



# STATEMENT

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

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

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER LEE

MELBOURNE, 6 FEBRUARY 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. Introduction**

[1] In July 2015 a Full Bench of the Commission *provisionally* determined a model TOIL term to be inserted into modern awards, as part of the 4 yearly review of modern awards.<sup>1</sup> The model term has been the subject of number of subsequent decisions. A plain language model term and associated schedule containing a template agreement were finalised in a decision dated 8 July 2016.<sup>2</sup>

[2] Our decision of 11 July 2016<sup>3</sup> varied awards to insert the model term into awards which provided for overtime, but did not give employees the option of taking time off instead of payment for working overtime. The decision also replaced the existing TOIL term in a number of award terms that provided TOIL at ‘ordinary rates’, that is, an hour off for an hour of overtime worked. A further decision on 31 August 2016<sup>4</sup> dealt with TOIL provisions in another 13 awards and following that decision only 29 of the 113 modern awards which make provision for paid overtime remained outstanding. A decision of 13 December 2016 (the *December 2016 decision*)<sup>5</sup> addressed a number of award specific issues among the remaining 29 modern awards.

[3] In the *December 2016 decision* we finalised a number of draft determinations which inserted or varied provisions providing time off instead of payment for overtime. Parties were afforded an opportunity to comment on the form of the draft determinations before they were finalised. Submissions were received in relation to, among others, the *Broadcasting, Recorded Entertainment and Cinemas Award 2010* (the Broadcasting Award) and the *Journalists Published Media Award 2010* (the Journalists Award).

[4] The outstanding issues concerning the draft determinations for the Broadcasting and Journalists Awards were referred to Deputy President Kovacic in order to attempt to resolve

the issues.<sup>6</sup> The purpose of this Statement is to set out how we intend to finalise the outstanding issues in respect of these awards.

## 2. *The Broadcasting, Recorded Entertainment and Cinemas Award 2010*

[5] Two submissions were received in response to the draft determination in respect of the Broadcasting Award. The Media, Entertainment and Arts Alliance (MEAA) supported the draft determination as published, while the Television Networks (Seven Network Operations; Nine Network Proprietary Limited and Network Ten Proprietary Limited) suggested an amendment to item 6 of the draft determination.

[6] 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.’

[7] The draft determination proposed the deletion of clause 52.3(a) and of the words “in excess of one hour” appearing in clause 52.3(b). The resulting provision would be:

**‘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)~~(a) 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.

...

[8] The Television Networks submitted that the draft determination represented a departure from the existing mechanism by which overtime is calculated;

‘...clause 52.3(b) provides 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. The combination of ‘in excess of one hour’ and ‘for the first hour’ mean that double time only applies after two hours — not one.’<sup>7</sup>

[9] The Television Networks sought the replacement of the words ‘first hour’ with ‘first two hours’, such that the resulting clause would read:

‘**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.’

[10] A conference was convened by the Deputy President on 9 August 2017 which was attended by the MEAA, the Television Networks, the CPSU and Commercial Radio Australia. At the conference no party objected the proposal put by the Television Networks.<sup>8</sup>

[11] A revised draft determination for the Broadcasting Award will be published shortly in the same terms as the earlier draft determination, save for the amendment proposed by the Television Networks. Directions will be issued shortly for the filing of any submissions in relation to the revised draft.

### 3. Journalists Published Media Award 2010

[12] The insertion of the model term into the Journalists Award was supported by the MEAA,<sup>9</sup> but was initially opposed by Nationwide News Pty Ltd, Bauer Media Pty Limited and Pacific Magazines Pty 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.<sup>10</sup>

[13] Clause 22.3 of the Journalists Award, which provides for time off instead of payment for overtime, appears in the following terms:

‘**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 off instead, 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.’

[14] In our decision of December 2016 we noted that an outstanding coverage issue existed in relation to this award:

‘We note that clause 4.10(a) of the award provides that Part 5—Hours of Work and Related Matters does not apply to employees employed in certain online publications (namely those online publications *not* associated with a print publication). In the context of the Award stage of the Review the MEAA is seeking to vary the coverage of the award – and in particular to delete clause 4.10(a). The outcome of the MEAA’s application may affect the coverage of the model TOIL term, were it to be inserted into the award.’<sup>11</sup>

[15] In light of the objections of the Media Organisations, and the outstanding coverage issue, we decided to defer consideration of the TOIL provisions in the award until the coverage matter had been determined. We referred the TOIL matter to Deputy President Kovacic to resolve, or at least narrow, the contested issues in relation to the TOIL term.<sup>12</sup>

[16] Following conferences conducted by the Deputy President in March, April and August 2017, correspondence was received from the Media Organisations advising that they had reached an in-principle agreement with the MEAA in relation to the TOIL provisions.<sup>13</sup>

[17] A conference was convened by the Deputy President on 20 December 2017, attended by the MEAA, Fairfax Media, Australian Business Industrial (ABI), Commercial Radio Australia and the Media Organisations. The MEAA confirmed that they had reached a consent position.<sup>14</sup> The representatives for Fairfax Media and ABI had not been involved in the discussions which lead to the in-principle agreement, and so sought further time to take instructions. The parties were given until 11 January 2018 to advise the Commission of their respective positions.<sup>15</sup> Fairfax has now advised the Commission that it supports the proposed clause. ABI has provided advice that they do not oppose the proposed clause.

[18] Commercial Radio Australia subsequently advised it does not have an interest in the Journalists Award.

#### **4. Next steps**

[19] Directions for the filing of submissions in relation to the revised draft determination varying the Broadcasting Award are set out at Attachment A.

[20] A draft determination setting out the agreement of the parties to the Journalists Award will be published together with this Statement. We note that we have made some minor changes to the numbering of the clause without changing the content of the draft. Directions for the filing of submissions in relation to the draft determination are set out at Attachment A.

[21] Any outstanding issues will be resolved on the papers, unless an interested party seeks an oral hearing.

PRESIDENT

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<sup>1</sup> [\[2015\] FWCFB 4466](#).

<sup>2</sup> [\[2016\] FWCFB 4258](#).

<sup>3</sup> [\[2016\] FWCFB 4579](#).

<sup>4</sup> [\[2016\] FWCFB 6178](#).

<sup>5</sup> [\[2016\] FWCFB 7737](#).

<sup>6</sup> Ibid, at [28] and [33].

<sup>7</sup> Television Networks, [submission](#), 19 October 2016.

<sup>8</sup> [Transcript](#), PN22–PN27.

<sup>9</sup> Media Organisations, [submission](#), 26 October 2016.

<sup>10</sup> MEAA, [submission](#), 16 November 2016.

<sup>11</sup> [\[2016\] FWCFB 7737](#) at [32].

<sup>12</sup> [\[2016\] FWCFB 7737](#) at [33].

<sup>13</sup> Media Organisations, [correspondence](#), 12 December 2017.

<sup>14</sup> [Transcript](#), PN26.

<sup>15</sup> [Transcript](#), PN33-PN35, PN42-PN43.

## ATTACHMENT A



# DIRECTIONS

Fair Work Act 2009  
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JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER LEE

MELBOURNE, 6 FEBRUARY 2018

Further to the statement issued by the Full Bench on 6 February 2018<sup>1</sup> it is directed that:

1. On or before **4.00 pm on Monday 26 February 2018** each interested party is to file in the Commission submissions on the ‘time off instead of payment for overtime’ clause proposed in relation to the *journalists Published Media Award 2010*.
2. On or before **4.00 pm on Monday 12 March 2018** each interested party is to file in the Commission submissions in reply to those filed in accordance with direction 1.
3. On or before **4.00 pm on Monday 26 February 2018** each interested party with an objection to the draft determination published in relation to the ‘time off instead of payment for overtime’ clause in the *Broadcasting, Recorded Entertainment and Cinemas Award 2010* is to file in the Commission written submissions outlining their objection to the draft determination.
4. On or before **4.00 pm on Monday 12 March 2018** each interested party is to file in the Commission submissions in reply to those filed in accordance with direction 3.
5. Leave is granted to apply generally.
6. All material should be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

PRESIDENT

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<sup>1</sup> [2018] FWCFB 770.



# DRAFT DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

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

### **BROADCASTING, RECORDED ENTERTAINMENT AND CINEMAS AWARD 2010** [MA000091]

Broadcasting and recorded entertainment industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER LEE

MELBOURNE, XX XXXX 2018

*4 yearly review of modern awards - award flexibility - time off in lieu of payment for overtime.*

A. Further to the Full Bench Statement issued by the Fair Work Commission on 6 February 2018<sup>2</sup> the above award is varied as follows:

1. By inserting clause 22A—Time off instead of overtime in Part 4—Minimum Wages and Related Matters as follows:

#### **22A Time off instead of payment for overtime**

**22A.1** An employee and employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

**22A.2** Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 22A.

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<sup>2</sup> [2018] FWCFB 770; see also [\[2016\] FWCFB 6178](#), [\[2016\] FWCFB 4579](#), [\[2016\] FWCFB 2602](#), [\[2016\] FWCFB 6333](#), [\[2016\] FWCFB 6591](#) and [\[2016\] FWCFB 4258](#)

**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.

**22A.4** The period of time off that an employee is entitled to take is:

- (a) for cinema workers (where the relevant overtime is performed on a Sunday or public holidays) and radio broadcasting technical staff—equivalent to the overtime payment that would have been made; and

EXAMPLE: By making an agreement under clause 22A an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

- (b) for all other employees and cinema workers (where the relevant overtime is performed other than on a Sunday or public holidays)—the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 22A an employee who worked 2 overtime hours is entitled to 2 hours' time off.

**22A.5** Time off must be taken:

- (a) within the period of 6 months after the overtime is worked; and
- (b) at a time or times within that period of 6 months agreed by the employee and employer.

**22A.6** If the employee requests at any time, to be paid for overtime covered by an agreement under clause 22A but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

**22A.7** If time off for overtime that has been worked is not taken within the period of 6 months mentioned in clause 22A.5, the employer must pay the employee for the

overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

- 22A.8** The employer must keep a copy of any agreement under clause 22A as an employee record.
- 22A.9** An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- 22A.10** An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 22A will apply, including the requirement for separate written agreements under clause 22A.2 for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- 22A.11** If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 22A applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 22A.

2. By deleting clause 29.5 and renumbering clauses 29.6 to 29.9 as clauses 29.5 to 29.8, respectively.
3. By deleting clause 40.4.
4. By deleting clauses 52.3(a) to 52.3(d).
5. By inserting a new clause 52.3(a) as follows:
  - (a) Overtime will be paid for at the rate of time and a half for the first two hours and double time after that.
6. By renumbering clause 52.3(e) as clause 52.3(b).
7. By deleting clause 58.4.
8. By inserting Schedule N—Agreement for Time Off Instead of Payment for Overtime as follows:

**Schedule N—Agreement for Time Off Instead of Payment for Overtime**

Name of employee: \_\_\_\_\_

Name of employer: \_\_\_\_\_

**The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:**

Date and time overtime started: \_\_\_/\_\_\_/20\_\_\_ am/pm

Date and time overtime ended: \_\_\_/\_\_\_/20\_\_\_ am/pm

Amount of overtime worked: \_\_\_\_\_ hours and \_\_\_\_\_ minutes

**The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period following the request.**

Signature of employee: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_

Name of employer  
representative: \_\_\_\_\_

Signature of employer  
representative: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_

9. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from XX Month 2018. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX Month 2018.

PRESIDENT