

## AM2014/259: Four Yearly Review of Modern Awards – Group 4 Awards

### Submissions on behalf of Seven Network (Operations) Limited, Nine Network Pty Limited and Network Ten Pty Ltd and each of their related entities

#### 1. Introduction

- 1.1 We act for Seven Network (Operations) Limited, Nine Network Pty Limited and Network Ten Pty Ltd and each of their related entities (**Companies**) in relation to the exposure draft of the *Broadcasting and Recorded Entertainment Award 2016* (**Exposure Draft**).
- 1.2 These reply submissions are made:
- (a) in accordance with the directions of the Fair Work Commission (**Commission**) dated 21 December 2016; and
  - (b) in opposition to paragraphs four to six of the written submissions filed by the Media, Entertainment and Arts Alliance (**MEAA**) about the Exposure Draft on 21 December 2016.

#### 2. MEAA submissions

- 2.1 MEAA has expressed concerns that the language adopted in the Exposure Draft relating to the calculation of overtime and penalty rates alters the existing arrangements in the *Broadcasting and Recorded Entertainment Award 2010* (**Current Award**) to the detriment of employees.
- 2.2 Although it is not clearly stated, the MEAA submission appears to be based on an assumption that the Exposure Draft has altered the existing arrangements for the calculation of overtime and other penalty rates in the Current Award from being based on an employee's actual rate of pay to being based on their minimum award rate of pay in the Exposure Draft.
- 2.3 To address this, MEAA proposes to vary a large number of clauses in the Exposure Draft:
- (a) to restore references to overtime and other penalty rates being 'time' based (ie time and a half, double time etc.) as opposed to 'percentage' based (ie 150%, 200% etc.); and
  - (b) to remove all references to '*minimum weekly rate*' and '*minimum hourly rate*' that have been added to the overtime provisions in the Exposure Draft.
- 2.4 As set out below, MEAA's position regarding the existing arrangements is incorrect. As a result, the proposed changes to the Exposure Draft are not necessary or appropriate.

#### 3. Companies' position

- 3.1 It is incumbent on MEAA to explain why the adoption of certain language in the Exposure Draft has altered the existing arrangements in the Current Award. It has failed to do this.
- 3.2 To the extent it relies on the assumption we identified above, then it is wrong. Overtime and penalty rates in the Current Award are **not** based on an employee's actual rate of pay. Rather they are based on an employee's '*minimum hourly rate*' or '*ordinary hourly rate*'.
- 3.3 The Companies submit that the argument raised by MEAA has already been considered and rejected by a Full Bench of the Commission in the Four Yearly Review.

In [2015] FWCFB 4658, which concerned Modern Awards in Stage 1 of the Four Yearly Review, the Full Bench relevantly said:

*[95] The AMWU and TCFUA, supported by a number of other unions submitted that replacing terms such as 'time and a half' and 'double time' with '150% of the minimum hourly rate' or '200% of the minimum hourly rate' (or '200% of the ordinary hourly rate' in awards where there is an all purpose payment) reduces an employee's entitlements under the award. They argue that where an employee is receiving an overaward payment, it is the higher rate that should be multiplied to calculate the amount payable.*

*[96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours*

*worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.'*

The Companies submit that the decision in [2015] FWCFB 4658 is authority for the proposition that, generally speaking, overtime and penalty rates are now to be expressed in modern awards as 'percentage' based and not 'time' based penalties. MEAA have not raised any cogent submissions to warrant a departure from this approach.

This is also consistent with the purpose of modern awards which is to provide a safety net of minimum terms and conditions. Modern Awards are not paid rates awards. Accordingly, where an award uses terminology such as '*time and a half*' and '*double time*', then the proper interpretation of such entitlements is that they mean '*time and a half*' of the '*minimum hourly rate*' or '*ordinary hourly rate*' (as the case may be). In this sense, the '*ordinary hourly rate*' means no more than the award minimum rate plus any all-purpose allowances: see [2015] FWCFB 4658 at [43].

3.4 For completeness, we refer to the Companies' previous submission that overtime under the Television Broadcasting stream and overtime and shift penalties under the Journalists stream should be calculated on the basis of minimum hourly rates of pay. In particular:

(a) In respect of the calculation of overtime in Television Broadcasting, clause 29.1 of the Current Award provides:

*'The hourly rate for overtime purposes is to be calculated by dividing the relevant minimum weekly wage by 38.'*

This clause is not replicated in the Exposure Draft, and the Companies have, through their earlier submissions, sought its reinstatement in order to reflect the existing arrangements. The Companies' submission has also sought that this be reflected in those provisions within the overtime clause referred to the basis of the calculation of overtime (eg clause 31.1(a),(b),(c) and (d) of the Exposure Draft).

(b) In respect of the calculation of overtime in the Journalists stream, clause 52.1 of the Current Award provides:

*'The hourly rate for overtime purposes is to be calculated by dividing the relevant minimum weekly wage by 38.'*

This clause is not replicated in the Exposure Draft, and the Companies have, through their earlier submissions, sought its reinstatement in order to reflect the existing arrangements. However, the Companies note that the position of overtime being calculated on minimum hourly rates of pay is reflected in clause 55.1, 55.2 and 53 of the Exposure Draft.

(c) In respect of the calculation of shift penalties in the Journalists stream, clause 48 of the Current Award expressly provides that shift penalties are calculated on the basis of minimum rates. This is reflected in the Exposure Draft and should be maintained.

**MinterEllison**

22 February 2017