

AM2014/275: Four Yearly Review of Modern Awards – Group 4 Awards

Submissions in reply on behalf of News Limited, Bauer Media and Pacific Magazines

1. Introduction

- 1.1 We act for News Limited, Bauer Media and Pacific Magazines (**Companies**) in relation to the exposure draft of the *Journalists Published Media 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 seven 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 rates of pay alters the existing arrangements in the *Journalists Published Media Award 2010* (**Current Award**) to the detriment of employees.
- 2.2 Underpinning this submission is a claim that the Exposure Draft has altered the existing arrangements for the calculation of overtime 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: see paragraph 5 of the MEAA submission.
- 2.3 MEAA proposes the following variations to the Exposure Draft:
- (a) to restore references to overtime rates of pay 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, the 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 The Companies submit that the MEAA submission is wrong.
- 3.2 First, in respect of overtime:
- (a) contrary to MEAA's claims, the existing arrangements for calculating overtime rates in the Current Award are **not** based on an employee's actual rates of pay. Rather, they are expressly stated as being calculated on an employee's minimum award rate of pay. In this regard, we note clause 22.1 of the Current Award relevantly provides:

'The hourly rate for overtime purposes will be calculated by dividing the minimum award rate of pay for the employee's level by 38.'

This clause has been essentially replicated in clause 20.1 of the Exposure Draft.

- (b) Even if clause 20.1 was not in the Exposure Draft (and many other modern awards do not have this provision), it would not follow that the calculation of overtime rates of pay in the Current Award was based on actual rates of pay and not minimum rates.

Modern awards provide a safety net of minimum terms and conditions. They 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].

This issue has already been dealt with by the Full Bench of the Commission in [2015] FWCFB 4658 when the same claims were made by several unions in relation to 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.'

- (c) For completeness, we note that the Exposure Draft does contain incorrect references at clause 20.3(e) to '*ordinary hourly rate of pay*'. Consistent with the Current Award and clause 20.1, those references should be to the '*minimum hourly rate of pay*'. We apologise for not previously drawing this to the Commission's attention in our initial submissions.

- 3.3 In respect of penalty rates, the Current Award does not contain a provision equivalent to the current clause 22.1 (and clause 20.1 of the Exposure Draft). However the rationale of the Commission in the decision referred to in clause 3.2(b) above applies. In those circumstances, it is appropriate that the penalties be specified as being calculated on '*ordinary hourly rates of pay*', being the minimum hourly rate of pay plus any all-purpose allowance.

MINTER ELLISON

22 February 2017