phillip Bay. If it goes outside that line it's seagoing. If it operates inside the bay it's then Ports and Harbours. It's quite an easy demarcation.

PN1326

However, around the country the sea states are somewhat different and there's been arguments around the sea state, whether it's smooth water, partially smooth water, enclosed water, et cetera. And the Backstairs Passage which is that strip of water between Kangaroo Island and the mainland, is excluded from being declared a smooth or partially smooth due to the sea state and so in relation to those vessels Sea Link recognised that the Seagoing Award was the award that applied, but considerable work was done within the enterprise agreement to arrive at classifications to better align with their operation.

PN1327

That's my submission in relation to the small ships. I just wanted to touch briefly on the issue of the casuals. As we stated in our written submission in reply, which is N3, AIMPE is of the view that the inclusion of a casual classification is not warranted or appropriate for the seagoing industry. The Seagoing Industry Award already provides for relief employment, and it's AIMPE's submission that the term "relief employee" can be interpreted in a manner which can also provide relief to operational circumstances which is not limited just to relieving a full-time employee, and this is a situation that often occurs.

PN1328

So we say that there's unintended consequences for employees on ships, seagoing vessels should a three hour casual provision be provided within the award. It's not possible for employees on ships to go home at night like it is for employees working ashore, and so we note that the submission of Sea Swift this morning that on the vessel it would be a one-day engagement, but our submission is that the casual engagement is not required and that the relief provisions within the award already provide flexibility, and we would say provides enough flexibility for companies to engage short-term employees to relieve any operational circumstances that may arise.

PN1329

VICE PRESIDENT WATSON: Including the prawn mother-ship.

PN1330

MR NIVEN: If it's as seasonal as what the submissions have been then we would still see that as being a relief. It could be covered by a relief engagement.

PN1331

DEPUTY PRESIDENT GOOLEY: Is it the case with the Seagoing Award because a relief employee received the equivalent pay and conditions as those of a full-time employee.

PN1332

MR NIVEN: Yes.

PN1333

DEPUTY PRESIDENT GOOLEY: A full-time employee gets a minimum of a week's notice of termination, casual employees don't.

PN1334

MR NIVEN: No, a relief employee doesn't as well. Their engagement finishes each night. A relief employee gets the benefits of the leave provisions, so a relief employee who does - - -

PN1335

DEPUTY PRESIDENT GOOLEY: But it simply says it's equivalent pay and conditions to those of a full-time employee. It's not a condition of employment of a full-time employee that their notice depends on their length of service.

PN1336

MR NIVEN: Yes, I have to concede that.

PN1337

VICE PRESIDENT WATSON: Who are they relieving?

PN1338

MR NIVEN: Who do they relieve? In normal circumstances they relieve a full-time employee who, for whatever reason, is unable to complete their swing or perform their swing or join the vessel at the time. Also occasionally, depending on the cargo, or forecasts of particular sea states, additional engineers can be engaged for a short period of time, and they're paid as reliefs.

PN1339

In relation to the coverage - - -

PN1340

DEPUTY PRESIDENT GOOLEY: Sorry, how would it apply to those people on the fishing supply ship? Because they are the crew, they're not relieving anybody. They are the crew.

PN1341

MR NIVEN: No, that's right. But they would still be entitled to the wages and conditions of someone if they were a full-time employee, it's just that they would be engaged for a short-term period.

PN1342

In relation to the coverage issues, it's AIMPE submission, as we outlined in our written submissions, which was N3, that the coverage issues have been settled by the Commission in the matter of *MUA and Others v Sea Swift* [2016] FWCFB 651, and that the application from Sea Swift in relation to that matter should be dismissed.

PN1343

DEPUTY PRESIDENT GOOLEY: Other than the fact that the Full Bench made that decision about what the existing coverage of the award is, what do you say in relation to Sea Swift's application that the coverage should change? I mean, the Full Bench didn't determine the merits of the coverage. It simply determined what it was. Sea Swift are putting up an argument which they say is based on the merit as to why the scope of the award should change such that it follows that part of your business. So instead of having a predominant nature of the business determine the award coverage, if you've got barges they'll be covered by one, and if you've got seagoing vessels, they'll be covered by another. What do you say in relation to the submissions they put up, that on merit we should change the scope of the awards?

PN1344

MR NIVEN: We don't agree with their submission in relation to that matter. I'm aware of enterprise agreements that have schedules across the various awards to meet a similar circumstance. Those enterprise agreements probably don't apply to companies that actually own or operate vessels, so there's a distinction there. But it has been recognised by companies in the maritime industry where they have different classes of vessels, that they have different schedules within their agreements to cover those arrangements, and within those agreements they have clauses that enable an employee or an engineer, in my case, to be able to move between the various schedules. Differences in relation to leave and allowances are ironed out through the enterprise agreements.

PN1345

DEPUTY PRESIDENT GOOLEY: But what the real issue here is not that because if this was Sea Swift and it had the different schedules those schedules would still need to be tested against the Seagoing Industry Award for the purposes of the BOOT.

PN1346

MR NIVEN: Yes. Yes, that's right. And we think that that is the - - -

PN1347

DEPUTY PRESIDENT GOOLEY: But it doesn't solve that issue.

PN1348

MR NIVEN: No, but we think that is the appropriate award for their operations and for employers that might find themselves in a similar situation. I mean, there are other operators that work in the offshore oil and gas industry and also in the Seagoing Industry Award. It depends what sort of clients or projects that they're servicing at the time. So it's not a problem that's necessarily unique to Sea Swift but it's definitely a matter which Sea Swift have agitated and made application for, but they wouldn't be the only employer to confront this situation.

PN1349

VICE PRESIDENT WATSON: The offshore industry has a different safety net award.

PN1350

MR NIVEN: Yes. That's right. Yes. Yes, and the rates of pay in the offshore industry and the leave provisions in the offshore are generally higher. So, for example, the Toll Investigator can service communities on islands off the north-west of WA but it can also do project work and has done project work in the offshore oil and gas field by, you know, delivering equipment to Barrow Island. It's the complexity of what cargo and what project it's doing at the time.

PN1351

VICE PRESIDENT WATSON: Well, let's treat it as a hypothetical that a cargo vessel operating in Western Australia might be involved in the offshore industry on occasions, and on other voyages be involved in cargo up the Western Australian coast. Would that vessel be covered by different safety net awards when it's undertaking different voyages?

PN1352

MR NIVEN: Yes. Yes, it would be. It would be. Generally if there's an EA in place the enterprise agreement rates of pay would be higher than the BOOT test - would meet the BOOT test for either award.

PN1353

VICE PRESIDENT WATSON: Both awards would be relevant to the BOOT.

PN1354

MR NIVEN: That's right, both awards would be relevant at the time.

PN1355

These matters were the subject of some debate when the Broadsword enterprise agreement was contested in WA. I don't have the case number for that handy, but, yes, it's another company a bit like Sea Swift.

PN1356

Unless there's any other questions I'll conclude my submissions there and rely on our written submissions for the rest.

PN1357

VICE PRESIDENT WATSON: Thank you, Mr Niven.

PN1358

MR NIVEN: Thank you.

PN1359

MR HERBERT: Your Honour, might I answer the questions that you asked me earlier with the fisheries situation? It appears that the Seafood Processing Award is confined to operation onshore. It has no marine component and that fishing vessels would appear to be covered by the Ports, Harbours and enclosed Water Vessels Award in that they are vessels that proceed to sea not otherwise named in any of the other awards referred to in the Ports Harbours Award. And so that would appear, on the face of it, to be the position of the fishing vessels.

PN1360

VICE PRESIDENT WATSON: Why aren't they seagoing?

PN1361

MR HERBERT: They're not engaged on a cargo operation. They're only engaged in a fishing operation. They go to sea not carrying cargo, and they quite often come home not carrying any catch (indistinct). But in some parts of the world, but they're not carrying cargo as such as we understand it. As I say we're not a fishing company so - - -

PN1362

COMMISSIONER CAMBRIDGE: They do the actual fishing rather than the supply to the - - -

PN1363

MR HERBERT: The trawlers do the actual fishing. They're not engaged in cargo operations, dry cargo operations within the meaning of the Seagoing Industry Award. They appear to be caught by the catch all in the Ports Harbours Award that any vessels that go to sea that are not named in any of the foregoing or not covered by any of the foregoing awards. And the dredging and marine and the other awards and then the Ports Harbours Awards unless there's an argument to say they're covered by the Seagoing Award because a trawler that doesn't have a mother ship brings its own catch home I think one might be a novel extension or the idea of a cargo run, but it would appear that they're covered by the Ports Harbours Award.

PN1364

VICE PRESIDENT WATSON: Thank you, Mr Herbert. Ms Guaran, we might mark your submission. I think there's only one, and I think it might be dated 10 June. I'll mark that exhibit G1. Yes, we'll mark your submission G1.

EXHIBIT #G1 OUTLINE OF SUBMISSIONS OF MIAL DATED 10/06/2016

PN1365

MS GUARAN: Yes, thank you. I will try and keep it as brief as possible. I might give some background to the Maritime Industry Australia Limited of MIAL to provide more context to the submissions that we've made. We're a peak industry body that represents the interests of the companies who base their seafaring and employment operations in Australia and we provide dedicated maritime advice and support to our membership and sometimes advocate in various forums. And our membership includes over 30 employers and quite a large number of them have employees who are covered by the awards being dealt with today, and because we sought input from our membership on their positions in relation to the submissions that Sea Swift have made and AIMPE have made. And that input was received and is reflected in the submissions that were made, and because we have quite a diverse membership base it's an agreed position that they've all put forward and I'm not necessarily in the position to elaborate much beyond that but there are some things that were raised today that I might quickly address.

PN1366

So one of them is there's been some discussion of casuals and being a feature of the industry or not. The Advice that we've had from our members is that casual employment would be beneficial to them and indeed it is a feature of the industry because many enterprise agreements do incorporate it already, so it's certainly something that reflects working arrangements in that industry and we would support the change that's been proposed, anything really that meets that modern award objective of increasing flexible and modern work practices is something that the industry would support.

PN1367

We've also discussed in some technical detail yesterday the AMSA NSCV Part D, I guess, legislative structure for training and qualification. Just as a bit of almost context to that those documents NSCV part D are the result of consultation with industry and safety experts, risk experts and training experts and of course unions and I think the nature of them reflects that they're a consulted outcome, not necessarily something that has just been come up with in a back room. And they're also subject to ongoing review so recently they went through a review process which unions and industry were a part of and the outcome of that review was that the scope of the review was too small and another bigger review needed to be conducted so that's now scheduled for next year. But I would just personally consider relying very heavily on the technical details in the AMSA NSCV Part D provisions may not be of the most assistance. I think the small ships award is a really good reflection of the wage rates in the industry and the levels, I suppose, of different qualification and skills that are required at different sized ships.

PN1368

Lastly, just in summary, the submissions that MIAL made, we do strongly feel that to not accept the small ships schedule proposed by Sea Swift, and we do also support the concept behind the schedule proposed by AIMPE, could have some concerning outcomes in an industry that's constantly changing. I think my colleague from the AIMPE politely called it being in transitional or transformation but it's - - -

PN1369

MR KEATS: I might rise just to make the same objection I made against others about giving evidence from the Bar table about what could be issues. There's no facts or evidence about issues that might arise.

PN1370

MR HOWELL: And can I join in that in one slightly different respect, one of the vices which we've identified in the written submissions, and which I intend to very briefly comment upon on shortly, is you have no evidence before you of what rates are being paid out there in industry and what dropping this small ships rate schedule into this instrument would mean. My friend from MIAL stands and says, "Well, we think that the rates that are out there are properly reflected in the small ships and barges award". Well, there's no evidence about that. And we'd want to test it, and we want to see the businesses say that they pay these things to see if they're actually contravening the Seagoing Award right now. But all of this is important evidential material which you just can't throw up in this way. I'm sorry. It's just fundamentally - - -

PN1371

VICE PRESIDENT WATSON: Didn't you say what is said in that regard can only be regarded as an assertion?

PN1372

MR HOWELL: At best. Thank you, your Honour.

PN1373

MS GUARAN: We are representing the view of employers and I haven't characterised them as anything other than that. These are – I think that the goals of the modern award and the objectives of the modern award do require some degree of speculation and reflection of the potential consequences of changing an award and that needs to be given consideration and there's going to inevitably be some generalisations about an industry as large and diverse as shipping, and I do accept that, no, we haven't made submissions from individual employers as to what they are paying their different employees, and I won't elaborate further on that, based on that objection.

PN1374

We do consider it a logical outcome that where you have a situation where a structure of the relevant modern awards means that an employee who is doing a particular job and is covered by, say, the Ports, Harbours and Enclosed Water Vessels Modern Award and the employer also, as Sea Swift does, has employees who would be covered by the Seagoing Industry Modern Award, in that situation that's going to discourage collective bargaining if there was - - -

PN1375

DEPUTY PRESIDENT GOOLEY: But that's a difference to whether there should be a small ships provisions in the Seagoing Award. That's the submission that's made by Sea Swift that the separation of the award should be done in a different way, such that people could perform work in that area – now, that's not an argument for putting a small ships classification structure in to the Seagoing

Award and to make an argument for a change in the classification structure in the Seagoing Award you have to make an argument about work value.

PN1376

MS GUARAN: Yes. No, I acknowledge that and where MIAL is merely supporting the goals behind what has been put forward by AIMPE and what has been put forward by Sea Swift and we're not making a work value argument on behalf of our members.

PN1377

I was going to elaborate further on collective bargaining or meeting the goals of the modern award, and I think that in terms of flexible and modern work practices some kind of small ships schedule, be it based on – I also agree with my colleague that the AMSA certification structure clearly reflects very different skills required for different sized vessels, and that is why our members would support this change. And I think in an industry that's contracting in parts and there's employees in regional areas that are servicing remote communities we would really strongly support any changes that enables them to increase employment or continue employment in those areas, and also changes which would encourage enterprise bargaining rather than the present scenario which we believe discourages it. Those are our submissions, and we rely on our written submissions. Unless there are any further questions.

PN1378

VICE PRESIDENT WATSON: Thank you, Ms Guaran. Mr Fredericks? We'll mark your outline of submissions of 10 June, Mr Fredericks, exhibit F1.

EXHIBIT #F1 OUTLINE OF SUBMISSIONS OF CSL DATED 10/06/2016

PN1379

MR FREDERICKS: Thank you, Vice President. I think there's 2015 submissions, probably a bit less relevant now. But I don't even have them in front of me at the moment.

PN1380

VICE PRESIDENT WATSON: Are there other submissions, are there?

PN1381

MR FREDERICKS: They are brief. They were 24 September 2015 in relation to the Seagoing Industry Award.

PN1382

VICE PRESIDENT WATSON: Yes. We'll mark those submissions exhibit F2.

EXHIBIT #F2 OUTLINE OF SUBMISSIONS OF CSL DATED 24/09/2016

PN1383

VICE PRESIDENT WATSON: Reverse chronological order.

PN1384

MR FREDERICKS: Thank you. I will only be addressing the submissions in F1. Look, just going through those submissions dealing with the items that we raised, the first item is the electro technical officer issue, which of course has now been referred to conference to be conducted by Commissioner Cambridge. That skips over the bulk of what I would otherwise have said. Item B is the Seagoing Industry Award, the proposed new small vessel schedule. The position of CSL is that it does not oppose the insertion of a schedule. If I've understood the, I guess, the tenor of the submissions of Mr Herbert and Mr Niven, it seems the suggestion is that the Commission, if it's minded to insert such a schedule, it's being asked to do so on some sort of in principle basis with presumably giving as much guidance as it can as to how that schedule might work and then for the matter to be referred to a conference with the parties. If that does occur then CSL would seek to be a participant in that conference and it does seem to us, in our respectful submission, that if the Commission is minded to insert such a schedule that that is the appropriate course to take, so the detail of it can be worked out, not the least of which including ensuring that everyone actually has a common definition of tonnes for example would be a promising start to that.

PN1385

That then takes us to the wage relativities issue. The proposed change of relativities put forward by AIMPE in the Ports Award, for master and engineer. AIMPE asserts that when the award was made the wrong relativity was applied and that the engineer wage rate should have been made the same as the wage rate for masters. There's a number of things that can and should be said about that proposal. Firstly there is minimal to no evidence put forward by AIMPE in support of that claim. If one looks at the Act and the relevant decision including the preliminary jurisdictional issues decision which Mr Herbert referred to yesterday and that's [2014] FWCFB 1788, there are a number of factors that need to be considered, both under that decision and also under the Act. For example, one would have expected AIMPE to have met the requirements, for example, of sections 138 and sections 156(3) head on to explain what those requirements are and put forward how the evidence that it has put forward has met those requirements.

PN1386

We suggest that it hasn't done that and particularly that's very problematic when you've got a starting point as set out in the preliminary jurisdictional issues decision, that the prima facie presumption is that the Commission got it right when it came to meeting the modern award objectives when it made the modern award. So what AIMPE are now looking for is a change in that decision and it seems to be put forward on two possible bases; firstly, that there was just simply a mistake made at the time the modern award was made; and then secondly, related to that, the work value issues mean that award rates should be changed.

PN1387

In that respect mention has already been made of the submissions that AIMPE actually put forward to the Commission, amend the initial award modernisation process. The AMOU has put forward a number of documents from that process annexed to its submissions, so I'm just going to refer to one of those documents and I hand that up if I can. And that's the submissions of the draft award of 6

March 2009 put forward on behalf of the Maritime Union of Australia and Australian Institute of Marine and Power Engineers. And I believe that's attached to the AMOU's statement, and I think it's attachment 2 from memory. I have further copies if anyone is feeling they don't have enough paper. And perhaps too, again to make the obvious observation - - -

PN1388

VICE PRESIDENT WATSON: If it's already in evidence or attached to submissions we won't mark it again.

PN1389

MR FREDERICKS: Thank you.

PN1390

VICE PRESIDENT WATSON: If it was going to be.

PN1391

MR FREDERICKS: We first made the observation that indeed it has already come from the Bench that the very proposal of AIMPE in its draft award that you have the engineer relativity is linked with the mate rather than that of master, and that's page 11 of the draft award that's attached to the submissions. So it's their own proposal that the AIMPE is now attempting to walk away from, and that's an observation made in more detail in the AMOU submissions. I put this forward also just to pick up something else that Mr Niven has said in oral submissions and also to pick up something in the attachment to their submissions which is, I think, their notional evidence, the schedule. As I understood Mr Niven to say there was perhaps some inadvertence on the part of the union when this draft award was put forward or perhaps not a proper attention to detail so that the matter was not properly considered.

PN1392

VICE PRESIDENT WATSON: It wouldn't be the only aspect of the award modernisation process if that were the case.

PN1393

MR FREDERICKS: Yes. Well, I think he's done something of a disservice to McNally Jones Staff. I think they've had a fairly detailed look at the issues when they were putting this award together. If I firstly take you to perhaps the Commission will need both that AIMPE schedule attached to their submissions. If you have a look at page 2 of the draft award – in fact, I won't take you to that after all. I'll take you to the submissions. Page 2 of the submissions, so it's the third page of the document I've just handed up. We set out the instruments that are being replaced by this proposed award. And if you compare that – and the table goes over the page – if you compare that to the list of awards in that AIMPE schedule attached to its submissions, by my reckoning all but one of the transitional instruments referred to in that AIMPE schedule are mentioned as being replaced by this proposed instrument. So this is firstly a matter that's specifically before the Commission that these transitional instruments are going to be replaced, and by my reckoning the only one that's not mentioned is this senior officers, Rail Bus and Ferries New South Wales Award.

PN1394

Then, again, recognising the consideration that we've given to how this new award would work if I take you to, there's then a table setting out helpfully where the terms of their proposed award comes from, that starts at page 5. If I take you to page 7 of the documents we have detail of where the various allowances have come from in the proposed award. And, again, far from there being an indication of any inadvertence on the part of the drafter of the award of a failure to properly consider the terms of the draft award, again, by my reckoning all but one of the transitional instruments referred to in the AIMPE's submissions are mentioned in this allowances clause so it's quite clear when this award was put together that the MUA and AIMPE have gone through and they have had a look at the various awards. They've considered what needs to be included in the proposed award and where they've considered what needs to be included they've put it in, and I suggest that the Commission has then relied on that in making the award.

PN1395

So, again, far from there being any indication of inadvertence which might lead to some view that there was a mistake I suggest that the opposite has in fact occurred and it looks like there's close attention that's been given to the terms of this award having regard to the transitional instruments and I think as a matter of procedure, if not law, and perhaps even law, the Commission can be regarded to have considered this material and have been aware of the transitional instruments when it made the new award.

PN1396

The other apparent evidence of a mistake, as I understand Mr Niven's submissions, are that the various transitional instruments, some of them at least, have different relativities than the modern award. In my submission, it would be completely unexceptional for a modern award to have a classification structure which has different relativities and transitional instruments it replaces and in some instance even completely different classification structures than transitional instruments that it replaces. That's what modern awards did; they modernised; they replaced things. So the fact the modern award has ended up with something different than the transitional instruments, in my respectful submission, does not advance Mr Niven's cause one inch. That's what modern awards do.

PN1397

I recognise, despite all of that if there are work value issues and the wrong value assessments have been made then that is a matter which this Full Bench can now consider, but there's simply no evidence of the work value, of the different classifications, again, beyond a very, very brief summary of wage rates in transitional instruments. And even for those transitional instruments there's no examination of the history of those awards, and there's different relativities in those instruments. There's no consideration of the history of those awards; how those different relativities came into being; what the respective work value considerations were; and frankly whether any of those work value considerations are still relevant. There is simply, in our submission, nothing before the Commission which would compel it to agree to AIMPE's submission.

PN1398

That perhaps goes even more strongly to their proposed alternative classification, their alternative submission, which is to insert a new classification. Again, if we're going to be inserting new classifications in modern awards there needs to be some, and there's no evidence on this proposed new classification, there needs to be evidence before the Commission; there needs to be submissions which then consider that evidence in light of the requirements of the Act and in light of the requirements of the authorities about how modern awards should be dealt with. We simply don't have that. All we have from AIMPE is a couple of lines in their submissions with a draft schedule attached. So, in our respectful submission, there's simply not the material before the Commission that currently allows this Full Bench to find that the modern award objectives weren't met at the time the modern award was made, and linked to that, that the work value or the relativities were wrong at the time, or that those work values or relativities now need to be changed. There's just simply nothing there, and now, in our respectful submission, the AIMPE application on that part should be rejected.

PN1399

That's all I have to say unless there's any question from the Bench.

PN1400

VICE PRESIDENT WATSON: Thank you, Mr Fredericks. Mr Keats?

PN1401

MR KEATS: Yes, your Honour.

PN1402

VICE PRESIDENT WATSON: I don't think we should have evidence from the Bar table as to the origin of previous submissions.

PN1403

MR KEATS: I might just say that it's clear on their face where they came from. I note in relation to some of the parties you've marked the outlines of submissions. In the case of my client, the Maritime Union of Australia, we've provided written submissions that are dated 3 June 2016.

PN1404

VICE PRESIDENT WATSON: We'll mark those submissions exhibit K4.

EXHIBIT #K4 OUTLINE OF SUBMISSIONS OF MUA DATED 03/06/2016

PN1405

MR KEATS: Thank you, your Honour. I might first by just explaining which of the various applications my client is involved and has made submissions in relation to just so that there's some clarity about that point. I do that in the sense that there are a series of claims by the Australian Institute of Marine Power and Engineers, not about the relativity between the master and the engineer. My client, the Maritime Union of Australia doesn't make submissions in relation to that claim at all. There's also a claim about insert of an electro technical officer classification. Again, my client doesn't wish to make any submissions about that claim by the Institute.

PN1406

The only claim that we understand is left live of the Institute that we wish to comment on is that of the small ships schedule and it's one that we oppose. There were a myriad of earlier claims made by the institute and I just draw the members of the Bench's attention to their two letters of 15 July this year. One in relation to the Ports, Harbours and Closed Water Vessels Award proceedings and one in relation to the Seagoing Industry Award proceedings which withdraw the balance of those claims if it's to be suggested I didn't respond to some issues.

PN1407

I'd like to start in an unusual way, as it turns out in these proceedings, by reference to the law. In paragraph 6 and 7 of our written submissions we set out the special rule about changing coverage, and it hasn't been addressed at all by Sea Swift as to how their application meets the criteria of section 163 and how they say that instead they're going to be covered by another award in how people move around. I've heard those submissions about that and no evidence about that, which is a fundamental aspect of that aspect of their claim.

PN1408

In paragraph 7 we refer the Bench to section 156 of the Act. So that's about the work value considerations. It's a matter of live debate and I'll come back to that later in the submissions. The second issue that flows from the law then is the case law, and the key case, it's behind tab 1 in the bundle of authorities I provided to the Members of the Full Bench. It's this decision Re 4 Yearly Review Preliminary Jurisdictional Issues, and there's just a couple of useful aspects that's worth recalling. The first is found on page 198 of the reported decision. It's paragraph 24, a little more than two-thirds of the way down the page. And it's what the starting point is:

PN1409

In the review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.

PN1410

And that doesn't mean they're prevented from making these claims, but it means that there's a significant bar that they need to meet before the application gets granted. It's not just, as I think was put, that there was a change that happened when the award was made therefore a lesser onus is placed on us. That's not what the Full Bench said in this decision. The onus remains the same for all that seek a change.

PN1411

That goes to the second part of the decision I wish to remind the Members of the Commission of, and it's found on page 210 of the reported decision. It's in numbered paragraph 60 and then there's a series of points and it's in the third point, and it starts about 10 lines down towards the right-hand side of the line:

PN1412

However, where a significant change is proposed –

PN1413

I might just pause there. Each of the three changes proposed by Sea Swift and the small ship schedule proposed by the Institute is what I'd characterise as a significant change. We're talking about changing rates of pay for people in the case of the small ship schedule. We're talking about introducing casuals with minimum engagement periods, although that might have changed some time this morning in relation to casuals, and we're talking about changing the whole structure about the interaction between three modern awards.

PN1414

So if a significant is proposed:

PN1415

It must be supported by a submission which addresses the relevant legislative provisions -

PN1416

We say that's lacking:

PN1417

and be accompanied by probative evidence properly directed to demonstrating facts supporting the proposed variation.

PN1418

We'll get to the evidence but we say that doesn't meet that test either. And then it goes on to say:

PN1419

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.

PN1420

It goes on to restate the idea of a prima facie position. So that's the limbs from which we must start. So if I deal with the Australian Institute of Marine and Power Engineers' application for a small ship schedule first, the first thing to note is there is no evidence, not even a shred of it. So we don't even get to the point of probative evidence. We don't have to ask that question. What you have instead in the 10 May 2016 submissions is a number of paragraphs between 15 and 21 and then there are reply submissions, another three paragraphs between 15 and 17. That should be a sufficient reason to defeat the claim as brought by the institute. But lest it is not we go on to say that what's found in those submissions is a reliance upon the fact that earlier there existed a Self-Proposed Barge and Small Ships Industry Award 2001. We say that that's not sufficient. First of all the Full Bench was aware of it, and to pick up Mr Frederick's submissions just a moment ago, therefore we can assume the Commission took into account and was cognisant of it at the time they made the award. And it's not an anomaly. It's not an oversight. It was squarely within the knowledge of the Full Bench.

PN1421

The only respondent at the time of the award modernisation was the Perkins Shipping Group. They didn't come along to this Commission and complain about it. And we say, whilst the wording of the enterprise agreement is just a little unclear, that their later enterprise agreements, the Toll Marine Logistics AIMPE Agreement [2014] FWCA 3492 and the Toll Marine Logistics AMOU and MUA Agreement which is [2015] FWCA 3811 are examples of that employer using the Seagoing Industry Award for the purposes of the BOOT, i.e., the relevant award. Copies of those decisions are at tabs 9 and 10.

PN1422

Now, I heard today from Mr Niven an attempt to discuss work value in relation to why the small ships schedule should be included. The problem with what was put from the Bar table; (a) is we've objected to any evidence from the Bar table of that nature, so you can't, in my submission, take that into account. It's just a bare assertion at best. And, secondly, it doesn't meet the work value requirements. The Act requires nature of the work, so if we're looking at small ships we need to know what all the small ships around the country are doing, what's the nature of the work of an engineer, a rating and a master and a mate. Then we need to know what's the level of skill and responsibilities and all we have about that is the qualification documents before this Commission, which I put up. At part D in relation to the domestic commercial vessels, and there are the marine orders, in the case of my client, Marine Order 73. We don't know whether they're the skills and qualifications actually used by Sea Swift, and we don't know whether they are the actual skills and qualifications used by the ships that are now N6 that are now before the Commission, the Statesman and the Aburri and the other vessels.

PN1423

Now, that's important because the third element of work value is the conditions under which the work is done. It could be that you're going across very smooth waters working, nothing really happens, or it could be that you're cover going across some of the roughest water in Australia. You just don't know. In my respectful submission claim for the small ships schedule by the Institute should be rejected. And in any event we note there are no rates put forward.

PN1424

That brings me to the claims by Sea Swift. The first, which I think is easiest to deal with in this order, is that for the small ship schedule. We repeat what we say about the deficiencies of the Institute's claim in relation to Sea Swift but we do note that they actually did bring some evidence along, and I'll just discuss that very briefly. There are two affidavits of Mr Ben Cooper. They don't really take the matter very far at all. All those two affidavits do is attach a series of earlier Commissioned award documents. So we have an earlier copy of the Self-Propelled Barge and Small Ships Industry Award, and the only addition to it we have is a wage comparison that's then updated in the second affidavit. It's not what we call the relevant probative evidence as to why a work value change should be made. And, in any event, I understand the concession made by Mr Herbert in relation to a question from the Deputy President that the work value evidence relied upon is that of Mr Stephen Ainscough together with the Marine Orders in Part D.

PN1425

That concession is important for my client because in the cross-examination, when I asked Mr Ainscough about Marine Order 73, he said he didn't have regard to the work of ratings. "I focused on the officers". So he didn't even look at my client and its members, one-third if you like, of the puzzle. And that might be because when you actually look at the relevant qualification documents, if I might just wander back to, you've got K2 Marine Order 73, and you might recall I took the witness to page 9, the grades of certificates and the permitted duties or functions. Whether you're an able seafarer deck, an able seafarer engineer an integrated rating or a chief integrated rating if you get your ticket you can work on any size vessel in any operating are full stop. We don't worry about length, we don't worry about the size of the engine, we don't worry about tonnage.

PN1426

It's a slightly different story in relation to exhibit K3, which is the Part D Crew Competencies for the National Standard for Commercial Vessels. You might recall I took the witness to page 25 where we found the general purpose hand NC at item 3.1 towards the top of the page. I took the witness to the work being performed, and work on deck is then the first time related to the length of the vessel, but it's in any waters in the EEZ, so the first 200 nautical miles. Bear in mind we're talking about vessels here, for Sea Swift at least, that are trading along the coast except for one that goes across to East Timor. So you wouldn't expect the vessel to go 200 nautical miles away from the Australian coast and then come back again to another part of the coast. You'd think that there might be a logical reason why that may not occur.

PN1427

Mr Ainscough, his evidence, if I could just remind the Commission of it, it's marked as H3. After wandering through the various differences between the two styles of classifications expressed an opinion that's both in paragraphs 42 and 43 of his affidavit. But it's very equivocal as a guide, neglecting certain ships, small gas and chemical tankers, domestic vessels. I assume he means domestic commercial vessels, but we don't know, of up to 5000 tonnes, which he clarified were dead weight tonnes, could, not "are", conditional:

PN1428

could be considered as ships that trade exclusively in Australian waters.

PN1429

And he wasn't quite sure what Australian waters were. That's the high point of the evidence for drawing the 5000 tonne line. In my submission, not probative as to why that should occur.

PN1430

Reliance was then placed on the small propelled barge to say it had a dividing line, and it does have a dividing line. The dividing line is 500 tonnes. Mr Ainscough complains bitterly that naught to 19,000 tonnes is too wide and yet he's trying to apply one that's 500 to no sky. That's in the Self-Propelled Barge and Small Ships Industry Award, and Sea Swift just says, "Well, we can just apply a 5000 tonne line". No real explanation as to why. It just conveniently seems to hold every single one of their vessels. If you look at the list of vessels at

attachment A to Mr Bruno's first statement they're all under 5000 tonnes. The biggest is around about 3400 and a little bit. It's the Kronos. It's 3463 tonnes.

PN1431

One might think that this is about something else this application. This might be about setting a particular BOOT for a particular employer for making an enterprise bargaining that otherwise they had to discontinue earlier this year, and that you might think that this is not about how industry awards might be but rather this is about trying to craft something for an individual employer. That's the purpose of enterprise bargaining, not industry awards.

PN1432

Between paragraphs 23 and 31 we set out a series of propositions as to further reasons why reliance upon the Self-Propelled Barge Award should not be the basis of granting the application. You might recall when I took you to the decision of the Full Bench about the preliminary issues, one of the things that was relevant was the history. So the history of Sea Swift we set out in part, paragraphs 23 and onwards, is that the unions, and the decisions are set out in the folder, sought to have Sea Swift apply this Small Self-Propelled Barge and Small Ships Award. They resisted it bitterly.

PN1433

You might recall there were these ideas of 111(1)(g) not in the public interest that awards be made to rope in certain employers into a particular award. That's the application that was made. They lost that. And lest it be suggested that this is not about that award at all, behind tab 5 of the bundle of authorities you'll find print J1528, it's a decision of Fogarty C of 14 February 1990, and on page 3 you'll see that the logs of claim are described to be in the same terms as the Self-Propelled Barge and Small Ships Award 1981, which I note at one stage was suggested not to be in existence at that time yet curiously the decision records it.

PN1434

Behind tab 6 is the appeal which was unsuccessful by Sea Swift. And lastly, behind tab 7 of the authorities there's the decision recording the decision of Sea Swift about half-down the page on page 2 that counsel for Sea Swift, who remains common in these proceedings, informed that the company was going through a structural re-organisation involving the demised chartering of its vessels and the establishment of partnerships of crews for vessels before very long therefore save for perhaps three employees Sea Swift would no longer employ maritime crews.

PN1435

Naturally what happened then is that they moved to the State system. So that's their history. The history continues though. They have a State award, the State Enterprise Award that only applies to them. Award modernisation kicks off; a lot of publicity about it even in Parliament. The then Minister for Workplace Relations Julia Gillard issues the request. It has to be amended two or three times. Much publicity about how that's all happening. It would be hard if you're involved in industrial relations to miss it. They don't participate. Now, I don't say that's an absolute bar to coming over here and asking for an application, but it does mean you can't just say, "We have a lesser bar because they did something" when they didn't bother to turn up to show what the problem was how could the

Bench have assisted if they didn't know? They wouldn't have been able to work out whether there was a truly a problem itself. And it's not like that wasn't the only opportunity they had. There was the 2012 transitional review, but also they had an Enterprise Award. There was an enterprise transitional instrument. They had rights under schedule 6A of the Transitional At. To come along to this Commission and say, "We're unique. We have this mixed business. We don't know anyone else that does this. We've got this mother-shipping for prawning. We want the special instrument, and the Act provided for special instruments to be created in those circumstances". They didn't come. Instead what did they do? They engaged in bargaining and they engaged in bargaining on the basis that they thought the relevant award was the Ports, Harbours and Enclosed Water Vessels Award. They were initially proved right by Simpson C of this Commission but on appeal that changed and we've been told, both by Mr Bruno and by Mr Herbert that they accept that's the current wording, meaning and understanding of the Seagoing Industry Award. And I'll come to the hierarchy a little bit later.

PN1436

I've set out in the submissions a table as to what would happen, it's at paragraph 27, to the rates of the various classification as the determinations were originally given to this Commission. I haven't redone the figures but you will recall that yesterday we were told there was roughly a seven-and-a-half thousand dollar allowance that needs to be taken out of these figures so that makes the differential greater still.

PN1437

Yet the only evidence about work value, and we set out in paragraph 29 of our written submission, is that of Mr Bruno. And from our client the deckhands, and I just might pause there. It was said yesterday, "Well, we've got deckhands. We don't have general purpose hands. We don't have integrated ratings, therefore we're award free". Rather an interesting submission for counsel for an employer to put given we've just put forward to this Commission the relevant competencies that you must have to work on a vessel. If you don't have it you've got people without the right qualifications working on the vessels and the operation is working contrary to legislation. And if that's truly the position transcripts should be referred to AMSA for prosecution.

PN1438

MR HERBERT: This is just, with respect, that sort of nonsense shouldn't really form part of any submissions in these proceedings. Far from asserting facts as he suggested that I was doing earlier, he's asserting criminal liability in relation to matters he knows nothing about, and that's really quite improper, and I object entirely to this kind of submission.

PN1439

MR KEATS: The submission comes in the context that he says deckhands are completely award free.

PN1440

MR HERBERT: We're do you get all that?

PN1441

MR KEATS: Whereas the true position is the deckhands under the system became general purpose hands. That's really what happened.

PN1442

MR HERBERT: Well, let's have a prosecution about that.

PN1443

MR KEATS: Sea Swift has provided no comparison of the work performed by employees on vessels up to 5000 tonnes. They don't even have a 5000 tonne vessel. They don't know what happens on one. They don't even have a 4000 tonne vessel. Don't know what happens on one of those either. They say that we should look at the competitors. They say we should look at the decision of the Australian Competition Tribunal decision. I think we should first say what the task was that the Tribunal was looking at. The task was should the Tribunal grant an authorisation under the competition and Consumer Act 2010 for Sea Swift to acquire assets of another company in circumstances where the ACCC had raised a concern about lessening competition. So what you're looking at is with acquisition or without acquisition. That's the test that is asked to be applied and it's set out in the decision. So when you're looking at the competitors we're looking at would these other operators have taken up the work that Toll, who is leaving the field because those assets are going to Sea Swift if approved, and whether they would have taken it up. And the relevant parts of the decision are found at paragraphs 65 and 67 numbered pages of the reported decision. That's attachment A to Mr Bruno.

PN1444

I think that brings me to the award coverage application. The evidence of Mr Bruno was a little surprising about that, in that when I asked him the opening question about whether he was aware that his company, because he's the chief operating officer, had applied to vary the coverage of the Ports, Harbours and Enclosed Vessels Award, he said no. The same answer arrived when I asked him about the Marine Towing Award. Now, you might think that's unsurprising but you've got to think of it in the context that he is the only employee of Sea Swift that is before this Commission to support and explain, in an evidentiary sense, rather than in a submission sense, their claim. So it means that the other parties to these proceedings, the other award participants, if you like, are deprived of the opportunity to cross-examine such an employee.

PN1445

Now, my friend for the Maritime Industry Australia Limited said there's an element of speculation in looking at these coverage claims. Well, is there? This is the four yearly review. We're actually in the sixth year of the awards. And has anyone else complained? Shouldn't there be some evidence by now about what the problem is; really good cogent probative evidence that we could all look at and respond to? Apparently not. And indeed there's not even evidence of the practical difficulty that is submitted time and time again that Sea Swift is going to face. And we can assume it might be about the relevant award for a BOOT. That might be the safe assumption, but it's unclear. If you look at the – they have currently got an enterprise agreement. It's in place. Yes, it's gone past its nominal term, but there's no evidence that that's disappearing or anything like that, so we say there's no evidence of a practical difficulty currently facing Sea Swift that

gives the genesis of this, or even one in the near future. We didn't hear, for example, that the enterprise agreement is in the process of being terminated. We're going to fall back on to the modern award, and when that happens there are these problems. We didn't hear that.

PN1446

The submissions of Sea Swift also complain that there's a lack of clarity about the modern awards. They also say the lack of fairness but if I can deal with clarity, we say that that's just not right. They may not like the clarity but the clarity was given by the Full Bench on the current wording the Seagoing Industry Award applies. That's the relevant modern award for the BOOT and that was made crystal clear, in my view, by that Full Bench decision.

PN1447

Now, how did we get the modern awards to look like they do? Well, I suppose we have to go back to the beginning. You would have seen the various submissions that are attached to the submissions of others that were part of the Part 10 process. There are a whole multitude of awards that existed before modern awards did, and when it came to the maritime space it wasn't the case that we started from, "Yes, we'll have a dredging award. Yes, we'll have a Towage Award. Yes, we'll have a Seagoing Award", et cetera. That's not where the process for award modernisation started. We started a process that there would be a Maritime Award and a Ports and Harbour Services Award. And it wasn't really until the Maritime Union of Australia, together with the Australian Institute of Marine Power and Engineers, and you would've seen the 6 March 2009 submissions which I signed off on, that we suggested that there be a number of additional awards made. And in doing that it created a situation where certain things fell into a nice bundle and we got things like the Marine Towage Award. A nice discrete bundle. Marine Towage Operations and Tug and Barge Operations. We got Seagoing which was a nice, neat, discrete bundle, vessels that proceed to sea outside of the bays, harbours and rivers. We've got Maritime Offshore Oil and Gas, and a whole series of others.

PN1448

Then there's a whole group of other awards that didn't fall into a nice big category at all. There were all a group of a whole series of different things. And what was done, and we set this out in annexure B of our submissions, is that we submitted that there should be an award created that covers the circumstance when you're working on a vessel that's not covered by the other awards. So you start with, "Are you in this?", because that's the understood category, "Are you in this understood category?", and if you're not in any of the understood categories you fall down to this, if you like, catch all award in the same way that the Miscellaneous Award was a catch all award for people that were covered by awards that didn't otherwise get modern industry award.

PN1449

At annexure B we set out what we say are relevant aspects of that whole process that we put to the Australian Industrial Relations Commission as it then was. So, for example, 6 March we say that vessels that are not otherwise covered by the Tug Industry Award, the Offshore and Gas Award, the Dredging Award and the Seagoing Award. We proposed some coverage at that time. By 12 June we

submit slightly different, that the intention of the unions was to have created an award with coverage of operations of all maritime vessels that were not covered by the four under the Maritime Awards which the unions have sought at that time.

PN1450

Now, what then happened was a series of exposure drafts were issued. And the exposure drafts maintained this, "You're under this industry award", and then this idea of a catch all for the Ports, Harbours and Enclosed Water Vessels Award. There was no complaint by MIAL. There was no complaint by CSL. Sea Swift didn't come. So the award participants that came to the Commission saw reason in that and that's how we got where we are. And I raise that because when you look at the coverage provision for the Ports, Harbours and Enclosed Water Vessels Award that is proposed by Sea Swift they are upsetting the apple cart in quite a significant way. And it's not just a simple, as they have it seemed to be, that you just delete out the reference to the Seagoing Award in the current 3.3F and then put in a further do not cover provision about the operation of some vessels, because the intent of that award when made, as far as the unions were concerned, and we submit adopted by the Commission's Full Bench, was that it was a catch all for all other vessels, so that in the definition of that industry the words are broad in scope, and they include:

PN1451

Operation of vessels at any time wholly or substantially within a port, harbour or other body of water within the Australian coastline or at sea.

PN1452

And the immediate problem I wish to draw to the attention of the Members of the Full Bench is that you're then going to have the Seagoing Industry Award where vessels proceed to sea, and you're going to have the Ports, Harbours and Enclosed Water Vessels Award which applies to vessels at sea, and we're going to have to work out how the exclusions work that are proposed by Sea Swift.

PN1453

If I could just attempt to try and work through that because I must say I've struggled with it. So if we start with the line haul vessels, because we know a little bit about them, because the Full Bench found in February this year that they are vessels that proceed to sea outside the limits of Bays, harbours and rivers. They go from Cairns outside of the harbour of Cairns, along the coast between the reef and the mainland up around the top of Cape York into Weipa and back again. They sometimes stop at Thursday Island. So if you look at the Seagoing Industry Award, you look at the definition of the industry, "operation of vessels trading as cargo vessel". Yes, it's a cargo vessel. Mr Bruno accepted they were dry cargo vessels. "In the course of such trade they proceed to sea". That's what was accepted by the Full Bench. So we're in the industry. Next point is we need to look at the exclusions. So what we're going to have is in 3.5A as proposed by Sea Swift:

PN1454

The award does not cover the operation of vessels described in clause 3.2 of the Ports, Harbours and Enclosed Water Vessels Award 2015.

PN1455

I think that was amended yesterday to be "not cover the employment of employees in the operation of" or words to that effect. So we than have to go and look at the Ports, Harbours and Enclosed Water Vessels Award and look at 3.2. 3.2 is the definition of the ports, harbours and enclosed water vessels industry. So they're vessels of any type, relevantly here, at sea. Well, the line haul vessel would fall into there. So that means Seagoing doesn't apply. So let's go the other way. Does Ports Harbours apply? So we've just established in 3.2 that they're within the industry of the Ports, Harbours and Enclosed Water Vessels Award. Then there's an exclusion in 3.3A:

PN1456

Does not cover employees engaged in the operation of (a) vessels as described in clause 3.2 of the Seagoing Industry Award and who are employed in the classifications in clauses 10 and A.11 of that award.

PN1457

Noting they are the references to the current exposure draft.

PN1458

So we go back to what's 3.2 of the Seagoing Industry Award. That's a definition of the seagoing industry. We're in that. We've suddenly got a merry-go-round. We're covered by the industries of both awards and we're covered by the exclusions of both awards. Where do we fit? Now, the answer may be that in each award there's a provision that says where you've covered by more than one award you're covered by the award of classification which is most appropriate to the work performed. But if we've already been excluded by each award then we didn't get into either award, so this is not the answer. If the Bench, for some reason, is inclined to revisit the question of coverage you'd have to revisit the whole idea of a catch all award that is currently the Ports, Harbours and Enclosed Water Vessels Award, and do a lot more work than suggested by Sea Swift in its application.

PN1459

I think that takes me to the casuals claim. I think I first must deal with this idea of loading. It was said today that neither the Marine Towage Award nor the Ports, Harbours and Enclosed Water Vessels Award has a casual loading.

PN1460

MR HERBERT: I didn't say that. They both have.

PN1461

MR KEATS: No, you said neither had and that's why you weren't seeking a loading. But if I could just for the record put the loadings on in case my recollection is incorrect. The Ports, Harbours and Enclosed Water Vessels Award 2010 at clause 10.3(b) provides for a 25 per cent loading and the Marine Towage Award 2010 provides for a 25 per cent loading in clause 13.3(a). The application sought by Sea Swift does not include a loading.

PN1462

Now, it's said that the claim is for the re-introduction of casuals and there's a reference, and I read that to mean that we're looking at what was in the maritime industry Seagoing Award. A copy of that award is found behind tab 3 of our folder of authorities. If I could trouble the Bench to go to that, and specifically it's clause 10. I'm afraid they're not numbered.

PN1463

What you have at clause 10.3 of the maritime industry Seagoing Award was a, if you like, dual classification for type of employment; a casual/relief. It wasn't that casuals were somehow paid for a minimum start, and it wasn't a suggestion that casuals could be sitting on a vessel and not being paid whilst the vessel is stuck at sea for periods of time. And indeed that's not the way Sea Swift operates. You would have heard the evidence of Mr Bruno when I asked him about casuals and whether they'd be left on board a vessel not being paid, and he said, "That's not how we operate. If you're on the vessel you get paid for the day you're on the vessel" which I would extrapolate to mean whilst ever you're on the vessel, noting that wasn't quite his evidence, but that's what I think the force of it was.

PN1464

So the claim that is put in for casual employees doesn't even reflect the way Sea Swift currently operates. There was an attempt to do some tinkering this morning which I must say I'm not quite sure exactly how you'd word it, because formal words haven't been given to the parties. But if it's a re-introduction this is not a re-introduction. If you wanted a re-introduction it would be just being the relief/casual or the other way around and leaving it so that you'd maintained your entitlements because you are replacing someone on an ad hoc basis that's otherwise a full-time employee. And I might note in that regard that there was a question that came out during award modernisation as to whether there was even part-timers in the industry, and if I take you to tab 11 of our list of authorities, it's a decision of the Full Bench. It's part of the award modernisation. It's a decision [2009] AIRCFB 450. It's a decision of 22 May 2009. At page 19 paragraph 114:

PN1465

The employers propose the insertion of part-time and probationary employment. This proposal was opposed by the unions. The current award does not provide for part-time or probation employment. Part-time employment is not a current practice in this industry and we've decided not to include provision for it at this stage.

PN1466

There was a submission made by MIAL that there are casuals in the industry. I might remind the Bench that that was evidence from the Bar table that was objected to. At best it's a bare assertion and we'd say that no weight should be given to that suggestion.

PN1467

In any event, what is the probative weight or value of evidence that's been given to this Commission for its insertion? I think it boils down to this, and I hope I don't do it a disservice; they have casuals; they need them to economically survive, although there is no balance sheet put forward; there's no financial material put here. We don't even know the actual rates paid by casuals and how a

change for that casual to a permanent would affect their bottom line. We don't know anything about their margin. The other thing they point out is that they need casuals for this prawning mother-shipping operation but I think, as the Members of the Full Bench correctly asked, couldn't this be solved on a contractual basis? And the answer to that is, yes, it could be solved on a contractual basis.

PN1468

Unless there's anything further they'd be our submissions as to why each of those applications made by Sea Swift and the small ship schedule as made by AIMPE should be dismissed.

PN1469

VICE PRESIDENT WATSON: Thank you, Mr Keats. Might we hear from you after lunch, Mr Howell?

PN1470

MR HOWELL: I was going to say, your Honour, I'll be longer than five minutes, so, yes, it's perhaps a good idea.

PN1471

VICE PRESIDENT WATSON: Yes. Are you going to be considerably longer than five minutes?

PN1472

MR HOWELL: Well, I think Mr Keats has done an awful lot of the work for me so I'll endeavour to keep it as brief as I can.

PN1473

VICE PRESIDENT WATSON: Yes. Very well, we'll adjourn until 2 pm.

LUNCHEON ADJOURNMENT **[12.54 PM]**

RESUMED **[2.00 PM]**

PN1474

VICE PRESIDENT WATSON: Mr Howell.

PN1475

MR HOWELL: Thank you, your Honour. Your Honour, I will endeavour to be as brief as I can. The AMOU has filed some written submissions. They are, of course, undated on the front page, just to make life tricky. They are dated 14 June 2016 and perhaps I might ask that they be marked.

PN1476

VICE PRESIDENT WATSON: We will mark those exhibit A5.

EXHIBIT #A5 WRITTEN SUBMISSIONS OF AMOU DATED 14/06/2016

PN1477

MR HOWELL: Thank you, your Honour. Your Honour, I will rely upon those written submissions and, as I say, I will try and be brief. There are five claims being advanced in which my client has an interest: the two claims being advanced by the institute, AIMPE, and the three advanced by Sea Swift and we oppose each of them.

PN1478

Can I very briefly say something about the application of general principles. You have already been taken to the Full Bench in the *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision and I am not going to rehash it or repeat it or take you to it again. I would simply make these three point, which again have already been made but I think they warrant repeating.

PN1479

The Full Bench's task is, in my respectful submission, one, to review modern awards individually to ensure they continue to meet the modern awards objective, that is, that they continue to provide a fair and relevant minimum safety net, terms and conditions.

PN1480

Two, the Commission should start from the position, the prima facie position, that the modern award being reviewed achieved the modern awards objective at the time that it was made. That is paragraph 23, paragraph 60.3 of the Jurisdictional Principles decision and, again, I won't ask you to reopen that. I should say, before leaving that point, that must necessarily focus one's attention on what has happened since to examine whether there is something which requires adjustment so as to ensure it continues to meet that objective, and that is simply not what we see in any respect in any of the claims being advanced here.

PN1481

VICE PRESIDENT WATSON: Why can't it include something that wasn't considered in sufficient detail?

PN1482

MR HOWELL: If there was evidence that was capable of addressing that question, then certainly it could be. That would be certainly a relevant consideration, it would certainly bear upon whether or not an adjustment ought be made to ensure that it continued to meet the modern awards objective, but, again, there is nothing of that kind here, in my respectful submission.

PN1483

The third thing is before the Commission made a variation to a modern award, it would need to be satisfied that the variation was necessary, to use the language of section 138, necessary to ensure that it continued to meet that objective.

PN1484

Finally, and this is where I think the emphasis in my submission is a little different than what has come before, because the Commission in these proceedings is now being invited to make a determination at the level of principle, it is appropriate that I draw the Commission's attention in particular to the language of section 156(3) and (4). Can I ask the Full Bench to open that

provision if it has it with it. I want to take you to this provision because, in my respectful submission, the position which is now being advanced by the institute and by Sea Swift to try and address a proposed salary scale at the level of principle, which the parties can then go off and sort out between themselves and bring back, hopefully, a consent position to the Full Bench, is not one that is open when what you are dealing with is minimum wages.

PN1485

VICE PRESIDENT WATSON: Which subsection?

PN1486

MR HOWELL: Section 156(3) is the critically relevant provision for the purposes of this submission. It provides:

PN1487

In a four-yearly review of modern awards, the Commission may make a determination varying modern award minimum wages only -

PN1488

pause there - it is a necessary jurisdictional prerequisite what follows -

PN1489

only if the Fair Work Commission is satisfied that the variation of modern award minimum wages is justified by work value reasons.

PN1490

To enable the Full Bench to carry out that task, firstly, you must know what the variation is before you can form a view about whether or not a minimum wage adjustment is one that is capable of being made. You have to know what it is. You then have to be able to assess the work value reasons which are said to justify that variation. You cannot, in my respectful submission, in the ether and at some broad level of principle, say, "Well, look, I think something needs to happen, go off and sort it out, come back after a conference and tell us what it is." The evidence, the work value reasons has to address that variation.

PN1491

Subsection (4) informs, of course, informs what work value reasons are and I will come back to that again in a little while rather than troubling you to look at it now because I think it warrants attention in the context of the small ships schedule in particular.

PN1492

Can I then go to the claims. Firstly, the institute's claims, the AIMPE claims, and can I deal firstly with the wage relativity claim between masters and engineers. That is dealt with in the AMOU's written submissions between paragraphs 4 and 17. It is dealt with fairly comprehensively and, frankly, I don't think much more needs to be said about it. I am probably going to make history here by saying on behalf of a union in this place, I embrace everything which came from CSL, but really I don't think much more needs to be said, other than simply this: there is no evidence of work value reasons; there's no submission which addresses work value reasons; it must feel fail in limine, that is the end of it. The small ships

schedule from AIMPE I will address when I come to deal with the small ships schedule for Sea Swift.

PN1493

Can I then turn to Sea Swift's three claims: the inclusion of a casual provision in the Seagoing Award; the inclusion of what I will call the small ships schedule into the Seagoing Award, and the questions of coverage. Again, each are dealt with in the written submissions and I will rely upon them and will endeavour not to repeat them, but can I start this part of the submissions by making some general observations. In this respect, I am really parroting what your Honour the Vice President had said to my learned friend Mr Herbert yesterday. What the Full Bench is being invited to do in these proceedings is substantively vary, one, the Seagoing Industry Award, and otherwise substantively vary collectively three modern awards in circumstances were, in my submission, it simply has no proper evidential foundation for doing so.

PN1494

Before you, you have an application for claims, claims advanced by a single employer. Despite the rhetoric that has so far fallen from Sea Swift, none of the other small ship and barge operators, assuming there be some, across the country have come forward at any time since the creation of any of these modern awards to articulate a need for casual employment in the Seagoing Award, for a small ships schedule, certainly not a small ships schedule of the type which is now being propounded by either of the institute or Sea Swift, or claiming that there is some vice in the collective coverage arrangements between the three award which is intended to balance which applies in which circumstances. So there is no-one else making - - -

PN1495

VICE PRESIDENT WATSON: But might they be members of MIAL?

PN1496

MR HOWELL: If they were, one would expect to see - sorry, I will take a step back. The starting point is there is no evidence from anyone who is a member of MIAL. MIAL's submissions so far are put at the level of, "We consulted our members and this is what they want." To the extent that they say anything at all about the small ships schedule, to use that as the particular illustration, quite appropriately, I have to say, MIAL said, "We are not advancing that on a work value basis, we just reckon what they say is a good thing." That is, in essence, the substance of the submissions.

PN1497

MS GUARAN: Sorry, I have to object to that, and I really do regret interrupting, but when my submissions or my predecessor's submissions are being thoroughly summarised and characterised by my colleague, obviously he has not had an opportunity to read through them in their fullness, but there is a lot of detail in those submissions about the background of the Small Ships and Self-Propelled Barge Award and the relevance of it to the Ports, Harbours and Enclosed Water Vessels Award, the differences between the two awards, why one reflects the industry better than the other and, yes, they are broad, as we are speaking on behalf of 33 employers, so by nature they are broad.

PN1498

MR HOWELL: I was really rather reinforcing the submission which was otherwise put earlier today that it is not advanced as a work value change, and I certainly didn't mean to be disrespectful or excessively summarise what was put, that was simply the point I wanted to make. The short point being there is no evidence - sorry, I withdraw that - no claim by any other small ship and barge operator that these things are necessary in order to ensure that these instruments continue to meet the modern awards objective.

PN1499

The second thing is you have no evidence about the working arrangements in industry beyond the four walls of Sea Swift, no evidence about how any other operators in the seagoing industry work to assess how, if at all, casual employment applies or might be applicable or might be necessary, whether it be under an enterprise instrument or otherwise. There is no evidence beyond the four walls of Sea Swift at all.

PN1500

Similarly when it comes to small ships and barges, there is no evidence about what wage rates are being paid for vessels at 5000 dead weight tonnes out there in industry today. Indeed, you don't even have that evidence from Sea Swift because they don't have any vessels of that size. Nor do we have any evidence from any other organisation that operates a mixed business, assuming there be some - we haven't had any evidence about that either - or evidence that there is some particular vice in these collective coverage arrangements.

PN1501

The third think I want to say by way of general observation at the outset really builds upon the second. The fact that you only have one employer who gives evidence in a modern award review might not matter greatly. It depends on the issue, it depends upon the industry, it depends upon the circumstances. Like Mr Herbert said to your Honours yesterday, one employer raising a matter of concern might well be enough, it just depends, but that could only be right if that one employer could be legitimately said to be reflective of a broader industry problem. We are dealing with industry awards here, not an award to meet the convenience of a particular employer. That is not this case.

PN1502

In the written submissions, I make some observations about how Sea Swift, in some correspondence, has characterised itself as unique. You don't need to trouble yourself with going to that correspondence. Yesterday you had Mr Bruno here in the witness box, in answer to a question from my learned friend Mr Keats, reinforcing for the Commission in several ways, quite frankly quite proudly, that the business that he works for is unique, unique in its fleet, unique in its scope of operations, it is a multi-factored business, unique in its area of operations. That is not a proper evidential foundation for adjusting any part of the substantive industry awards that we are here dealing with.

PN1503

Can I then go to the casual employment question. It is dealt with in the written submissions at paragraph 29 to 35 and, as I say, they need not be repeated. In

summary, contrary to Sea Swift's submissions, what they are endeavouring to do by their application in this respect is not simply reinsert something which fell out of what was previously in MISA as a part of the award modernisation process. That is simply not right. Other than that, I embrace what was said by Mr Keats in that respect.

PN1504

Secondly, in the award modernisation process, the question of part-time employment in this industry was raised. Mr Keats took you to the relevant reference and again I embrace that submission. There is no reason to think that the industry has changed such in the last six-odd years - part-time employment was not a feature of the industry back then, as found by the Full Bench and, as such, was not a term or condition appropriate to be put in the Seagoing Industry Award - and there is no reason to think that casual employment is in any material way different, certainly not casual employment of the kind which Sea Swift is now trying to advance.

PN1505

We have seen a change from the three-hour minimum block to a day, but, frankly, that doesn't assist because it still doesn't sit with the nature of the industry. The point in arguendo that was canvassed was, "Well, what happens if you've only got a three-hour block and you're stuck on a vessel that runs for three days one way or the other?" The concern in that respect is the same, whether the minimum is a day or not, whether it's three hours, whether it's five hours, whether it's a day, whether it's two days. If the journey is that, the journey is longer than that. Casual employment simply doesn't fit. Your Honour the Vice President is quite right, permanent employment is quite suitable for the mother-shipping operations which are otherwise described in the evidence of Sea Swift. You can have term periods, you can have task periods of employment, fixed periods of employment. If one period is not adequate, you can split it into two.

PN1506

VICE PRESIDENT WATSON: Is it better to do it that way or to have a casual provision with a loading?

PN1507

MR HOWELL: Your Honour, I am instructed to oppose the insertion of a casual provision. Seasonal employment is not unique to this industry, that is to say the fishing industry, it is a feature of many, and where it exists, and again without being precise and taking you to particular awards of that kind, a point of general principle, oftentimes it is dealt with by seasonal employment rather than simple casual employment. One might think that if you are on a mother-shipping operation and you are at sea for multiple days, the concept of casual really doesn't seem to fit at all. It would be better to have terms of employment that could be based around an instrument which is crafted to accommodate, as is the Seagoing Industry Award, people who are for multiple periods, multiple days, engaged in an operation away from home base where you are not really ever off work, as it were, or off duty.

PN1508

Mr Keats has already drawn to your attention the loading clauses in each of the Ports, Harbours Award and the Marine Towage Award, so I won't trouble you with that again, other than to note while Sea Swift claims to have drawn the casual provision from the Ports, Harbours and Enclosed Water Vessels Award, it just hasn't because it hasn't (indistinct) loading.

PN1509

Can I then go to what I will call the small ships schedule. I am bound to get tongue-tied in saying that as we progress but I will endeavour not to. Again it is dealt with in the written submissions here at paragraphs 36 to 40 and I rely upon them. As a general observation again at the outset in dealing with this particular claim, can I say with the greatest of respect that much of what fell from my learned friend Mr Herbert in his oral submissions yesterday and today in dealing with this claim is really in the nature of rhetoric. It does not engage with the centrally relevant statutory provision, which is section 156(3) and (4). Nonetheless, I will endeavour to engage with some of that rhetoric before coming to that specific statutory provision.

PN1510

Before doing that with respect to Sea Swift, can I say something very briefly about the institute's claim for a 6000 tonne small ships schedule. The first time we see that is in the submissions of the institute dated 10 May. It is after the decision of the Full Bench in the *MUA v Sea Swift* decision in February and it is less than a month after Sea Swift wrote to this Commission seeking to insert it into the Seagoing Industry Award. In the 10 May submissions, the institute's reason for making this change - and this is really the only place we can go to because there is no evidence which is relied upon to justify it - the institute's reason for making the change is a bald assertion that the absence of the small ships classification schedule from the Seagoing Award was an anomaly.

PN1511

It is dealt with in the written submissions, but not to make too fine a point about it, the institute was one of the agitating parties in the proceedings before the award modernisation Full Bench actively advancing the very schedule which now appears in the modern award. It's a little cute to now turn around and say that by embracing precisely what it was in joint submission with the MUA that what was done was an anomaly. It was not an anomaly in any sense. To the extent that the Small Ships and Barge Award ceased to exist as a consequence of the award modernisation process, the Full Bench would appreciate that enterprise instruments, as was the Small Ships and Self-Propelled Barge Award as at the time of the award modernisation, were dealt with in a particular way. It was reflected in, I think, section 576V(3) of the Workplace Relations Act, it was reflected in paragraph 2(e) of the award modernisation request and it was reflected in the stage 2 decision of the Full Bench. That I have the reference for. It was [2009] AIRCFB 345 at paragraph 39, and I don't need to take the Full Bench to it for this purpose, but the force of those collective provisions was you don't frame an industry instrument by reference to a particular enterprise arrangement reached to meet the convenience of a particular employer, and that is fundamentally the submission which we advance in these proceedings here because it is, in essence, what is being sought to be done now. Not including the Small Ships and Barge

Award in the Seagoing Industry Award as it ultimately came to be made was not an anomaly.

PN1512

One other feature of the award modernisation process that I ought briefly address is this: Mr Herbert yesterday accepted that the way in which the award modernisation process rolled out was very public, there was a lot of public consultation, exposure drafts were put out. The very purpose of doing all that was to ensure that industry, employers and employees alike, would know what was coming, could have an input into what was coming and then could adjust themselves, including throughout the transitional provisions, to what was put in place.

PN1513

Yes, it is right to say that the Small Ships and Self-Propelled Barge Award fell out because it was an enterprise instrument. What is more important, the bigger inference, the more important feature of the award modernisation process, in my respectful submission, is, leaving that enterprise instrument aside, no employer organisation, no employer, nobody came forward as a part of that large public consultation process to say that there's this segment of the industry which needs to continue. There could be all sorts of reasons for that, we don't know, but one of them might well be that the rates which were contemplated for the 0 to 19,000 dry cargo tonne category in the Seagoing Industry Award, the rates were not inappropriate for what was being out there in the industry at the time. We just don't know. Yes, it covers a very broad category of vessels, no doubt, but that doesn't mean anything about whether the rate of pay identified is fair and relevant as a minimum safety net.

PN1514

Again, no submission put to the 2012 transitional review that there was this anomaly that the Small Ships and Self-Propelled barge classifications weren't taken into account or the industry wasn't specifically addressed in the Seagoing Industry Award. Indeed, even in these very proceeding, the institute itself doesn't put that submission until March of 2016, despite its first submissions having been put in March of 2015, including submissions about changing the classification scales in the Seagoing Industry Award. In those circumstances, one would look with some very real circumspection at claims now made that the absence of a small ships and barge classification scale or provision in the Seagoing Industry Award amounted to an anomaly. It wasn't.

PN1515

All that is a little bit of rhetoric really because, at the end of the day, the institute's claim has to fail because it has not done anything which would enable this Full Bench to be satisfied of the things it must be satisfied of in order to grant it having regard to the terms of section 156(3) and (4). It hasn't postulated a variation of minimum wages, it has just said there would be this new and different salary scale. It has not led any evidence about work value reasons for any of the classifications, be it master, engineer, mate, deckhand - sorry, rating - however you might style them, general purpose hand. There is no evidence about any of it to justify a 6000 dead weight tonne delineation point and, frankly, it is difficult to see why the institute would use that benchmark of 6000 dead weight tonnes, in

any event, given engineers certificates of competency have nothing to do with dead weight tonnes and turn on kilowatts of engine power and length of vessel.

PN1516

If the institute wants to bring forward a claim which is specific to engineers to have the minimum safety net for their members reduced, well, good for it, but there is no evidence in these proceedings which would justify on work value grounds reduction in pay in the order of - well, in the institute we don't actually have an order - justify a reduction in pay for masters and mates, the classifications which I represent, on work value grounds. There is simply no basis for it and that application brought by the institute must fail in limine.

PN1517

What I will ask the Full Bench to do, though, is to open the institute's first submission, the 10 May submission, which is now marked exhibit M1. I am going to ask you to open it at paragraph 15. This is really a starting point for addressing a matter which is advanced in the submissions of both the institute and Sea Swift. It deals with the Self-Propelled Barge and Small Ships Award. It is paragraph 15, sentence 2. What the institute there says in the second sentence is:

PN1518

This Award applied to self-propelled barges and small ships which in the course of such trade proceeded to sea.

PN1519

Mr Herbert yesterday advanced submissions that the Self-Propelled Barge and Small Ships Award amounted to an arbitrated standard for vessels of that kind. The point I wanted to make at the very outset was putting the submission in that way is just simply wrong. It is not factually accurate at all.

PN1520

It as though everyone at the Bar table seems to have forgotten the idea that prior to six years ago, federal award application was based on respondency. If you leave Victoria aside for one moment, the application of any particular award was determined by the scope of an industrial dispute and those who were bound by it as a consequence. Now, it is true to say that some federal instruments had such large and broad respondency that they could probably be considered an industry instrument and there were usually counterparts at state and territory level which accommodated that, but the Self-Propelled Barge and Small Ships Award is perhaps the quintessential example of where that is not the case. In 2007, and it appears since 2001 when one looks at the copy of it which is attached to Mr Cooper's evidence, it had one respondent - one. In no sense can it be considered an industry instrument. It simply cannot.

PN1521

Before coming to the statutory criteria that applies to the small ships schedule claims, can I make two other observations. The first deals with the submission which, if my note is correct, Mr Herbert advanced yesterday which was to this effect: what Sea Swift is trying to do in these proceedings with respect to the small ships schedule is simply returning the position to what it was for small ships and barges before award modernisation. With respect, that's just not right. It is

not right because the Self-Propelled Barge and Small Ships Award was not an industry instrument. I have already made that point. But what they are endeavouring to do by their application is not consistent with the Self-Propelled Barge and Small Ships Award in any event. That instrument drew a delineation at 500 dead weight tonnes, so there was a zero to 500 dead weight tonnes and a 500 dead weight tonnes and above. It said nothing at all about 5000 dead weight tonnes, as does the Sea Swift application.

PN1522

The limit, the upper limit, of the application of those rates of pay was determined by the size of Perkins Shipping's fleet. It wasn't as though prior to award modernisation, you had the Self-Propelled Barge and Small Ships Award which provided the rates of pay for vessels that proceeded to see in zero to 500 dead weight tonne space, then the 500 dead weight tonne through to 19,000 dead weight tonne space, where MISA would then kick in and then MISA provided the salary rates thereafter. They were two separate instruments which had two separate groups of respondents. They didn't interact at all. What they are endeavouring to do here by the creation of a schedule for ships that go to sea that has a delineation of 5000 dead weight tonnes between zero and 19,000 dead weight tonnes is fundamentally different to the position that existed prior to award modernisation. The second thing I wanted to say in that respect - - -

PN1523

DEPUTY PRESIDENT GOOLEY: Can I just be clear in that what you are saying is that if I was a ship owner with exactly the same work that Perkins have done but because I am not a respondent to the Small Ships Award, it wouldn't apply to me, the old Maritime Award would have applied?

PN1524

MR HOWELL: No.

PN1525

DEPUTY PRESIDENT GOOLEY: No?

PN1526

MR HOWELL: The first part yes, the second part no. What did apply to you would depend upon what state or territory you were in, I think is the simple answer. If you were not a respondent - - -

PN1527

DEPUTY PRESIDENT GOOLEY: What was the only federal award that applied to that kind of work?

PN1528

MR HOWELL: It's the Small Ships and - - -

PN1529

DEPUTY PRESIDENT GOOLEY: No, but it only applied to one respondent?

PN1530

MR HOWELL: That's right.

PN1531

DEPUTY PRESIDENT GOOLEY: All right. If I was roped into a federal award and nobody wanted to rope me into the Small Ships Award, what award would have covered the work?

PN1532

MR HOWELL: It is difficult to know the answer to that hypothetical question, but I would imagine - my gut reaction is probably you wouldn't have, it just wouldn't have arisen.

PN1533

DEPUTY PRESIDENT GOOLEY: All right.

PN1534

MR HOWELL: Theoretically, it could have been MISA.

PN1535

DEPUTY PRESIDENT GOOLEY: Nobody did it?

PN1536

MR HOWELL: Not that I am aware of.

PN1537

VICE PRESIDENT WATSON: There may or may not have been common rule awards in different states covering this sort of operation.

PN1538

MR HOWELL: Exactly, quite, none of which Sea Swift has put before the Commission to enable comparatives to be made or anything of that kind.

PN1539

VICE PRESIDENT WATSON: I think they referred to being covered by the Queensland jurisdiction.

PN1540

MR HOWELL: They refer to being covered by an enterprise award of Sea Swift in the Queensland jurisdiction - that's it - which, incidentally, they also didn't put before the Commission.

PN1541

The second thing I wanted to address is this notion of relativity that Mr Herbert advanced by reference to the Small Ships and Self-Propelled Barge Award. The point really that I want to make is that a lot of this evidence about the Small Ship and Self-Propelled Barge Award is utterly irrelevant because that is not what their claim is based on. To use the language of section 154(3), that is not the variation that they seek. We have come here to deal with the variation which they seek.

PN1542

The salaries proposed for the 5000 dead weight tonne vessels that proceed to sea advanced by Sea Swift, the salaries are based on the Ports, Harbour and Enclosed Water Vessels Award, not the Small Ships Award at all. There is no evidence of a work value kind that enables this Full Bench to say, "This is the work typically

covered by" - I will withdraw that - "This is the work typically done by a master covered by the Ports, Harbour and Enclosed Water Vessels Award, this is the work done" - and by "work done", I mean evidence by reference to the nature of the work, the 156(4) criteria - the nature of the work, the skill and responsibility required to do the work, or the conditions in which the work is performed, on the one hand, and the 5000 dead weight tonne vessel that goes to sea, again, to use the master as simply the illustration, keeping in mind before the Full Bench could do anything that they ask, you would have to have it for all of the classifications, nothing about a master that operates a 5000 dead weight tonne vessel to show the nature of their work, the skill and responsibility required to do their work, and I will come back to the Marine Orders and Part D of the NSCV to deal with that in a little bit more detail in a moment, or the conditions in which they work. There is no evidence that enables you to undertake the very comparison that is required by section 156(3) and (4) to enable this Commission to conclude that it is justified in reducing the wage rates, to use my client's interests as the illustration, masters by 29 per cent, more if you go to exhibit H9, and mates by 21 per cent, again more if you go to exhibit H9, based on work value grounds. No evidence of it at all.

PN1543

But even if you were dealing with the Small Ships and Self-Propelled Barge Award and the salary scale which was based on that was raised up from the 2000 or whatever level to be a minimum safety net adjustment said to be reflective of that now in 2016, again you still wouldn't have evidence that was capable of meeting the tests outlined in section 156(3) and (4) at all. Mr Bruno's evidence - and I will read it to you rather than having you open it - it is exhibit H6 at paragraph 33. Mr Bruno's unchallenged evidence was this:

PN1544

The Perkins operations, which were covered by the SPB Award, were, and still are, materially almost identical to the type and size of vessels and trading patterns of the Sea Swift barge and small ships fleet.

PN1545

He puts a bit more detail on that at paragraphs 34 to 36 of exhibit H6 and, in particular, there is a table that you will see at paragraph 36 which has - I don't need you to open it - the largest vessel that is identified in the Perkins fleet, at least in the Northern Territory, is a vessel that has a dead weight tonnage of 1630 dead weight tonnes and is 79 metres long. That is the largest vessel we can see, on the evidence, dealing with the Perkins fleet.

PN1546

If you come back to where I commenced these submissions about the operation of the Small Ships and Self-Propelled Barge Award, which only had Perkins as a respondent, the largest vessel it had, the upper limit of its operation, so far as we can tell on the evidence, is 1630 dead weight tonnes. The inference is that that instrument not only did not, but, one would infer, was never intended to provide a salary for a vessel of the size that is now contemplated by the claim being advanced by Sea Swift. There is no evidence that they had anything even remotely close to a 5000 dead weight tonne vessel which would be paid in accordance with the salary scales outlined in that instrument. Again, this repeated

emphasis and reliance upon the Small Ships and Self-Propelled Barge Award is, frankly, utterly misplaced. It doesn't help them at all.

PN1547

Can I then ask you to focus upon what is actually important and that is the statutory criteria, section 156(3) and (4). Frankly, that is the central and insurmountable difficulty with the claim advanced by Sea Swift for their small ships schedule, and it is the same vice that one sees in the application brought by the institute in that respect. There is just no evidence that can possibly meet the criteria.

PN1548

Can I ask the Full Bench to go back to section 156 and this time can I ask the Full Bench to look at section 156(4) with a little more focus. What the Commission has to be satisfied of is that there are work value reasons to justify the variation. That is subsection (3). So what are work value reasons? Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work - a particular kind of work. So what we are here dealing with in the Sea Swift application is masters, engineers, mates, general purpose hands - I think I got that right this time - on vessels up to 5000 dead weight tonnes. Leave aside comparisons and the like. You have got no evidence from anyone, even Sea Swift that possibly meets those criteria. You have got no evidence about what any of those particular - to use the language of the provision - what people employed in that particular kind of work do on a vessel that size in any environment anywhere.

PN1549

The application fails in limine. It can't even get to the first limb of the comparator which is required by section 156(3), let alone there is no evidence about the work value considerations for vessels to 5000 dead weight tonnes or, for that matter, from 5000 dead weight tonnes to 19,000 dead weight tonnes, assuming they are dead weight tonnes in the Seagoing Award, that enables the sort of comparison to be drawn that says, "Well, some change needs to happen and this is what it is." The only thing which even comes remotely close to work value evidence, and I don't accept that it is, is Mr Ainscough's evidence. Perhaps if one wants to take a very general view of it, the documents that my client and Mr Keats' client and, indeed, even Mr Niven put in evidence, which are drawn from the competency schedules and the competency requirements from the NSCV system and the AMSA system, the Australian Regulated Vessel system, the international stream, they do no more than establish minimum criteria for the performance - sorry, I withdraw that - minimum criteria for securing certain certificates of competency and broad descriptions of work for people who hold particular certificates. That doesn't actually say anything about the frequency with which any particular duty is performed, the conditions under which that work is often performed and how it might differ from one class of vessel to the next, one dead weight tonnage to the next, nothing like that.

PN1550

All Mr Ainscough's evidence was, reduced down to its bare bones basics, is this: bigger ship, more complex operation systems, further away from shore, greater skill required, greater knowledge required in order to be able to properly carry out the vessels, and that's reflected in all of the certificates of competency scales.

That is not controversial but, by itself and without more, that is not work value evidence that engages in any way, shape or form with a 5000 dead weight tonne category as is trying to be advanced now by Sea Swift.

PN1551

There is no work value evidence, there are no work value reasons even articulated for each of the different classifications which are being advanced here by Sea Swift or by the institute. To the extent you have anything, to use masters and mates for the purposes of this submission, to the extent you know anything about the minimum knowledge requirements and the minimum skill requirements in order to hold those certificates of competencies - and I took Mr Ainscough through this in cross-examination and the Full Bench would no doubt have had the opportunity to follow it then, so I won't take you to them again now - nothing in the AMSA system or the National Domestic Commercial Vessel system latches onto this 5000 dead weight tonne delineation point at all. National Domestic Commercial Vessels, which is the scheme which centrally regulates Sea Swift's operations, doesn't use tonnage at all, so far as mates and masters are concerned, it works on the length of vessel and the operating environment for the vessel.

PN1552

To the extent that one can draw any parallels at all using the features of the regulatory scheme between length and tonnage, it relates to gross tonnage, which does not necessarily bear any particular relationship to dead weight tonnes and it is found in clause 3.5 of Part B of the National Commercial Vessel Scheme. You will recall I took Mr Bruno to that yesterday in cross-examination and he referred to a table which related tonnage to length of vessel. What it provides is an 80 metre-long vessel is to be understood in equivalent to a 3000 gross tonne vessel, if one had to apply one of the international standards. Again, no relationship at all - - -

PN1553

VICE PRESIDENT WATSON: What is the conversion of 3000 gross tonnes to dead weight tonnes?

PN1554

MR HOWELL: I don't know that there can be one. I don't know that there can be one for vessels generally. There is certainly no evidence about it, to start with. The second thing is, if I understood Mr Ainscough's evidence yesterday, you might well be able to do it, but you would need to know the type of vessel and other considerations. There is not a simple answer to your Honour's question of how does 3000 gross tonnes relate to dead weight tonnes because there is not necessarily a direct relationship of that kind.

PN1555

Again, to the extent that you can draw anything from any of those certificates of competency schemes, they engage in no way whatsoever with the claims made and advanced by Sea Swift. There is just nothing in the nature of work value evidence which is before the Commission that could permit the Commission to draw the jurisdictional prerequisite conclusion that is required before it is empowered to make any variation to a minimum wage as a part of this review.

PN1556

I note the time and I want to give Mr Herbert an opportunity to say what he needs to say in reply and the same for Mr Niven. Can I simply say with respect to the questions arising from the coverage claim, I rely upon the submissions that we have put in writing and otherwise the submissions which were advanced by Mr Keats. What is proposed by Sea Swift does not make the interaction of these various instruments clearer or more fair.

PN1557

Can I just one thing, which I think might be fairly characterised as the high point of Sea Swift's submissions in this connection. The current classification scale in the Seagoing Industry Award - sorry, I withdraw that. Sea Swift has a multifaceted business and we shouldn't have the terms and conditions of one part of that business regulated by terms and conditions which are set for a different part of that business for a different purpose. That has a superficial attraction to it, but, with respect, it is a superficial attraction.

PN1558

The starting point is the coverage schemes that exist in the three instruments presently before the Full Bench were created, in my respectful submission, one would infer from the history, quite deliberately by the Full Bench and there is nothing in the history which would enable this Full Bench to properly conclude, in my respectful submission, as your Honour had foreshadowed as a consideration right at the very outset, it is not a circumstance where one could legitimately infer, "Well, something just hasn't been properly looked at", there is nothing in the history of the award modernisation process which would permit one to come to that conclusion. Indeed, the history, as it is traced through Mr Keats' submissions, suggests quite the contrary.

PN1559

What's more than that, for the purposes of these proceedings, keeping in mind, of course, that each of them are presumed or the prima facie position is that they currently meet the modern awards objective, if there was an issue about the coverage that was a broader concern to industry, surely it would have been noticed at the time of the 2012 transitional review. No submission to that effect there. To the extent it might have somehow become a problem that someone appreciated at some point over the last six years in the industry more generally, there is no complaint here made by anyone other than Sea Swift, Sea Swift itself characterising its business, in part because it has such a diverse fleet, as unique. A single employer with a unique business is not a proper foundation for revisiting the coverage schemes created, we would say, one would infer quite deliberately by the Full Bench as a part of the award modernisation process. So, yes, there is a superficial attraction to that submission, but with the greatest of respect, in all the circumstances, it is not one which should be accepted. The Commission should not form the view, in my respectful submission, that it is necessary to make that change to the coverage provisions in order to ensure that the prima facie position as it stands today continues, that is, that these three instruments presently provide a fair and relevant minimum safety net of conditions.

PN1560

Unless the Commission has any questions for me, those are my submissions.

PN1561

VICE PRESIDENT WATSON: Thank you, Mr Howell.

PN1562

MR HERBERT: Excuse me, your Honour. Can I deal firstly with the question that was raised in the AIMPE submissions in relation to if the Commission has concerns about the precise details, obviously, of the slightly conflicting decisions or provisions sought by Sea Swift and AIMPE in relation to the 6000, 5000, whether tonnage or length of horsepower of engines ought to be the defining characteristic of the proposals we seek, might I repeat what I said yesterday and that is that we invite the Commission to refer such matters to a conference before a single member of the Full Bench in order to see if there is some common ground that can be reached between the parties in respect of that issue and with a number of other issues that arise. I will deal with them as I go through very briefly.

PN1563

As to the submissions by Mr Keats that the issues, firstly, in section 163 have not been addressed, section 163 only requires - and he did go on without addressing it himself - but section 163(1) requires only that:

PN1564

The Commission must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the Commission is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

PN1565

That, in effect, characterises exactly what we are asking the Commission to do, to ensure that they are covered by another modern award that is appropriate for them when it comes to the coverage issues, so I am not sure why it has been said that hasn't been addressed. One might have thought it went without saying. Similarly, the Commission must - - -

PN1566

DEPUTY PRESIDENT GOOLEY: Isn't it because it was suggested by the MUA's representative that, in fact, the way you have crafted the scope of the award actually means that people fall outside of modern awards?

PN1567

MR HERBERT: Yes. Can I say we disagree with that. I am not sure I understood that. None of that was put in the submissions. We had no notice that submission was going to be made and the way that it went around the circle, I had to say that I didn't understand that, but I certainly disagree with the conclusion that was reached. But in the event there is any infelicity in drafting in that regard, it is very clear to everybody concerned what it is that is intended by those clauses. If it turns out there may be some circularity in the way that they are crafted, as I say, it was not put in any of the written submissions so as to alert us to that possibility so that we could deal with it and in the course of the oral submissions, I must say, I lost the thread of what was being said and it didn't seem to - it seemed to be a very black armband view of the provisions and it wasn't one

which, in my submission, was correct. We certainly stand to be corrected in that regard because certainly, as we put endlessly in these proceedings, the intention is to make sure that all employees are covered by a modern award that is appropriate to them. We certainly don't wish any person to fall outside and we disagree with that.

PN1568

In relation to (2):

PN1569

The Commission must not make a modern award covering certain employers or employees unless the Commission has considered whether it should, instead, make a determination varying an existing modern award to cover them.

PN1570

There was an alternative to seek to have a small ships award made, but, of course, that would have immediately raised the question, "Well, what's wrong with varying the Seagoing Industry Award?" and the Commission is required to consider that and rather than erecting another obstacle in the path of what we were doing, we simply sought to vary the Seagoing Industry Award to save the Commission having to consider the alternative of making a new award. Subsection (3) does not appear to apply. So section 163 stands addressed.

PN1571

Section 156 I dealt with in my primary submissions. Can I say for clarity - I think it was picked up by subsequent submissions - but it was said by Mr Keats at one point that we confined our evidence of work value to Mr Ainscough. Of course, Mr Bruno - if I badly expressed that - I think that was in answer to a question from your Honour the Deputy President - of course we don't resile from the evidence of Mr Bruno as going to questions of work value as well and we did not confine ourselves to Mr Ainscough. I have to say that the subsequent submissions all addressed questions in relation to the evidence of Mr Bruno going to work values, so we do rely on that as well as that of Mr Ainscough.

PN1572

Can I very quickly deal with the reference made by Mr Keats to the history of what occurred in the 1980s in relation to Sea Swift. As I said yesterday, I am not sure why that was brought forward, but now having reread those decisions, it is rather propitious that Mr Keats did so because it tells the Commission a couple of things. The first thing is that contrary to my recollection of the situation from 26 years ago, not having read that material in any depth up until yesterday, in fact it is true, as Mr Keats said, that unions, including his client, sought to rope Sea Swift into the Self-Propelled Barge and Small Ships Award, along with half a dozen other operators who were performing similar work in the area and a section 41(1)(b) application, which became 111(1)(g), was made once that dispute was notified in order to seek to prevent that from occurring because Sea Swift was then operating under state awards and it wished to remain doing so.

PN1573

The interesting part, when one reads the authorities - and I won't ask you to look at them now - but if one reads the decision of Fogarty C, one of the grounds

advanced by the unions as to why it is that they were seeking to rope Sea Swift into that particular award as distinct from the MISA Award was because the union had a history, as did the Commission, of moulding award requirements, et cetera, around the particular requirements of the locality concerned and that was addressing the company's concerns about the fact that they were operating in a rather unusual part of the world and they had very particular requirements in relation to their industrial arrangements, and Fogarty C particularly referred to that characteristic as being a reason why the company shouldn't be so frightened of federal awards because they were able to be moulded to the circumstances of the case, which essentially is what we say about the Self-Propelled Barge and Small Ships Award, that that is what it was intended to be. It didn't suit Sea Swift on that day, but that's the way that it remained for the next 20 or 30 years.

PN1574

The second important thing, and this goes to one of the matters that was put forward by my learned friend Mr Howell, and that is it puts to death the notion that the Self-Propelled Barge and Small Ships Award was an enterprise award. Perkins Shipping, so far as I recall, wasn't even in existence at the time; it certainly isn't mentioned in the proceedings, but Mason Shipping, which was a division of John Burke Shipping, which was the big operator in North Queensland in that day, was then a respondent to the Self-Propelled Barge and Small Ships Award. I don't know if Perkins was a respondent to the award at that time or not, but Masons is named in those proceedings as being an existing respondent who appeared in the proceedings before Fogarty C, and there is no mention in the whole case of Perkins anywhere. If they did exist and they were a respondent, they certainly weren't involved in the proceeding.

PN1575

There were half a dozen other companies, as I say, who were attempted to be roped in. Because Sea Swift ultimately was - the determination to make a federal award was determined against them and then Sea Swift opted out of the arrangement by reconstructing their business so they no longer had any employees who were operating in the maritime space and they contracted out their vessels. I am not sure what happened after that in relation to the addition of other respondents. Maybe when we get the file out of Melbourne, we will know how many respondents were actually added to that award as a result of those proceedings. Sea Swift wasn't, but they weren't the only entity involved in those proceedings. But it certainly wasn't a Perkins Award, a Perkins Enterprise Award, or anything of that kind, at that time, and even the 1991 award, as I understand it, had at least two respondents, one of which I think was Perkins and there was a company called Barge Express in the award and was also a respondent to it. So it was a two-company award at that stage.

PN1576

The mere fact that, as a matter of history, companies went out of business and therefore presumably dropped off the respondency of this because they went out of business doesn't mean that the award was - we heard a brand new expression today, an "enterprise instrument" - it was no such thing, with respect, as those decisions that Mr Keats has brought along demonstrate, it was, in fact, the award which was touted by his client and others at the time as being an appropriate

emanation of the federal industrial system to cover the operations of Sea Swift and John Burke Shipping and the others that were operating in and around northern Australia and across the Northern Territory. That was what the proceedings were about, and the Full Bench subsequently upheld the contention that the Commission was perfectly entitled to make an award in that space to cover Sea Swift and it no doubt would have taken into account all of the circumstances of Sea Swift's operations, if one reads those decision.

PN1577

So, it actually suggests the opposite of what has been said by the two unions to my far left at the Bar table to the effect that you can't take anything at all from the Self-Propelled Barge and Small Ships Award, it is just - it's a Perkins-exclusive document and it's just one company. It is the only company that is standing, but that doesn't mean that it was an enterprise instrument of any kind and its origins were certainly not that.

PN1578

In relation to the question of the casual loading, as has now been put, the Marine Towage and Ports, Harbours Award do have a casual loading, and I stand corrected in relation to what I may have said yesterday that I thought the Ports, Harbours Award did not have a casual loading; it does. The provision that we have sought in relation to pro rata entitlements is actually derived from the Seagoing Industry Award and not the Ports, Harbours Award in respect of that, but were the matter to devolve to a question of whether it would be appropriate to have pro rata entitlements or a 25 per cent loading, again because the Commission is the determinate in relation to these things, it is not a matter of significant concern. Having the capacity to engage casual employees in order to meet the exigencies of the world in which they live is the issue which confronts my clients.

PN1579

So far as the AMOU submissions are concerned, again can I say that in relation to the suggestions that the Ports, Harbours and Enclosed Waters Vessels Award has absolutely nothing to say or do about these proceedings because it is an enterprise instrument and, as such, should be dealt with under some of the more exotic provisions in the Act that deal with enterprise instruments, that is just simply not true, in my submission, and reading the decisions put forward by the MUA where Fogarty C deals with some of the existing respondents of that award at the time and those who were being attempted to be made respondents to that award by those proceedings, it is very clear that isn't so.

PN1580

A submission was made that section 156(4) prevents the Commission from convening conferences to seek to reach a position in relation to the nature of the order, if any, it should make in relation to a variation of the Seagoing Award. In my submission, those submissions are just plainly wrong and they misconceive the role of the Commission in this regard. Sections 590 and 591 of the Act, which are expressly referred to in the Full Bench decision, the jurisdiction decision I mentioned yesterday as having a bearing upon this process, allow the Commission to inform itself as it considers appropriate, to paraphrase what those sections say.

PN1581

Under section 156(4), it focuses on the - I am sorry, my notes say 156(4) - I think it should have been 156(3):

PN1582

The Commission may make a determination varying modern award wages only if the Commission is satisfied the variation of modern award minimum wages is justified by work value reasons.

PN1583

My friend sought to persuade the Full Bench that those words meant that one needs to have the precise variation placed before the Commission, the Commission needs to look at that proposed variation and nothing else and must be satisfied that that particular variation is justified by work value reasons.

PN1584

In the course of the Commission determining whether and which variation it is going to make, that is, the nature of the order that it might propose to make, the Commission is entitled to inform itself about the propriety or the accuracy or the rectitude of any order it might ultimately make in the proceedings by, if necessary, convening a conference with a member of the Full Bench to investigate the question further as to whether tonnage or kilowatts or length or some combination of those matters may in fact be a more accurate depiction of what we would call the tipping point as between the small vessels and larger vessels or some other measure is more accurate rather than the admittedly blunt instrument of the 5000 tonne measure that we have proposed. That is not to say the Commission is immediately making a variation, but the Commission can proceed to widen the scope of its investigation into that question so as to inform itself, by procedures which it chooses for itself, to inquire into that question a little more deeply and see whether there is some common ground that can be reached, facilitated under the chairmanship of a member of this Full Bench, for example, in order to drill down into the issues that have been raised in these proceedings, and the Commission can do that without being ultimately satisfied as to the nature of the order it might make but only to further inquire as to whether it should make an order and, if so, the parameters of what that order might be and whether there is any more consensus that might be reached in relation to the terms of that order.

PN1585

It is not correct for my learned friend to say the Commission cannot reach a conclusion in principle that the matter requires further investigation and conferencing between the parties in order to determine that issue. What section 156(3) is concerned with is the nature of the order that the Commission makes at the end of that process, not at the end of this hearing, and an order cannot be made then unless the Commission is satisfied on work value principles. That is not, however, to say the Commission should not continue the fact-finding process that has been undertaken or certainly commenced in the course of this hearing. There is no substance in that submission.

PN1586

A submission was put that something ought to be made of the fact that no other employers have come forward to complain about the issues that have been raised by my client. That ignores the fact that MIAL is here representing 33 significant

employers in the industry who are members of that organisation and that it reports to the Commission that its members support what is being proposed. So, in that sense, 33 employers, including Sea Swift, who happens also to be a member of that organisation, have come forward and indicated their support for what has been proposed now the matter has been brought to their attention.

PN1587

My friend Mr Howell then went on to say and make something out of the uniqueness of Sea Swift's operation, which, of course, goes a long way to explain why it is that other employers who do not have this hybrid operation or this diverse operation that Sea Swift has would not necessarily have raised this question because they are not concerned about the question, their marine towage operations no doubt operate under the Marine Towage Award and not under the Seagoing Award. If they don't have a mixture of operations with a predominance of seagoing vessels, why would they come forward and complain about something in that sense that doesn't concern them and hasn't affected them, one asks rhetorically.

PN1588

The fact of the matter is, as we have sought to demonstrate in these proceedings, it does affect Sea Swift dramatically, and the tenor of the submission from my learned friend seemed to be that because Sea Swift's operation is unique means that, in effect, it is not entitled to considerations of fairness because its uniqueness deprives it of that. That seems to be the underpinning - - -

PN1589

DEPUTY PRESIDENT GOOLEY: Isn't the issue - these things just get conflated - which is that there's two parts to your theme. One is to be able to separate out your different parts of your business under the relevant awards.

PN1590

MR HERBERT: Yes.

PN1591

DEPUTY PRESIDENT GOOLEY: Then there is the other part of your business which is to vary the Seagoing Award to put in the small ships.

PN1592

MR HERBERT: Yes, that's right.

PN1593

DEPUTY PRESIDENT GOOLEY: I think what they are saying is there is nobody else - and there may not be anybody - but nobody else who operates ships that would fit into the category that you are seeking to carve out into the Seagoing Award has come along and said, "Well, the Seagoing Award is a problem for us because we have got small ships and we have to pay the up to 19,000 tonne rate."

PN1594

MR HERBERT: The fact that others, if there are others, firstly, are actually complying with the Seagoing Award, we simply don't know and, secondly, whether they might be tolerating it or they might be finding other ways around it

is not something that we can know and they are hardly likely to share with us what it is that is happening in that perspective.

PN1595

DEPUTY PRESIDENT GOOLEY: But I think the point is being made that industry awards have never been intended to be responsive to the particular needs of a particular individual and we don't craft the industry award so that we have got a section that deals with this employer and a section that deals with that employer, or even a section for an employer that operates in a particular state, for example.

PN1596

MR HERBERT: Yes, I understand that.

PN1597

DEPUTY PRESIDENT GOOLEY: So what they are saying is, "Well, where is the evidence, except for Sea Swift, that the Seagoing Award with its current classification structure is not meeting the modern award objective?"

PN1598

MR HERBERT: Sea Swift has only been able to generate the evidence as to how it affects Sea Swift and the fact that it is required by that award to pay the same safety net wages to its masters and engineers as does an ocean-going tanker company that has got a master 1 and a class 1 engineer, as the case may be, the absolute top line qualifications of an international seagoing vessel with 10 or 15-year qualifications.

PN1599

The safety net set for those persons under this award is the same as they have for a master 4 in the old money doing a two-day trip around to the Torres Strait Islands on a 200-tonne tonne barge. Put that way, and the qualifications required to do it and the place in which the work is to be done, no more than 10 miles off shore, travelling in between islands, et cetera, cetera, as compared to crossing the Pacific Ocean, all of those characteristics and criteria were set down by Mr Ainscough and Mr Bruno and in Mr Ainscough's schedule where he says the amount of training that has to be done in order to even step on board a 19,000 tonne ship compared to the training that needs to be done to actually qualify to drive the 200-tonne barge. In those circumstances, Sea Swift is able to say that to say there is the same safety net for those two classifications, assuming it is correct for the 19,000 tonne situation, it cannot also be correct for the situation with which they are faced, and if there is a ship that has got 2000 containers going to California as distinct from a barge that's got five containers going to an island 15 miles off Thursday Island, then all of the criteria, both the environment in which it occurs, the income-generation capacity of the vessel, the training required to do it, the number of people in the crew, the complexity of the vessel, et cetera, et cetera, the sheltered water conditions, all suggest that the same safety net cannot apply to those two persons.

PN1600

If nobody else chooses to complain about it, that is regrettable from our point of view, but Sea Swift certainly is and it is saying as loudly as it can politely, "That must be wrong", and if other people in the industry don't feel aggrieved by that or

they are not complying with it or they don't care or whatever the case may be, that is as may be, but that doesn't mean that Sea Swift is not being aggrieved by the situation.

PN1601

I can't put it any higher than that. It is an industry award - one accepts that - and undoubtedly there will be somebody out there who may well be affected by what is proposed and they might be the beneficiary of that without having taken any action, but if it's wrong, it's wrong is all we can say and we seek to have it reduced.

PN1602

The second-last thing in relation to the AMOU submissions - I return again because I am dealing with matters in the order in which my friend did - and he returned to the Self-Propelled Barge and Small Ships Award and sought to persuade the Commission that it is not an arbitrated standard because he said, and quite wrongly, that it was only - I think he purported to give the impression that it, in effect, had only ever been a single employer award and for the reasons that appear on the basis of the materials before the Commission, that is not correct.

PN1603

The question of whether it was an arbitrated standard, that is, whether the relativities set in that award by reference to the sort of vessels that are being covered from, in effect zero to 1600 tonnes going to sea in relation to those vessels and, certainly in recent times, that was the extent of the Perkins vessels, and it is not before the Commission the size of the vessels of the previous respondents, being Mason Shipping and Barge Express and the others who were previously a respondent to that award, but although it is true, as I said yesterday and I think again this morning, the question of the respondency to federal awards control these matters, it is important to understand, and I think my friend endeavoured not to answer the question, but in the hypothetical situation which you, Deputy President, put to him, "What if, hypothetically, the federal unions had sought to rope a shipping company into an existing federal award, if it wasn't the Self-Propelled Barge and Small Ships Award because of the circumstances, what would it be?", it would have only been the MISA Award at that time.

PN1604

It is interesting to note that when the major roping in exercise was undertaken in the late 1980s with varying degrees of success, it was not into the MISA Award, it was into the Self-Propelled Barge and Small Ships Award. The two stood separately and apart. The same unions were respondents to both, were union parties to both and in their choice as to the most appropriate award regulation for small vessels operating in that part of the world, they chose the Self-Propelled Barge and Small Ships Award and it was subject to the research that was undertaken, we assume, the subject of the setting of proper relativities in relation to the minimum rates in that award, and that was done, as I apprehend it, at a time when it had more than one respondent to the award, and whether ultimately things were done by consent or not perhaps doesn't matter; the question will be whether it has been set as being an appropriate minimum standard.

PN1605

What we draw from that is to say that there has now, since the early 1980s, been a recognition by the unions and by this Commission that small ships and self-propelled barges operating in this part of the world were entitled to be treated differently than the bald application of the Maritime Industry Seagoing Award provisions, and the Self-Propelled Barge and Small Ships Award was apparently developed for that purpose and small operators, including Sea Swift, were either roped into that award or attempted to be roped into that award at the time.

PN1606

That is a very important matter to be taken into account in assessing questions as to whether there is, and was, a comparable work value study in relation to the question of the arbitration of the wage rates applicable to that kind of work in that location and if the Self-Propelled Barge and Small Ships Award is taken to be that, in addition to the other evidence we have called in these proceedings, that provides sufficient justification, in my submission, for the Commission to be satisfied that the matter, at the very least, requires some further investigation with the parties and the assistance of the Commission as to the point at which the continuation of a standard of that kind within the federal maritime award rubric should be affected by the sorts of orders that we have asked for. That is the main use that can be used from that award. We have not sought to introduce those conditions into the award because that would be, in effect, seeking to resuscitate and old award which the Commission has terminated and we have tried to minimise the number of problems that we may have in this matter, which is why we sought that the changes be made in the context of an award which the Commission has made, but that they reflect the fact that the Commission, for a very long time now, has accepted that the flagship Seagoing Award has, for a long time, been accepted as not being the appropriate standard for vessels in this area and that position should be continued by granting something in the order of the relief that we seek, subject, as we say, to further conferencing between the parties.

PN1607

Unless there is anything further, those are my submissions.

PN1608

VICE PRESIDENT WATSON: Thank you, Mr Herbert.

PN1609

MR HERBERT: Thank you, your Honour.

PN1610

MR HOWELL: Your Honour, I rise just very briefly. There is just one thing I should address from something which Mr Herbert has said. It relates to the operation of section 156(3). If I understood what fell from my friend, what he is inviting this Full Bench to do is to undertake some further factual inquiry process and, for that purpose, to refer everybody off for some further conferencing about that. On behalf of my client, I oppose that. That is what this hearing was supposed to be. They had their chance to put on their evidence, everyone else who was potentially interested had their opportunity to put on their evidence. It is their case to prove. These provisions are presumed to be a fair and relevant safety net. They have not identified anything that has changed in the interim. In my respectful submission, the chance for the factual inquiry that my friend invites is

now. We have already had nearly two years of conferencing in an effort to try and get to an agreed position. That is why this Full Bench was constituted. There should not be a further referral off for a factual inquiry.

PN1611

VICE PRESIDENT WATSON: Mr Niven?

PN1612

MR NIVEN: Thank you, your Honours. I will be brief in my response. Those opposing our claims have been relying on the argument that the work value or evidence of the work value is not sufficient to satisfy the Commission or is lacking. In relation to the relativity claim for the Ports, Harbours Award, the work value evidence supporting the claim is the transitional instruments that were used in forming the Ports, Harbours Award itself, and those transitional instruments, as I outlined in my submission, demonstrated that the relativity between the masters and engineers was struck at a level which was too low. The Act requires that the Commission be satisfied that there are work value reasons and the Commission can be satisfied, based on the evidence we presented in relation to the relativities in the transitional instruments, that the rate struck in the Ports, Harbours Award was well below any of those transitional instruments. The Commission can be satisfied that there are reasons that are related to a work value reason.

PN1613

Mention was also made of section 156(4) and (a), (b), (c), the three reasons. The Commission only needs to be satisfied for "any" of the following, certainly not "all" of the following and, again, I submit that we respond by saying that the Commission can be satisfied that there are sufficient work value reasons for the claim we make in relation to the relativity between masters and engineers in the application, and also that the alternative suggestion we made was made in good faith as a way of providing an alternative resolution to that particular issue.

PN1614

In relation to the small ships issue and the points that were raised in relation to the fact that no-one had come forward, either now or at other opportunities such as the 2012 review, I respond by saying that AIMPE, when considering and making the claim for a small ships schedule, recognised in what is now 2016 that there have been unintended consequences of what was struck back in 2010 and we should be recognised for making that distinction and recognising what we see as the unintended consequence of something that we did, as the evidence demonstrates, agitate for back then, but we now recognise, with the benefit of hindsight, what that has resulted in.

PN1615

The evidence in relation to the work value and in relation to the small ships, the evidence I presented is evidence that demonstrates the distinction between the qualifications for engineers working on the big ships compared with the smaller ships and, again, the classification for zero to 19,000 tonnes - 19,000 tonnes is the larger ships - and the ships we are talking about for the small ships schedule would be ships that are regulated more by the National Standard for Commercial Vessels and the schedules in the existing award properly reflect the STCW standards and classifications.

PN1616

Again, there is evidence on the record in relation to the work value and the distinction between the qualifications, the skills and the duties for what we would say is the class for when you are coastal compared to class 1 and class 2.

PN1617

Unless there are any further questions, I will conclude my response there.

PN1618

VICE PRESIDENT WATSON: Thank you, Mr Niven. We thank counsel and the representatives for their submissions in this matter. We will reserve our decision.

PN1619

MR HERBERT: Might I ask about the question of the research that we are going to provide about the Small Ships Award that was raised?

PN1620

VICE PRESIDENT WATSON: Yes.

PN1621

MR HERBERT: We obviously don't know yet how long that would take. We understand we have to ask for that material to be taken out of archives and sent to another Registry so that we can see it. When we know that, can we communicate with your chambers, your Honour, and with other parties, of course, about the timeframe?

PN1622

VICE PRESIDENT WATSON: Yes, and clearly it would be appropriate for the other parties to be given an opportunity to make submissions about any further material you put forward.

PN1623

MR HERBERT: Yes, certainly. We can't ask the Commission for a timeframe for doing all that because we don't know how long the Registry will take.

PN1624

VICE PRESIDENT WATSON: No, that is understood.

PN1625

MR HERBERT: They probably keep it in Perth or somewhere.

PN1626

DEPUTY PRESIDENT GOOLEY: It doesn't actually take very long.

PN1627

MR FREDERICKS: One further administrative point. We assume that Cambridge C's chambers will be in contact with the parties about a proposed conference date?

PN1628

MR HERBERT: I think we have to get in contact with them.

PN1629

VICE PRESIDENT WATSON: Yes, you can assume that. We will now adjourn the proceedings.

ADJOURNED INDEFINITELY [3.28 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs