IN THE FAIR WORK COMMISSION

Matter No: AM2014/300

In Re: Award Flexibility Common Issue: *Journalists Published Media Award 2010*

SUBMISSIONS OF FAIRFAX MEDIA LTD

1. These submissions are filed pursuant to the directions of the Full Bench of 6 February 2018, regarding the Draft Determination published in relation to the *Journalists Published Media Award 2010* (**Award**).

2. Fairfax Media Ltd (**Fairfax**) is the holding company of the Fairfax Media Group, which publishes a variety of print and online mastheads and employs journalists covered by the Award. As the parent company of numerous employers covered by the Award, which operate under enterprise agreements underpinned by it, Fairfax has a particular interest in the terms of the Award.

3. As set out in the Full Bench's recent Statement,[1] Fairfax supports the consent proposal to vary the Award as set out in the Draft Determination, subject to two drafting matters to which we refer below.

4. As has been noted on numerous occasions by the federal industrial tribunal of the day, journalism is in many ways a unique profession, distinct from many other forms of work traditionally covered by awards.[2] Subject to specific exemptions, the Award covers any employees who perform editorial work, including those who "exercise the highest levels of skills and responsibility", requiring "sustained high levels of professional, technical and creative skills of mature and experienced judgment and outstanding levels of individual accomplishment".[3] It provides for base wages much higher than in many other awards – up to $87,308 per annum for the highest classification – with some employees entitled to a base salary of almost $70,000 entitled to earn overtime.[4]

5. In particular, the nature of journalism frequently requires significant flexibility. As was noted over 60 years ago, journalism:

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1 [2018] FWCFB 770, [17].

2 *Australian Journalists Association v Sydney Daily Newspaper Employers' Association* (1917) 11 CAR 67, 86-88; *Australian Journalists Association v Ballarat Courier Pty Ltd* (1951) 73 CAR 249, 250; *Australian Journalists Association v Associated Newspapers Ltd* (1955) 81 CAR 699, 703.

3 *Journalists Published Media Award 2010*, cl 13.5(c).

4 On print publications other than suburban and country non-daily newspapers, a Level 11 employee with a base full-time wage of $1,335.90 per week can still earn overtime: see clauses 4.10(b) and 14.1.

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> … is a profession, the conditions of which cannot, in many instances, be regulated by the usual hard and fast rules of industrial regulation; it is a profession in which there must be given and take, in which too rigid rules would tend to embarrass and fetter both sides.[5]

6. Little has changed in this respect: the Commission may take notice that many journalists (and their employers) remain subject to the unpredictable timing of many significant events and the need to work as necessary to file copy. Journalists do not simply attend a newsroom at an allotted time, work their allocated shift and then leave – they may need to travel to interview subjects, investigate sources or in the case of photographers, to perform the core function of their role. Journalists may need to work to whatever time is necessary to deal with an emerging story. It is therefore appropriate that the Award facilitate flexibilities that benefit both employers and employees.

7. In light of that position, it is unsurprising that "special features" have developed in awards covering journalists.[6] For present purposes, the most relevant of these is that for over 100 years awards covering journalists have included bespoke regimes for the compensation of overtime, involving the provision of time off in lieu (**TOIL**) as the default form of compensation for such work.[7] These provisions existed long before TOIL provisions found their way into awards more broadly following the *Family Leave Test Case*.[8] A provision of that kind is appropriate in the context of the fluctuating workloads and unpredictability of journalistic work.

8. The proposed variations set out in the Draft Determination would continue that approach. Fairfax supports these variations, which will assist in ensuring that the Award provides a fair and relevant (in the sense of being suited to contemporary circumstances in journalism[9]) minimum safety net of terms and conditions. The proposal maintains a general approach which has a lengthy history[10] and promotes flexible modern work practices,[11] while incorporating additional protections for employees which will help to ensure they are properly compensated for working overtime.[12]

9. The proposal reflected in the Draft Determination is, in short, a sensible compromise. Fairfax therefore supports its adoption, subject to two drafting matters:

   (a) *First*, there appears to be a small omission from the variation which is required to clause 22.3(c) of the Award to reduce the period within which TOIL is to be taken from 12 to four months. As such, there should be a new paragraph A.4 of the Draft Determination, which should read:

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5 *Australian Journalists Association v Associated Newspapers Ltd* (1955) 81 CAR 699, 703.

6 *Re Journalists (Metropolitan Daily Newspapers) Award 1991* (unreported, Australian Industrial Relations Commission (Full Bench), Boulton J, Marsh SDP and Merriman C, 24 March 1993, Print K7084).

7 See e.g. *Australian Journalists Association v Wilson* (1913) 7 CAR 112; *Australian Journalists Association v Sydney Daily Newspaper Employers' Association* (1916) 11 CAR 67.

8 (1994) 57 IR 121.

9 *Re 4 Yearly Review of Modern Awards—Penalty Rates* (2017) 265 IR 1, [120] (***Penalty Rates Case***).

10 Cf. *Re Security Services Industry Award 2010* [2015] FWCFB 620, [8].

11 *Fair Work Act 2009* (Cth) s 134(1)(d).

12 Ibid s 134(1)(da), noting the *Penalty Rates Case* (2017) 265 IR 1, [194]-[202] and [856].

4. By deleting the words “not taken within 12 months” and inserting “not taken within four months”.

The current paragraphs A.4 and onwards would then be renumbered accordingly without any other change.

(b) *Second*, one element of the agreed outcome between the parties is that the commencement of the variations take effect from three months after the determination is made. That will allow for both the taking of TOIL in the period before the variations take effect, and for employers to ensure that any additional administrative mechanisms required to comply with the varied clause 22 (particularly the new clause 22.5) are in place when it commences operation.

This would benefit both employers, who may otherwise face a significant up-front cost (particularly where enterprise agreements incorporate the overtime provisions of the Award, as is the case for several of Fairfax’s subsidiaries) and experience compliance issues as a result of the variation, as well as employees who may not wish to lose accrued TOIL balances where they had planned to take time off. Fairfax therefore submits that the effective date in Order B should be three months after the date on which the finalised Determination issues.

Seyfarth Shaw Australia
26 February 2018