

IN THE FAIR WORK COMMISSION

AT SYDNEY

Matter No. AM2017/46

Fair Work Act 2009

section 160 - Variation of modern award

Application by Australian Southern Bluefin Tuna (SBT) Industry Association Limited to vary the Ports, Harbours and Enclosed Water Vessels Award 2010

SUBMISSIONS BY THE APPLICANT

A. Introduction

1. These submissions are made on behalf of the Australian Southern Bluefin Tuna (SBT) Industry Association Ltd (**ASBTIAL**) in respect of the application it filed in the Fair Work Commission on 31 July 2017 pursuant to section 160 of the *Fair Work Act 2009* (Cth) (**FW Act**) to vary the *Ports, Harbours and Enclosed Water Vessels Award 2010* (**Ports Award**) to remove ambiguity or uncertainty or to correct an error in relation to the potential coverage of the Wild Catch Fishing Industry (**WCFI**) by that award (**Application**).
2. The Fair Work Commission (**FWC**) has identified a threshold issue in respect of the Application, namely whether section 163 of the FW Act applies, and is relevant, to the Application (**Threshold Issue**). Section 163 relates to the changing coverage of modern awards and states, in part:

"(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them."
3. These submissions are filed pursuant to Directions made by Senior Deputy President Hamburger on 21 August 2017 requiring the ASBTIAL and any other party who wished to be heard on the Threshold Issue to file submissions on the application and relevance of section 163 of the FW Act to the Application.

B. Executive Summary

4. The WCFI has both historically and traditionally been an award-free industry. This is largely due to the highly variable and unique nature of the work activities and arrangements within the industry. The industry has operated in this way for hundreds of years.
5. The award-free status of the WCFI was the subject of detailed written submissions by peak industry bodies, and consideration by the Full Bench of the Australian Industrial Relations Commission (**AIRC**), as part of stages 2 and 4 of the award modernisation process in 2008 and 2009. These stages of the process related to the aquaculture and miscellaneous modern awards. The outcome of that process was that the Full Bench of the AIRC ultimately accepted the submissions made by peak industry bodies that the award-free status of the WCFI should be retained and that it should not be subject to a modern award.
6. Given the WCFI was clearly and comprehensively being dealt with as part of stages 2 and 4 of the award modernisation process, peak industry bodies and relevant unions in the WCFI did not participate in the consultation process for the maritime and port and harbour services industries which formed part of stage 3 of the award modernisation process and resulted in the creation of the Ports Award. Throughout the stage 3 process, there was no reference to the WCFI or the fishing industry in general. This is not surprising given that it was already being dealt with in stages 2 and 4 of the process and given that the various pre-reform awards and Notional Agreement Preserving State Awards (**NAPSAs**) that applied in the maritime and port and harbour services industries did not ever have coverage over the WCFI.
7. Notwithstanding the above, the Ports Award was created and the broad coverage provisions in that award (on an uninformed view) appear to possibly cover the WCFI. Having regard to the history and nature of the WCFI, the documented history regarding the development of a number of modern awards as part of the award modernisation process, specifically the Aquaculture Award, the Miscellaneous Award and the Ports Award, as well as consideration of the industrial instruments underpinning the Ports Award, it is clear that this was not intended to be the case and that the WCFI continues to be an award-free industry.
8. In the circumstances, the Application does not seek to change the coverage of the Ports Award because WCFI employees are not covered, and were never intended to be covered, by the Ports Award or any modern award. Instead, the Application seeks to clarify and/or make clear this intention.
9. For completeness, the decision in the Federal Circuit Court of Australia (**FCCA**) in *Fair Work Ombudsman v Australian Wild Tuna Pty Ltd & Anor* [2016] FCCA 2626 (**the FWO Case**), which is referred to in the Application, is not binding upon the FWC and is not relevant to the Application. The issue of award coverage of the WCFI was not the subject of evidence or submissions by the parties or judicial consideration by the FCCA. Rather it was agreed, pursuant to an Agreed Statement of Facts (**ASOF**) entered into between the parties, that the

Ports Award applied to the employer in that case and the relevant employees. Consistent with section 191 of the *Evidence Act 1995* (Cth), an ASOF is only binding on the parties who enter into such agreement for the purposes of that proceeding only. It therefore bears no relevance to the Application.

C. Wild Catch Fishing Industry

10. Background to the WCFI is set out in detail in a written submission made by peak industry bodies, which was filed in the AIRC as part of the award modernisation process. The submissions are attached to the Application and are reproduced as **Attachment 3** to these submissions.
11. By way of summary:
 - (a) The WCFI comprises those sectors engaged in catching aquatic species in both fresh and marine waters. The industry operates in some inland water and lakes areas, and in a range of near-coastal and offshore marine areas.
 - (b) The WCFI comprises a multitude of fisheries that have historically been characterized by three distinguishing features:
 - (i) extreme uncertainty of product availability on a daily basis;
 - (ii) reward for effort arrangements for fishing crews;
 - (iii) unpredictable work arrangements that straddle 24 hours, seven days a week and 365 days a year; and
 - (c) The WCFI model is very often owners (licence holders) and sub-contractors.
 - (d) Fishing operations vary considerably with some sectors operating large commercial vessels (greater than 25 metres) with crews of up to 15 or more fishers and sectors where vessels are typically less than 18 meters (often less than 10 meters) where crew levels are often between 1 and 2 fishers. There are some smaller fisheries that sustain single operator small vessel operation that are often “lifestyle” fisheries. These are often inshore or inland fisheries.
 - (e) Fishers in the WCFI have traditionally often shared part of the risk by working in a share of catch contract arrangement whereby the owner/vessel operator, the engineer, the coxwain and the general fishing crew have a fixed agreed percentage of the net income from the catch. The higher the catch value, the greater the return for all fishing crew. Even though some fishing seasons can be relatively short, returns can be substantial in some sectors. This contract work arrangement allows fishers to work highly flexible hours, day or night, ranging from short term to

continuous fishing operations. It also allows fishers to work for intensive seasonal periods. At all times, the normal National Employment Standards and Occupational Health and Safety requirements apply.

- (f) These intensive fishing seasons are related to, and regulated by, various State and Commonwealth fisheries legislation dealing with fishery management and licence conditions. Such legislation enshrines principles of sustainable fish stock management, individual species management, seasonal determination, temporal factors and areas (zones) of operation and applies in respect of most commercial fishing operations. That is, the legislation defines catching seasons, it identifies specific areas of operation, imposes vessel and crew regulations and, in some cases, regulates the time of the day when fish can be caught and imposes limits on trips or catches.
- (g) Apart from the regulated components of commercial fishing, the variations in actual fishing operations and the unpredictability of the work, are extreme and can be dependent upon lunar cycles, tidal movement, temperature, weather patterns, allocated fishing grounds, individual species and species behaviour. All of these can and often do combine to set the actual pattern of work activity including its time and duration. This can and sometimes does impact upon crew availability which often limits fishing operations. Even with modern technologies, there remains a high degree of unpredictability in all fishing operations that fundamentally drives all aspects of the work. All of these factors result in there being no operational consistency between the various fisheries or specific sector catching practices.
- (h) In addition, unlike all other marine sectors, skilled fishing crew in the WCFI have specific fishing certificates of competency (licences) that are issued by Marine Safety Authorities for the fishing industry. These licences relate to competencies set down under the National Seafood Industry Training Package and allow fishers to work in a range of fisheries at appropriate competency levels. The various qualifications from the Restricted Coxswain level through to Skipper Grade 1 all relate to fishing operations and enshrine the concept of relevant “sea time” on fishing vessels.

12. Due to the highly variable, and unique, nature of the work arrangements within the WCFI and the generally high returns that most fishers enjoy through the share of catch payments system, the WCFI has historically and traditionally been an Award free industry. There has never been any industrial award that has been developed for, or applied to, the commercial catching components of the WCFI. The industry has operated in this way since before the beginning of industrial regulation in Australia. The only parts of the Seafood industry that have been the subject of any industrial award regulation are the processing (post-harvest) and aquaculture sectors where a number of state awards have applied.

D. Award Modernisation Process and the WCFI

13. As noted above, the WCFI historically and traditionally has been award free. The award-free status of the industry was the subject of submissions by industry representatives, and consideration by the Full Bench of the Australian Industrial Relations Commission (**AIRC**) (now the FWC), as part of the award modernisation process that took place throughout 2008 and 2009. The Full Bench of the AIRC ultimately accepted the submissions made by peak industry bodies that the award-free status of the WCFI should be retained and that it should not be subject to a modern award.
14. Set out below is a detailed history of the proceedings as they related to the WCFI.

Stage 2: Agricultural Group

15. On 3 September 2008, the Full Bench of the AIRC publishes a [statement](#) regarding stage 2 of the award modernisation process ([2008] AIRCFB 70). Activities regarding aquaculture were allocated to the Agricultural Group.
16. On 31 October 2008, The AWU files with the AIRC a [draft Fish, Aquaculture and Marine Products Award 2010 \(AWU Draft Award\)](#), which, amongst other things, contains an Application clause as follows:

This industry award applies throughout Australia to employers in the Producing and Processing of Fish, Aquaculture and Marine Products including fish purse seining or polling, fish farming, marine farming, aquaculture, pisciculture, mariculture, cultivation of live sea and freshwater products, breeding or spawning of fish and hatching of fish or marine products whether in or from the sea, rivers, dams, tanks, ponds, underwater cages, aquariums or other water source, holding, containing, penning, or harvesting of live fish or marine products or marine vegetation, cleaning, purging, flushing, packing, freezing, processing, preserving, smoking, treatment of fish or marine products, cultivation, culling or treatment of live shellfish including marine farming of oysters, mussels, clams, scallops and abalone to the exclusion of any other modern award. However, the award does not apply to an employee excluded from award coverage by the Act. [our emphasis]

17. This comprehensive coverage provision proposed by the AWU potentially covered the WCFI particularly having regard to the underlined terms.
18. On 31 October 2008, the National Farmers' Federation [filed submissions and a draft Agricultural Industry Award 2010 \(Draft NFF Award\)](#). The Draft NFF Award specifically excluded "wild catch fishing" from its operation (clause 4.3(i) of the Draft NFF Award). In the accompanying submission, the NFF submitted that not all forms of fishing and aquaculture should fall within the modern Agricultural Industry Award and that " *wild catch fishing and*

fishing where processing is an integral part of the work done by employees should not be included". The Draft NFF Award was however drafted to include the "harvesting of fresh water fish (eg trout) in inland waters and the farming of fish, yabbies and marron in farm dams".

19. Between 6 November 2008 and 10 November 2008, as part of the public consultation process preliminary written submissions were filed by representatives within the aquaculture industry and the WCFI, specifically, Tassal Operations Pty Ltd, the ASBTIAL, the National Aquaculture Council, Pearl Producers Association, Australian Marine Finfish Farmers Association Inc. and the South Australian Aquaculture Council. In summary, these submissions confirmed that the aquaculture industry was predominantly award free and that, in the case of wild catch fishing, the industry had never been covered by any state or Federal awards. Each of the submissions also opposed the AWU Draft Award.
20. In relation to the WCFI in particular, the ASBTIAL's preliminary submission (filed on 7 November 2008) (**Attachment 1**) provided some insight into tuna catching and ranching which highlighted the difficulties in relation to regulating such activities in an award environment. The submission explained:

The tuna is caught live in the Great Australian Bight (GAB) up to 250km from Port Lincoln, during December to March, the time when the tuna are seasonally in the GAB. They are then towed in large pontoons for 15-30 days to ranching pontoons offshore from Port Lincoln. The tuna are then ranched (ie fed, husbanded) for 3-6 months before marketing - over 99% goes to export.

Husbandry is necessarily 7 days/week, and at all times of night and day, consistent with the feeding pattern of the tuna in the wild.

Australia competes in the international tuna market against subsidised operations in Mexico and the Mediterranean. The viability of the Australian operations depends on being more efficient, and this depends on having total flexibility in work practices. This includes intensive multi-skilling.

21. The ASBTIAL's preliminary submission also noted that there are awards in some states for some parts of aquaculture but confirmed that those "*aquaculture operations are very different from offshore tuna capture/ranching*".
22. On 27 November 2008, a [hearing](#) took place before Commissioner Lewin with respect to the Agriculture Group. Representatives in the aquaculture industry and WCFI attended. In relation to the WCFI, Mr Brian Jeffriess appeared for the ASBTIAL and the following discussion took place with the Commissioner [PN28-33]:

MR B JEFFRIES: Sir, I am from the Australian Tuna Association.

THE COMMISSIONER: Mr Jeffries, you don't want the tuna ranching operation covered by an award. Is that right?

MR JEFFRIES: That's right, and a fundamental issue to us is that it's currently not covered by an award.

THE COMMISSIONER: I've noted that. I've read your submission. I understand what you say. I just caution you that there is an issue that arises as to the nature of the request and the process itself. The question that arises is whether it's appropriate for the Commission to consciously make a decision to leave an industry sector award free as of 1 January 2010 but unless you want to say anything else, I'm right across what you're saying and I will certainly be explaining that to the Full Bench in due course. You are not the only aquaculture party, if you like, or industry representative that takes the view that the sector should be award free.

MR JEFFRIES: Will we get some direction on that at some stage?

THE COMMISSIONER: Yes, you will have a response to your submission in I would imagine a statement, just to characterise it, which will be issued by the Full Bench, on my understanding, in due course. The question is a live one, you've made it a live one. The Commission will not ignore it. [our emphasis]

23. Further submissions were made in relation to the aquaculture industry (including by Mr Simon Bennison of the National Aquaculture Council [PN533-556]) about the unique characteristics of that industry and that it has historically and traditionally been award-free. The exchange between Mr Bennison and the Commissioner concluded as follows:

THE COMMISSIONER: What I'm hearing you say is in the circumstances this will probably require - if there is going to be an Aquaculture Award or if there is any sort of extension or regulatory arrangements, then that requires more consideration, work and input and interaction from the industry towards the Commission. Is that right?

MR BENNISON: Correct, yes.

THE COMMISSIONER: That's what you're seeking is it? That will be noted, I mean, one option, of course, that arises from that is, given the particular circumstances and the relatively sparse regulatory landscape and the development of the industry and its diversity, that it may be necessary to consider the matter further than within the scope of stage 2. I'll report that to the Bench for their consideration. Is that what you want me to do?

MR BENNISON: Yes, if you could, Commissioner. At the moment we still have a lot more aspects of this to be considered and which award are most appropriate, whether

some industry sectors actually consider themselves to fit in with an award and again, obviously, given the complexity of the structure within those industries with partnerships and contractors and so forth, just how that's going to be accommodated in the future, in particular, some of our industry sectors that are, again, as we mentioned, without awards at this present time.

24. Following the hearing on 27 November 2008, between 9 December 2008 and 10 December 2008, further written submissions were filed by representatives within the aquaculture industry and the WCFI, including the ASBTIAL, Shellfish Industry Council of Australia and the Pearl Producers Association. In the ASBTIAL's submission dated 9 December 2008 (**Attachment 2**), the ASBTIAL confirmed its position that (amongst other things), the WCFI:
- (a) wishes to remain award-free; and
 - (b) has no interest in being part of any separate Aquaculture Award explaining that the tuna catching/ranching is an offshore wild fish operation and the only common factor with other aquaculture is that it is fish.
25. Following the public consultation, on 23 January 2009 the Full Bench of the AIRC issued a [statement](#) in relation to the publication of a number of exposure drafts of modern awards for Stage 2 of the award modernisation process ([2009] AIRCFB 50). In relation to the Agriculture Group, the Full Bench stated, amongst other things, that:

"We should indicate that we have decided not to publish an exposure draft for the aquaculture... industries. We shall give further consideration to the aquaculture industry in Stage 4..."

Stage 4: Aquaculture Industry and Miscellaneous Award

26. On 29 June 2009, the Full Bench of the AIRC published a [statement](#) regarding the stage 4 award modernisation process ([2009] AIRCFB 641). The statement identifies the list of industries to be dealt with as part of Stage 4, which included aquaculture, as well as an indicative list of awards and notional agreement preserving state awards (**NAPSAs**) for each industry/occupation. In respect of aquaculture, the following pre-reform awards and NAPSAs were identified:

Pre-reform awards (non-enterprise)

- (i) the *Agriculture, Forestry and Fishing Industry Sector Minimum Wage Order - Victoria - 1997* (AP767376);

NAPSAs (non-enterprise)

- (ii) the *Oyster Farmers &c. (State) Award* (AN120399) - NSW;

- (iii) the *Pearl Culture (North Queensland) Award 2003* (AN140204) - QLD;
 - (iv) the *Fish, Aquaculture and Marine Products Award* (AN170036) - TAS; and
 - (v) the *Shellfish Industry Award* (AN170124) - TAS.
27. The pre-reform award and the NAPSAs referred to above did not cover the WCFI.
28. On 24 July 2009, the AWU filed with the AIRC a further draft Fish, Aquaculture and Marine Products Award 2010 (**AWU Further Draft Award**). The 'Application' clause, clause 4.1, which was in very similar terms to the AWU Draft Award stated as follows:
- "This industry award applies throughout Australia to employers in the producing, farming and/or harvesting of Fish, Aquaculture and Marine Products including fish purse seining or polling, fish farming, marine farming, aquaculture, pisciculture, mariculture, cultivation of live sea and freshwater products, breeding or spawning of fish and hatching of fish or marine products or harvesting of live fish or marine products or marine vegetation, cleaning, purging, flushing, packing, freezing and associated treatment of fish or marine products, cultivation, culling or treatment of live shellfish including marine farming of oysters, mussels, clams, scallops and abalone to the exclusion of any other modern award. However, the award does not apply to an employee excluded from award coverage by the Act."* [our emphasis]
29. Again, this comprehensive coverage provision proposed by the AWU potentially covered the WCFI particularly having regard to the underlined terms.
30. On 24 July 2009, a [detailed written submission](#) was filed in the AIRC on behalf of the following peak industry bodies in the WCFI (referred to in paragraph 10 above and attached to this Submission as **Attachment 3**):
- (a) Western Australia Fishing Industry Council;
 - (b) Wildcatch Fisheries SA;
 - (c) Tasmanian Seafood Industry Council;
 - (d) Seafood Industry Victoria;
 - (e) New South Wales Seafood Industry Council;
 - (f) Queensland Seafood Industry Association;
 - (g) Northern Territory Seafood Council; and
 - (h) Seafood Processors and Exporters Council.
31. In short, the submission confirmed that the WCFI industry was not, and never had been, covered by an industrial award and explained in detail the reasons why the industry could not

exist in an award environment, including because wild catch fishing activities cannot be regulated in terms of when (either in a seasonal sense, or daily) work could be performed, when it would start or stop, or where it would be performed. In addition, the submission highlighted the remote and regional nature of the industry and that it was subject to "a high level of unpredictability due to natural forces" therefore requiring significant "flexibility". The peak industry bodies further explained in the submission that the industry largely operates under a "reward for effort model" involving "share of the catch" fishing agreements and arrangements. The submission concluded:

6.1 The Award Modernisation Request from Minister Gillard dated 1 July 2009 seeks to clarify those categories of work that Modern Awards are not intended to cover especially in areas that have traditionally been Award free. In particular, the Request also cites the inclusion of new industries and occupations in those Award free areas where the work performed is of a similar nature to work that has been historically regulated by Awards. The Wild Catch (Commercial) Fishing Industry contends that there are no other industries that have even remotely similar work arrangements regulated by Awards.

6.2 It is the contention of the Wild Catch (Commercial) Fishing Industry that the industry should not be covered by a Modern Award, the current Award free arrangements that govern all work in the industry be maintained and that the Wild Catch (Commercial) Fishing Industry be designated an Award free Industry.

32. On 24 July 2009, the National Aquaculture Council and its constituent bodies, which included the ASBTIAL, also filed a detailed written submission seeking to retain the industry's award free status under the award modernisation process. Whilst the submission deals with the aquaculture industry rather than the WCFI, parts of the submission are relevant to the WCFI particularly those parts relating to the catching of Southern Bluefin Tuna.
33. As part of the public consultation process for stage 4 of the award modernisation process, a [hearing](#) took place before Commissioner Lewin on 14 August 2009. Mr Costa appeared on behalf of the AWU, Mr Frank McMahon appeared on behalf of the employer associations in the WCFI as well as the National Aquaculture Council and its constituents and Mr Brian Jeffriess also appeared on behalf of the National Aquaculture Council. At this hearing, there was some discussion about the AWU Further Draft Award and its application to the WCFI. The AWU ultimately accepted that the AWU Further Draft Award was not intended to cover wild catch fishing and that the industry should remain award free [PN28-PN43]:

THE COMMISSIONER: That might be a convenient time to ask a question. What do you perceive to be the aquaculture industry? It seems to me it's cultivation isn't it?

MR COSTA: That's right, Commissioner.

THE COMMISSIONER: All right. Well, if that's the case your draft would recognise it. I've read your draft and, in particular, the scope of the industry which is identified in the draft. It seems not to cover wild catch fishing.

MR COSTA: No, it doesn't. And we concede that wild catch fishing has never been award covered. We don't oppose the submissions of the employers in regard to wild catch fishing and we have not - - -

THE COMMISSIONER: You don't propose a modern award to cover wild catch fishing?

MR COSTA: No, we don't, Commissioner.

THE COMMISSIONER: Do you concede that wild cat fishing has not been covered by a NAPSA in the past and there's no federal award?

MR COSTA: That's right, Commissioner, that's our understanding of the situation.

THE COMMISSIONER: So in a way, without being conclusive about it, your submission based on R2 of the amended Request tends to therefore exclude wild catch fishing?

MR COSTA: That's our understanding of the Request.

THE COMMISSIONER: Because there is no previous regulation?

MR COSTA: Yes, because there hasn't been any award coverage for that, for employees of that type of industry and so we only sought to cover - - -

THE COMMISSIONER: In any form?

MR COSTA: In any form.

THE COMMISSIONER: All right. Well, the wild catch fishing organisations severally have filed submissions which seem to be in harmony with your perspective on that industry. You have that I imagine, Mr Costa?

MR COSTA: Yes, we have, correct.

34. A further exchange took place between Mr McMahon and the Commissioner regarding WCFI as follows [PN90-PN98]:

THE COMMISSIONER: Thank you. Mr McMahon? Now, you cover wild catch and aquaculture?

MR MCMAHON: Yes, I do.

THE COMMISSIONER: Now, you cover wild catch and aquaculture?

MR MCMAHON: Yes, I do.

THE COMMISSIONER: Well, do you need to tell me anything about wild catch?

MR MCMAHON: I don't believe so.

THE COMMISSIONER: Not in light of the AWU's submissions?

MR MCMAHON: Only that we have always been award free and wish to remain award free.

THE COMMISSIONER: Yes, you've already told me that. I remember you from previous consultations and your submission has the overwhelming merit and consistency.

MR MCMAHON: Thank you.

35. Some discussion was also had in relation to the Application clause in the AWU Further Draft and its potential application to the WCFI [PN109-PN111]:

MR MCMAHON: But certainly purse seining and poling and harvesting live fish is included in their document, could be interpreted to include clearly wild catch fishing, they're gone.

THE COMMISSIONER: Yes. Let's assume for the purpose of discussion that the award has an express exclusion of wild catch fishing, let's assume that for the sake of discussion.

MR MCMAHON: Well, the rest of it that is there in terms of the cleaning, purging, flushing, packing, freezing and associated treatment goes beyond cultivation and into seafood processing.

36. During a later discussion with Mr Jeffriess about aquaculture and tuna ranching, the Commissioner confirmed that there was no need to worry about the WCFI [PN218-PN227]:

THE COMMISSIONER: What's the size of the workforce in the tuna ranching business?

MR JEFFRIES: The cycle, sorry?

THE COMMISSIONER: The size of the workforce.

MR JEFFRIES: The actual full time about 350, 400. There's actually official government surveys on that. And then there's a very indirect workforce who catches the sardines for the industry.

THE COMMISSIONER: Are they employees?

MR JEFFRIES: No, they largely share a catch.

THE COMMISSIONER: And they're wild fishing in any event?

MR JEFFRIES: Yes.

THE COMMISSIONER: So we don't need to worry about them.

37. It is clear from the above exchange between the relevant parties and the Commissioner that there was agreement that the WCFI should continue to remain an award free industry.
38. On 25 September 2009, the Full Bench of the AIRC issued a [statement](#) regarding publishing an exposure draft of the Aquaculture Industry Award 2010 ([2009] AIRCFB 865). The Statement stated, amongst other things:

The industry is currently subject to very limited regulation... Consequently, significant components of the industry would be subject to regulation for the first time in the event that a modern aquaculture industry award were to be made. The industry associations have made submissions that we should consider the industry as historically and traditionally award free and therefore no modern award should be made. We have not finally determined this question.

Three options arise from the consultations. One is to make a modern award for the industry after having considered responses to the exposure draft. Another is to provide that the industry will be subject to the Miscellaneous Award 2010 currently under consideration as part of Stage 4. If the industry associations' submissions were to be upheld in full the industry would be wholly award free. While we have decided to publish an exposure draft the other options have not been excluded...

39. The [Exposure Draft of the Aquaculture Industry Award 2010](#) was also published on the same day and contained a coverage clause which stated, in part:

4.1 This industry award applies throughout Australia to employers engaged in the breeding, production, farming and related harvesting of fish, shellfish, crustacea and marine vegetation and operations ancillary thereto and their employees in the classifications in clause 13 to the exclusion of any other modern award.

40. Relevantly, this coverage clause did not refer to fishing or otherwise include activities that would capture the WCFI (unlike the AWU Further Draft Award).

41. The Full Bench statement on 25 September 2009 also dealt with the exposure draft for the Miscellaneous Award and stated, amongst other things:

[81] We publish a draft Miscellaneous Award 2010..... While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it....

....

[84] It is unclear which employees will be covered by this award. It may be that it will have application in some areas of the workforce which have not been covered by awards before.

42. An [Exposure Draft of the Miscellaneous Award](#) was also published on the same day. It included a very broad coverage clause which stated, in part:

4.1 Subject to clauses 4.2, 4.3, 4.4 and 4.5, this award covers employers throughout Australia and their employees in the classifications listed in clause 14—Minimum wages who are not covered by any other modern award.

4.2 The award does not cover employees:

(a) in an industry covered by a modern award who are not within a classification in that modern award; or

(b) in a class exempted from the operation of a modern award, or employers in relation to those employees.

4.3 The award does not cover employees excluded from award coverage by the Act.

43. The breadth and lack of clarity in relation to the coverage clause of the Exposure Draft of the Miscellaneous Award, and the statements made by the Full Bench in the statement issued on 25 September 2009 regarding the aquaculture award, created some uncertainty within the WCFI and the aquaculture industry as to whether or not it could be covered by the Miscellaneous Award irrespective of the outcome achieved in respect of the aquaculture award. Accordingly, on 16 October 2009, correspondence was filed in the AIRC by the Commonwealth Fisheries Association seeking confirmation from the Full Bench that the WCFI will remain award-free and will not be covered by the Miscellaneous Award (**Attachment 4**).

In addition, representatives within both the aquaculture industry and the WCFI prepared to attend the hearing scheduled for 26 October 2009 regarding the Miscellaneous Award.

44. On 26 October 2009, as part of the public consultation process for stage 4 of the award modernisation process, a [hearing](#) took place before the Full Bench regarding a number of industries and awards, including the Miscellaneous Award 2010. Mr McMahon appeared on behalf of the National Agricultural Council and its constituent bodies and made the following submission [PN271-272]:

MR MCMAHON: If it please the Commission, yes, your Honour. Whilst we continue on the written and oral submissions made we need to expand that position slightly in respect to some of the discussions this morning, and in particular I suppose the amendment sought by the AI Group. In essence what I would say to your Honours is that we would wish that the class of employees, being those employees as defined for aquaculture and wild catch fishing be expressly excluded from the coverage of this award. We say that because we find that the strange position, or I would call it strange, arises, that if 4.2(b) was pursued, as obviously AI Group and others intend to pursue it, it would have the impact of leaving some classes of employees, namely those employed in fin fish and shellfish in Tasmania and those in oyster farming in New South Wales clearly open to be covered by the Miscellaneous Award whilst the rest of those industries, depending on the outcome of next Friday, could well be award free.

The basis for this request goes to not even a question of fairness, but it would seem to me that it offends the spirit at least, if nothing else, of section 154, and my instructors believe that what we were trying to get away from was this sort of situation where, by whatever manner it occurs, we find shellfish farmers and fin fish farmers in Tasmania along with oyster farmers in New South Wales under a different level of regulation than the rest of the industry in Australia. Finally, your Honour, as far as emerging industries are concerned, which seems to have had some sort of a run this morning, wild catch fishing we'd say has been around for at least 2000 years and shellfish has been around for at least 200. I say that not just in jest, as some people have suggested that aquaculture is actually an emerging industry. If it please the Commission. [our emphasis]

45. Following the public consultation process, on 4 December 2009, the Full Bench issued a [statement](#) in relation to the publication of a number of exposure drafts of modern awards for Stage 4 of the award modernisation process, including the Aquaculture Industry Award 2010 (**Aquaculture Award**) and the Miscellaneous Award 2010 (**Miscellaneous Award**) ([2009]).
46. In relation to the Aquaculture Award, the Full Bench stated, amongst other things, that:

[17] We have decided to make an award which is in similar terms to the exposure draft. We have made some significant alterations in response to the submissions of the National Aquaculture Industry Council (AIC). We have altered the coverage provisions to exclude hatchery work and have therefore removed the corresponding classifications, descriptors and wage rates which were contained in the exposure draft. We have also added to the coverage provisions work performed by employees within the remaining classifications which is done for the initial preparation of aquaculture products for market....

[19] We also note that the alterations to the coverage of the Miscellaneous Award 2010 should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the Aquaculture Award 2010. [our emphasis]

47. Relevantly, the Full Bench then stated, in relation to the Miscellaneous Award, that:

[146] The principal issue in relation to the Miscellaneous Award 2010 (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

“4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

[147] Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

“2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

... ..”

[148] Several parties also drew our attention to s.143(7) of the Fair Work Act:

“143 Coverage terms

Employees not traditionally covered by awards etc.

... ..

(7) A modern award must not be expressed to cover classes of employees:

(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.”

[149] Although s.143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the Miscellaneous Award in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature or seniority of their roles have traditionally not been covered by awards.

....

[150] A number of submissions canvassed the purpose or function of the award. The ACTU, for example, submitted that the functions of the award should be twofold. The first is to fill gaps in modern award coverage which became apparent during the process of setting aside award-based transitional instruments as required by the Transitional Act. The second function is to provide interim coverage for emerging industries pending the making of a new modern industry award or an appropriate extension to the coverage of an existing modern award. The Australian Government took a very similar approach, while stressing the importance to the economy of ensuring that employees who have not traditionally been covered by awards remain free from modern award coverage as well.

....

[151] Almost without exception employer representatives criticised the breadth of coverage in the exposure draft. They suggested that employees who have traditionally been excluded from award coverage, particularly professional and managerial

employees, would be covered, including those deliberately excluded from modern award coverage in earlier stages of the modernisation process.

[152] We have considered all of the submissions and decided to include an additional paragraph in the coverage clause which more closely reflects the terms of the consolidated request and the Fair Work Act. The paragraph also contains some greater definition of the types of employees excluded. It reads:

“4.2 The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.” [our emphasis]

48. Both the [Aquaculture Award](#) and the [Miscellaneous Award](#) were published on 4 December 2009. The coverage provisions of the Aquaculture Award did not cover the WCFI either explicitly or by reference to the specified activities which pertain to aquaculture only and do not extend to wild catch fishing activities. In relation to the Miscellaneous Award, the coverage provisions contained the exclusion relating to "those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards". That exclusion read in the context of the statements made by the Full Bench in its decision of 4 December 2009 in respect of both the Aquaculture Industry and the Miscellaneous Award make it clear that the employees in the WCFI fell within that exclusion and were to remain award-free.

E. The Ports Award

49. Despite the WCFI being successful as part of Stages 2 and 4 of the award modernisation process in retaining its award-free status (as detailed above), on a literal reading of the coverage provisions of the [Ports Award](#) there is some uncertainty as to whether the WCFI could unintentionally be covered by that award.
50. The issue arises because of the broad nature of the coverage provision which states in part:

4.1 This award covers employers throughout Australia in the ports, harbours and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the Maritime Offshore Oil and Gas Award 2010;

(b) the Seagoing Industry Award 2010;

(c) the Port Authorities Award 2010;

(d) the Dredging Industry Award 2010;

(e) the Stevedoring Industry Award 2010;

(f) the Marine Towage Award 2010; and

(g) the Marine Tourism and Charter Vessels Award 2010.

*For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline or at sea on activities not covered by the above awards. [our emphasis]*

51. For the purposes of that definition, the activities in the WCFI are not covered by the other maritime industry awards specified in clause 4.1. Further, there are also very general classifications listed in the Ports Award, such as "deckhand", that could (on an uninformed view of the WCFI) apply to the WCFI.
52. Notwithstanding the broad coverage provisions, and their apparent coverage of the WCFI, the Ports Award was never intended to cover the WCFI and the employees (fishers) within the industry. This is evident having regard to the matters referred to in section D of this submission and the fact that the Full Bench of the AIRC ultimately accepted the numerous submissions made by the industry peak bodies and the relevant union that the WCFI retain its award-free status. The Full Bench reflected this in its decisions relating to both the Aquaculture Award and the Miscellaneous Award.
53. The history of the Ports Award (including its development through the award modernisation process) also supports the view that the award is not intended to cover the WCFI. Set out below is a detailed history regarding the creation of the Ports Award.

Stage 3 of the Award Modernisation Process

54. The Ports Award was dealt with as part of Stage 3 of the award modernisation process. The Full Bench issued a [statement](#) on 30 January 2009 ([2009] AIRCFB 100) identifying the industries to be dealt with as part of that stage, which included the maritime industry and the ports and harbour services industry. The statement also provided an indicative list of awards and NAPSAs for each industry/occupation. There were many pre-reform awards and NAPSAs identified for both the maritime and ports and harbour services industries, none of which had historically applied to or covered the WCFI or the fishing industry generally. By way of example, some of the main pre-reform awards and NAPSAs referred to included:

Maritime Industry - pre-reform awards

- (a) *Maritime Industry Seagoing Award 1999 (AP788080)*

- This pre-reform award applied "in or in connection with vessels trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers)" (clause 4.2) and was responsibility-based. It did not cover the WCFI or the fishing industry.

Maritime Industry - NAPSAs

- (b) *North Queensland Boating Operators Employees Award - State 2003 (AN140190) - QLD*
- This NAPSA expressly excluded vessels equipped for or used in taking fish or other seafood for commercial purpose (clause 1.3) and therefore did not cover the WCFI or the fishing industry.
- (c) *Ketches & Schooners Award (AN150068) - SA*
- This NAPSA applies throughout the State of South Australia to the industry and occupations of all persons engaged as crew persons on ketches, schooners, and similar sailing or auxiliary sailing vessels in commercial survey and over 25 metres measures in length, whether as employers or employees (clause 1.4). The classifications included general purpose hands, masters and mates/engineers. This did not cover the WCFI or the fishing industry because the vessels covered by the Award are sailing vessels only and no sailing vessels are used in the WCFI. There is also no mention of fishing or fishers in the NAPSA.
- (d) *Shipping Award (AN170095) - WA*
- This NAPSA applied only to the operation of ferries, barges, cruise vessels and charter vessels, as well as stevedoring. It therefore does not apply to the WCFI or commercial fishing.

Port and Harbour Services Industry - NAPSAs

- (e) *Motor Boats and Small Tugs (State) Award (AN120350) - NSW*
- This NAPSA applied to "all marine motor drivers, coxswains, masters, MED IIIs and assistants on motor boats, charge hands, coxswain engineers, ship-keepers and general purpose hands, mooring gangs, winch drivers employed in connection with motor boats". A motor boat is defined as a vessel propelled by mechanical power other than steam and which was under 24 metres in length overall (clause 2.11). This did not cover WCFI as the work is not performed on motor boats as defined. There is also no mention of fishing or fishers in the NAPSA.
- (f) *New South Wales Colliers and Small Ships (State) Award (AN120365) - NSW*

- This NAPSA applied to "able seamen and other classifications employed on colliers and all vessels carrying stone, metal and other materials within the jurisdiction of the Shipping, Sailors, Deep Sea (State) Industrial Committee (clause 28).
 - The coverage included "sailors, lamp trimmers, greasers, firemen, trimmers and deckhands employed on sea-going vessels in the State... excepting those employed on ferryboats and tugs (clause 28).
 - This NAPSA does not refer to fishing or fishers and it is unlikely that fish will constitute "other materials" given the references to materials such as stone and metal. This NAPSA does not cover the WCFI.
- (g) *Deckhands (Passenger Ferries, Launches and Barges) Award (AN160097) - WA;*
and
- This NAPSA does not apply to the WCFI or the fishing industry generally as it covers "deckhands employed on or about passenger ferries, launches, barges or other vessels operated by the Respondents in the ports of Fremantle and Perth". None of the Respondents were in the WCFI and/or the fishing industry generally.
- (h) *Masters, Mates and Engineers Passenger Ferries Award (AN160199) - WA*
- This NAPSA was also responsibility-based and applied to Masters, Mates and Engineers employed on or about surveyed passenger vessels or other vessels operated in coastal waters (clause 3). None of the Respondents were in the WCFI or the fishing industry generally.

55. On 6 March 2009, the Maritime Union of Australia (**MUA**) and the Australian Institute of Marine and Power Engineers (**AIMPE**) filed in the AIRC a [draft Port Harbour and Enclosed Water Vessels Award 2010 \(MUA Draft Ports Award\)](#). The MUA also filed a number of other draft awards covering seagoing, dredging, maritime offshore oil and gas and the marine towage industries.
56. The coverage provisions of the MUA Draft Ports Award defined the "Port, Harbour and Enclosed Water Vessels Industry" as "employers engaged in or in connection with vessels" with vessels defined as "any kind of vessel used in navigation other than air navigation and includes a barge, lighter or like vessel." The MUA Draft Ports Award was stated to replace a number of instruments (clause 3), which included the pre-reform award referred to above and most of the NAPSAs. It also included a number of NAPSAs relating to charter boats and ferries. None of these instruments covered the WCFI. In addition, the MUA Draft Ports Award did not appear to cover the WCFI and did not make any reference to fishing or fishers.

57. On 18 March 2009, the MUA and AIMPE made a [further submission](#) to the AIRC regarding the coverage of the MUA Draft Ports Award stating that:

"... Some of the vessels previously covered by awards which have been absorbed into this award do proceed beyond enclosed waters; however their operations and current award conditions fit more comfortably into this award than the proposed Seagoing Industry Award 2010 or any other industry award."

58. Both the [CEPU](#) and the [Commercial Vessels Association of NSW \(the CVA\)](#) filed written submissions regarding the MUA Draft Ports Award on 26 March 2009. A number of parties (including the CVA, the Australian Federation of Employers and Industries (**AFEI**), the MUA and AIMPE and the AWU) attended the public consultation hearing before Vice President Watson on 27 March 2009 and made submissions in relation to the MUA Draft Ports Award. These submissions centred around the coverage of the award and, in particular, whether it should cover charter vessels (see [PN-15-23, PN88-156 and PN313-314] of the [Transcript of Proceedings](#)). There was no discussion about coverage of the WCFI or the fishing industry in general.

59. On 22 May 2009, the Full Bench of the AIRC issued a [statement](#) regarding the exposure drafts for the stage 3 modern awards ([2009] AIRCFB 450). In relation to the exposure draft for the Ports Award (**Ports Award Exposure Draft**), the Full Bench stated:

[172] We publish a draft Ports, Harbours and Enclosed Water Vessels Award 2010. It covers all marine operations in enclosed waters including ferries, barges, and all other miscellaneous vessels. We consider that tourist based charter operations should be excluded as these are more appropriately combined with seagoing tourist charter operations and covered by an award developed by reference to existing standards in the tourist industry...

60. The [Ports Award Exposure Draft](#) was published on the same day. The Ports Award Exposure Draft appears to have been based largely on the MUA Draft Ports Award. However, in relation to coverage of the award, it included a definition of "ports, harbours and enclosed water vessels industry" as meaning "the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline" [our emphasis] . This definition could not have covered the large majority of the WCFI as coverage was limited to within the Australian coastline. The Ports Award Exposure Draft also made no mention of fishing or fishers.

61. In response to the Ports Award Exposure Draft, the MUA and AIMPE filed [further submissions](#) on 12 June 2009. By way of summary, the MUA:

- (a) disagreed with the coverage provisions of the Ports Award Exposure Draft and in particular that it was limited to "within the Australian coastline";

- (b) submitted that its intention behind the coverage provision in the MUA Draft Ports Award was to create an award with coverage of the operation of all maritime vessels which were not covered by the other four modern awards that it had drafted. Its concern therefore was that the operators of vessels not covered by the four other awards that it sought would be award free once they proceed to sea;
- (c) sought changes to the Ports Award Exposure Draft which included altering the definition to cover "the operation of any type of vessel used for navigating by water"; and
- (d) did not make any reference in its submission to the WCFI or the fishing industry in general.

62. Further written submissions were filed by a number of interested parties in relation to the Ports Award Exposure Draft, including the [AFEI](#) on 12 June 2009 and the [MUA and AIMPE](#) on 16 June 2009. Again, these submissions focused on the coverage provisions of the Ports Award Exposure Draft, including the coverage of charter vessels.

63. As part of the public consultation process, a further [hearing](#) took place on 30 June 2009 before the Full Bench. Mr McNally appeared for the MUA and AIMPE, Mr Warren appeared for AFEI and Mr Harvey for the ASU. Each of these parties made submissions in relation to the Ports Award Exposure Draft. The relevant parts of the submissions made are set out below:

PN3555 MR MCNALLY: In the Ports, Harbours and Enclosed Water Vessels Award we had proposed an industry as meaning employees engaged in or in connection with vessels and we widely define vessels. We finished up with an exposure draft which defined the industry as vessels operating within ports, harbours and other bodies of waters within the Australian coastline.

PN3556 It was the intention of the unions to have an award made that applied to all other maritime activities other than those covered by the specific awards, the Seagoing Award, the Offshore Oil and Gas Award and the Dredging Award and the Towing Award. In our submission filed in this matter on 22 June, that's filed in respect to the Ports, Harbours and Enclosed Waters Award, we address that difficulty and the award that we proposed or the coverage of the award that we propose is to operate in respect of all types of vessels used for navigation on waters that isn't covered by those other awards which we specifically refer to.

PN3557 We have suggested that the name of the award be changed to the Maritime Industry General Award 2010 because the name of the award that we previously suggested was confusing and it certainly confused the Commission in that they made an award that only was in enclosed internal waters. What the intention is and

what the need is, is to have an award that covers coastal waters including the territorial sea 12 miles out and possibly beyond.

PN3558 The reasoning for that is set out in our written submission.

....

PN3714 MR WARREN: Your Honour, with specific reference - could I firstly indicate that the AFEI maintains the position that the exposure draft of Ports, Harbours and Enclosed Water Vessels Award 2010 and the enclosed coverage clause in that award is appropriate, properly meets the needs of the industries that it covers and the Commission should with respect to my learned friend reject the suggestion or the submission that the persons currently covered by that award should be covered by some general marine award and we support the establishment of a Ports, Harbours and Enclosed Water Vessels Award and would submit that the coverage clause should be maintained.

.....

PN3729 MR MCNALLY: As Mr Warren submitted, the Maritime Industry General Award or whatever its name is going to be is confined to enclosed waters. The whole area beyond the coastline would be award free if the vessel wasn't a passenger or cargo transporting vessel, a tug, a dredge, et cetera, but that's the very reason why we propose the general award to cover all that's left such as pipe laying vessels and those types of vessels who work beyond the coast.

PN3730 JUSTICE GIUDICE: Yes. Thank you. [our emphasis]

64. As is evident from these submissions, particularly those from the MUA/AIMPE is that extending coverage of the Ports Award Exposure Draft to beyond the Australian coastline was to capture those types of vessels that work beyond the coast such as "pipe laying vessels" that were not covered by the other maritime awards it was seeking. There was no mention of covering fishing vessels or the WCFI by the MUA and AIMPE or any other party that made submissions at the hearing.
65. On 4 September 2009, the Full Bench published its [decision](#) regarding the Ports Award ([2009] AIRCFB 826) and stated:

[219] The Maritime Union of Australia (MUA) and The Australian Institute of Marine and Power Engineers (AIMPE) sought to retitle the award as the Maritime Industry General Award to reflect a desire that the award apply to vessels which venture beyond ports and harbours. The current scope clause is not so confined but we have

decided to make this clearer by adding additional words to the definition of the industry.

66. The Full Bench published the [Ports Award](#) on the same day and it contained the coverage provisions which we have referred to in paragraph 50 above.
67. Whilst the coverage provisions of the Ports Award and, in particular, the extended coverage to vessels "at sea" does have the potential to cover the WCFI, it is clear from the documented history detailed above that this was not the intention of the Full Bench in making those amendments. The Ports Award was never intended to cover the fishing industry or the WCFI. It was not a subject that was discussed or even contemplated by any party or the Full Bench as part of the lengthy public consultation process. This is not surprising given that the industry was being dealt with as part of a different stage of the award modernisation process and in respect of different awards.

E. Relevance of the Fair Work Ombudsman Case?

68. The Application refers to a decision of the FCCA in the FWO Case. In that case the Fair Work Ombudsman (**FWO**) and Australian Wild Tuna Pty Ltd, an employer in the WCFI, agreed pursuant to an Agreed Statement of Facts (**ASOF**) that for the purposes of the proceeding (which involved alleged underpayments with respect to 9 employees), the Ports Award covered the employer and that the employees the subject of the proceeding fell within the classifications of deckhand and engineer in the Ports Award.
69. The FWO Case is not binding on the Commission, and is not relevant to the Application. The issue of award coverage of the WCFI was not the subject of evidence or submissions by the parties or judicial consideration by the FCCA. The FCCA did not therefore make any finding of fact, or rule on a point of law, in relation to the issue of award coverage nor were there any comments made by way of obiter on the issue. Rather, the parties agreed pursuant to an ASOF that the Ports Award covered the employees the subject of the proceeding. Consistent with section 191 of the *Evidence Act 1995* (Cth), the ASOF was entered into for the purposes of the proceeding and accordingly was only binding on the parties to that proceeding.

F. Conclusion

70. For the reasons set out in these Submissions, the FWC should determine that the Application does not seek to change the coverage of the Ports Award so that the employees in the WCFI stop being covered by that award because such employees are not covered by the Ports Award. Employees in the WCFI are, and always have been, award free. Section 163 of the FW Act therefore does not apply, and is not relevant, to the Application and should not prevent the FWC from ultimately making a determination to vary the Ports Award as set out in the Application.

AUSTRALIAN SOUTHERN BLUEFIN TUNA
INDUSTRY ASSOCIATION LTD (ASBTIA)

The President
Australian Industrial Relations Commission
GPO Box 1994
Melbourne. Victoria 3001

Submission to Award Modernisation Process Hearings – on 27 November 2008.

Request

We submit that:

- (1) Tuna catching and ranching is not currently covered by any Federal or State Award, and therefore is not covered by the Award Modernisation process.
- (2) The submission by AWU (AMWU) of a document which might cover tuna catching and ranching is not relevant to the Award Modernisation process. If sustained, the document should be dealt with elsewhere.

We have only just become aware of the Award Modernisation process, and seek your permission to make this Submission. We will attend the next Agriculture Hearing to address any issues.

Tuna Catching and Ranching

The catching of marine finfish species in Australia for ranching exists only in Port Lincoln South Australia (SA). It exists only for Southern Bluefin Tuna (SBT).

SBT is a fish species which migrates across the Southern Hemisphere High Seas, and sometimes in the Australian Fishing Zone. It is harvested by a range of countries – Japan, Australia, Indonesia, Korea, Taiwan, NZ, and the Philippines – under an international agreement.

The Australian industry is totally owned by Australian residents. The Australian Southern Bluefin Tuna Industry Association Ltd (ASBTIA) represents all the operators in the industry.

The technology is only useable in SA because it is the only place in Australia where the Southern Bluefin Tuna (SBT) school in the numbers and quality to support viable tuna ranching. It was in Port Lincoln that the global technology behind tuna ranching was invented.

The tuna is caught live in the Great Australian Bight (GAB) up to 250km from Port Lincoln, during December to March, the time when the tuna are seasonally in the GAB. They are then towed in large pontoons for 15-30 days to ranching pontoons offshore from Port Lincoln. The tuna are then ranched (ie fed, husbanded) for 3-6 months before marketing – over 99% goes to export.

Husbandry is necessarily 7 days/week, and at all times of night and day, consistent with the feeding pattern of the tuna in the wild. Each company is highly integrated – from catching, towing, husbandry, harvesting, and selling.

Australia competes in the international tuna market against subsidised operations in Mexico and the Mediterranean. The viability of the Australian operations depends on being more efficient, and this depends on having total flexibility in work practices. This includes intensive multi-skilling.

The result has been high retention rates, and a consistent growth in the work force.

Award Issues

From time to time, the work force and the industry association have been approached by various trade unions to seek coverage. In two cases, documents very similar to that submitted to the Modernisation Process by the AMWU have been sent to a range of industry, including the work force. To our knowledge, they have never been sustained by the union bodies involved, or by anyone else.

Other States

We note that there are Awards for some parts of aquaculture in some other States. These aquaculture operations are very different from offshore tuna capture/ranching. They also possibly reflect particular conditions in those States – but the background to their existence is not always clear.

Yours Faithfully
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AUSTRALIAN SOUTHERN BLUEFIN TUNA
INDUSTRY ASSOCIATION LTD (ASBTIA)

9 December 2008

Commissioner Lewin
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

Dear Commissioner

Second Submission to Award Modernisation Process Hearings – for Hearing on 12 December 2008.

Background

We note the issues arising for tuna catching/ranching from the Agriculture Hearing on 27 November were:

- (1) Whether there might be a separate Aquaculture Award, and whether it could include a wild catch/ranching industry such as tuna.
- (2) Whether the Award Modernisation Process covers industries such as tuna catching/ranching which are not currently covered by an Award, and which wish to remain Award-free. The related question is whether the Commission would be required to register the position of such an industry.
- (3) The intent of the Fair Work Bill 2008 (“the Bill”), introduced into Federal Parliament on 25 November 2008. This Bill will now go to Committee, with the aim of enactment by 1 July 2009.
- (4) If the outcome of the above processes is that tuna catching/ranching is still required to be covered by an Award, then what is the appropriate Award.

Requests to the Commission on the Above Issues

The tuna catching/ranching industry requests that the Commission records that:

- (1) The industry wishes to be award-free. We see this as a separate issue from “agreements”, as defined by the Bill.
- (2) The industry does not request the Commission to decide on whether the industry should be award-free. This would only arise if the Government’s intent is that all workers (whether over \$100,000pa or not) be covered by an Award. We suggest that the Bill provides for award-free industries (eg see Clause 19), and specifies the conditions under which these industries must operate.

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- (3) The industry has no interest in being part of any separate Aquaculture Award. As noted in our first Submission, and below, the tuna catching/ranching is an offshore wild fish operation. It is more equivalent to the agistment of wild horses, but a long way offshore. The only common factor with other aquaculture is that it is fish.
- (4) The industry notes that it is possible that our interpretation that the Bill provides for award-free industries is not correct. It is also possible that these provisions in the Bill may be amended before enactment. The question then arises as to which existing Award is the most appropriate one for tuna catching/ranching. Our strong preference is the Pastoral Award as an umbrella, with specific provisions for tuna catching/ranching. These provisions would draw on the current terms and conditions of employment, the NES content in the Bill, and the provisions in the Bill for employee/employer agreements (eg on averaging of hours).

Background to Tuna Catching/Ranching

The catching of marine finfish species in Australia for ranching exists only in Port Lincoln South Australia (SA). It exists only for Southern Bluefin Tuna (SBT). The only rough equivalent we know in any other marine species is wild pearl shell.

SBT is a fish species which migrates across the Southern Hemisphere High Seas, and sometimes in the Australian Fishing Zone. It is harvested by a range of countries – Japan, Australia, Indonesia, Korea, Taiwan, NZ, and the Philippines – under an international agreement.

The Australian industry is totally owned by Australian residents. The Australian Southern Bluefin Tuna Industry Association Ltd (ASBTIA) represents all the operators in the industry.

The technology is only useable in SA because it is the only place in Australia where the Southern Bluefin Tuna (SBT) school in the numbers and quality to support viable tuna ranching. It was in Port Lincoln that the global technology behind tuna ranching was invented.

The tuna is caught live in the Great Australian Bight (GAB) up to 250km from Port Lincoln, during December to March, the time when the tuna are seasonally in the GAB. They can only be caught at that time.

They are then towed in large pontoons for 15-30 days to ranching pontoons offshore from Port Lincoln. The tuna are then ranched (ie fed, husbanded) for 3-6 months before harvesting and marketing – over 99% goes to export.

Husbandry is necessarily 7 days/week, and at all times of night and day, consistent with the feeding pattern of the tuna in the wild. Each company is highly integrated – from catching, towing, husbandry, harvesting, and selling.

Australia competes in the international tuna market against subsidised Northern Bluefin Tuna ranching operations in Mexico, Japan, and the Mediterranean countries.

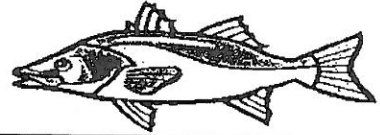
The viability of the Australian operations depends on being more efficient, and this depends on having total flexibility in work practices. This includes intensive multi-skilling.

The result has been high retention rates, and a consistent growth in the work force. The industry now generates around 700 direct jobs, and over 2,000 direct and indirect jobs, of all skill levels.

Yours Sincerely
Brian Jeffriess
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**SEAFOOD PROCESSORS &
EXPORTERS COUNCIL**

ABN 73 073 788 744



Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

The Seafood Processors and Exporters Council is proud to support the Submission by the Commercial Fishing Industry Peak bodies in relation to maintaining an Award free status for the Wild Catch (Commercial) Fishing Industry.

As the submission points out, the Wild Catch (Commercial) Fishing Industry has historically been an Award free industry due to the very nature of the work and the extreme difficulties of encompassing that work within an Industrial Award structure.

The industry operates under a reward for effort model based around share of catch agreements and it is without doubt the only model that works for the type of work that fishers do.

Our Council agrees with the points raised in the submission and the fact that industries such as Commercial fishing should not be subject to a Modern Award.

In particular, we wish to note the Minister's Request in relation to industries that have historically not been subject to Industrial Awards or undertaken work not normally covered by Awards. It would appear that this is clearly the case with the Wild Catch Commercial Fishing Industry.

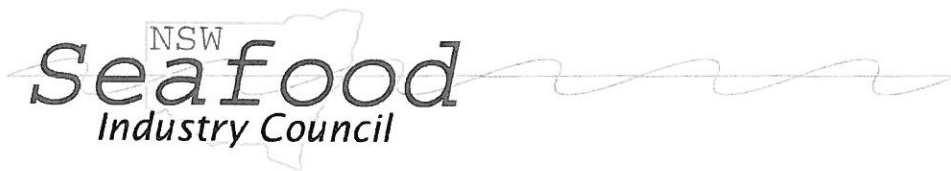
Yours sincerely

Sincerely



Mark Cody
Executive Director

23 July 2009



22 July 2009

Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

NSW Seafood Industry Council strongly supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in NSW we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintains its historical and current "share of the catch" fishing agreement arrangements.

As an industry that is remote and regional in nature and subject to a high level of unpredictability due to natural forces, the labour force of the Wild Catch (Commercial) Fishing Industry works in a contractual system based around reward for effort. Combined with this unique industrial framework is a high degree of variance in operational arrangements between the various fishing industry sectors. It is our contention that neither the industry nor the individuals engaged in it would benefit from an industrial award system common in other industries.

We are of the opinion that the issues set out in the attached submission cover the more common work patterns and industrial arrangements in the wide variety of fishing activities in NSW and across the nation.

We trust that the argument submitted will result in the maintenance of our industry remaining award free.

Yours sincerely

A handwritten signature in black ink, appearing to be "G. Turk".

Grahame Turk
Chair, NSW SIC

NSW Seafood Industry Council
Locked Bag 247, Pyrmont NSW 2009
Ph: 02 9004 1101 Fax: 02 9004 1170
Email: grt@sydneyfishmarket.com.au ABN: 94 565 525 496

22nd July 2009

Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

The Northern Territory Seafood Council strongly supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in the Northern Territory representing all commercial fishing sectors in the Northern Territory (with the exception of the Northern Prawn Fishery), we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintain its historical and current share of the catch fishing agreement arrangements.

As an industry that is remote and regional in nature and subject to a high level of unpredictability due to natural forces, the labour force of the Wild Catch (Commercial) Fishing Industry works in a contractual system based around reward for effort. Combined with this unique industrial framework is a high degree of variance in operational arrangements between the various fishing industry sectors. It is our contention that such an industry cannot benefit from an industrial award system common in other industries.

The issues put forward in the attached submission cover the more common work patterns and industrial arrangements in the wide variety of fishing industries both within the Northern Territory and across the nation.

We trust that the issues put forward will result in the maintenance of our industry remaining award free.

Yours sincerely



Katherine Sarneckis
Chief Executive Officer





TASMANIAN SEAFOOD INDUSTRY COUNCIL ABN 61 009

555 604

Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

The Tasmanian Seafood industry Council (TSIC) strongly supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in Tasmania representing all commercial fishing sectors in the State abalone, rock lobster, scalefish, scallop commercial dive and octopus we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintain its historical and current share of the catch fishing agreement arrangements.

As an industry that is remote and regional in nature and subject to a high level of unpredictability due to natural forces, the labour force of the Wild Catch (Commercial) Fishing Industry works in a contractual system based around reward for effort. Combined with this unique industrial framework is a high degree of variance in operational arrangements between the various fishing industry sectors. It is our contention that such an industry cannot benefit from an industrial award system common in other industries.

We are of the opinion that the issues put forward in the attached submission cover the common work patterns and industrial arrangements in the wide variety of fishing industries both in Tasmania and across the nation.

We trust that the issues put forward will result in the maintenance of our industry remaining award free.

Yours sincerely

CHIEF EXECUTIVE

PO Box 878 SANDY BAY TAS 7006 (117 Sandy Bay Road SANDY BAY TAS 7005)

Phone (03) 6224 2332 Fax (03) 6224 2321 Email tsic@tsic.org.au Web www.tsic.org.au



Sustainable Fishing - Healthy Seafood
Seafood Industry Victoria Inc.

Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

Seafood Industry Victoria strongly supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in Victoria representing all commercial fishing sectors in the State, we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintain its historical and current share of the catch fishing agreement arrangements.

As an industry that is remote and regional in nature and subject to a high level of unpredictability due to natural forces, the labour force of the Wild Catch (Commercial) Fishing Industry works in a contractual system based around reward for effort. Combined with this unique industrial framework is a high degree of variance in operational arrangements between the various fishing industry sectors. It is our contention that such an industry cannot benefit from an industrial award system common in other industries.

We are of the opinion about the issues put forward in the attached submission cover the more common work patterns and industrial arrangements in the wide variety of fishing industries both in Victoria and across the nation.

We trust that the issues put forward will result in the maintenance of our industry remaining award free.

Yours sincerely

Ross McGowan
Executive Director

22 July 2009



Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

23 July 2009

Dear Justice Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

The Western Australian Fishing Industry Council supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in Western Australia representing all commercial fishing sectors in the State, we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintain its historical and current share of the catch fishing agreement arrangements.

Our industry is regionally based and requires a high level of flexibility. The most effective labour force arrangements for the Wild Catch (Commercial) Fishing Industry are based on contractual arrangements based around reward for effort.

The issues put forward in the attached submission cover the cover the usual work patterns and industrial arrangements in the fishing industries both in Western Australia and across the nation.

Yours sincerely

Anna Cronin

Chief Executive Officer





Wildcatch Fisheries SA

PO Box 2099 DC Port Adelaide SA 5015
Ph: 08 83032759 Fax 08 83032791

24 July 2009

Justice GM Giudice
President
Australian Industrial Relations Commission
11 Exhibition Street
Melbourne VIC 3000

Dear President Giudice

Re: Award free Status for the Wild Catch (Commercial) Fishing Industry

Wildcatch Fisheries SA as the South Australian Industry's peak body strongly supports the submission in relation to declaring the Wild Catch (Commercial) Fishing Industry as an award free industry not subject to a Modern Award.

As the peak fishing industry body in South Australia representing all commercial fishing sectors in the State, we believe that it is essential that the Wild Catch (Commercial) Fishing Industry maintain its historical and current share of the catch fishing agreement arrangements.

As an industry that is remote and regional in nature and subject to a high level of unpredictability due to natural forces, the labour force of the Wild Catch (Commercial) Fishing Industry works in a contractual system based around reward for effort. Combined with this unique industrial framework is a high degree of variance in operational arrangements between the various fishing industry sectors. It is our contention that such an industry cannot benefit from an industrial award system common in other industries.

We are of the opinion that the issues put forward in the attached submission covers the more common work patterns and industrial arrangements in the wide variety of fishing industries both in South Australia and across the nation.

We trust that the issues put forward will result in the maintenance of our industry remaining award free.

Yours sincerely

Neil MacDonal
GENERAL MANAGER

E-mail: wfsa@wildcatchfisheriessa.com.au
Web Site: www.wildcatchfisheries.com.au

ABN: 92 147 769 558

Sustainable South Australian Seafood

Submission to the Australian Industrial Relations Commission for the Wild Catch (Commercial) Fishing Sector of the Seafood Industry

Retention of the Industry's Award free status under the Award Modernisation Process

Submitted by:

Western Australia Fishing Industry Council

Wildcatch Fisheries SA

Tasmanian Seafood Industry Council

Seafood Industry Victoria

New South Wales Seafood Industry Council

Queensland Seafood Industry Association

Northern Territory Seafood Council

Seafood Processors and Exporters Council

23 July 2009

1. Preamble

- 1.1 The Wild Catch (Commercial) Fishing Industry is an Award free industry with no history of Industrial Awards. The industry has unique work arrangements that are not covered by any other awards and industry personnel have traditionally been Award free by virtue of the nature of their roles. The Ministerial Request under S576c(1) of the Act states that Modern Awards are not intended to cover workers who operate in such Award free industries. This submission provides supportive evidence for the maintenance of this Award free status.
- 1.2 The Wild Catch (Commercial) Fishing Industry comprises those sectors engaged in catching aquatic species in both fresh and marine waters. The industry operates in inland water and lakes areas, inshore marine (generally sheltered water) areas and offshore marine areas.
- 1.3 Wild Catch (Commercial) Fishing comprises a multitude of fisheries that have historically been characterized by four distinguishing features, extreme uncertainty of product availability on a daily basis, reward for effort (share of catch) arrangements for fishing crews, unpredictable work arrangements that straddle 24 hours, seven days a week and 365 days a year and defined seasons of work aligned with natural freshwater and marine aquatic life cycles.
- 1.4 The total unpredictability of the work is driven by time, tides, weather and fish behaviour. These factors result in no operational consistency between the various fisheries or specific sector catching practices.
- 1.5 Wild catch fishing has always been an Award free industry due to the highly variable nature of fishing and the generally high returns that most fishers enjoy through the share of catch payments system. In history the fishing industry has operated this way for several thousand years and set a benchmark reward for effort model of remuneration that provides substantial rewards for operatives.
- 1.6 The commercial fishing industry model is effectively owners (licence holders) and sub-contractors. After a period of assessment of the status of people engaged in wild catch fishing share of catch arrangements, the Australian Taxation Office has accepted that fishers not engaged in a wage agreement arrangement (share of catch crew) are deemed to be contractors for taxation purposes.

- 1.7 The entire nature of the Fishing industry results in both vessel owners/operators and contract crew sharing the risk in what is clearly a special shared contract arrangement with the possibility of high returns. This contract work arrangement allows fishers to work highly flexible hours, day or night, ranging from short term to continuous fishing operations. It also allows fishers to work for intensive seasonal periods which are tied to government fishery management and licence conditions. Seasonal fishing rewards can be substantial and allow fishers to undertake other seasonal work in other fisheries or other industries. These intensive fishing seasons are related to various State and Commonwealth fisheries legislation that enshrine principles of sustainable fish stock management, individual species management, seasonal determinations, temporal factors and areas (zones) of operation.
- 1.8 Fishing operations vary considerably with some sectors operating large commercial vessels (greater than 25 metres) with crews of up to 15 or more fishers and the overwhelming majority of sectors where vessels are typically less than 18 meters (often less than 10 meters) where crew levels are often between 1 and 2 fishers. There are some smaller fisheries that sustain single operator small vessel operation that are principally "lifestyle" fisheries. These are often inshore or inland fisheries but a number also operate offshore.
- 1.9 Most commercial fishing operations are highly regulated in terms of defined catching seasons, specific areas of operation, vessel and crew regulations and in some cases times of the day when fish can be caught and limits on trips or catches.
- 1.10 Apart from the regulated components of commercial fishing, the variations in actual fishing operations are extreme and can be tied to lunar cycles, tidal movement, temperature, weather patterns, allocated fishing grounds, individual species and species behavior. All of these can and often do combine to set the actual pattern of work activity including its time and duration. This can and sometimes does impact upon crew availability which often limits fishing operations. Even with modern technologies, there remains a high degree of unpredictability in all fishing operations that fundamentally drives all aspects of the work.
- 1.11 Many seasonal fisheries provide fishing crews with sufficient financial rewards to ensure an adequate income for a full year. However the range of seasons allows crew to undertake other seasonal work, mostly in other fisheries but sometimes in other seasonal industries. The share of catch system rewards also result in effective retention levels in most fisheries that maintain experienced crew for following fishing seasons.

Those owners and sectors that provide lower share of catch levels tend to lose experienced crew to other vessels and fisheries that have higher share of catch arrangements. In practice though the share of catch differences are not that marked within each fishery.

- 1.12 The remoteness of most fishing operations results in limited numbers of available local labour. To counter this and retain skilled and experienced labour the industry has maintained the share of catch arrangements as a key attraction and retention strategy. Without this contract arrangement, the industry would have great difficulty attracting sufficient numbers of personnel to continue within the industry.
- 1.13 Unlike all other marine sectors, skilled fishing crew have specific fishing certificates of competency (licences) that are issued by Marine Safety Authorities for the fishing industry. These licences relate to competencies set down under the national Seafood Industry Training Package and allow fishers to work in a range of fisheries at appropriate competency levels. The various qualifications from the Restricted Coxswain level through to Skipper Grade 1 all relate to fishing operations and enshrine the concept of relevant “sea time” on fishing vessels.

2. Major Fishery Sectors and Work Patterns

2.1 Diving Sectors (Abalone, Sea Cucumber etc)

- 2.1.1 Abalone Fisheries operate within defined zones, with regulated catch limits (quotas), size limits and diving licences. An Abalone quota owner or holder engages a diver to harvest the quota. These divers are paid on a per kilogram basis. The diver is supported by a vessel skipper to monitor the diving compressor and abalone catch. Vessel skippers are remunerated on a percentage value of abalone harvested by the diver in what is a defined share of catch arrangement. Actual volumes vary considerably for each trip and remuneration for all crew is also highly variable.
- 2.1.2 Crewing arrangements are typically 1 Vessel Skipper and 1 Diver with sometimes an additional deck hand with operations being conducted during daylight hours (day and multi day trips) usually between 5 am and 6pm. Most Abalone fishing is conducted in inshore fishing areas.

2.2 Multi-species Handlining/Longlining/Netting

- 2.2.1 Line and net fisheries are widespread around Australia and different technologies and work systems operate within each fishery sector. Some of these fisheries target specific species whilst others catch a variety of species within a defined fishing zone.
- 2.2.2 Crewing arrangements are usually 1 Skipper and 1-2 crew with some sectors operating with up to 6 crew and operations straddling both day and night hours depending on lunar cycles, tides, species, regulation etc.
- 2.2.3 The actual work hours spread can occur at any time, be a single trip operation, multiple trip operations with breaks or continuous fishing operations and can be mostly during the day pre dawn to evening or late afternoon to next morning. Each work operation can be as short as 1-2 hours or as long as 10-12 hours. The operations can take place on inland waterways, inshore marine waters, offshore marine waters or in shallow intertidal areas.
- 2.2.4 A common factor in these sectors is that operational working hours are determined by factors that are mostly outside of any human control.

2.3 Pot/Trap/Droplining

- 2.3.1 These fisheries cover a variety of day fishing operations including rock lobster and crab fishing and involve either single day trips or multi day trips. Multi day trips vary between 5-8 days in peak catching periods to 14-16 days in periods of low catches. Actual work hours vary but generally are during the day, pre dawn to evening or late afternoon to next morning. Each work operation can be as short as 1-2 hours or as long as 10-12 hours. Fishing operations take place in both inshore and offshore waters.
- 2.3.2 Crewing arrangements usually involve a vessel skipper and 1-2 crew although some fisheries (Timor Reef) have between 4 and 6 crew on 14 day trips. Remuneration is through a share of catch payment arrangement with varying percentages for the skipper and deck crew. Vessel sizes vary between 6 and 25 metres.

2.4 Prawn or Finfish Trawling/ Purse or Danish Seining

- 2.4.1 These fisheries generally operate vessels less than 25 metres and operate within both inshore and offshore waters. Trips can be single day trips or multi-day trips ranging from 2 -30 days. Periods of fishing vary according to the journey time to fishing grounds and successful location of fish. Operations can take place during the day, pre –dawn to late evening although most operations take place at night usually 1 hour prior to dusk until 2 hours after dawn or during the day,.
- 2.4.2 Crewing arrangements are usually 1 skipper, 1 Engineer and between 2 and 5 deck crew. All crew are remunerated on a share of catch basis according to pre-determined percentages related to level of responsibility and experience.

2.5 Autolining/Deep Sea Trawling/Purse Seining/Tuna Cage Towing

- 2.5.1 These fisheries generally operate with vessels greater than 25 metres in length and with large crews, generally between 10 and 15 crew members and with a variety of higher skills (eg Ships Master, Engineers. These larger fishing vessels operate in offshore waters, territorial waters (eg sub Antarctic) and International waters.
- 2.5.2 Trips can vary in length with most trips being 1-2 weeks in duration although some vessels operating in the southern oceans can be at sea for up to 2 months. Operations take place during the day and night subject to the timing of the catches with varying harvesting and on board processing times. Remuneration is variable with both share of catch and set payments for some crew in line with fixed enterprise agreements.
- 2.5.3 Some operations are unique to a particular fishery and tuna fishing for live ranching is a good example where fishing crews work in the Great Australian Bight, locate and purse seine the fish in special tow cages and then tow these cages and fish back to grow out areas over periods of several weeks. Offshore deep sea trawling operations are undertaken in a variety of regions around Australia for a multitude of species.

3. Industry Culture

- 3.1 The Wild Catch (Commercial) Fishing Industry has traditionally been a family based industry where fishing operators and licence holders have typically been individuals or their families. The operations have tended to be passed down the family to successive generations. This family base is evident in nearly all fishing sectors today with very limited corporate involvement.
- 3.2 Unlike other Agrifood sectors, Wild Catch fishing is much more subject to the vagaries of nature and is considered to be hazardous work that attracts people with a love of the ocean and fishing. Much of the attraction for fishers is that the industry does not have the sort of work constraints evident in most industries and directly rewards people for effort. Fishers enjoy the hunting component of the work, the flexible hours associated with most fishing operations, the hard physical effort that goes into catching fish and seeing their effort directly relate to remuneration.
- 3.3 Fishers prefer the tight team working systems that are part of commercial fishing and have a strong bond born of winning against the ocean and its bounty. Fishers are a special breed of people who love outdoor work in all weathers, understand the dangerous working environments that ocean fishing offers, feel part of the family structures that typify the industry, love working specific seasons and continue to be attracted by often high share of catch remuneration, remuneration that is often much higher than workers receive in most other industries.
- 3.4 Fishers also value the cyclical nature of the work that provides a variety of off-work periods. These provide often extended periods of time allowing fishers to enjoy time with their families, enjoying recreational activities or undertaking other seasonal work.

4. Management Impacts on Fishing Activities

- 4.1 The Wild Catch (Commercial) Fishing Industry is highly regulated around State and Commonwealth Fishery legislation as it harvests from a community owned resource. This legislation determines to a great extent how each fishery operates but within the limits set down by that legislation, there often exists a vast array of regulation providing for input controls such as spatial and temporal closures, limitations on nets, traps,

numbers of hooks, vessel restrictions and environmental controls as well as output controls such as fishery quotas.

- 4.2 Much of the actual seasonal controls lie within both Ministerial obligations and Fishery Management Committees and Councils. These bodies can and do adjust the total allowable catch limits on a seasonal basis, or even within seasons, based on scientific research with the aim of ensuring sustainable fishing stocks.
- 4.3 In addition, the establishment of a national network of Marine Parks has set further limits on where, when and how fishers can “ply their trade”. The impact of this layered management regime directly results in fishers having to undertake their work within limits that are far outside any other comparable industry.
- 4.4 The result is often increased journey time to fishing grounds, increased selection of catch to meet regulatory limits, use of by catch limiters and other technologies to meet sustainability measures and adjustment of working hours to meet narrow seasonal and other fishery controls. All these directly impact on the actual work performed and mean that fishers have to often work extremely hard for the period that fish are available resulting in a highly flexible set of operating hours and a very variable spread of hours.
- 4.5 As fishery management controls are adjusted on a seasonal basis, particularly in allowable catch limits and seasonal duration, the entire work program is also adjusted to maximize catch and limit operating costs, all of which impact on the entire crew’s final remuneration for each trip.
- 4.6 The Fishing Industry is also represented at a State and Territory level by Peak Fishing Industry Councils that have a clear fishery management role. These bodies cover all relevant fishery sectors in their State or Territory jurisdiction and contribute directly to State/Territory Fishery Management arrangements that impact on all patterns of work. All State and Territory Peak Fishing Industry bodies are signatories to this submission.

5. Award Free Status

- 5.1 The Fishing Industry has a history of being Award free. No Industrial Awards have ever been developed for the commercial catching components of the Wild Catch (Commercial) Fishing industry. In fact the processing (post harvest) sector has been the only Seafood Industry sector with a full range of State Awards.

- 5.2 Fishers traditionally have worked in a share of catch contract arrangement where the Owner/Vessel Operator, the Engineer, the Coxswain and General Fishing Crew have a fixed agreed percentage of the net income from the catch. The higher the catch value, the greater the return for all fishing crew. There are many instances of the crew failing to catch sufficient fish to cover operating expenses and in these instances, the crew generally receive no income. However, even though some fishing seasons are relatively short, returns can be substantial in some sectors which are an attraction for people who wish to undertake such demanding and hazardous work.
- 5.3 Whilst a small percentage of fishers have worked for wages in a “traditional” employer/employee relationship, the basis for this remuneration has been an unregistered enterprise agreement between vessel operators/owners and day crew with no evidence of reference to any existing Industry Award either in the determination of the remuneration level or employment conditions. The percentage of fishers who are currently on an unregistered employment agreement is unclear but is estimated to be less than 4%.
- 5.4 As a general rule, the enormous differences between individual fisheries as well as between the same fisheries in different locations, which are all tied to highly unpredictable and variable natural cycles and work hours, all point to an industry that cannot have an industrial arrangement that sets any limitations for workers.
- 5.5 Importantly workers in the Wild Catch (Commercial) Fishing Industry perform work that is unique and not covered by any Award. That is why the industry has historically operated without Awards and continues to remain Award free. The definition of “Award free” in this context relates to persons who are not deemed to be employees as such and whose work effort is not covered by a Federal Award, State Award, (NAPSA) Enterprise Award or any registered Agreement based on a “designated” Award.
- 5.6 The Australian Taxation Office (ATO) conducted a review in 2007 of the work relationships within the Wild Catch (Commercial) Fishing Industry and following that review the ATO has continued to accept the established assessment of owner/contractor where such arrangements occur. The ATO have advised that no specific or formal determination was made following that review.
- 5.7 An Industrial Award model does not meet the needs of the Wild Catch (Commercial) Fishing Industry which by its very nature would have extreme difficulty complying with

such concepts as ordinary hours. The administrative burden that an industrial Award would create for the widely varying work patterns would add substantial costs to the industry, almost certainly result in reduced remuneration levels for crews and result in a loss of industry personnel.

6. Conclusion

- 6.1 The Award Modernisation Request from Minister Gillard dated 1 July 2009 seeks to clarify those categories of work that Modern Awards are not intended to cover especially in areas that have traditionally been Award free. In particular, the Request also cites the inclusion of new industries and occupations in those Award free areas where the work performed is of a similar nature to work that has been historically regulated by Awards. The Wild Catch (Commercial) Fishing Industry contends that there are no other industries that have even remotely similar work arrangements regulated by Awards.
- 6.2 It is the contention of the Wild Catch (Commercial) Fishing Industry that the industry should not be covered by a Modern Award, the current Award free arrangements that govern all work in the industry be maintained and that the Wild Catch (Commercial) Fishing Industry be designated an Award free Industry.

Attachment 4

PO Box 9022
Deakin. ACT 2600

16 October 2009

Justice Giudici
President
Australian Industrial Relations Commission
GPO Box 1994
Melbourne. Victoria. 3001

Your Honour,

Subject: Wild Catch Fishing Industry – Stage 4 (Award Modernisation)

This submission is made on behalf of the Australian Fishing Industry. The total industry is represented by the Parties to this submission – the Members of the National Seafood Industry Alliance (NSIA) which covers all the fisheries managed by the State and Commonwealth Governments.

The Full Bench Statement of 25/09/09 on Stage 4 Industries makes no mention of the Wild Catch Fishing Industry. Can we assume that the Commission has accepted that Wild Catch Fishing will be award free in light of:

- (1) It has never been covered in Australia by an award of any kind.
- (2) Its work by definition and observation is not of a kind or similar to that undertaken by award covered employees.
- (3) The union has no objection to it being award free (please refer transcript of hearing before Commissioner Lewin, 14 August 2009, PN 30-43).
- (4) Covering the industry by any Award (eg the proposed Miscellaneous Award 2010) would be in conflict with the Ministerial Request.

We understand you are extremely busy with a very difficult task but we would be grateful if the Full Bench could confirm that the industry will be award free, consistent with the agreement previously reached by Parties in the Commission hearing on the issue.

Yours Faithfully,

Jeff Moore
A/g Chief Executive Officer
Commonwealth Fisheries Association
Member National Seafood Industry Alliance
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