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Associate to the Hon Justice Ross AO

Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

By email: chambers.ross.j@fwc.com.au; amod@fwc.gov.au

Dear Associate

**RE: 4 YEARLY REVIEW – PORTS, HARBOURS AND ENCLOSED WATER
VESSELS AWARD 2010
AM2014/241**

We are the solicitors for the Maritime Union of Australia (MUA).

We are instructed to provide the following responses to the questions posed in the exposure draft of the above award.

- 1. Clause 6.4(h) - Parties are asked to make submissions on how clause 6.4(h) applies. In particular, how does a part-time employee work additional hours that aren't overtime hours?**

Clause 6.4(h) is a requirement that for part time employees all time worked in excess of the hours as mutually arranged, excluding any additional hours, will be overtime.

This provision was sourced from clause 10 of AN120376 – New South Wales Port Corporations Award 2001. The inclusion of the words “excluding any additional hours” in the context of a modern award is confusing. Accordingly it is proposed that those words be deleted.

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2. Clause 8.1 - Parties should make submissions to clarify which of the breaks in clauses 8.2 to 8.4 are paid and which are unpaid.

The provisions of the modern award in relation to breaks was sourced from clause 20 of the Maritime Union of Australia (Ship Services) Award 2002 - AP816677. That award did not specify which of the breaks are paid breaks.

We propose that:

- (a) the one hour breakfast break be unpaid. This is consistent with the option to convert it into a 20 minute paid rest period.
- (b) The 45 minute lunch break is unpaid; and
- (c) The tea break is unpaid.

3. Clause 9.1 - Parties are asked to clarify payment for a crane driver at 20 tonnes

The rate of pay for the crane driver is sourced from the Motor Boats and Small Tugs (State) Award (AN120350). That award only provided for rates of pay for operating a crane under 20 tonnes or over 20 tonnes. We propose that a crane driver of a 20 tonne crane be paid the higher rate. Accordingly the description should be amended to read "Crane Driver (20 tonnes or over)"

4. Clause 9.1 - Parties are asked whether classification definitions should be inserted in this award.

This was an issue that was raised at the time the award was first made. We remain of the view that classification definitions should not be inserted into the award.

5. Clause 10.1(e) - Parties are asked whether the allowances in clauses 10.1(e), (f) & (o) should be classed as expense related allowances and varied in line with the relevant CPI group?

The allowance for uniforms (clause 10.1(e)) and compensation for loss of personnel effects (clause 10.1(f)) should be classed as expense related allowances. The allowance for waiting orders (clause 10.1(o)) is a work related allowance.

6. Clause 10.1(j) - This award does not provide for junior rates or a definition of junior. Should the allowance in clause 10.1(j) apply to all employees?

Yes. We propose that the words "A junior" be replaced by the word "An".

7. Clause 10.1(o)(i) - Parties are asked whether clause 10.1(o) should be updated to take into account mobile phones.

The Maritime Union of Australia considers that the monetary allowance for being required to telephone for orders should remain and not be replaced with a requirement that the employer provide a mobile phone.

8. Clause 10.1(p)(iii) - Parties are asked whether the references to “normal wage” in clause 10.1(p)(iii) should be to “ordinary hourly rate”

We propose that the words “normal wage for each day” be replaced with the words “ordinary rate of pay for each day”. This reflects the updated language of the modern award. The proposed reference to “hourly rate” is inconsistent with the fact that it is paid for each day.

9. Clause 10.2(i)(iv) - In clause 10.2(i)(ii), parties are asked whether “attendances” can be replaced by an alternative word or term.

The word “attendances” can be deleted.

10. Clause 12.2 - Parties are asked whether the span of ordinary hours in clause 7.2 should also be defined to clarify under what circumstances an employee can work ‘ordinary hours’ on a weekend

We repeat our submissions of 28 May 2015 (updating the clause references) namely:

The span of ordinary hours of work is set by clause 7.2. That clause is in these terms:

Ordinary hours may be worked between 6.00 am and 6.00 pm for up to eight hours per day, Monday to Friday inclusive.

This clause makes it clear that work on Saturday and Sunday falls outside the span of ordinary hours. Unfortunately the clauses providing for the payment of penalty rates on Saturdays and Sundays make reference to ordinary hours. We suggest that this contradiction be clarified by making the changes marked below:

12.2 Employees will be paid the following rates for all overtime and work on the or ordinary weekend work at the following rates:

		% of ordinary hourly rate
Overtime		
Monday to Friday	First three hours	150
	After three hours	200
Ordinary hours and overtime Weekend and Public Holidays		
Saturday		150
Sunday		200
Public holiday		250

11. **Clause 13.2 - Parties are asked to make submissions on which rates apply to shift work on weekends. Issue of how the casual loading applies in relation to shiftwork and weekend penalties has been referred to AM2014/197.**

We repeat our submissions of 28 May 2015 namely:

Clause 10.3(b) of the current award is in these terms:

A casual employee working within the ordinary hours of work pursuant to clause 18 will be paid per hour for the work performed plus 25% loading which incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances. (our emphasis)

The award is clear that the casual loading is not in substitution of either the overtime rates or the shift work allowances. The casual loading is in addition to the overtime rates or the shift work allowances. No amendment of the award is required.

We are concerned, however, that the FWO considers that the wording is unclear. In those circumstances and to ensure that the award is easy to understand we propose that the clause 10.3(b) be amended as marked below:

~~A casual employee working within the ordinary hours of work pursuant to clause 18 will be paid per hour for the work performed plus 25% loading which incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances.~~ Overtime and shift allowances are to be paid in addition to the casual loading.

In the exposure draft we propose that clause 6.59(b)(ii) be amended by adding the words "Overtime and shift allowances are to be paid in addition to the casual loading." At the end of the clause.

Additional matters

1. In clause 3.2 the words "above awards" no longer identifies any awards as they have been relocated. We suggest that the words "above awards" be replaced with the words "awards identified in clause 3.3."
2. On 12 April 2016 Livingstones, the agent for Sea Swift Pty Ltd, provided the FWC with a draft determination seeking to vary this award in a number of significant respects, including coverage and wage classifications. The draft determination is proposed to be supported by submissions that have not yet been received. The proposed determination is opposed in its entirety and we will respond to any submissions in support of the determination in our reply submissions that are due on 5 May 2016.

Yours faithfully,
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