

FAIR WORK COMMISSION

Matter No: AM2017/51

Submissions in Reply on behalf of Maritime Industry Australia Ltd

1. This submission in reply to the submission dated 26 April 2019 on behalf of the Construction, Forestry, Maritime, Mining and Energy Union – The Maritime Union of Australia Division (**CFMMEU**) is provided by Maritime Industry Australia Ltd (**MIAL**), an industry peak body representing vessel owners, operators and employers across the maritime industry, pursuant to the Directions published on 15 March 2019 in respect of overtime for casuals.¹
2. MIAL's interest in this matter relates to the following modern awards:
 - a. Marine Towage Award 2010 (**Towage Award**);
 - b. Dredging Industry Award 2010 (**Dredging Award**);
 - c. Ports, Harbours and Enclosed Water Vessels Award 2010 (**Ports and Harbours Award**); and
 - d. Professional Diving Industry (Industrial) Award 2010 (**Diving Award**).

Casual entitlement to overtime in these awards

3. MIAL understands these proceedings have commenced due to potential ambiguity regarding the payment of overtime to casuals in the awards identified as part of the four yearly modern award review.²
4. The Commission has previously noted that the position on whether any overtime penalty rates for casual employees should be in addition to, or in substitution for, casual loading in pre-existing awards and instruments was somewhat mixed, with no clear predominant position emerging.³ It is MIAL's position that in the absence of a clear intention that overtime rates be paid in addition to a casual loading, then no variation to the modern award is necessary to achieve the modern award objectives contained in s 134 of the *Fair Work Act 2009* (**FW Act**).
5. In the event the Commission finds that an ambiguity currently exists, any variation proposed should only resolve the ambiguity to the extent of it. MIAL is concerned that the variations proposed by the CFMMEU predetermine that an ambiguity exists and that the awards to

¹ [Directions](#), 4 yearly review of modern awards – Overtime for casuals – AM2017/51 (15 March 2019).

² Statement, 4 yearly review of modern awards – AM2017/51 (4 December 2017); and Issues paper, 4 yearly review of modern awards – Overtime for casual, AM2017/51 (5 February 2019).

³ *Australian Municipal, Administrative, Clerical and Services Union (ASU) v Jobs Australia & Aged and Community Services Association of NSW and ACT Incorporated and Others* [2014] FWCFB 379 (4 March 2014) at [42].

which it proposes variations currently provide for casuals to receive both an overtime rate and casual loading. MIAL does not agree that all the awards in which it has an interest currently provide casuals with an entitlement to overtime.

6. MIAL notes that predecessor instruments of the abovementioned awards did not specifically provide for casual employees to receive overtime penalties in addition to the casual loading. For example, the Marine Industry Federal Awards, which include the Dredging Industry (AWU) Award 1998, Marine Engineers (Non propelled) Dredge Award 1998, Maritime Industry Dredging Award 1998 and the Tug and Barge Industry (Interim) Award 2002 did not make reference to overtime applying to casual employees.⁴
7. The Commission has historically taken the approach that the most common provisions in pre-existing modern awards were usually adopted unless there was good reason to the contrary.⁵
8. MIAL notes that a majority of its members, who operate in the maritime industry, have their own enterprise agreements such that employees, including any casuals, are paid above the award minimum or are at least better off overall under the enterprise agreement. This makes it difficult to apply a historical benchmark of how the award was applied. MIAL is also unaware whether its members applying award conditions under the Towage Award provide overtime for casuals.
9. The draft determination of 5 February 2019 as modified by the CFMMEU assume an entitlement which has not been established through evidence of past industry practice or previous award entitlements provided for in pre-reform awards. Instead, they rely on a decision specific to industry sectors being the Hospitality Award, Restaurants Award and the Clubs Award to assert that other classes of award employees should also be entitled to overtime payments for casuals.⁶ With respect, the decision they rely on considers evidence of those industries and does not consider the specific nuances of the industries of the Towage Award, Dredging Award, Ports and Harbours Award or the Diving Award.
10. Where a variation provides an additional benefit for a class of employees, in this case casuals, employers will assume an equivalent burden. Certain parts of the maritime industry engage high levels of casual employees particularly where work is seasonal or work is remote and infrequent. Particularly in remote areas, increasing employment costs for employers of casual employees will likely have an adverse effect on employment in those regional and remote areas.
11. MIAL considers that the FW Act requires the Commission to ensure that together with the national employment standards, modern awards provide a fair and relevant minimum safety net of terms and conditions, including the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.⁷
12. MIAL therefore provides the following submissions.

⁴ Marine Industry Comparison – Federal Awards – Type of Employment; Marine Industry Comparison – Federal Awards – Overtime Rates < <http://www.airc.gov.au/awardmod/research/maritime.htm#specific> >.

⁵ *Modern Awards Review 2012 - Penalty Rates* [2013] FWCFB 1635 at [32] referenced in *ASU v Jobs Australia & Aged and Community Services Association of NSW and ACT Incorporated and Others* [2014] FWCFB 379 (4 March 2014) at [37].

⁶ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 (5 July 2017).

⁷ Section 134(1)(f) Fair Work Act 2009 (Cth).

Towage Award

13. MIAL notes that clause 13.3(b) of the current Towage Award provides that *“the casual loading is paid instead of annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment”*. While the casual loading is not specifically said to include overtime, the loading is said to be paid instead of *“other attributes of full time or part time employment”*.
14. Paragraph 25 of the CFMMEU’s submissions are an inaccurate conclusion given that:
 - a. The Towage Award does not include a provision in the current award, nor the Exposure Draft, that *“provides that the casual loading is not in compensation of overtime payments”* as claimed in their submissions; and
 - b. There is no specific provision in the current award or the Exposure Draft which confirms that *“the overtime provisions in clause 13.1 apply to an employee regardless of whether they are a casual”*, as taken from their submissions.
15. The payment of overtime could be said to be an attribute of full time or part time employment as compensation for working hours other than, and in addition to, those that they regularly work. Casual employees’ work and rosters are spasmodic and inherently unpredictable, which is why a casual loading compensates for all hours worked.
16. There is no specific reference to overtime as being part of the casual loading in clause 22 (overtime and penalty rates) of the current award or in the Exposure Draft.
17. Accordingly, it is unclear whether it was intended that payment of overtime in addition to a casual loading is a feature of this award, meaning the variation as proposed by the CFMMEU represents a substantive variation, which should only be made if necessary to achieve the modern award objectives.

Dredging Award and the Ports and Harbours Award

18. For the Dredging Award and the Ports and Harbours Award, MIAL opposes the CFMMEU’s submissions given MIAL contends that there is little to no ambiguity in these two awards.
19. Clause 10.4(b) and clause 10.3(b) of these current awards respectively already provide that a casual employee *“...will be paid per hour for the work performed plus [a] 25% loading which incorporates the casual employee’s entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances”* (emphasis added).
20. MIAL contends that these respective clauses provide plain and unambiguous meaning that a casual employee is entitled to overtime payment in addition to the 25% casual loading such that no additional changes are needed to these awards.

Diving Award

21. For the Diving Award, MIAL notes that the current award at clauses 21.1(b) and 21.2 already specify when overtime rates apply to employees, with no exclusion of casual employees.
22. In addition, the Exposure Draft at clause 23.2 includes rates for *“casual overtime rate % of the casual hourly rate”* clarifying that the *“casual hourly rate is in clause 6.3 and includes the casual loading which constitutes part of the casual employee’s all purpose rate”*.

23. There is therefore no ambiguity needing to be addressed in this award.

Submitted on behalf of

A handwritten signature in black ink, appearing to read "T. Papaniz". The signature is written in a cursive style with a large initial 'T' and a long, sweeping underline.

Maritime Industry Australia Ltd
30 May 2019