



Australian Directors' Guild

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26th April 2018.

IN THE FAIR WORK COMMISSION

4 Yearly Review of Modern Awards- Group 4 Awards Broadcasting, Recorded Entertainment and Cinemas Award 2010 AM2014/259

Dear Associate,

Motion Picture Production

Directors' Ordinary Hours

Scheduled and Unscheduled Overtime Arrangements

Annualised Salaries

Facilitative Provisions including Director's Loading in Television Broadcasting

ADG notes the Full Bench decision FWCFB 1548 dated 21 March 2018, which addressed a range of issues in relation to the content of the Broadcasting, Recorded Entertainment and Cinema Award. With all due respect to the Full Bench and whilst accepting a certain lack of clarity in the ADG and other parties' submissions the ADG submits that the Full Bench has failed to fully appreciate and consider the issues relating to ordinary hours of work, overtime and related matters as they apply in both motion picture production and some areas of television broadcasting to directors having regard to both industry practice and history.

The relevant Full Bench comments are set out below

"Item 1 – Calculation of overtime

[240] The following submissions were made by the Australian Directors' Guild (ADG): [130](#)

12. The ADG notes various proposals to change the content of the award in relation to the calculation of overtime particularly to specify that overtime is payable only at the minimum rate of pay for a classification or at the ordinary hourly rate so defined and to introduce a provision that overtime is payable on a daily basis. Such an approach is inconsistent with the history and content of the Motion Picture Production Section of the existing award and the provisions of the earlier Motion Picture Production Award.

13. The industry is unique as it operates on a standard working week of 50 hrs, well in excess of the NES standard of 38 hours, minimum daily hours of 10, set periods of high intensity duty and limited duration engagements which limit the effectiveness and opportunity to use averaging of hours and for that matter accrued leave or TOIL.

14. The manner of payment and the calculation of overtime is set out in clauses 76 and 77. Overtime is already calculated on a daily basis rounded to the nearest quarter of an hour if more than 5 minutes is worked. The proposed variations are inconsistent with the current provisions in clause 77.2 and they are also inconsistent with

the wording in the exposure draft at clause 81.2 which refer to overtime being payable on the employees gross agreed remuneration. A similar provision was found in the earlier Motion Picture Award. The current proposal would result in a significant reduction in pay.'

[241] A previous Full Bench determined the following:

'[43] The term 'ordinary hourly rate' has been used in contrast to 'minimum hourly rate' in affected awards to make it clear that all purpose allowances must be added to the minimum rate of pay before calculating any penalty rate.

[44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate before calculating the loaded rate, that is, there is a compounding effect.' [131](#)

[242] Given this established calculation principle we believe overtime should be calculated by reference to the ordinary hourly rate, not the minimum hourly rate. Interested parties may wish to comment on whether any variation to the exposure draft is required to give effect to this interpretation. Submissions can be made by **19 April 2018**, see the [Next steps](#) below.

Item 47 – Motion Picture Production – Overtime

[287] The ADG submits that clause 80.3 of the exposure draft should be amended so that the references to 'two hours' should be deleted and replaced with references to either '2.4 hours' or 'two hours and 24 minutes':

'The apparent error limiting prescheduled overtime to a maximum of two hours a day in clause 76.3 or proposed exposure draft [sic] clause 80.3 could be retrospectively corrected as it represents a provision not amended at the time of the introduction of the modern award and the 38 hrs week. Subject to the agreement of the Commission and other parties the reference to 2 hours would be deleted and replaced with 2.4 hours or 2 hours and 24 minutes. The industry practice is to not apply the two-hour limit and to have pre scheduled overtime up to 2.4 hrs. There does not appear to be any financial consequence.' [166](#)

[288] The provision appears in the current Broadcasting Award in the following terms:

'76.3 Scheduled overtime may be contracted as follows:

- (a) where a five-day week is worked scheduled overtime up to a maximum of two hours per day may be contracted for; or*
- (b) where a six-day week is worked, scheduled overtime up to a maximum of two hours per day for each day between Monday and Friday inclusive and up to a maximum of 10 hours on Saturday may be contracted for.'*
- (c)*

[289] It is unclear what the ADG means when referring to the 'apparent error' in this provision. The current provision is worded in identical terms to that which appears in the exposure draft. And the exposure draft and Broadcasting Award are worded in identical terms to the two relevant pre-reform awards: the Entertainment and Broadcasting Industry – Motion Picture Production Award 1998 [167](#) and the Entertainment and Broadcasting Industry – Film and Video Production (State) Award. [168](#)

[290] We are not persuaded that this is an error of a technical and drafting nature that requires amending, nor has a merit case been advanced for any substantive change. If any interested party wishes to pursue this matter as a substantive change they can do so, see the [Next steps](#) below.

Item 48 – Calculations of penalties and provision of rosters

[291] In the exposure draft, the Commission posed a question to interested parties concerning the wording of clause 81.2:

'Parties are asked whether clause 81.2 should refer to the minimum rates in clause 13 rather than the 'gross agreed remuneration' – see [\[2015\] FWCFB 4658](#) at [96].'

[292] The MEAA submitted that the term ‘gross agreed remuneration’ should be retained and pointed to its submissions on the need to retain terms such as ‘time and a half’ over ‘200% of the minimum hourly rate’, in support. [169](#) Conversely, ABI submitted that the clause should refer to the minimum rates in clause 13 of the exposure draft rather than the ‘gross agreed remuneration’. [170](#)

[293] In the decision referred to in the question, the Full Bench made the following observation:

‘Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Over award payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.’ [171](#)

[294] While we accept that the reference to ‘gross agreed remuneration’ is reflective of the current award, we have decided that the reference should instead be to the minimum rates in clause 13. We reiterate our view that modern awards provide a safety net of minimum entitlements. The exposure draft will be updated to reflect this change as follows:

81.2 Penalty and overtime rates will be based on hourly rates calculated from the employee’s ordinary time minimum rate in clause 13. on which the employee’s gross agreed remuneration is based. A divisor of 38 will be used for such calculations.

[295] We note that this amendment to clause 81.2 of the exposure draft does not factor in any all-purpose allowance payable. If interested parties think further re-drafting is necessary to account for any other applicable allowances they are invited to provide a comment on this point, see the [Next steps](#) below.

[296] There are no other outstanding issues for this Full Bench to determine with regards to the Broadcasting Award.”

The earlier ADG submission addressed the issues of the existing and accepted industry practices in relation to ordinary hours worked and the calculation and payment for overtime. The current industry practice and award provisions provide for both scheduled and unscheduled overtime. In recognition of the industry acceptance of a notional 50 hour working week scheduled overtime is provided for and is paid for irrespective of whether it is worked or not worked. Prior to the introduction of the modern award the industry operated on the basis of a 40-hour week. See 2009 AIRCFB 943

In effect the industry practice is to establish a so called consolidated or gross remuneration rate which incorporates the additional scheduled overtime and provides for payment of a 50-hour week rate. This rate is effectively used as an all purposes rate including for annual leave.

The existing limitation to 2 hours of scheduled overtime a day (clause 76 refers) meant that assuming an 8-hour day was worked the typical or accepted working day of 10 hours could be accommodated within the 2 hour daily scheduled overtime limit.

The confirmation and implementation of the 38-hour week in 2009 meant that the daily ordinary hours of duty reduced from 8 hours to 7.6 hours. If the daily limit of 2 hours on scheduled overtime is maintained the maximum daily hours including both ordinary time pre-scheduled overtime are limited to 7.6 plus 2 hours or 9.6 hours per day compared to the actual accepted practice of 10 hours.

Describing the issue as “an error” as we did may have been unhelpful, it is certainly an issue where a considered discussion under the direction of a member of the Commission would be helpful for all parties to develop clear and considered understandings of both the intent and application of the relevant provisions.

A similar situation applies to the payment and use of the consolidated rate/ gross remuneration rate issue also considered by the Full Bench. A change in approach to award provisions providing for payment of overtime at the minimum hourly rate of the classification rather than the consolidated or

gross remuneration rate (see clause 77) is a significant change and effectively reduces the monetary value of the overtime compensation. In this regard the ordinary rate in the industry is effectively the gross agreed remuneration which incorporates payment for the additional hours of prescheduled overtime.

Given the recent Full Bench decision on Annualised Wage Arrangements 2018 FWCB 154 it may be an appropriate time for the parties again under the guidance of a Commission member to develop clearer understandings and appropriate wording of entitlements.

Television Broadcasting Directors Loading. Facilitative Provision Annualised Salaries

At this stage the application and use of the Director's Loading provided for by Clause 32.15 is unclear to the ADG. The classifications referred to in the provision are not the normal classification titles used. In the event that the provision does apply it should like other facilitative provisions be subject to a better off overall requirement and a formal written agreement between the employee and the employer. The exact history and rationale of the provision is uncertain however a suggestion that a 25% loading based on the minimum rate for the classification is certainly unlikely to provide a no disadvantage situation. Again, the concept of an annualised salary may be a more appropriate approach.

ADG is available at the Commission's convenience to participate in further conferences to consider and resolve these issues.

Australian Directors Guild
Sydney
26 April 2017