



AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.576E - Procedure for carrying out award modernisation process

**Request from the Minister for Employment and Workplace Relations (as revised)
Award modernisation**

**Submission of the Australian Mines and Metals Association regarding award
modernisation for the Seagoing Industry Award 2010**

September 2009

Introduction

- 1 The Australian Mines and Metals Association (the “AMMA”) make this submission in relation to the modern award for the maritime seagoing industry.
- 2 This submission has regard to, and addresses, the following matters:
 - A) the principles of the award modernisation process and the Commission’s obligations under Part 10A of the *Workplace Relations Act 1996* (Cth) (the “WRA”);
 - B) the exposure draft of the *Seagoing Industry Award 2010* issued by the Commission on 22 May 2009 (the “exposure draft”); and
 - C) the Request from the Minister for Employment and Workplace Relations (the “Request”), as varied. Specifically, this submission addresses the variation to the Request on 17 August 2009 (the “variation”) which relates directly to the maritime seagoing industry.

3 This submission is to be read in conjunction with the submissions filed by AMMA and the Australian Shipowners Association (the "ASA") on 17 March 2009 and 15 June 2009 and oral submission on 19 March 2009.

Effect of the Variation to the Ministerial Request

4 The variation to the Request on 17 August 2009, introduced a substantial change to the application of the modern award by extending award regulation to cover employers and employees on permit ships, which historically has been a section of the maritime seagoing industry that has not been covered by Australian workplace relations law.

5 The coverage of the current *Maritime Industry Seagoing Award 1999* applied to vessels trading as cargo or passenger vessels which in the course of such trade, proceed to sea. The definition of coasting trade within the *Navigation Act 1912* meant that the award applied, or had capacity to apply, to licensed ships (as these ships are deemed to be engaged in the coasting trade) but not to permit ships (as these ships are not deemed to be in the coasting trade).

6 Therefore, the variation extends coverage to ships that were not previously regulated by the award. The variation requires, among other things, that the Commission give consideration to:

- A) the circumstances and needs of the employers and employees in the areas described in the regulations; and
- B) whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements having regard to the needs of those who may be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction.

7 In our view, as stated in our previous submission on 17 March 2009, the award modernisation process should not introduce from one branch or sector of the industry to the other, particular terms or conditions that have a different background, form, content or structure or regulate different methods of work. If this was to occur, this could adversely affect cost structures, leave arrangements, and flexibilities that have been specifically tailored for the industry. This would be contrary to the requirements of s576A 2(c) of the WRA and s2 (c) and (d) of the Request which requires that the award

modernisation process does not disadvantage employees or increase costs for employers.

- 8 Given that permit ships have not historically been regulated by Australian workplace relations law and the award system, the extension of the modern award to permit ships, would have the effect of introducing terms and conditions from that part of the industry historically regulated by the award system to those that were not previously regulated.
- 9 AMMA supports the view that has been advocated by ASA that issues surrounding the levelling of the playing field between Australian and foreign shipowners should be dealt with through amendment to the system of cabotage that operates in Australia as provided for in Part VI of the *Navigation Act 1912*, rather than via employment law.
- 10 The permit system was originally crafted to fill gaps where there are no Australian licensed ships available. If the permit system is not being utilised in accordance with its original intent then again this situation should be resolved through amendment to the cabotage regime not by increasing the cost of foreign ships undertaking tasks for which there are no Australian licensed ships available.
- 11 The Government is considering a range of policy initiatives that are inextricably linked. Development of an entire package that considers all the issues associated with provision of domestic Australian shipping services would provide a much more robust base on which to consider the impacts of changes to employment law coverage. Consideration of this matter in isolation of the broader policy package makes it difficult to assess the appropriate application of the modern award to the various vessel types.
- 12 Despite the above, AMMA acknowledges the decision of the Minister to extend the application of the *Fair Work Act 2009* (the "FWA") to all permit ships. Therefore, AMMA has attempted to develop a draft modern award that accommodates the Request whilst continuing to recognise the historical boundaries of this industry in order that it does not unduly create impractical terms and conditions of employment or jeopardise the sustainability and flexibility in employment arrangements of permit ships operating within Australia.

Draft Modern Award

- 13 In developing its draft modern award, AMMA have used the exposure draft issued by the Commission on 22 May 2009, and incorporated certain definitions, terms and conditions it feels are necessary to address the extension of coverage of the modern award to permit ships.

Definitions

- 14 The first modifications required to the exposure draft as a result of the variation are to include a set of definitions that describe the range of ships that are now covered by the modern award, which are drawn from existing parameters in the *Navigation Act 1912*.

15 Licensed ship

- A) A licensed ship is a ship to which a licence has been granted under section 288 of the *Navigation Act 1912* which is either Australian or foreign flagged.
- B) Licensed ships have permanent coverage to operate throughout the Australian domestic market.
- C) The proposed definition for inclusion in the modern award is:
licensed ship means a ship (a) to which a licence has been granted under section 288 of the *Navigation Act 1912*, (b) for which the licence is in force, and (c) which is operation under the licence.

16 Continuing Voyage Permits (CVPs)

- A) A continuing voyage permit (CVP) is a permit that allows ships to carry domestic cargo between interstate Australian ports for a period of up to three months. A new CVP can only be issued once the ship has left Australia for a port outside Australia.
- B) The proposed definition for inclusion in the modern award is:
continuous voyage permit (CVP) means a permit which has been granted under section 286 of the *Navigation Act 1912* that allows ships to carry domestic cargo between interstate Australian ports and that have a life of three months and are only reissued after the ship has left Australia for a port outside Australia

17 Single Voyage Permits (SVPs)

A) A single voyage permit (SVP) is a permit that is available to carry domestic cargo in a “single voyage” – that is, from one Australian port to another Australian port.

B) The proposed definition for inclusion in the modern award is:

single voyage permit (SVP) means a permit which has been granted under section 286 of the Navigation Act 1912 that allows ships to carry domestic cargo from one Australian port to another Australian port in one trip

Coverage

18 As previously stated, the historical regulation of the maritime seagoing industry has been such that all permit ships were not covered by Australian workplace relations law. This was a result of consideration for the unique nature of permit ships and their role in the Australian economy to fill gaps where there were no Australian licensed ships available to carry out the work.

19 Given that the award now extends to both licensed and permit ships, it is AMMA's position that differentiation between the two be made within the award and that the draft award be separated into two main parts:

A) Part A to cover licensed ships; and

B) Part B to cover permit ships.

20 A copy of the draft award is provided at Appendix 2.

Part A

21 As already stated, licensed ships are those that have been, or have been capable of being, covered by traditional award regulation. Therefore, it is the proposal of AMMA that the terms and conditions as provided in the exposure draft, should continue to apply to licensed ships.

22 In the attached draft modern award, the provisions of Part A remain the same as the exposure draft issued by the Commission. AMMA submits however, that an extension of the current classifications in the modern award is required to reflect the composition of international crew. This requires that classifications are inserted, such as Able Seaman, Ordinary Seaman and Greaser, and AMMA have included these in the attached draft.

Part B

- 23 Consistent with the view that the award modernisation process continues to recognise the historical boundaries of this industry and taking into consideration the numerous difficulties and challenges of permit ships complying with unnecessary regulatory burden, AMMA proposes that Part B of the draft award applies to permit ships.
- 24 This part of the draft award refers to the terms and conditions of employment set in accordance with the International Transport Federation Standard Collective Agreement (the “*ITF Agreement*”). The ITF Agreement guarantees the basic rights of these employees and represents a practical and reasonable approach to the unique employment situation of foreign seafarers.
- 25 A copy of the ITF Agreement is at Appendix 3.
- 26 The conditions of the NES (where they can apply to a foreign resident) are met by the ITF Agreement, as illustrated below. Therefore, maintaining the ITF Agreement as the minimum terms and conditions of employment for permit ships preserves both the industry standards and the Australian minimum conditions provided for by the FWA and does not unduly increase regulatory burden for such ships.

Leave and the NES

- 27 The leave provisions in the NES include annual leave, personal/carer’s leave, compassionate leave, community service leave, public holidays and parental leave.
- 28 The provisions within the ITF Agreement give full effect to the minimum entitlements under the NES to annual leave, personal/carer’s leave and public holidays.
- 29 Annual leave
Section 18 of the ITF Agreement provides seven days of leave for each month of service, which is an annual entitlement of 84 days of leave. The entitlement under the NES for annual leave is 4 weeks (or 5 weeks for shift workers). Therefore, the ITF Standard Agreement provides a significantly greater entitlement than the NES.

30 Personal/carer's leave

Section 17 of the ITF Standard Agreement also provides up to 130 days sick pay following repatriation due to sickness or injury, which exceeds the NES requirement of 10 days sick leave per annum.

31 Public holidays

The ITF Agreement includes provisions for public holidays. Section 9 of the ITF Agreement outlines those days which are to be recognised as public holidays and section 6 provides overtime for work performed on public holidays. These provisions therefore meet the NES provisions.

32 Community service leave

Given the nature of permit ships and the occasional Australian jurisdictional coverage of employees engaged on such ships, the NES entitlement to community service leave would not apply to these employees.

33 Parental leave

In the case of parental leave, section 31 of the ITF Agreements includes provision for paid maternity leave of 100 days basic pay. Section 31 also requires that the seafarer is given priority in filling a suitable vacancy in the same or equivalent period within three years following the birth of a child.

Other provisions of the NES

34 Maximum weekly hours

The NES allows employees to refuse additional hours beyond 38 hours per week for full-time employees. Generally speaking foreign seafarers on ITF Agreements are engaged to work between 40 to 44 hours per week. AMMA notes the provisions for determining whether the refusal to work additional hours is unreasonable such as the needs of the workplace or enterprise in which the employee is employed and the usual patterns of work in the industry (section 62 of the FWA).

As with Part A of the proposed modern award, the needs of permit ships and the usual patterns of work in this industry are such that hours of work are averaged over a 52 week period and for periods of work on-duty, employees are required to work additional hours beyond 38 hours per week.

35 Request for flexible working arrangements

The NES entitles employees the right to request a change in working arrangements for parents of children under 18 or with a disability. Once again, given the nature of the workplace, this provision is not applicable to seafarers, whether on licensed ships or permit ships, in that when they are on-duty they are away from home and it is impractical to offer flexible work arrangements.

36 Notice of termination and redundancy pay

The NES requires that employees are provided with written notice on termination of employment and redundancy payments, where a redundancy situation exists, based on years of service. Section 27 of the ITF Agreement outlines certain parameters around termination of employment that are consistent with, or better than, the NES provisions, including compensation of two months pay upon termination.

37 Fair Work Information Statement

The NES requires employers to give a new employee a copy of the Fair Work Information Statement. AMMA submits that it is impractical for foreign employers to comply with this standard.

Conclusion

38 As mentioned consistently throughout this submission, AMMA has been mindful of the principles outlined in the Request and various other statements of government in relation to the award modernisation process.

39 The submission and proposed draft award has aimed to balance the intention of Government to provide a fair safety net for seafarers working in Australia whilst not unduly disadvantaging employees or increasing costs for employers.

40 Subsequently, AMMA/ASA contends that this submission, whilst not representing the ideal resolution to the system of cabotage that operates within Australia, goes a long way to introducing a practical, fair and reasonable approach to workplace regulation in one of the most difficult industries to legislate.