

[2017] FWCFB 6918
FAIR WORK COMMISSION

STATEMENT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Professional Diving Industry (Industrial) Award 2010*
(AM2017/58)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT

SYDNEY, 22 DECEMBER 2017

4 yearly review of modern awards – award stage – technical and drafting issues – Professional Diving Industry (Industrial) Award 2010 – hours of work and payment of overtime for inshore divers

[1] On 1 September 2017, the Maritime Union of Australia (MUA) wrote to the Commission concerning an issue arising out of the 4 yearly review of the *Professional Diving Industry (Industrial) Award 2010* (Award). [1](#) The issue identified is in regard to the purported reduction in the hourly rates for inshore divers arising from a Full Bench decision of 9 June 2017² and subsequent determination varying the Award dated 13 June 2017.³ The variation removed references to ordinary hours for inshore divers of 6 hours and 36 minutes per day, and inserted 38 hours per week. The MUA provided copies of “Pay Guides” issued by the Fair Work Ombudsman which showed a lower hourly rate for inshore divers as of 13 June 2017, as compared to the previous Pay Guide effective from 1 July 2016.

[2] The Full Bench variation of 13 June 2017 was premised on the basis of inconsistencies in the Award, where there is reference to 38 hours per week as the average hours worked by full time employees, and 38 hours per week being the divisor for calculating the hourly rate of pay for all casuals. This was inconsistent with the prescribed ordinary hours for inshore divers (as opposed to offshore divers) being less than 38 hours per week. [4](#)

[3] The provisions stating that full time divers are engaged to work an average of 38 hours per week, [5](#) and that a casual employee will be paid 1/38th of the relevant minimum wage plus a 25% loading,⁶ which were determined with the handing down of the Award in 2010, were not altered by the Full Bench Order of 13 June 2017.

[4] On 3 November 2017, the Full Bench issued a Statement advising that a further Full Bench (a subset of the Group 1 Award stage Full Bench) would be constituted to consider the issues raised by the MUA. That Full Bench was convened on 19 December 2017 to hear submissions from the MUA and interested parties. Representatives from the MUA, Australian Mines and Metals Association (AMMA) and Fremantle Commercial Diving (FCD) appeared and made submissions. [7](#)

[5] At the hearing the MUA advised that they wished to pursue an evidence based case to support the retention in the Award of ordinary hours of 6 hours and 36 minutes per day, Monday to Friday, for inshore divers, but were not in a position to do so on the day. In that connection, MUA requested to have until 29 January 2018 to file evidence of the “fundamental differences” between offshore and inshore diving that justified different hours of work, and also evidence demonstrating that inshore divers incurred a loss of income arising from the 13 June 2017 variation.

[6] AMMA and FCD submitted that the issue of ordinary hours for inshore divers was now settled and should not be revisited. FCD did however seek clarification as to at what point daily overtime under the Award became payable for inshore divers. [8](#) It submitted that although it had been paying inshore divers an hourly rate based on a 38 hour week, it had been paying overtime on a daily basis after 6 hours and 36 minutes work, and that some of its competitors had ceased doing this after the 13 June 2017 variation. It suggested that the Award be varied to require payment of overtime on a daily basis after 7 hours and 36 minutes. This approach was supported by AMMA.

[7] We do not propose at this stage to determine the MUA's application to be permitted to file further evidence for the purpose of revisiting the 13 June 2017 variation. We consider that a more constructive course would be for the parties to endeavour to reach an agreement to insert a daily overtime provision in the Award which would mitigate any adverse effect of the 13 June 2017 variation. We direct the parties to confer about this, and to report the progress of such discussions to the Commission (chambers.hatcher.vp@fwc.gov.au) by **5.00 29 January 2018**. If the parties consider that such discussions would be assisted by the conduct of a conference by a member of the Commission, this will be arranged upon request.



VICE PRESIDENT

[1](#) [MUA letter](#) dated 1 September 2017

[2](#) [\[2017\] FWCFB 3177](#)

[3](#) [MA000108 PR593669](#)

[4](#) Clause 10 stipulates that full-time employees, both inshore and offshore, are engaged to work an average of 38 ordinary hours per week and casual employees are to be paid 1/38th of the relevant minimum wage plus a loading of 25%. However, clause 21 provided that inshore divers' ordinary hours of work will not exceed 6 hours and 36 minutes per day, worked between 6:00 am and 6:00 pm Monday to Friday (i.e. 33 hours per week).

[5](#) Clause 10.2(c) of the Award

[6](#) Clause 10.3(c) of the Award

[7](#) AMMA and FCD appeared via video link from Perth

[8](#) Clause 24.1 of the Award

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