



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT KOVACIC**

**AM2014/300**

**s.156 - 4 yearly review of modern awards**

**Journalists Published Media Award – MA000067 – TOIL Provisions  
(AM2014/300)**

**Canberra**

**4.30 PM, WEDNESDAY, 20 DECEMBER 2017**

PN1

THE DEPUTY PRESIDENT: Good afternoon, everybody. Can you hear me clearly?

PN2

MS CHAN: Yes, Deputy President.

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MR FORSTER: Yes, yes, I can, Deputy President.

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THE DEPUTY PRESIDENT: Thank you. Thank you, everyone, for making yourselves available late in the day so close to Christmas. Much appreciated. Look, I should indicate first off that this afternoon's hearing is being recorded so I might just ask each of you to state your appearance. If I can start perhaps with you, Mr Forster?

PN5

MR FORSTER: Yes, thank you, Deputy President. My name is Forster, initial S, and I continue my appearance on behalf of Nationwide News Proprietary Limited, Bauer Media Proprietary Limited and Pacific Magazines Proprietary Limited. If the Commission pleases.

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THE DEPUTY PRESIDENT: Thank you, Mr Forster. Mr Chesher?

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MR CHESHER: Yes, thanks, your Honour. Chesher, initial M, for the Media, Entertainment and Arts Alliance. Thank you.

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THE DEPUTY PRESIDENT: Thank you. Mr Crilly?

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MR CRILLY: Thank you, Deputy President. Crilly, initial S, continuing my appearance for Fairfax Media Limited.

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THE DEPUTY PRESIDENT: Thank you. And finally, Ms Chan?

PN11

MS CHAN: May it please the Commission, Chan, in short M for Margaret, for the Australian Business Lawyers and Advisors continuing to appear for our client, the Australian Business Industrial and the New South Wales Business Chamber.

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THE DEPUTY PRESIDENT: Thank you and welcome, Ms Chan. Mr Forster, thank you for the email which had attached to it a copy of the proposed clause and also a draft determination. I might invite you in the first instance to say anything you may wish to in terms of the draft provision that's been developed as a result of the conversations you've been having with Mr Chesher.

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MR FORSTER: Yes, thank you, Deputy President. Very briefly, the two documents that I have sent through reflect at this stage an agreement that's been reached by the clients that I represent and also the Media, Entertainment and Arts Alliance.

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The draft provision that we sent through, in a nutshell, is a negotiated position that my clients and the Media, Entertainment and Arts Alliance are prepared to agree to, to what we hope will resolve the TOIL proceedings or the - to be correct, the award flexibility proceedings in the four-yearly review as they pertain to the Journalists (Published Media) industry award.

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No doubt Mr Crilly and Ms Chan will have something to say on behalf of the clients that they represent. But can I just say on behalf of my clients that the agreement between them and me represents what we think is a reasonable compromise that's been a long time in the making; is a result of lots and lots of discussions and proposals between those two parties who have been, I can say fairly, the principal parties involved in these award flexibility proceedings in relation to this particular award.

PN16

So we're comfortable with the provision. We've endeavoured to assist the Commission by showing both what the clause will look like in its entirety in a marked up form, but also produced some draft orders as well. This is unlike some traditional arbitral proceedings relating to awards, given that there are no parties to these awards anymore. So we thought it would be a good idea, and we thank your Honour for convening this conference so that we can perhaps talk with all of the interested parties about how we might advance this matter to its completion.

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THE DEPUTY PRESIDENT: Thank you, Mr Forster. I've just been advised by my associate that Mr Burke either has joined the teleconference - the hearing or is about to. Are you there, Mr Burke?

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THE ASSOCIATE: Just dialling him in now.

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THE DEPUTY PRESIDENT: Okay, so just bear with us, everybody.

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THE ASSOCIATE: Mr Burke has joined the call.

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THE DEPUTY PRESIDENT: Good afternoon, Mr Burke. It's the Deputy President here. Can you hear me clearly?

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MR BURKE: I can indeed, thank you, Deputy President.

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THE DEPUTY PRESIDENT: Thank you. Look, I'll just briefly summarise and I should indicate first that this afternoon's hearing is being recorded so I might just ask you to state your name or your appearance for the purposes of the record, thank you.

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MR BURKE: Thank you. Burke, initial S, solicitor appearing for Commercial Radio Australia.

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THE DEPUTY PRESIDENT: All right. Thank you. Now, Mr Forster has just outlined the background to the proposed clause that had been negotiated between those that he represents and the MEAA. And his words were, in essence, that it represented a reasonable compromise and that his clients were certainly comfortable with this listed provision. So that's where we've gotten to thus far. Now, Mr Chesher, is there anything you wish to say in respect of the provision that's been agreed with those that Mr Forster represents?

PN26

MR CHESHER: Your Honour, I concur with Mr Forster's reflections on the course of negotiations and the outcome.

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THE DEPUTY PRESIDENT: Okay. Can I just perhaps ask one question? And just in terms of preparing myself for this afternoon's hearing I revisited the Full Bench's decision around about this time last year. And in respect of this particular award it alluded to an application by - or the issue of the MEA age(?)4.38.18 coverage application in respect of the award.

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And I just thought it might be useful to get a sense of where that particular element is up to at the moment because the Bench's decision at that time sort of indicated that the Bench had decided to defer further consideration and variation of the TOIL provisions until that coverage application had been determined. So that's the context underpinning why I ask that question, Mr Chesher.

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MR CHESHER: Your Honour, that matter hasn't been progressed. There have been several proceedings this year before Catanzariti VP but of the substantial or substantive claims that we have put forward in early 2015, those matters haven't been addressed.

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THE DEPUTY PRESIDENT: All right. Thank you for that.

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MR CHESHER: So we're awaiting direction from the Commission.

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THE DEPUTY PRESIDENT: Yes, thank you for that, Mr Chesher. Mr Crilly, is there anything you wish to say in respect of the proposed clause or anything that Mr Forster or Mr Chesher have stated today?

PN33

MR CRILLY: Yes, briefly, Deputy President. As Mr Forster has noted, this clause originates from discussions between those clients whom he represents and the Media, Entertainment and Arts Alliance. My client wasn't involved in the drafting of the clause or those discussions and so it's been about a week that we've been on notice that this discussion had resulted in a proposed clause.

PN34

As to our position, that's by way of background. The clause is largely supported by my client and turning to some of the specifics, it's not concerned with any of the proposed changes to the aspects around recordkeeping and so on.

PN35

The only matter on which it is still consulting with internal stakeholders, and as such hasn't yet been able to finalise its position, is the proposition that time off which is not taken within four months of accrual be paid out. So they're still just stress testing that internally as to whether that's an acceptable outcome from its perspective.

PN36

THE DEPUTY PRESIDENT: All right. Do you have a timeframe in terms of how long that internal consideration might take to come to a concluded view, Mr Crilly?

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MR CRILLY: I don't Deputy President. I wouldn't anticipate it would take terribly long but the complicating factor is, of course, the Christmas, New Year holiday when lots of people will be away which will, I would have thought, make it difficult to do it before, say, mid-January at the earliest.

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THE DEPUTY PRESIDENT: Okay. All right. Thank you for that. Mr Burke, I might throw to you now.

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MR BURKE: Deputy President, I'm unfortunately at a bit of a hamstrung position here at the moment. I wasn't aware of the hearing this afternoon until I had a kind phone call from your associate. So I'm not across the proposed clause that Mr Forster has spoken about earlier in the hearing.

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If Mr Crilly's issues might require the matter to be adjourned that would give me sufficient time to be able to get some proper instructions because I'm just simply unable to commit or comment on it either way for my client's interest.

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THE DEPUTY PRESIDENT: All right. Thanks for that, Mr Burke. Ms Chan?

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MS CHAN: Yes, Deputy President. My client is in a similar position to that of my colleague Mr Crilly. That is, we have only recently been on notice of these discussions and the proposed clause. However, I have obtained some initial instruction from my client which is that we are generally not opposed to the clause.

PN43

Similarly, we feel in a position where we would need to consult with some of our members around the proposition that time not taken off within four months be paid out in that timeframe. And it really is a question of, you know, should it be 12, six, four or some other number? Because that is a change from the current award clause, obviously.

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THE DEPUTY PRESIDENT: Yes, thank you for that. Ms Chan, do you have a sense how long it might take you to conclude those consultations with members?

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MS CHAN: Deputy President, I would imagine we should be able to come back to the Commission maybe sometime in - I would say maybe early February. As Mr Crilly has alluded to obviously, some of our members will either be shut down or away over the Christmas, New Year period. So I would imagine if we were to resume those conversations with interested members in about mid-January, about sort of early February would be feasible.

PN46

MR CHESHER: Could I ask - I'm sorry to butt in, your Honour, but can I ask of the representatives of Ms Chan and Mr Bourke who their clients - well, especially Ms Chan, who their client is in the journalist industry that they need to consult with?

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MS CHAN: We have a number of sort of smaller members.

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MR CHESHER: In journalism?

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MS CHAN: To my knowledge, yes. It's not a huge number but obviously I am, you know, hoping to just have a small amount of time to consult with them after that Christmas, New Year break.

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THE DEPUTY PRESIDENT: Can you be a bit more specific, I think, for everybody's benefit, Ms Chan, as to who they might be?

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MS CHAN: I don't have the list to hand straight away but I do recall looking at it in the past.

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MR CHESHER: I think the question I'm alluding to is if - of course, proceeding with negotiations in the manner in which we have does carry some hazard because other parties aren't at the table along the way. But I think it's reasonable that if someone seeks effectively six weeks to respond to the Commission then I think it's reasonable that they be able to present the identity of their affected clients.

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THE DEPUTY PRESIDENT: Well, I have reservations about the six weeks timeframe, Mr Cheshier, which I think is something that underpins the comment that you just made as well so that - and Ms Chan, are you able to elaborate any further?

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MS CHAN: Not at this particular point in time but I will endeavour to either - if six weeks is a concern I will endeavour to either consult those members sooner and hopefully respond by, say, the end of the week or alternatively provide a list of the affected members by the end of the week. Would that be amenable?

PN55

THE DEPUTY PRESIDENT: Look, I think - and I'll come back to this in a moment and I just want to ask a question of Mr Burke. In terms of your timeframe, I think you are sort of comfortable with the sort of timeframe that Mr Forster mentioned earlier in respect of - sorry, not Mr - Mr Crilly, I should say, earlier mentioned in terms of finalising the consideration by his client.

PN56

MR BURKE: Yes, I am. Thank you, Deputy President.

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THE DEPUTY PRESIDENT: Okay. Look, just in terms of timeframe for a response, I have two weeks' leave in January which my last day at work is 12 January which is the Friday and I don't return until the Monday after the Australia Day weekend.

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So one option, and I think this is my preferred option, is if the parties were able to advise my Chambers of their members' views by no later than close of business on Thursday, 11 January. That would enable me to provide a report to the President and Commissioner who are on the Bench as well in terms of where things are up to and where it might go from here.

PN59

And I think then by the time I return from leave I'd probably have some clarity or some feedback from the President in terms of how the matter might proceed from there and whether the point that I made about the coverage issue, whether the Full Bench remains of the view that that needs to be determined before this particular issue can be finalised, particularly in circumstances if - I know there is an agreed position that the parties are comfortable with.

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Does that sound amenable? Is everyone comfortable with that sort of approach?

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MR FORSTER: Yes, your Honour.

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MS CHAN: Yes, your Honour.

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MR BURKE: That's fine.

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MR CRILLY: Yes, fine for Fairfax.

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THE DEPUTY PRESIDENT: Okay, great. All right.

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MR FORSTER: Yes, I might just say, if it assists Mr Burke, I can send through a copy of the draft clause and the draft proposed orders to him this afternoon.

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THE DEPUTY PRESIDENT: Okay, that would be much appreciated.

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MR BURKE: That would be great, thank you.

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THE DEPUTY PRESIDENT: This prompts another question in my mind. Mr Forster, is there any objection to the draft provision and the draft order being posted on the Commission's website? Or is it still a without prejudice document, if I can put it that way?

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MR FORSTER: Well, it's a very good question, your Honour. It's got the heading, "Without prejudice," because the document derives from a document that was produced to the Fair Work Commission on 5 December 2016 during the Full Bench hearing of the proceedings related to this award.

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So with the exception of the recordkeeping provisions which we've added, this document has been doing the rounds amongst the parties for some time. I'm comfortable with it being published now but I don't want to prejudice the MEAA in any way so I'm happy for Matthew to speak to that.

PN72

Just one further point, I suppose, in furtherance to what I've just commented about, the fact that this clause has been doing the rounds for some time and I don't mean this as any criticism to Ms Chan, for example. But there's the suggestion being that the parties have only been on notice of discussions for about a week is perhaps a little unfair, given that these discussions were actually discussions that



were agreed to in a conference that was an open conference before the Commission in about August this year.

PN73

That was a conference that was listed that the parties should have been aware of and had every opportunity to attend. And had they done so they would have had, I would have thought, the opportunity to agree to participate in the discussions that the MEAA and my clients have. So I don't wish to say any more about that but I think it's worth noting for the record.

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THE DEPUTY PRESIDENT: Yes, thank you for that, Mr Forster. Mr Chesher, do you have any views as to publication on the Commission's website of the without prejudice document?

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MR CHESHER: I do. I do, your Honour. Thank you. I'd prefer that it remain a without prejudice document and that it not be uploaded. The reason I say that, and it's hard to say this without it being interpreted as a shot across the bow, is that our membership, our national media section, has been uncommonly pragmatic in coming to the negotiated position with Mr Forster and Ms Patterson(?) and others.

PN76

You'll note from the materials provided by Mr Forster that the default position has been maintained and that puts it in a very small minority of modern awards, notwithstanding that it was one of the few modern awards that had TOIL before overtime when the award flexibility proceedings commenced.

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My view is that - and it's not really meant to be a shot across the bow. But if by 11 January there are responses received by your Chambers that seeks material changes to what has been distributed to all parties today, then MEAA may well exercise its right to have the Full Bench hear fresh submissions and the new evidence that we've previously foreshadowed to you and to seek an inversion, if you like, of the current TOIL before overtime position. So that is our view and I think that if it's publicised I see some potential prejudice to our position.

PN78

THE DEPUTY PRESIDENT: Okay. Look, I understand the sentiment there, in essence, that pending Mr Crilly, Ms Chan and Mr Burke coming back, that the proposed clause remains a work in progress. I think that's (indistinct) used in the proposition. So I'm comfortable with it not being published on the Commission's website at this stage, given that there is an element of work to be done before it comes to a concluded review, at least among the parties here.

PN79

Can I just perhaps ask one question? And it's more for my own understanding and in one sense I probably anticipate what the answer might be. But is there any particular rationale around the landing spot at four months?

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MR CHESHER: Your Honour, it was the position advanced by MEAA with the knowledge that the model provision is a six-month term. And it's not especially scientific but I know that in the more recent award flexibility decisions made by the Commission that variations of four months have been approved. I don't have the award in front of me but I believe there's a medical based award, perhaps even the pastoral one.

PN81

So there have been departures from six months and, frankly, in terms of negotiations MEAA thought that in return for seeding its ground on TOIL before overtime, that four months was a better outcome for our members than six.

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THE DEPUTY PRESIDENT: Yes, I understand that. Okay. All right.

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MS CHAN: Thank you.

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THE DEPUTY PRESIDENT: Did anyone else have any other questions that they may wish to ask before we wrap it up for this afternoon?

PN85

MR CRILLY: Only this, Deputy President. It's Steve Crilly for Fairfax. There have been some comments about the basis on which these discussions that have led to this clause took place and I don't want to get into the (indistinct) or to criticise any party about that or about anything that's been said today. I am, however, instructed to put on the record unequivocally that my client does seem to be involved in any future discussions regarding this award, whether in relation to time off in lieu of overtime or (indistinct). That's all I wish to say at this point.

PN86

THE DEPUTY PRESIDENT: Thank you. Okay. All right. Look, I think - go on?

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MS CHAN: Deputy President, Ms Chan here. Similarly my client is in a similar position about seeking to be involved in any future discussion about - - -

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THE DEPUTY PRESIDENT: Well, I'm just trying to make a point here that certainly as part of this process there's been a number of conferences. My Chambers has issued notices of listing to directions and to the extent that parties have not taken up the opportunity to participate in those conferences, and my recollection is - and I don't have the file completely in front of me at the moment - that there have been occasions where not all of the parties that are here today and participated in those earlier conferences.

PN89

The Commission can only do so much in terms of alerting parties to proceedings but if at the end of the day people don't show, we do our best to chase up. But there's a limit to what can be done in those circumstances but nonetheless I note the points that have been made. But I just reiterate the Commission's practice has been, and is, to notify all relevant parties of particular proceedings but we'll leave that there.

PN90

All right. So unless there's any other burning issues that people wanted to raise I suggest we leave it there. Anything else?

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MR FORSTER: No, your Honour. Thank you for convening the conference, your Honour.

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MS CHAN: No, Deputy President.

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THE DEPUTY PRESIDENT: All right. And thank you, Mr Forster and Mr Chesher, for your efforts in terms of getting it to this point. And can I take this opportunity to wish everyone all the best for Christmas and the new year and we'll undoubtedly talk at some stage again in 2018. All the best, everybody.

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MR CHESHER: Thank you, your Honour.

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MR FORSTER: Thanks, your Honour.

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MR BURKE: Thanks, your Honour.

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MR CRILLY: Thank you, your Honour.

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MS CHAN: Thanks, everyone.

**ADJOURNED TO A DATE TO BE FIXED**

**[4.56 PM]**