



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award flexibility (AM2014/300)

PRESIDENT ROSS
DEPUTY PRESIDENT KOVACIC
COMMISSIONER LEE

SYDNEY, 1 JUNE 2018

4 yearly review of modern awards – common issue – time off instead of payment for overtime – Broadcasting, Recorded Entertainment and Cinemas Award 2010 – Journalists Published Media Award 2010.

[1] In July 2015, a Full Bench of the Commission *provisionally* determined that a model time off in lieu of overtime (TOIL) term should be inserted into modern awards as part of the 4 yearly review of modern awards.¹

[2] In directions issued 6 October 2015, it was advised that draft determinations would be published for 113 modern awards and interested persons were given an opportunity to make submissions on why a particular award should *not* be varied to include a model TOIL term or provide submissions as to whether the draft determination did not correctly reflect the outcome of the decisions in this matter.²

[3] The model term has been the subject of a number of further Full Bench decisions³ including a decision which finalised the term (and associated schedule) in line with plain language principles.⁴

[4] Submissions opposing the insertion of the model TOIL term were received in relation to eight awards. This decision deals with the two remaining awards:

- The *Broadcasting, Recorded Entertainment and Cinemas Award 2010* (the Broadcasting Award) and

¹ [\[2015\] FWCFB 4466](#)

² [Directions](#), 6 October 2015

³ See also [\[2015\] FWCFB 6847](#), [\[2016\] FWCFB 2602](#), [\[2016\] FWCFB 4579](#), [\[2016\] FWCFB 6178](#), [\[2016\] FWCFB 6333](#), [\[2016\] FWCFB 6591](#), [\[2016\] FWCFB 7737](#).

⁴ [\[2016\] FWCFB 4258](#)

- the *Journalists Published Media Award 2010* (the Journalists Award).

[5] In relation to the Broadcasting Award, the Media, Entertainment and Arts Alliance (MEAA) supported the draft determination as published.⁵ Seven Network Operations, Nine Network Proprietary Limited and Network Ten Proprietary Limited (the Television Networks) were not opposed to the variation determination being made but suggested one amendment to the draft determination.⁶ The insertion of the model term into the Journalists Award was supported by the MEAA⁷, but was initially opposed by Nationwide News Pty Ltd, Bauer Media Pty Limited and Pacific Magazines Limited (the Media Organisations) on the basis that the award currently provides that time off is the default method of compensation for overtime worked, rather than monetary compensation.⁸

[6] A series of conferences, before Deputy President Kovacic, were held in respect of each award. In a Statement issued 6 February 2018,⁹ we set out the process for finalising the outstanding issues in relation to these two awards. An amended draft determination for the Broadcasting Award was published together with the Statement and an amended draft determination for the Journalists Award was published on 15 February 2018. Directions for filing submissions were also published with the Statement.

The Broadcasting Award

[7] Clause 52.3 of the Broadcasting Award currently provides as follows:

‘52.3 Daily overtime will be compensated for in the following manner.

- (a) Up to and including the first hour of overtime will either be given as time off instead of payment, 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 will be paid for at the rate of time and a half for the first hour and double time after that.
- (c) An employee may, by mutual agreement with their employer, opt to take overtime as time off instead of payment at the rate of single time within the next 12 months. Such agreement will be recorded in writing.
- (d) Any time allowed off duty instead of overtime will be deemed to be ordinary hours for the day or days on which the time off instead is taken.
- (e) When an employee is not given the days or nights off duty as provided for in clause 45—Hours of work the employee will be paid at the rate of double time for all work done on any such day or days with a minimum payment for four hours.’

⁵ [Submission](#), 21 October 2016

⁶ [Submission](#), 19 October 2016

⁷ [Submission](#), MEAA, 16 November 2015

⁸ [Submission](#), Media Organisations, 26 October 2016

⁹ [\[2018\] FWCFB 770](#)

[8] The Television Networks seek an amendment in the following terms:

‘52.3 Daily overtime will be compensated for in the following manner.

- (a) Overtime will be paid for at the rate of time and a half for the first two hours and double time after that.’

(emphasis added)

[9] The February 2018 Statement noted that at the conference before Deputy President Kovacic on 9 August 2017 no party objected to the proposal put by the Television Networks. The Statement annexed an amended draft determination (which included the amendment sought by the Television Networks) and any party with an objection to the draft determination was directed to file written submissions by 26 February 2018. Submissions in reply to any objections received were to be filed by 12 March 2018.

[10] Interested parties were advised by email that no submissions had been received in relation to the draft determination and were provided with a further opportunity to file any submissions they wished to make in relation to the draft determination by 6 April 2018. One response was received from Commercial Radio Australia, who indicated they had no submissions to make in relation to the draft.

[11] We agree to the amendment proposed by the Television Networks and will amend the variation determination accordingly.

[12] Upon reviewing the terms of the draft determination, it has come to our attention that clause 22A.3 of the draft determination appears to contain an error, relating to radio broadcasting technical staff. Clause 22A.3 of the draft determination provides:

22A.3 For employees other than cinema workers (where the relevant overtime is performed on a Sunday or public holidays) and radio broadcasting technical staff, an agreement under clause 22A must be made in writing and must state each of the following:

- (a) the number of overtime hours to which it applies and when those hours were worked;
- (b) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
- (c) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
- (d) that any payment mentioned in paragraph (c) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule N. There is no requirement to use the form of agreement set out at

Schedule N. An agreement under clause 22A can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(emphasis added)

[13] It is unclear to us why radio broadcasting technical staff are excluded from the operation of clause 22A.3. The current terms of the Broadcasting Award provide (at clause 40.4(a)) that a radio broadcasting technical employee may choose, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer and that this agreement *must be in writing*. At clause 40.4(c), the current Broadcasting Award provides that if requested by the employee, an employer must within one week of receiving a request, pay the employee for any overtime worked (noting the employee must be paid at overtime rates).

[14] The draft determination in its current form would change the entitlements for radio broadcasting technical staff in a manner not intended by this Full Bench. The change would result in radio broadcasting technical staff being denied an entitlement to have an agreement relating to time off instead of overtime payment in writing and to have that agreement note that if requested, an employer must pay the employee (for overtime covered by the agreement but not taken as time off) at the overtime rate applicable to the overtime when worked – entitlements that radio broadcasting technical employees currently benefit from.

[15] It is our *provisional* view that Clause 22A.3 will be amended in the following terms:

22A.3 For employees other than cinema workers (where the relevant overtime is performed on a Sunday or public holidays) ~~and radio broadcasting technical staff~~, an agreement under clause 22A must be made in writing and must state each of the following:

- (a) the number of overtime hours to which it applies and when those hours were worked;
- (b) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
- (c) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
- (d) that any payment mentioned in paragraph (c) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule N. There is no requirement to use the form of agreement set out at Schedule N. An agreement under clause 22A can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(emphasis added)

[16] A revised draft determination varying the Broadcasting Award consistent with the *provisional* view expressed above will be issued concurrently with this decision. Any

objection to the draft determination is to be filed by no later than **4pm on Tuesday 26 June 2018**. In the absence of any objection we will vary the award in the manner proposed in the revised draft determination.

The Journalists Award

[17] The Statement issued 6 February 2018¹⁰ noted that there was an outstanding coverage issue in relation to this award and stated¹¹ that we had decided to defer consideration of the TOIL provisions in the award until that coverage matter had been determined. Subsequent correspondence was received from the Media Organisations which advised that they had reached an in-principle agreement with the MEAA in relation to the TOIL provisions.¹² A conference convened before Deputy President Kovacic on 20 December 2017 confirmed that the Media Organisations and the MEAA had come to a consent position. After that conference, Fairfax Media Ltd advised the Commission that it supported the proposed clause and Australian Business Industrial and New South Wales Business Chamber advised that they did not oppose the proposed TOIL clause. Commercial Radio Australia advised that it did not have an interest in the Journalists Award.

[18] We have reviewed the application by the MEAA to vary coverage of the award (being dealt with in the award stage of the review) and given the consent position of the parties, and our own view that the coverage issue can be determined separately from the issue of the TOIL term, it is no longer necessary to defer determination of the TOIL matter.

[19] As mentioned earlier, the Journalists Award draft determination was published on 15 February 2018. Submissions in response were received from Fairfax Media and the Media Organisations.

[20] Fairfax Media Ltd confirmed that it supported the consent proposal to vary the award as set out in the draft determination, subject to two drafting matters.¹³ The Media Organisations advised that they also supported the variation to the award in the terms proposed in the draft determination, subject to the same two issues.¹⁴

Issue 1: Item 4 of draft determination.

[21] The first matter raised relates to Item 4 of the draft determination, which deals with changes proposed for clause 22.3(c) of the Journalists Award.

[22] Clause 22.3(c) of the Journalists Award currently provides that:

‘(c) time off instead of overtime not taken within 12 months of the overtime being worked must be paid out at overtime rates;’

¹⁰ [\[2018\] FWCFB 770](#)

¹¹ [\[2018\] FWCFB 770](#), [15]

¹² [Correspondence](#), Media Organisations, 12 December 2017

¹³ [Submission](#), Fairfax Media Ltd, 26 February 2018, para 3.

¹⁴ [Submission](#), Media Organisations, 26 February 2018, page 1

[23] Item 4 of the draft determination proposed a change to this provision in the following terms:

‘By deleting the words “at overtime rates” appearing in clause 22.3(c) and inserting “in the next pay period following those four months, at the overtime rate applicable to the overtime when worked”.’

[24] Both parties advised that the clause as corrected in line with the draft, would refer to both a twelve month period and a four month period within the same clause. Fairfax Media Ltd proposed an additional item be added to the draft determination to reduce the period within which TOIL is to be taken from 12 months to four months.¹⁵ The Media Organisations proposed the issue be resolved by rewording item 4 in the draft determination as follows:

‘By deleting the existing clause 22.3(c) and replacing it with:

‘time off instead of overtime not taken within four months of the overtime being worked must be paid out in the next pay period following those four months, at the overtime rate applicable to the overtime when worked.’¹⁶

[25] We agree that the current wording of item 4 gives rise to an internal inconsistency in the operation of the clause. We will amend item 4 in the terms proposed by the Media Organisations.

Issue 2: Operative date

[26] The second matter raised by the parties concerns the operative date for the variation. In short they submit that any variation determination not commence for a period of three months following the date of the order.¹⁷

[27] Fairfax Media Ltd submit that a delayed commencement would allow both for 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 are in place when it commences operation.¹⁸ It also submits that this would benefit employers who may otherwise face significant up-front costs and experience compliance issues as a result of the variation and would also benefit employees who may not wish to lose accrued TOIL balances where they had planned to take time off.¹⁹

[28] The Media Organisations submit that a transitional period would allow employers to put in place arrangements to give effect to the orders, which it submits represent a substantial

¹⁵ [Submission](#), Fairfax Media Ltd, 26 February 2018, para 9

¹⁶ [Submission](#), Media Organisations, 26 February 2018, page 2

¹⁷ [Submission](#), Fairfax Media Ltd, 26 February 2018, para 9(b) and [Submission](#), Media Organisations, 26 February 2018, page 2

¹⁸ [Submission](#), Fairfax Media Ltd, 26 February 2018, para 9(b)

¹⁹ [Submission](#), Fairfax Media Ltd, 26 February 2018, para 9(b).

change to the way TOIL has operated in the industry for a number of years.²⁰ The Media Organisations note that the proposal was agreed with the MEAA on this basis.²¹

[29] We agree to the provision of a transitional period for the operative date for the variation, for the reasons advanced by the parties. The operative date for the variation will be 1 September 2018.

[30] A determination varying the Journalists Award will be issued concurrently with this decision.

[31] We are satisfied that the variations we propose in respect of these two awards are necessary to ensure that the awards achieve the modern awards objective.

PRESIDENT

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²⁰ [Submission](#), Media Organisations, 26 February 2018, page 2

²¹ [Submission](#), Media Organisations, 26 February 2018, page 2