MinterEllison

26 October 2016

Associate to President Ross
Fair Work Commission
Terrace Tower
80 William Street
EAST SYDNEY NSW 2000

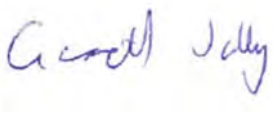
Dear Associate

**AM2014/300: Four Yearly Review of Modern Awards – Award Flexibility**

We refer to to the direction Statement and Directions made by the Commission on 26 September 2016. [2016] FWCFB 6887.

We enclose a copy of submissions on behalf of Nationwide News Pty Ltd; Bauer Media Pty Limited; Pacific Magazines Pty Limited in relation to the *Re Journalists Published Media Award 2010,* together with a copy of material being relied on.

Yours faithfully
**MinterEllison**



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**AM2014/300 – Four Yearly Review of Modern Awards - Award flexibility**

**SUBMISSIONS ON BEHALF OF**

**NATIONWIDE NEWS PTY LTD; BAUER MEDIA PTY LIMITED;**

**PACIFIC MAGAZINES PTY LIMITED**

**RE *JOURNALISTS PUBLISHED MEDIA AWARD 2010***

1. These submissions are made pursuant to the Statement and Directions made by the Commission on 26 September 2016. [2016] FWCFB 6887.

2. Nationwide News Pty Ltd, Bauer Media Pty Limited and Pacific Magazines Pty Limited (**the Companies**) submit that clause 22 of the Journalists Published Media Award 2010 (**Journalists Award**) meets the modern awards objective in s 134 of the Fair Work Act 2009 (Cth) (**the Act**) and there is no warrant to amend the current provision.

3. Clause 22 of the Journalists Award relevantly reads as follows:

> ***22. Overtime and penalty rates***
>
> ***22.1*** *The hourly rate for overtime purposes will be calculated by dividing the minimum award rate of pay for the employee's level by 38.*
>
> ***22.2*** ***Daily overtime*** *means all time worked outside of an employee's rostered hours of duty, except for time worked on a rostered day off.*
>
> ***22.3*** *Daily overtime will be compensated for in the following manner:*

> ***(a)*** *overtime will be banked to be taken as time off instead at single time;*
>
> ***(b)*** *time off instead of overtime will be taken as mutually agreed, or by the employer rostering accrued overtime as time of finstead, by giving at least 14 days' notice that the employee is required to take such accrued time off instead;*
>
> ***(c)*** *time off instead of overtime not taken within 12 months of the overtime being worked must be paid out at overtime rates;*
>
> ***(d)*** *on termination of an employee's employment, all untaken time off instead of overtime will be paid out at overtime rates prescribed in clause 22.3(e), subject to the forfeiture for inadequate notice as provided for under clause 11.2;*
>
> ***(e)*** *where mutually agreed, overtime may be paid as it is worked at the rate of time and a half for the first two hours and double time thereafter; and*
>
> ***(f)*** *any time allowed off duty instead of overtime will be deemed to be ordinary rostered hours for the day or days on which the time off instead is taken.*
>
> ***22.4*** **…**

4. In summary

(i) The underlying entitlement in the Journalists Award is for time off in compensation for overtime. This position is practically unique. There are only two other modern awards which made such a provision – both of which were also journalists awards.

(ii) This provision is consistent with the nature of journalism (which is a profession *sue generis* – in a class by itself) and the history of the award – the predecessors to which have always provided, to some degree or another, for time off in lieu of overtime at the election of the employer.

(iii) The provision was included by the Full Bench in making the award in 2009 and it must be assumed that the award was regarded as achieving the modern awards objective at the time that it was made.

(iv) The party seeking to argue that the Journalists Award no longer meets the modern awards objective and that change is required, bears the onus of persuading the Commission that it should do so.

(v) It would be a fundamental change to insert model TOIL provision into the Journalists Award – it would amount to an inversion of the current position. The fact that the underlying entitlement is to time off, and not to payment, distinguishes the awards being considered by the Full Bench in its decision of [2016] FWCFB 4579 at [50]

(vi) The present provision is supported by a number of aspects of the modern award objective - including section 131(1)(a), (c), (d) and (f). Section 134(1)(da) does not mandate the provision of the model TOIL provision and the award provides for payment of additional remuneration where TOIL is not given. Nor is section 134(1(da) given any primacy over the other objectives in section 134(1).

**4 YEARLY REVIEW**

5. A modern award, including the Journalists Award, must meet the "*modern awards objective*" – to provide a "*fair and relevant minimum safety net of terms and conditions*" (see s 134 (1) of the Act).

6. A modern award, including the Journalists Award, must contain terms "*only to the extent necessary to achieve the modern award awards objective*" (see s 138 of the Act).

7. In the context of the modern awards objective, the word "*fair*" means "*just, unbiased and equitable*" (see *Australian Modern Oxford Dictionary*, Second Edition, (2004), p448, first meaning; see also *Macquarie Dictionary*, Third Edition, (1997), p756, first meaning) and should be considered from the perspective of both employers and employees.

8. In the context of the modern awards objective, the word "*relevant*" means pertinent (see *Macquarie Dictionary*, Third Edition, (1997), p1798), appropriate, contemporary and not obsolete (see also s 164(a) of the Act).

9. In the context of the modern award objective, the word "*modern*" means "*current*" (see *Australian Modern Oxford Dictionary*, Second Edition, (2004), p448, first meaning).

10. In the context of the modern awards objective, the word "necessary" in s 138 of the Act should be construed as "*required*", "*essential*", "*imperative*" or "*indispensable*"

to meet the modern awards objective (see *SDA v NRA* (No 2) [2012] FCA 480; (2012) 205 FCR 227 at [46] per Tracey J; *Re Modern Awards Review 2012* [2012] FWAFB 5600; (2012) 223 IR 49 at [33] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; see also *Australian Modern Oxford Dictionary*, Second Edition, (2004), p857, first meaning).

11. Applied to a modern awards review under s 156 of the Act, the Commission is required, as part of the four yearly review, to form a view on whether (or be satisfied that) a provision (or term) of a modern award is essential, imperative or indispensable to meeting the modern awards objective and to vary a modern award if it forms the view (or is satisfied) that the provision (or term) of the modern award is not essential, imperative or indispensable to meet the modern awards objective (that is, a fair and relevant minimum safety net).

12. The Companies submit that the following principles enunciated by the Commission for the purposes of the four yearly review, and subsequently applied by the Commission, are most pertinent to its consideration of clause 22 of the Journalists Award:

    (i) Each modern award is to be reviewed in its own right (s 156(5) of the Act).

    (ii) The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the review must advance a merit argument in support of the proposed variation. The extent of such an

argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality.

(iii) Where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

(iv) In conducting the review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue.

(v) The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

(vi) The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

(vii) In the review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s 138). What is *"necessary"* in a particular case is a value judgment based on an assessment of the considerations in s 134(1)(a) to (h) of the Act, having regard to the submissions and evidence directed to those considerations.

(viii) There may be *no one set* of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.

(ix) The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.

(Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788; (2014) 241 IR 189 at [60](3) to [60](7)).

**CHARACTERISTICS OF THE EMPLOYERS AND EMPLOYEES COVERED BY THE JOURNALISTS AWARD**

13. By clause 4.1 it is provided that the Journalists Award covers employers throughout Australia in the "*published media industry*" with respect to certain employees engaged in journalism in its literary, artistic and photographic branches and all the gathering, writing or preparing of news matter or news commentaries.

14. "*Published media industry*" is defined in clause 3 to mean the industry concerned with the publication of newspapers, magazines, periodicals, journals and online publications, and the provision of wires services.

15. The history of award regulation commenced in 1913 under the Conciliation and Arbitration Act 1904-1911. In the first arbitrated decision before Deputy President Isaacs J in 1917 his Honour, having referred to "*the physical qualities that are indispensable to sustain the arduous labour and strains at times involved*" (of at least a large group of journalists), and whether it was appropriate to make just comparisons with other accusations held as follows:

> *"Journalism is really a professions* sui generis*; I cannot measure it by what is paid for totally different work…"*

(See *Australian Journalists Association v The Sydney Daily Newspaper Employers' Association and others* (1917) 11 CAR 67 at [86]-[87] and [88].)

16. On the first occasion an industrial authority was called upon to adjudicate in relation to a log of claims submitted by either party (the Australian Journalists Association and employers covering provincial daily newspapers) in respect of provincial daily newspapers, Commissioner Tonkin noted that the first Federal award to cover provincial daily newspapers in all States was made in 1924. It was a consent award. The Commissioner went on to note that other awards were made in 1929, 1934, 1939 and 1946, all of which were consent awards made in terms of agreements reached between the parties. In his decision ((1951) 73 CAR 249 at [249]-[250]) Commissioner Tonkin said this:

> *"I fully realise the important part the press plays in the affairs of the country. It has a great responsibility, one that must be faithfully carried out and those responsible for securing and writing the news must be people of ability and*

> *integrity and should be paid a salary commensurate with the work they are called upon to perform.*
>
> *In 1917 Sir Isaac Isaacs said "Journalism is really a profession sui generis; I cannot measure it by what is paid with totally different work". With these remarks I am in entire agreement."*

17. In 1953 Commissioner Blackburn dealt with a dispute concerning logs of claims which had been served on employers of metropolitan newspapers seeking a new award covering the hours of work, wages and working conditions of journalists and certain other employees. In his decision of 5 July 1954 the Commissioner, dealing with the history of award coverage, said this:

> *"It is for me a matter of very considerable importance that with the single exception of the awards arbitrated upon by Isaacs J in 1917 and R.G. Menzies in 1928*[*]*, all awards have been by agreements reached between the parties after round table conferences. As a result of these conferences a code has been built up covering the many extreme intricacies of a profession which is sui generis. It is a hard profession; it is a profession calling for a high standard of honour and requiring considerable ability. It is a profession, the conditions of work in 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 give and take, in which too rigid rules would tend to embarrass and fetter both sides.*
>
> *I, therefore, consider that upon many of the matters dealt with in the respective claims, it is advisable that I should be wary in altering conditions and provisions of agreements which, have been evolved by the parties throughout the years."*

[*] R.G. Menzies as counsel arbitrated certain matters which were subsequently included in consent awards.

> (*The Australian Journalists Association v Associated Newspapers Ltd & Ors* (1955) 81 CAR 699 at 703)

18. In respect of overtime provisions and time off in lieu of payment, the Commissioner held that the existing award allows an employer, subject to certain conditions, to give time off in lieu of paying the employee for certain over time. He held as follows:

> *"I am of opinion that in this industry this in principle is a desirable thing. The evidence has made it abundantly clear to me that the work of journalists is exacting and tiring. It is better that some of the overtime should, therefore, be used for extra rest than merely paid for, provided that there is a reasonable opportunity for such rest. I am of opinion that, to ensure this, the existing provisions should be tightened up to some extent."*
>
> (*The Australian Journalists Association v Associated Newspapers Ltd & Ors* (1955) 81 CAR 699 at 718)

(This 'tightening up' occurred, amongst other things by provisions inserted into the award to ensure that when overtime is liquidated by giving time off, the periods of such time must either be of four hours or eight hours duration.)

19. More recently, in dealing with a claim for additional holidays the Full Bench of the Australian Industrial Relations Commission (**AIRC**) (Boulton J, Marsh SDP and Merriman C) also said that they recognise the special features relating to the employment of journalists (Print K7084 p3.9, 24 March 1993).

20. In modern times with a 24 hour news cycle the need for flexibility remains paramount in this industry. News, and breaking news, is not readily predictable and timing is in many cases almost entirely outside the control of employers and employees, be it natural disasters, political developments, crime, economic crises etc. Social media

has added a new dimension to the performance of work covered by the Journalists Award. Journalists have to react to news as it breaks as well as pursuing their own self-generated articles and photographic opportunities.

**AWARD HISTORY OF TIME OFF PROVISIONS**

21. Given that the history of the Journalists Award concerns over a century of coverage, these submissions focus on the principle journalists award – the Journalists (Metropolitan Daily Newspapers) Award and its predecessors.

22. The first industrial dispute in the newspaper industry throughout Australia between the journalists and the staffs of metropolitan newspapers and the newspaper proprietors was in 1913 and following a range of conferences then held before the President of the Commonwealth Court of Conciliation and Arbitration agreements were reached and certified. In respect of hours of employment the agreed provisions (clause 7) was as follows:

*'If the number of hours on duty shall exceed forty-eight in any week, with one clear day off in seven, time off to the amount of the excess shall be allowed within a month from the date of the excess. Notice of time off in lieu of overtime so worked shall be given at least one day in advance.'* (*AJA v Wilson and Mackinnon and Ors* (1913) 7 CAR 112 at 115 and 118.)

23. In the first arbitrated award decision under the *Conciliation and Arbitration Act* (1904) Isaacs J provided for time off in lieu of overtime by default. Hours in excess

of the maximum weekly hours (46 hours for day works; 40 hours for night work) were deducted from the hours of work to be deducted in the succeeding week (or failing that, the week after). Hours in excess of 11 hours a day were reckoned as overtime and were either allowed or paid. If time off was not allowed it was to be paid at the rate of time and a half. ((1917) 11 CAR 67 at [103]-[104], clause 3(c)). This distinction between daily and weekly overtime was carried into future print journalist awards up to 2010.

24. It is also worth noting that a 46 hour, 5 day week would mean ordinary hours on each day would average 9.2 hours – whereas daily overtime was reckoned after 11 hours.

25. In 1929, an award was made by consent covering metropolitan newspapers. It continued the distinction between daily and weekly overtime and defined daily and weekly overtime in the materially the same way. It provided that up to three hours of daily overtime be allowed off in the next succeeding week or be paid at time and a half for overtime beyond three hours. Similarly, weekly overtime of up to nine hours could be allowed off in the next succeeding week or be paid at time and a half for overtime beyond nine hours. (*The Australian Journalists Association v John Fairfax & Sons Ltd and Others* (1929) 27 CAR 1174)

26. This basic structure was retained for more than 50 years – with some adjustments to the number of hours which were taken as time off in lieu from 1938 through to 1951. From 1951 to 1982, the number of hours which were taken as time off in lieu were static.

27. It is notable that – despite the reduction of the working week from 46 hours to 42 hours and 42 hours to 40 hours – daily overtime remained hours worked in excess of 11 hours. See *Journalists (Metropolitan Daily Newspapers) Award 1938* (1938) 39 CAR 1068; *Journalists (Metropolitan Daily Newspapers) Award 1945* (1945) 55 CAR 566.

28. The *Journalists (Metropolitan Daily Newspapers) Award 1951* provided for a 40 hour week. It provided daily overtime of up to one hour, and weekly overtime of up to eight hours, was allowed off duty in the next succeeding week. As noted above, daily overtime was after 11 hours - despite the fact there was a 40 hour week and therefore an average of 8 ordinary hours a day. (*The Australian Journalists Association v Associated Newspapers and Others* (1950) 70 CAR 778)

29. As noted above, from 1951 to 1982, the number of hours which were taken as time off in lieu were static.

30. In 1982, the *Journalists (Metropolitan Daily Newspapers) Award 1982* was made. It provided that daily overtime was after 11 hours and was paid. It provided that the first eight hours of weekly overtime may be taken as time off in the next week and this time not allowed off was to be paid for at the rate of time and a half.

31. In 1990, the *Journalists (Metropolitan Daily Newspapers) Award 1990* was made (Print J9044). It changed the definition of daily overtime - providing that overtime was time worked outside rostered hours. It provided that the first hour of daily overtime would either be given off within the following fortnight or paid at the rate of time and a half at the discretion of the employer (clause 22).

32. In 2001 - 2002, *Journalists (Metropolitan Daily Newspapers) Award 1991* devolved into a series of enterprise awards. The award was renamed the *Journalists (News Limited – Metropolitan Daily Newspapers) Award 2002* (Print AP819806) and the respondents outside of News Limited were removed. The overtime provisions were changed, so that all overtime (other than a sixth shift) was to be banked to the taken as

time off in lieu of single time as time off in lieu of overtime. All unused time off in lieu was paid out at overtime rates on 1 January each year.

33. Various of the other enterprise awards made similar provision to the Journalists (Metropolitan Daily Newspapers) Award 1990 – that is, the first hour of daily overtime was given as time off in lieu (or paid) at the employer's election.

34. By 2009, the position with the predecessors to the Journalists Award (that is, the print journalists awards) was as follows:

(i) the *Journalists (News Limited - Metropolitan Daily Newspapers) Award 2002* provided for time off in lieu of overtime – with the exception of a sixth shift;

(ii) various awards made provision for the first hour of daily overtime was given as time off in lieu (or paid) at the employer's election (e.g the *Journalists (Australian Associated Press) Award 1999*; *Journalists (Jewish Newspapers) Award 2003*; *Journalists (John Fairfax Group) Award 2001*; *Journalists (Pacific Publications) Award 2001*; *Journalists (Regional Daily Newspapers) Award 1999* and *Journalists (Suburban Newspapers) Award 2003*);

(iii) specialist publications awards provided for all overtime to be taken as time off (*Journalists (Specialist Publications) Award 1999* and the *Journalists (Specialists Publications) (State) Award*);

(iv) some awards had provisions similar to the earlier Journalists Metropolitan Daily Newspapers awards – with daily overtime being time worked after 11 hours and a specified number of hours daily and weekly overtime being taken

as time off in lieu in the next week) (*Journalists (Country Non-Daily Newspapers) Award 1998* and *Journalists (Rural Press Limited - Agricultural Publishing) Award 2000*);

(v) some residual awards had different provisions. (e.g *Journalists (Murdoch Magazines) Enterprise Award 2000; Journalists (Reed Business Information) Award 2000*; *Journalists' (Eastern Suburbs Newpapers) Award 2003*)

35. It is also worth noting that – while the journalists print awards had been varied to adopt the concept of personal carers leave from the Family Leave Test Case (with amendments to reflect the different sick leave entitlements of journalists) – none of the awards had been varied to include the Family Leave Test Case concerning time off in lieu of overtime at the election of the employee.

36. In 2009, the Australian Industrial Relations Commission made the *Journalists Print Media Award 2010*. The award was largely made by consent. The parties agreed that overtime would be taken as be taken as time off in lieu – with unused time off in lieu to be paid out after 12 months. There was one point of disagreement – which concerned whether time off in lieu would be given in blocks of four hours at a minimum. The Commission ultimately decided it should not. This is elaborated on below.

37. It will be seen from the history of award coverage referred to above:

(i) that time off in lieu of overtime at the election of the employer has always been part of the journalists awards – although the amount of overtime which the employer can require be taken has varied;

(ii) the provisions in the *Journalists Print Media Award 2010* about time off in lieu of overtime are based on the provisions in the *Journalists (News Limited – Metropolitan Daily Newspapers) Award 2002* and are consistent with the history of the award; and

(iii) in the vast majority of cases, awards and changes to awards have been by consent.

**1994 FAMILY LEAVE TEST CASE**

38. The course of, and measures introduced by, the *1994 Family Leave Test Case* are set out in detail, for example, in the **Background Paper** of 10 March 2015 published by the Commission (at [22] and following), the decision of the Commission of 16 July 2015 [2015] FWCFB 4466 (**the Award Flexibility decision**) and the 11 July 2016 decision of the Commission ([2016] FWCFB 4579 at [29] and following). Following the *1994 Family Leave Test Case* one sees the introduction of a number of measures which were designed to assist workers in reconciling their employment and family responsibilities by means of increased flexibilities in awards. As part of the process the Commission sought an appropriate balance between a number of objectives, one of which was the Commission's statutory obligation to ensure that awards are suited

to the efficient performance of work according to the needs of particular industries and enterprises, while employees interests are also taken into account (at [25]).

39. The *1994 Family Leave Test Case* (drawn from the *Re Laundry Industry (Victoria) Interim Award 1993*) resulted in the formulation of a model time off in lieu of overtime payment clause as follows:

> *"8 Time Off in Lieu of Payment*
>
> *Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish system of time off in lieu of overtime provided that;*
>
> *8.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.*
>
> *8.2 Overtime taken as time off during ordinary time hours shall be taken at this ordinary time rate, that is an hour for each hour worked. (unless otherwise provided elsewhere in the award)*
>
> *8.3 An employer shall if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed in clause 11 of this award, for any overtime worked under this subclause where such time has not been taken within four weeks of accrual.*
>
> *8.4 Paragraph 1 is subject to the employer informing the ALHMWU which is both party to the Award and which has members employed at the particular enterprise of its intention to introduce an enterprise system of time off in lieu of overtime flexibility, and providing a reasonable opportunity for the union to participate in negotiations.*
>
> *8.5 Once a decision has been taken to introduce an enterprise system of time off in lieu, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A - 131R of the Industrial Relations Regulations.*
>
> *8.6 An employer shall record time off in lieu arrangements in the time and wages book as prescribed in clause 23 of this Award at each time this provision is used."*
>
> (L0125 V006S print N 1781 Marsh SDP, 20 May 1996.)

40. The *1994 Family Leave Test Case* was directed at awards which did not include TOIL provisions. As noted above, the published media industry awards applicable at the time were not amended to provide flexibility in the form considered desirable in that test case. It is also worth noting that the journalists print awards were varied to the concept of adopt personal carers leave - with amendments to reflect the different sick leave entitlements of journalists.

**AWARD MODERNISATION**

41. The award modernisation process undertaken by the Commission in respect of the published media industry led to the making of the Journalists Award on 4 September 2009.

42. The process adopted was as follows:
    (a) interested parties filed written submissions and draft awards;
    (b) there was then pre-drafting consultation – including a conference chaired by a member of the Commission;
    (c) the Full Bench then published exposure drafts;
    (d) written submissions were filed by the parties on the exposure drafts, with Full Bench hearings following; and
    (e) the Full Bench then handed down its decision, with the final awards.

43. As noted above, the first step involved interested parties filing written submissions and draft awards. This was required by 6 March 2009. Amongst others, both the MEAA and a group of employers represented by MinterEllison filed submissions and draft awards. The employers represented by MinterEllison were substantially the same as the employers represented here (that is News Limited, ACP Magazines Pty Limited (who was subsequently purchased by Bauer Media), Pacific Magazines Pty

Limited and Text Pacific) (**Employers**). Fairfax Media was separately represented. The Country Press Association also made submissions.

44. Importantly, both the draft awards proposed by the Employers and MEAA provided for overtime to be taken as time off in lieu. The MEAA draft provided for the first hour of daily overtime to be given as time off in lieu (at the time rate of time and a half) or payment as determined by the employer. The Employer draft provided for time off in lieu for all overtime.

45. In this regard, the MEAA draft award dated 13 March 2009 relevantly provided

> *27. Overtime*
> *27.1 Any amount paid to an employee in excess of the minimum award rate of pay for the employee's grade shall not be regarded as a set off against overtime worked.*
> *27.2 The hourly rate for overtime purposes shall be calculated by dividing the minimum award rate of pay for the employee's grade by 38.*
> *27.3 All overtime payments due to an employee shall be made within eighteen days of the end of the week or fortnight, as the case may be, in which the overtime was worked.*
> *27.4 Daily overtime represents all time worked outside an employee's rostered hours of duty, except for time worked on a rostered day off. Daily overtime shall be compensated for in the following manner:*
> *(a) Up to and including the first hour of overtime shall either be given off as time in lieu at the rate of time and a half within the following fortnight or paid for at the rate of time and a half at the discretion of the employer.*
> *(b) Overtime in excess of one hour shall be paid for at the rate of time and a half for the first hour and double time thereafter.*
> *(c) An employee may, by mutual agreement with his or her employer, opt to take time off in lieu at the rate of single time within the next twelve months. Such agreement shall be recorded in writing.*
> *27.5 Any time allowed off duty in lieu of overtime shall be deemed to be ordinary rostered hours for the day or days on which the time off in lieu is taken.*

46. The Employer draft award dated 9 March 2009 provided

> *26.2 Overtime represents all time worked in excess of an average of 38 hours per week, except for time worked on a rostered day off (called a "sixth shift").*

> *26.3 Overtime shall be compensated for in the following manner:*
> *(a) Overtime, other than a sixth shift, will be banked to be taken as time off in lieu at single time;*
> *(b) Time off in lieu of overtime shall be taken as mutually agreed, or by the employer rostering accrued overtime as time off in lieu, by giving at least 14 days' notice that the employee is required to take such accrued time off in lieu;*
> *(c) On termination of an employee's employment, all untaken time off in lieu shall be paid out at overtime rates prescribed in sub-clause 26.3(d), subject to the forfeiture for inadequate notice as provided for under clause 14.2;*
> *(d) Where mutually agreed, overtime may be paid as it is worked at the rate of time and a half for the first two hours and double time thereafter.*

47. There were then pre drafting consultations before Senior Deputy President Hamberger and private discussions.

48. A substantial measure of agreement was reached. On 9 April 2009, MinterEllison wrote to the AIRC attaching a consolidated party draft award which included colour coded sections depicting where there was agreement and disagreement over the terms of the award (**9 April Draft**).

49. Clause 25.6 of the 9 April Draft concerned TOIL. The clause was as follows:

> ***25.6*** *Daily overtime shall be compensated for in the following manner:*
>
> ***(a)*** *Overtime will be banked to be taken as time off in lieu at single time;*
>
> ***(b)*** *Time off in lieu of overtime shall be taken as mutually agreed, or by the employer rostering accrued overtime as time off in lieu, by giving at least 14 days' notice that the employee is required to take such accrued time off in lieu. Time off will be given in blocks of no less than four hours;*
>
> ***(c)*** *Time off in lieu of overtime not taken within 12 months of the overtime being worked must be paid out at overtime rates;*
>
> ***(d)*** *On termination of an employee's employment, all untaken time off in lieu shall be paid out at overtime rates prescribed in sub-clause 25.6(e), subject to the*
> *forfeiture for inadequate notice as provided for under clause 15.2;*
>
> ***(e)*** *Where mutually agreed, overtime may be paid as it is worked at the rate of*

*time and a half for the first two hours and double time thereafter.*

50. The grey highlighted text was not agreed – it was sought by the MEAA. All other parts of the provision were agreed. In relation to this, MinterEllison said

> *"The MEAA seeks to include a requirement that time off in lieu be taken in blocks of 4 hours. The Employers, CPA and Fairfax Media oppose the inclusion of such a provision as it does not provide sufficient flexibilities to recognise the current 'swings and roundabouts' arrangements used by most employers. In addition, the provision fails to recognise that employees use time off in lieu flexibly in relation to child care and other family responsibilities. "*

51. The Employers also sought a capacity for agreements to buy out a specified number of overtime hours – which the MEAA opposed.

52. Finally, the Employers agreed that overtime be defined as *"all time worked outside of an employee's rostered hours of duty, except for time worked on a rostered day off"* whereas the Employers had originally sought that overtime be time worked in excess of an average of 38 hours per week.

53. On 22 May 2009, the Full Bench of the AIRC released a statement and the Stage 3 exposure draft awards - including an exposure draft of the *Journalists Published Media Award 2010* (**Exposure Draft**). The statement did not address the issue of time off in lieu of overtime – although the Full Bench did make the observation (at [98]) that

> *The draft does not include provision for employers and employees to make written agreements to 'buy out' overtime and shift penalties. However the award flexibility provision is obviously available.*

54. This was evidently a reference to the submissions of the Employers seeking a capacity to buy out overtime.

55. The Full Bench also said

> *[99] The proposed modern award will replace 10 current non-enterprise pre-reform awards and four non-enterprise NAPSAs.* ***The weekly award rates of pay (which have been agreed to by all the major parties) are in some cases significantly higher than the existing applicable rates. There are also additional employee benefits, such as a higher casual loading, and the right to redundancy pay****. On the other hand, the proposed award deletes a small number of allowances that have traditionally been payable in some parts of the industry.*

56. The exposure draft substantially replicated the parties draft – with some plain English changes and the addition of a new clause (g) providing that *'any time allowed off duty instead of overtime will be deemed to be ordinary rostered hours for the day or days on which the time off instead is taken'*. The Full Bench rejected the MEAA's claim that time off in lieu of overtime to be provided in minimum blocks of four hours.

57. There were submissions on the Exposure Draft – but none concerned overtime or TOIL.

58. On 4 September 2009, the Full Bench of the AIRC handed down its decision on the making of the Stage 3 awards and publishing the awards – including the *Journalists Published Media Award 2010*. ([2009] AIRCFB 826). The Full Bench said at [107]

> *The exposure draft has been modified having regard to the written and oral submissions made by the parties. Substantive submissions were received in relation to the exposure draft from News Limited, ACP Magazines, Pacific Magazines and Text Pacific (the employers), Country Press Australia (CPA) and MEAA. We refer only to the changes which appear to be significant.*

59. It is apparent that – the parties having had the full opportunity to address the Commission on the matter – that the Full Bench concluded that the provisions of the Journalists Award concerning time off in lieu of overtime were appropriate and met the modern awards objective. It also reflects an acceptance that the time off in lieu of overtime provisions from the Family Leave Test case – providing for time off in lieu of overtime at the election of the employee - were not appropriate to be included in the award.

**UNDERLYING ENTITLEMENT**

60. The Full Bench noted in the 11 July 2016 decision ([2016] FWCFB 4579 at [50]) the issues before the Commission in respect of the range of awards there under consideration were addressed on the basis that the underlying entitlement was to the payment of additional remuneration with time off being the flexible alternative.

61. By way of contrast, time off in the first instance is the underlying entitlement of employees who work overtime in the Journalists Award is for time off, as opposed to payment.

62. Importantly, there only two other modern awards made as part of the award modernisation process which provided for overtime to be compensated by time off in the first instance, as opposed to payment. Both were journalists awards. Those two awards are the *Broadcasting and Recorded Entertainment Award 2010* as it concerned journalists (clause 52) and the *Book Industry Award 2010* (clause 19) (which covers editors and publicists and which modernised the old *Journalists (Book Industry) Award 1998*).

**SECTION 134**

63. As pointed out above, the Journalists Award, including clause 22, must be taken to be *prima facie* meeting the modern award awards objective in s 134 when made.

64. In considering whether the Journalists Award now does not meet the modern awards objective it is necessary to bear in mind that no primacy is to be given to any one of

the matters set out in s 134(1)(a) to (h) (see, for example, the Award Flexibility decision [2015] FWCFB 4466 at [11]).

65. Applying the principles set out in paragraph 10 above, the Companies submit that no case has been made out to justify a variation of the award because it does not now meet the modern awards objective.

66. The Commission can comfortably be satisfied of the following:

(i) no issue arises as to the relative living standards and the needs of the low paid (s 134(1)(a));

(ii) by leaving clause 22 in the present form any change can be addressed through enterprise bargaining and therefore the need to encourage collective bargaining will be achieved (s 134 (1)(b);

(iii) as the Full Bench recognised in its 24 April 2016 decision ([2016] FWCFB 2602) at [37]) flexible working arrangements, such as TOIL, may encourage greater workforce participation and the appropriate TOIL facilitative provision will be consistent with the objective of promoting social inclusion through increased workforce participation and there is no valid basis for taking a different view in respect of Clause 22.3 of the Journalists Award (s 134(1)(c));

(iv) clause 22.3 satisfies the need to promote modern work practices and the efficient performance of work (s 134(1)(d));

(v) clause 22.3(c) and (e) provide for additional remuneration at the rate of time and a half for the first two hours and double time thereafter by mutual agreement between the employer and the employee (s 134(1)(da));

(vi) as the Commission held in the Award Flexibility decision:

> *s.134(1)(da) does not mandate the provision of TOIL on the basis of compensatory time. As we have observed earlier, the modern awards objective is very broadly expressed; there is a degree of tension between some of the s.134 considerations; and no particular primacy is attached to any of the matters specified in s.134(1)(a)–(h). The matters specified in s.134(1)(da) are to be taken into account in ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'. But, importantly, s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2–3 which must be included in modern awards, including the flexibility term to which we have referred earlier (s.144(1)). (At [172] and*
>
> *[173] On the basis that s 134(1)(da) does not amount to a legislative direction that all modern awards must provide additional remuneration for working overtime, it follows that s 134(1)(da) does not mandate the provision of TOIL on the basis of compensatory time.*

(vii) section 134(1)(da) thus does not mandate that the provision of additional remuneration for employees working overtime cannot be satisfied by an entitlement to payment by agreement, or to payment by agreement in circumstances where the balance of clause 22.3 is overwhelmingly supportive of flexibility and social inclusion for employees, and meets the needs of this industry where flexibility has always been necessary;

(viii) no questions arise as to the principle of equal remuneration (s 134(1)(e);

(ix) no issues arise as to the cost burden or productivity or the matters in subparagraphs 134(1)(g) and (h), noting that not all the matters identified in s 134 will necessarily be relevant to the assessment of particular terms in a modern award (the Award Flexibility decision at [11]).

**MODEL TOIL**

67. By its decision of 11 July 2016 the Full Bench published the Model Term And Template Agreement for Time Off Instead of Payment of Overtime (TOIL) ([2015] FWCFB 4579, para [6] and Attachment (a)). The Commission published the template agreement to assist in reducing the regulatory burden associated with the utilisation of the model TOIL term, recognising that there will be no requirement to use it ([2016] FWCFB 2602 at [5]).

68. In doing so, the Full Bench concluded that, despite differences in the statutory framework now applicable, some aspects of the *1994 Family Law Test Case* TOIL provision retained their cogency in the current statutory context (the Award Flexibility decision at [255]). Three particular safeguards from the *1994 Family Law Test Case* were given particular attention namely:

(i) provision for majority agreement prior to individual access to TOIL;

(ii) provision to notify the unions, which are both party to the award and to have members employed in the particular enterprise, of the intention to utilise the

facilitative provision and to provide those unions with the opportunity to participate in negotiations; and

(iii) provision being made in respect of recording the introduction of such facilitation. (the Award Flexibility decision at [264]).

69. The safeguards referred in (i) and (ii) above were ultimately departed from in the Award Flexibility decision (at [266], and see also 11 July 2016 decision [2016] FWCFB 4579 at [32]) as not necessary to achieve the modern awards objective.

70. As to the calculation of TOIL the Full Bench held that it would generally be calculated at the ordinary time rate, consistent with the *1994 Family Leave Test Case* standard with the exception that in relation to those modern awards which currently provide for TOIL at the overtime penalty rates they would provide for "*time for penalty rate*" (the Award Flexibility decision at [268]).

71. In respect of the third safeguard referred to in paragraph 68 above, the Full Bench in the Award Flexibility decision included in the provisional model TOIL term published with that decision a requirement that a TOIL agreement between the employee and employer be in writing and be retained as an 'employee record' within the meaning of the *Fair Work Regulations 2009.*

72. In considering the content of the model term, and submissions by the various interests represented, the Full Bench in its July 2016 decision ([2016] FWCFB 4579) examined six key differences between the existing TOIL provisions in 49 modern awards as

against both the *1994 Family Law Test Case* and the Commission's April 2016 model TOIL term (see [44] and following).

73. In respect of the requirement that a record of the agreement to take time off instead of payment be made, the Companies submit that such a requirement was directed at a departure from the underlying entitlement of employees in the awards under consideration to payment with an ability to depart from that underlying position by way of agreement between the employee and the employer to take time instead of payment.

74. In contrast, as pointed out above, clause 22.3 of the award provides for a guaranteed underlying entitlement to time off with an ability to obtain payment by agreement.

75. A requirement that time off be only by agreement, recorded in writing or otherwise, will amount to a very significant change and will depart from both the historical position and the acceptance by the employers, Union and the Commission in making the modern award that in this industry the position is different. In addition, as outlined above, the Companies submit that the present provisions meet the modern awards objective in s 134, and remains fair and relevant to the extent necessary.

76. Alternatively, if the Commission is of the view that s 134 and s 138 lead to the conclusion that the present clause does not meet those requirements, and that it is necessary that there be a written record kept of the agreement to receive payment instead of overtime, the requirement should only be directed at clause 22.3(e).

77. In respect of the second of the six key differences under consideration in the July 2016 decision (time within which TOIL is to be taken) clause 22.3(b) provides that it will be taken as mutually agreed, or rostered with 14 days' notice. The Companies submit that the present provisions are appropriate to the scheme where the underlying entitlement is for time off. The provisions meet the modern awards objective. In addition, clause 22.3(c) provides a protection that overtime not taken within 12 months of the overtime being worked must be paid out. In respect of this time limit, if contrary to the Companies' submissions, the Commission is of the view that the period of 12 months is too long, it can be reduced to 6 months (without otherwise altering the fundamental nature of the clause).

78. The third of the six key issues concerned subclause (f) of the model term being addressed (11 July 2016 decision at [60]) which dealt with an entitlement of an employee to request to be paid for overtime covered by an agreement (under the model term) but not taken as time off. Once again, this term proceeds upon the premise that the underlying entitlement is to payment, requiring an agreement to obtain flexibility, which is not applicable under the Journalists Award and should not be included in the award by variation.

79. The award does, however, provide for flexibility in relation to the entitlement to time off and payment. Payment is available by mutual agreement and at the rate of time and a half for the first two hours and double time thereafter. In the event that the

Commission, consistent with s 134 and s 138 is of the view that such an agreement should be in writing, provision can be made for that in clause 22.3(e) of the award.

80. As to the fourth of the six key issues (payment on termination) clause 22.3(d) makes provision for that entitlement.

81. As to the fifth of the six key issues (no compulsion to take time off instead of payment) the Companies accept that such a provision may have relevance where the underlying entitlement is to payment. There is no reason for the Commission to conclude that there may be a threat of compulsion by employers covered under this award aimed at employees to agree to payment under clause 22.3(e) of the award instead of time off. In this regard it should be noted that the regime now under consideration has operated in this industry for close on a century.

82. In respect of the sixth issue (s 65 of the Act) it appears that the Commission considered that subparagraph (j) of the model term should be inserted as an appropriate response to a submission advanced by the CFMEU (C and G) to the effect that the model term was inconsistent with s 65 of the NES because it requires the consent of the employer before an employee can access TOIL (11 July 2016 decision at [72]).

83. Clause 22.3 entitles employees to TOIL as of right and is not dependent on the consent of the employer before an employee can access TOIL and thus the concern addressed does not arise.

84. If the Full Bench is of the view that further protection is required in respect of s 65 of the Act consideration can be given to clause 22.3 being amended to ensure that an employer cannot withhold agreement to a request if it would result in being contrary to s 65 of the Act.

Harry Dixon SC Minter Ellison

26 October 2016

# SUBMISSIONS ON BEHALF OF

# NATIONWIDE NEWS PTY LTD; BAUER MEDIA PTY LIMITED;

# PACIFIC MAGAZINES PTY LIMITED

## Table of Documents Referred to in Submissions

| Document ID | Name of Document |
|---|---|
| 001 | Full Bench decision [2016] FWCFB 4579 |
| 002 | *SDA v NRA* (No 2) [2012] FCA 480 |
| 003 | *Re Modern Awards Review 2012* [2012] FWAFB 5600 |
| 004 | Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 |
| 005 | Print K7084 |
| 006 | Background Paper – 10 March 2015 |
| 007 | Award Flexibility Decision [2015] FWCFB 4466 |
| 008 | Print N1781 |
| 009 | MEAA draft award - 13 March 2009 |
| 010 | Employer draft award - 9 March 2009 |
| 011 | Consolidated draft award – 9 April 2009 |
| 012 | Exposure Draft – 22 May 2009 |
| 013 | *Journalists Published Media Award 2010* (as made in 2009) - [2009] AIRCFB 826 |
| 014 | Full Bench decision - [2016] FWCFB 4579 |
| 015 | *Broadcasting and Recorded Entertainment Award 2010* (as made in 2009) |
| 016 | *Book Industry Award 2010* (as made in 2009) |
| 017 | Full Bench decision - [2016] FWCFB 2602 |