

## IN THE FAIR WORK COMMISSION

**Matter No:** AM2018/24

**Re:** Review of the *Journalists Published Media Award 2010*

### SUBMISSIONS OF NINE ENTERTAINMENT CO. PTY LTD

#### A. Introduction

1. These submissions are filed by Nine Entertainment Co. Pty Ltd (**Nine**), on behalf of its various subsidiaries which employ award-covered journalists, photographers, and other editorial employees.
2. In December 2018, Nine merged with Fairfax Media Limited (**Fairfax**), and acquired Fairfax's mastheads, including *The Sydney Morning Herald*, *The Age*, and the *Australian Financial Review*. In addition to Nine's broadcast and radio assets, Nine now publishes:
  - (a) the *Australian Financial Review*, *The Sydney Morning Herald*, and *The Age*, each of which is defined as a "metropolitan daily newspaper" under clause 3.1 of the Award;
  - (b) three online news websites which are associated with the above print newspapers (www.smh.com.au, www.afr.com.au, and www.theage.com.au), the employees of which are covered as employees of a metropolitan daily newspaper under clause 3.2 of the Award; and
  - (c) a number of online only publications, which are not associated with a print publication, including WAtoday, Brisbane Times, nine.com.au, 9Honey, and Pedestrian.TV.
3. These submissions deal with the variations to the *Journalists Published Media Award 2010* (**Award**) proposed by the Media, Entertainment and Arts Alliance (**MEAA**), as set out in their submissions (**MS**) and evidence filed on 2 May 2019, and the MEAA marked up exposure draft of the Award filed on 1 March 2019. Nine's principal interest in the review of the Award is in the variations sought by MEAA which would:
  - (a) amend the definition of 'editorial employees' to include a broader range of roles (**Editorial Employees Variation**);

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- (b) impose additional conditions before an employee on its metropolitan daily newspapers (and any associated online publication) is exempt from coverage of the Award, than is currently the case under clause 4.9 of the Award, and remove the specific reference to associated publications (**Exemptions Variation**); and
  - (c) amend the Award so that the parts dealing with hours of work and overtime and penalty rates (currently Part 5 of the Award, and Parts 3 and 5 of the Fair Work Commission Exposure Draft) would apply to employees employed on an online publication (other than those employed by a print publication's associated online publication) (**Online-only Publications Variation**).
4. These submissions address the Editorial Employees Variation, and the Exemptions Variation only (together, the **Proposed Variations**). On 20 June 2019, the MEAA filed additional witness statements, which included a statement of Christopher Knaus relating to the Online-only Publications Variation. Nine is currently considering this statement and its bearing on Nine's submissions in relation to that matter. Accordingly, Nine will provide separate submissions and responsive evidence in relation to the Online-only Publications Variation in accordance with the Commission's directions.

#### **B. Summary**

5. The Fair Work Commission should not vary the Award in the manner sought.
6. The MEAA has failed to adduce evidence or put forward arguments which adequately demonstrate that the Proposed Variations are 'necessary' in order to ensure that the Award meets the modern awards objective in s 134 of the *Fair Work Act 2009* (Cth) (**FW Act**).

#### **C. Legal principles**

7. The principles applicable to the review of the Award are well-settled and need not be repeated at length. Several matters are however of particular relevance to the MEAA's proposed variations:
- (a) A modern award must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective (and, the extent applicable, the minimum wages objective): FW Act s 138. The distinction between what is necessary and what is merely desirable is apposite to the Commission's consideration of s 138: *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* (2014) 241 IR 189 at [39] (**Jurisdictional Issues Case**) and *Re 4 Yearly Review of Modern Awards – Penalty Rates* (2017) 265 IR 1 at [136] (**Penalty Rates Case**).

- (b) The Commission must have regard to the nine specified factors in s 134(1), which are mandatory considerations to be taken into account in determining the modern awards objective: s 134(1) and (2) FW Act.
- (c) The modern awards objective requires the Commission to consider, amongst other things, the need to ensure a “stable” modern awards system: FW Act s 134(1)(g). This implies that the variation of a modern award must be supported by merit arguments: *Penalty Rates Case* at [253].
- (d) While some variations may be obvious and require little detailed consideration, to found a case for a variation which represents a substantial change to an existing award requires the making out of a commensurately detailed case, supported by evidence and submissions: *Jurisdictional Issues Case* at [23]; *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8] (***Security Services Award Case***).
- (e) The burden of making out such a case lies with the party propounding a change: *Re Stevedoring Industry Award 2010* (2015) 249 IR 375 at [150] per Kovacic DP and Roe C (***Stevedoring Award Case***).
- (f) In the review, the Commission will proceed on the prima facie basis that awards achieved the modern awards objective at the time they were made: *Jurisdictional Issues Case* at [24]. This emanates from the general approach that while the Commission is not bound by the doctrine of *stare decisis*, it should generally (including in this review) follow previous Full Bench decisions in the absence of cogent reasons for not so doing: *Jurisdictional Issues Case* at [23]-[27]; *Penalty Rates Case* at [254].
- (g) This of course does not fetter the Commission’s discretion in the exercise of its powers if it finds that a variation is necessary for the award to achieve the modern awards objective, but this requires the moving party to establish that matter: *Penalty Rates Case* at [259]-[260], [263]; *Security Services Award Case* at [40]; *Stevedoring Award Case* at [156]-[161].

#### **D. Nine’s response to the MEAA’s Proposed Variations**

##### **The Exemptions Variation**

- 8. Presently, clause 4.9 of the Award provides that the Award does not cover certain persons who otherwise would fall within the breadth of the coverage clause. So far as Nine’s newspapers and associated publications are concerned, the persons exempt are:
  - (a) the editor, editor in chief or chief of staff of a metropolitan daily newspaper (clause 4.9(a));

- (b) a given number of additional positions on each metropolitan daily newspaper (6 positions nationally, 10 positions in each of Victoria and New South Wales (clause 4.9(b)(i), (c)(i) and d(i));
- (c) two positions on a metropolitan daily newspaper's related Sunday newspaper in each of Victoria and New South Wales (clause 4.9(c)(ii) and (d)(ii));
- (d) one position on any other associated publication of a metropolitan daily newspaper nationally, in Victoria and in New South Wales (clause 4.9(b)(ii), (c)(iii) and (d)(iii)); and
- (e) in an online publishing business (that is not an associated publication of a print publication) that employs more than 20 editorial employees:
  - (i) any employee (below the level of publisher) who has principal responsibility for the editorial or artistic aspect of more than one online publication published by the employer, including an editor in chief or art director (clause 4.9(m)(i));
  - (ii) the editor of any online publication (clause 4.9(m)(ii)).

9. The use of 'exemptions' in an award is unusual. It is necessary, however, due to the breadth of Band 3 (Levels 11-13) as defined in clause 13.5(c) of the Award, whereby employees in this Band:

*... exercise the highest level of skills and responsibility. Their duties require the exercise of sustained high levels of professional, technical and creative skills of mature and experienced judgment and outstanding levels of individual accomplishment.*

10. In other words, so long as a person falls within the broad definition of an "editorial employee" in clause 3.1, they will be covered by the Award unless they are 'exempt'. Exemptions therefore effectively fulfil the same function as drafting a classification scale in a way that excludes appropriate senior and highly-skilled employees.

11. The Exemptions Variation would require that in addition to filling one of these positions, in order to be exempt an employee must:

- (a) be classified (and paid) as not less than a Level 11 employee; and
- (b) be in a "senior managerial role" on an "ongoing basis".

12. In addition, the Exemptions Variation removes the reference to any associated publication, including an online publication, from the exemptions applying to metropolitan daily newspapers.

*Maximum classification and salary*

13. The proposed requirement in 11(a) above would effectively institute a new minimum rate of pay (currently \$74,058 per annum) for exempt staff. It is based primarily on the proposition that one historical matter underlying the grant of 'exemptions' to employers was an "expectation that an exempted employee would earn a relatively high salary" (MS at [174]). The very short answer to this is that this "expectation" was not reflected in the actual terms of awards made by the Commission's predecessors.

*Requirement that employees fill a "senior managerial role"*

14. The proposed requirement in 11(b) above that only employees in a "senior managerial role" should be eligible for exemption appears to be based primarily on the notion that the inclusion of 'exemptions' in the Award has drifted away from the original rationale for this mechanism (MS at [174]).
15. There are a number of important matters to observe in this respect.
16. *First*, it is not clear what a "senior" or "managerial" role is intended to mean in this context. Determining who is 'senior' is a matter of fact and degree and depends upon the particular context – for example, a person can be very senior in a particular operational role but sit below the top levels of management within the broader organisation. In addition, 'senior' can mean different things within different organisations. Similarly, the concept of 'management' may encompass a broad range of concepts depending on what it is that is 'managed' – this might be a team, a significant business function (regardless of whether the 'managerial' employee has direct reports), etc. Significant care is needed in this respect, for two overarching reasons:
  - (a) the Commission must be satisfied that any variation does not result in the Award covering classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards. A modern award must not include a coverage term which has that effect: FW Act s 143(7)(a). It would appear at first blush that the MEAA case would bring within coverage persons whom the Commission has, with the consent of all parties, generally seen fit to exclude from award coverage going back nearly 30 years in some cases and further in others; and
  - (b) failure to apply the Award to an employee whom an employer wrongly believes to be exempt would expose it to civil penalty proceedings: FW Act ss 45, 539(2). There should therefore be no ambiguity as to whether an employee is exempt, such that by making the wrong value judgment an employer could become liable to pecuniary penalties: *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-time Employment (2017) 269 IR 125* at [376]; see also *City of Wanneroo v Holmes* (1989) 30 IR 362 at 380.

17. *Second*, in making the Award and determining the current coverage provisions, the Australian Industrial Relations Commission (**AIRC**) specifically referred to the long history of ‘exempting’ certain staff from coverage:

*[108] Certain editorial positions have been exempted from coverage. The exemptions were generally supported by all parties. The only exception was that MEAA did not expressly support the exemption for senior positions in on-line publications. Given that such publications are not currently covered by an award it is appropriate to exclude them also.*

*[109] All three parties [that is, a group of employers, Country Press Australia, and MEAA] pointed out that the published media industry has a long history of exempting certain editorial positions from award coverage. This is reflected in a wide range of pre-reform awards and NAPSAs. Specific reference was made to a decision of a Full Bench of the Commission in 1984 which maintained the exemptions at the time, noting the long history of journalists’ awards having exemptions for senior editorial positions from the application of those awards. The Commission at the time confirmed that it was appropriate for senior editorial staff who had managerial or executive functions to be exempt from award coverage. The manner in which this principle has been implemented has been generally consistent across the various sectors of the industry, reflecting the agreed position between publishers and the MEAA regarding the types and number of positions appropriate to be exempted in a particular sector or market.*

18. The 1984 case to which the AIRC referred is *Re Journalists’ (Metropolitan Daily Newspapers) Award 1982* (1984) 293 CAR 69 (**Exemptions Case**). It was the result of an application by the Australian Journalists Association to remove specific exemptions from the coverage of the subject award. The Australian Conciliation and Arbitration Commission declined to lay down hard-and-fast rules as to whether particular staff could be exempt, instead establishing (at 81-82) a list of matters to be taken into account in determining whether a position is “truly a direct and major part of management”. Some of what is said in the Full Bench’s judgment remains apposite; other aspects, such as the need to give weight to the union’s interest in ensuring that journalistic work was not done by non-members (see at 82), plainly would not be proper considerations under the FW Act.
19. What is relevant in this respect is that the AIRC and the parties concerned were aware of and referred to the Exemptions Case when making the Award and setting the current exemptions framework. Having regard to that authority, the AIRC determined that the current framework was appropriate. There is no reason that the Commission ought not follow the AIRC’s decision in this regard. None of the material the MEAA has put forward would lead the Commission to doubt the correctness or appropriateness of the provisions the AIRC determined.

20. *Third*, the MEAA's submissions set out a lengthy recitation of historical cases where the Commission's predecessors have dealt with exempt positions, and conclude that the criteria once applied to determine whether a position ought be exempt have ceased to be applied. That some principles laid down many years ago are no longer applied in full is neither surprising nor objectionable. In that respect:

- (a) The role of a modern award is to provide a fair and relevant minimum safety net, which *inter alia* provides the underlying basis for enterprise bargaining: FW Act ss 3(b), 134. Awards cannot go beyond including terms which are necessary to achieve that: FW Act s 138. That is very different to the role of awards prior to the introduction of enterprise bargaining in the mid-1990s, and particularly to older frameworks in which the awards of the former Commissions were paid rates and/or members-only awards, and were made in settlement of particular industrial disputes. These very significant changes in the legislative framework are a cogent reason that previous decisions ought not necessarily be adopted as binding or persuasive guidance: *Penalty Rates Case* at [255]. The MEAA's case appears to propose that the Award revert to a system of exemptions that more closely reflects an Award made in 1955, when the union's eligibility rules and award coverage were intrinsically linked.
- (b) As the Full Bench foreshadowed in the *Exemptions Case* at 81, systems of management, control and direction in workplaces generally, including newsrooms, have changed over time. This point is made in a different way by the MEAA itself (MS at [181]). If however (as MEAA submits) what were formerly 'command and control' responsibilities are now more broadly distributed, it is artificial to try to insist on an exempt employee specifically filling a "senior managerial role" where employees are "plainly set... apart from the rest of their editorial colleagues" (MS at [177]). That is all the more reason not to take guidance from decisions made in different times.

*Requirement that employees fill a senior managerial role on an "ongoing basis"*

- 21. The MEAA asserts that the requirement that a "senior managerial" role be occupied on an "ongoing basis" is to "*guard against the inappropriate or unwitting exclusion of employees from award coverage in circumstances where they temporarily occupy a position*" (MS at [179]).
- 22. The MEAA's proposed change to clause 4.4 of the Award does not include any language that would clarify how this phrase is to be interpreted, nor do the submissions illuminate this issue. It is unclear what length of time will constitute an "ongoing basis" and/or whether the type of engagement is relevant (for example, would an employee engaged under a fixed term contract for 12 months be considered to be engaged in the role on an ongoing basis). As set out at paragraph 16 above, there should be no ambiguity as to whether an employee is exempt, such that by making the wrong value judgment an employer could become liable to pecuniary penalties: *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-time*

*Employment (2017) 269 IR 125 at [376]; see also City of Wanneroo v Holmes (1989) 30 IR 362 at 380.*

*Removal of “associated publications” and application to news “publications”*

23. Much of the MEAA’s submissions set out how the publishing industry has changed and is moving towards a new “digital reality”. Consistent with its case that there should be no distinction between print and digital publications, the MEAA asserts that the word “newspaper” throughout the Award should be replaced with the term “news publication” and has removed the reference to associated publications in relation to the exemptions from Award coverage in current clause 4.9 of the Award.
24. In relation to metropolitan newspapers, the number of available exemptions in clause 4.9 of the Award depend upon the frequency of publication, the location in which the publication is published, and whether the publication is an “associated publication”. For example, in Victoria and New South Wales, a metropolitan daily newspaper (which is defined as being one which is published Monday to Saturday, or only on a Sunday, and which is principally distributed throughout the metropolitan area of one or more capital cities or the metropolitan areas of Newcastle or Wollongong), the following exemptions apply:
  - (a) 10 positions on a metropolitan daily newspaper published in the relevant state;
  - (b) two positions on its related Sunday newspaper; and
  - (c) one position on any associated publication including an online publication.
25. Under the MEAA’s proposed change, it is unclear how an employee engaged on an associated online publication should be classified in order to determine the exemptions, in circumstances where the publication is “published” 7 days per week and distributed anywhere in the world. Further, it is unclear whether employees engaged on associated online publications could be exempt at all when one considers the definition of “metropolitan daily newspaper”, which requires distribution in specified locations. The MEAA’s proposed change would lead to uncertainty in relation to how the exemptions in clause 4.9 would apply.

*The Exemptions Variation is not necessary*

26. The MEAA has failed to demonstrate why, for the Award (together with the NES) to provide a fair and relevant minimum safety net of terms and conditions, it is necessary that the additional fetters on which staff can be ‘exempt’ are included.
27. The MEAA has not addressed the specific matters in s 134(1) at all. Nine submits that none of the factors in s 134(1) support the MEAA’s case to make the Exemptions Variation, as set out below:



- (a) The variation is irrelevant, or only marginally relevant, to relative living standards and the needs of the low paid, referring to employees earning less than around \$886.77 per week. Journalism is skilled work, typically now done by persons with relevant tertiary qualifications, which attracts a wage premium. As of May 2018, the average weekly wage for “journalists and other writers” was \$1,661.80 (that is, over \$86,000 per annum). In the Award itself, the lowest non-cadet minimum full-time wage is now \$941.10 per week. Under the *Fairfax Media – Metropolitan Journalists Enterprise Agreement 2018*, the lowest non-cadet minimum full time wage is \$1,153.71.
- (b) There is no evidence that the current exemptions framework has discouraged collective bargaining, or that reducing the number of exempt staff would change this. That follows logically – exempt staff would generally only be a small proportion of staff on a masthead. In this respect, all Nine metropolitan daily mastheads are covered by the *Fairfax Media – Metropolitan Journalists Enterprise Agreement 2018*.
- (c) There is no evidence that exemption or otherwise would promote or discourage social inclusion through workforce participation. There is no rational basis to assert that the variation sought would create jobs, or induce someone to take up a job when they would not otherwise do so.
- (d) Adding further restrictions to existing exemptions in modern awards would not promote flexible modern work practices or the efficient and productive performance of work.
- (da) The need to provide additional remuneration for employees working in various circumstances outside of weekday “business hours” presupposes that such persons are covered by the Award, and is more directed to the terms of the instrument. In any case, it is not an unequivocal requirement that persons working such hours must be additionally compensated for it: *Penalty Rates Case* at [194]-[202].
- (e) The variation is irrelevant to the principle of equal remuneration for work of equal or comparable value. It is not relevant to the respective amounts paid to women and men.
- (f) It could not be said that the variation would have a positive impact on business. To the extent there is any impact, it would be a negative one, because businesses would incur additional costs of administering the Award (even if remuneration costs do not actually increase).
- (g) For the reasons set out in paragraphs 16, 22 and 25 above, the Exemptions Variation as proposed by MEAA would make the Award more complex and less easy to understand. This factor otherwise does not weigh in favour of the proposal.
- (h) The impact on broader economic factors is likely to be nil or inconsequential given the scale of the effects, so this factor is not relevant.

28. The highest the MEAA's case rises is that the Award is hypothetically open to abuse of some kind. There is no evidence that this has occurred, that any person who would but for their 'exemption' be covered by the Award has experienced any detriment as a result, or that any 'exempt' employee is dissatisfied with that state of affairs.
29. There is no reason to find that the Award is not playing the required role creating a fair and relevant minimum safety net of terms and conditions, or that limiting the persons who can be 'exempt' from its terms will remedy this. Indeed, to the extent that the MEAA merely seeks to return the Award's coverage provision to one based on older conceptions of how newsrooms operate, this would tend to make the Award less "relevant" in that it would not be adapted to contemporary circumstances (though accepting that this is not the only facet of "relevance"): *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368 at [51], upholding the Full Bench's decision in the *Penalty Rates Case*.

### **Editorial Employees Variation**

30. 'Editorial employees' is currently defined in clause 3.1 of the Award as:
- editorial employees include reporters, writers, photographers, sub-editors, cartoonists, artists, video journalists, moderators of blogs on news websites, editorial content producers for online publications, chiefs of staff, picture editors, designers and production managers.*
31. The MEAA proposes to amend this definition to include the following roles: journalists, correspondents, content writer, social media coordinator, editors, associate editors, multimedia editors and producers, social media editors,<sup>1</sup> and art directors. In addition, the MEAA seeks to broaden the definition of editorial content producer so that it applies to such an employee on any publication as opposed to only on an online publication, and includes editorial content directors.
32. The need to make the proposed changes to this definition are not self-evident and the MEAA has failed to provide any cogent reason or evidence to support its request for the above amendments. Accordingly Nine submits the changes should not be made.

### **Seyfarth Shaw Australia**

Solicitors for Nine Entertainment Co. Pty Ltd

**8 July 2019**

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<sup>1</sup> Nine has assumed, based on the marked up version of the Award provided by the MEAA on 1 March 2019 that the second reference to "editors" in the proposed definition at paragraph 122 of their submissions is intended to be a reference to "social media editors".

## IN THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

FWC Matter No: AM2018/24

### 4 YEARLY REVIEW OF MODERN AWARDS

#### Review of the *Journalists Published Media Award 2010*

#### STATEMENT OF ALEX LAVELLE

I, Alex Lavelle, Editor, The Age c/- Media House, 655 Collins Street Docklands VIC 3008, state:

1. I make this statement based on my own direct observations and knowledge, or on the basis of information provided to me which, to the best of my knowledge and belief, is correct.

#### **My role and background**

2. I am the Editor of The Age newspaper.
3. The Age is a daily newspaper that has been published in Melbourne since 1854. It is currently published by The Age Company Pty Limited, which was owned by Fairfax Media Limited (**Fairfax Media**) until December 2018, when Fairfax Media merged with Nine Entertainment Co. Pty Ltd (**Nine**).
4. The Age primarily serves Victoria but is also available in Tasmania, the Australian Capital Territory, and border regions of South Australia and southern New South Wales. It also has an online news site ([www.theage.com.au](http://www.theage.com.au)) and a digital newspaper that can be viewed on a computer or tablet.
5. I have been in the role of Editor since approximately December 2016. My role involves running a newsroom of approximately 140 journalists. I have responsibility for editorial strategy in relation to newspaper and digital content, and editorial oversight and control over what we publish in print and online.
6. I started my career as a sports reporter for the Daily Mirror in the United Kingdom. After moving to Australia, I started working at Fairfax Media ahead of the Sydney Olympics in 2000. I went on to become the Sports Editor at The Age and then Deputy News Editor before taking up my current role as Editor.
7. I am aware that the Media Entertainment and Arts Alliance (**MEAA**) is seeking to introduce changes to the *Journalists Published Media Award 2010* (**Award**) with the effect that:

- (a) the current exemptions from coverage of the Award would only apply where the employee holding the position occupied a “senior managerial role on an ongoing basis”, and was paid at least level 11 of the Award; and
- (b) employees engaged on online-only publications would be covered by the hours of work, overtime and penalty rates provisions of the Award.

The Age has a website ([www.theage.com.au](http://www.theage.com.au)) and tablet apps, but all our digital platforms are strongly associated with The Age printed newspaper and virtually all staff work across print and digital platforms at least in some capacity. Most staff are ‘platform agnostic’. There is also a digital version of the daily newspaper, which is available for subscribers. The publication of a daily newspaper and regularly updated digital platforms is essential to maintain our commitments to subscribers, readers and advertisers and for the viability of our business.

### **Exemptions applying to The Age**

- 8. The Age Company Pty Limited is a party to the *Fairfax Media – Metropolitan Journalists Enterprise Agreement 2018 (Fairfax Metro Agreement)*, together with other former Fairfax Media companies, such as Fairfax Media Publications Pty Ltd, which publish *The Sydney Morning Herald* and the *Australian Financial Review*. The Fairfax Metro Agreement covers all editorial employees of the companies party to the enterprise agreement subject to certain exclusions depending on the publication.
- 9. Clause 4.3.2 provides for the following positions with The Age Company Pty Limited to be exempt from coverage of the Fairfax Metro Agreement:
  - (a) for The Age:
    - (i) Editor – The Age;
    - (ii) Deputy Editor Print;
    - (iii) News Director;
    - (iv) News Editor;
    - (v) Production Editor – The Age;
    - (vi) Weekday Print Editor;
    - (vii) Video Editor;
    - (viii) Photographic Editor;
    - (ix) Managing Editor Sport;
    - (x) Business Day Editor; and

- (b) the Editor on any associated publication.
10. In addition, clause 4.3.3 of the Fairfax Metro Agreement provides for the exemption of additional national roles that cover both The Age Company Pty Limited and Fairfax Media Publications Pty Limited. These roles are:
- (a) Audience & Innovation Editor;
  - (b) Federal Politics Editor;
  - (c) Life Editor;
  - (d) Creative Director
  - (e) Art Director;
  - (f) Head of Entertainment; and
  - (g) National Editor.
11. I was involved in determining which positions should be exempt from coverage of the Fairfax Metro Agreement. I broadly understand that the number of exempt positions are derived from the exemptions in the Award. I am aware that these positions can be amended from time to time on notification to the MEAA. I have not been involved in notifying the MEAA directly, except to ensure that the position titles are correct. I do not believe there have been any recent notifications of a change in an exempt role.

### **Exempt roles at The Age**

12. I set out below a brief summary of each role exempt from coverage of the Fairfax Metro Agreement.
13. Editor: this is my role as I outline at paragraph 5 above. The role reports to the Group Executive Editor, who leads the editorial teams across Nine's capital city mastheads.
14. Deputy Editor – (Print): this is a production-based role responsible for the content published in The Age's print newspaper across seven days. The Deputy Editor (Print) is involved in planning, pagination requirements, the placement of stories and accompanying photographs and/or graphics. The Deputy Editor (Print) is also the editor of the Saturday Age newspaper. The role liaises with other editors across business, sport, features and so on to ensure the smooth running of the print products and that, for example, resources and stories are not duplicated. Being a senior role, the Deputy Editor (Print) works the hours required to complete the job, although generally those hours are Monday to Friday, 11 am to 7.30 pm. The Deputy Editor (Print) has two direct reports: the Weekday Print Editor and the Sunday Print Editor.

15. News Director: The News Director is the most senior person in the newsroom responsible for content. The News Director is responsible for commissioning state-based stories and overseeing that content for The Age across the 7 days, both in print and online. This role works 5 days a week, typically Monday to Friday, but those days can vary depending on operational requirements. In terms of the organisational structure, the News Director reports to the Editor, and is on the same level as the Deputy Editor (Print). The News Director has personnel management responsibilities and responsibility for contributor budgets and involvement in interviewing and selecting candidates at a senior level. She/he has authority to make disciplinary decisions in relation to their direct reports (who occupy relatively senior reporting roles). The News Director may occasionally create editorial content when required, but this is not their primary function.
16. News Editor: The News Editor runs the news content on a day-to-day basis and reports to the News Director. The News Editor is responsible for rostering journalists and commissioning news stories to journalists on a daily basis. This role sits across both print and digital. This role has approximately 12 – 15 ‘rounds reporters’ reporting into them, plus a Deputy. ‘Rounds reporters’ are responsible for reporting on particular topic areas, for example, state politics, health or education. The News Editor has broadly the same personnel management responsibilities for interviewing and selecting candidates and making disciplinary decisions in relation to their direct reports as the News Director – a difference in the level of responsibility between the two roles lies in the fact that the News Editor generally makes those decisions in relation to less senior reporters, whereas the News Director generally makes those decisions in relation to more senior reporters. The News Editor may also create editorial content from time to time when required to assist, but this is not their primary responsibility.
17. Production Editor – The Age: The Production Editor is responsible for the production staff across digital and print. They oversee the production of stories but do not create content themselves. This role manages a team of approximately 20 Producers. A Producer reviews content written by journalists before it is published – what was traditionally known as a sub-editor. The hours worked by a Production Editor vary according to business requirements. Typically they will work between 12 pm and 8 pm in order to cover the daily 7.30 pm print publication deadline, but may work those hours across a variety of different days depending on the business and operational requirements of the week. For example, they could work Monday to Friday, Tuesday to Saturday and so on. The Production Editor reports to the Editor, and has management responsibilities for the production staff, recruitment and shortlisting of candidates, and disciplinary decisions. The Production Editor interacts with the News Editor, Deputy Editor (Print), Deputy Editor (Digital) and other staff in order to determine which stories need to be produced as a matter of priority, and directing and coordinating their respective teams accordingly to ensure deadlines are hit.

18. Weekday Print Editor: this is a “hands on” role producing the Monday to Friday paper. The Weekday Print Editor determines what stories appear on which page in the news section of the printed paper from Monday to Friday, how many words the story will run to, what pictures or graphic will accompany the story and so on. This involves some layout or production work, including responsibility for the overall look of the page and ‘mix’ of stories in the news book. This role generally will not commission reporters to write content nor do they write content themselves, except for ‘blurbs’, ‘puffs’, headlines and pointers. They will though be involved in the discussions on what content should be commissioned. Generally this role will work standard hours of Sunday to Thursday, 12 pm to 8 pm in order to accommodate the print deadline for the daily paper. This role reports to the Deputy Editor (Print), and has no staff reporting to them, but she/he will direct staff such as their deputy on the day, the chief sub and other production staff to ensure the smooth running of the operation. While this is a “hands on” role, it is a very senior and responsible position within the newsroom and has a high level of responsibility for producing The Age’s Monday to Friday newspaper.
19. Video Editor: this role manages the audio and visual department, which is comprised of approximately 15 employees across Melbourne and Sydney. It is a national role that is currently based at The Age, and reports into the Head of Editorial Operations. The Video Editor commissions videos and manages the production of podcasts. The hours worked will vary on business requirements but generally is a Monday to Friday, 9am to 5pm role. The Video Editor has management oversight of staff budget, hiring and disciplinary decisions and processes.
20. Photographic Editor: this role manages the photographic department, which is comprised of approximately 5 permanent photographers and two photo editor deputies. The Photographic Editor is responsible for commissioning photographers, liaising with the digital and print editors to determine their requirements in relation to photographs, and ensuring high quality photographs are provided to accompany stories in each of the online and print publications. At The Age this role reports into the News Director. The role currently has 7 reports. The Photographic Editor will roster themselves and their deputies to meet the needs of their department, so their hours can fluctuate and they are required to work late at night or early in the morning from time to time. The Photographic Editor has managerial responsibilities over the team of photographers and deputies reporting to them, including in relation to hiring and engaging freelance photographers, disciplinary processes and a contributor/casual budget. These roles collaborate with many other roles in the newsroom across news, business, sport, politics and so on.
21. The Managing Sports Editor, Business Day Editor and Federal Politics Editor are on the same level in terms of organisation hierarchy, and have the same broad managerial responsibilities as the News Director (as set out at paragraph 15 above) for contributor budgets, recruitment

and disciplinary decisions. The duties and responsibilities of each of these roles is described below.

22. Managing Editor Sport: this role runs the sports department across both digital and print and has approximately 16 direct reports, including deputy editors. They have control over the content reported and the placement of that content in the sports sections in print and online. The Managing Editor Sport reports into the Editor and works their core hours predominantly during the day Sunday to Thursday, but will work a mix of late finishes and other times as required.
23. Business Day Editor: this role runs the business sections of the paper and online, and has approximately 20 direct reports, including Deputy Editors. They have control and oversight of the content reported and the placement of that content in The Age and Sydney Morning Herald. This is a national role, currently based in Melbourne and reports to the National Editor. The Business Day Editor works their core hours predominantly during the day Monday to Friday, but will work a mix of other hours as required.
24. Federal Politics Editor: this role runs the federal politics department across both digital and print and has a team of approximately 14 direct reports, including a Deputy. The role has control and oversight of the content reported in The Age and Sydney Morning Herald in print and online. This is a national role based in Canberra and reports to the National Editor. This role works their core hours predominantly during the day Monday to Friday, but will work a mix of other hours as required.
25. Life Editor: this role runs the lifestyle and entertainment sections across both digital and print, and manages a team of approximately 20 employees, comprised of entertainment reporters and editors, fashion and lifestyle reporters, and magazine editors (with the exception of Good Weekend). This role is predominantly a managerial role responsible for content strategy. The hours worked would generally be during the day, Monday to Friday, with outside hours as required. This role reports into the Group Executive Editor. It is a national role that works across publications for both The Age Company Pty Limited and Fairfax Media Publications Pty Limited – that is, across the Sydney Morning Herald and The Age.
26. Audience and Innovation Editor: this role is now called Head of Audience Development. It is an analytical and data driven editorial role that informs what is written in our publications and provides advice on how we can grow the subscriber business. The role does not have specific day-to-day responsibilities, but its duties include identifying and reporting to the business on which stories are most relevant to our readers, when and on what platforms people read particular which stories, which readers are most likely to convert to subscribers, and what content may drive a reader to make that conversion. This is an editorial role in that it informs the content produced. It is a national role that works across publications for both The Age



Company Pty Limited and Fairfax Media Publications Pty Limited – that is, across the Sydney Morning Herald and The Age. The Head of Audience Development reports to the Group Executive Editor, who leads the editorial teams across all of Nine's capital city mastheads. This role is a senior professional role.

27. Creative Director: this role manages the art department, which is comprised of graphic designers, developers and cartoonists, as well as the Art Director. This role determines what the graphics for each masthead will look like across digital and print, and their primary function is to ensure quality, informative graphics and interactives are used in digital and print stories across the week. However, the Creative Director does not determine where they are placed, as that work is undertaken by the relevant editor(s). This role may also do some “hands on” designing work themselves from time to time. They report to the Director of Editorial Operations and have management responsibility for staff budgets, recruitment and disciplinary processes. The role is a national role, currently based in Melbourne. The Creative Director works the hours depending on business requirements but generally Monday to Friday, approximately 11 am to 7 pm.
28. Art Director: this role is effectively the Creative Director's deputy who has responsibility for the day-to-day graphics required by the relevant editors. There is an Art Director in both Melbourne and Sydney and both report in to the Creative Director. This is primarily a hands-on design role across both digital and print. The Art Director in Sydney has some management responsibility for their direct reports there in relation to staff management issues.
29. Head of Entertainment: this role runs the entertainment section nationally across the Sydney Morning Herald, and The Age and has a team of reporters in Melbourne and Sydney. They are responsible for commissioning entertainment reporters on staff and contributors, and assist in editing the entertainment sections of both the print and online publications. The Head of Entertainment reports into the Life Editor. The Head of Entertainment role is currently based in Melbourne, while the Life Editor is based in Sydney. The Head of Entertainment works hours depending on business requirements but approximately 8 am to 4 pm or 5 pm, Monday to Friday. The Head of Entertainment is responsible for content creation. This role works across both print and digital, however the focus of the role is principally on digital since there is no specific 'Entertainment' section in the newspapers. Their print responsibilities are around the Arts pages and entertainment stories that run in news, business or sports sections as required. The Head of Entertainment has contributor budget responsibilities and some management responsibility for their direct reports in Sydney and Melbourne in relation to staff management issues, but in my experience they would defer to the Life Editor for final decisions on these matters.

30. National Editor: this role manages the federal politics, business and world sections of each of the Sydney Morning Herald and The Age. The National Editor does not have final editorial control over placement in the print publication (although they will make recommendations), but they do have final placement responsibility for the home page straps for each of their relevant sections on the digital publication. Business Day, Federal Politics and World Editors report into this role. This is a senior role on the same level as the Editor of either The Age or the Sydney Morning Herald in terms of organisational structure, and they have personnel management responsibilities including for staff budgets, hiring and disciplinary matters. They will also be involved in hands on editing as required (as will the Editor of The Age or the Sydney Morning Herald). The National Editor would generally set their own hours across the week depending on business needs. The role reports to the Group Executive Editor.
31. The Deputy Editor (Digital) is responsible for the running of The Age website and other digital platforms. The Deputy Editor (Digital) has managerial responsibility for the home page editors, social media and tablet editors, some breaking news reporters and some production staff. This role generally sets her/his own hours depending on business needs. The role's responsibilities are similar to the Deputy Editor (Print) in that they are responsible for the digital platforms of The Age and for content placement on these platforms across seven days. They are on the same level as the News Director and Deputy Editor (Print) and collaborate with them in terms of story generation, ideas and commissioning and the scheduling of the publication of our journalism. They are involved in major decision-making in collaboration with the Editor.

#### **The nature of the exempt roles**

32. All of above roles are senior roles that, while engaged to work 38 hours per week, require the employee to work whatever additional hours are necessary in order to get the job done. As I refer to above, generally these employees do not have set times of work, and can determine what time they come in, what time they leave, and what days of the week they work in order to fulfil the responsibilities of their role. This flexibility is critical to the effective management of the business in the contemporary operations environment.
33. In print, the publication deadline is 7.30 pm and so editors predominantly involved with the print side of the business would start later in the morning (around 11 am or 12 pm) and work through to somewhere between 7 pm and 8 pm. General business practice is while these roles perform additional hours as required, if a person works a day in addition to their usual 5 day week, they would take a day off in lieu.

34. Each of the above roles:
- (a) has a high level of responsibility in relation to the publication of The Age's printed newspaper and online platforms, and in the case of national employees, a high level of responsibility across a number of the company's metropolitan mastheads;
  - (b) is critically important to the production of The Age newspaper and its associated online platforms; and
  - (c) has a high level of knowledge and awareness of what is appearing in their publications.

Each role's duties include the significant exercise of editorial judgments (with the exception of the Head of Audience Development which informs those judgments).

35. Most of the roles set out above do not have unilateral authority to engage or dismiss employees, although they are a part of that process insofar as they can make recommendations in relation to these decisions. The Editor and the National Editor have authority to unilaterally make those decisions, in consultation with the Group Executive Editor. Generally, each of the aforementioned exempt positions that report directly to myself as Editor, or into the National Editor or national Head of Editorial Operations role, have management responsibility for budgets, hiring and disciplinary decisions. Other exempt positions that report in to a lower level than the Editor, National Editor or the Head of Editorial Operations would not have responsibility for budgets (except for the Photographic editor), but may have input or make recommendations in relation to hiring and disciplinary decisions or processes.
36. All of the roles set out above do have the authority to direct the staff in their team, with the exception of the Head of Audience Development, who does not have any employees reporting to them. Although this employee does not have any direct reports, they are senior professional employee who has input into the direction of their relevant publication(s).
37. The role of each editor at The Age, and nationally, is very well defined.

#### **Structure of Editorial teams for other Fairfax Media print publications**

38. I am aware that the structure of the editorial team at The Age (including the exempt positions) is extremely similar to the structure of the editorial team at the Sydney Morning Herald. I am aware of this because I work closely with the Editor of the Sydney Morning Herald and attend daily meetings with that team, and staff can be shared across those teams.
39. I am not specifically aware of the structure of the editorial team at the Australian Financial Review, or the positions within that team that are exempt from Award coverage.

## **Statement of Peter Fray**

40. I have been provided with a copy of the Statement of Peter Fray dated 1 May 2019.
41. I do not agree with the statement at paragraph 12 that production staff turn their attention to print as a secondary or tertiary concern, if at all. Stories are written for both print and digital. In order to service our online readers, stories are uploaded to the website once they are complete and approved by either a producer or an editor for publication. They are then produced for print not as a secondary concern, but because print has a static deadline later in the day and digital can be updated constantly. Very often, the story will be edited differently for print, almost always for length in that it must fit the assigned news hole, but sometimes also to change the nature of the story to be more 'newsy' or 'look ahead' since it will not be read in the paper until the following day. This is not to say that digital is more important than print or that print is a secondary or tertiary concern, if at all. Rather, the online medium allows for the continuous updating of news stories, in a way that print does not and we want to serve our readers as best we can across all platforms.
42. In response to paragraph 16, at The Age there is a recognised hierarchy around the Editor having overall control and oversight over the publication of our journalism on each platform. The Editor still has control and oversight over what happens on the newsroom floor and there is a clear hierarchy and area of responsibility for each role. Each topic Editor has responsibility over their specific content area. Reporters are responsible for editing their own work only to the extent that they are expected to put forward polished drafts for their topic Editor to review. I do not agree that the control over the newsroom has been "delegated thin and wide". Even if could be construed as the case a few years ago, it is not the case now. I accept that a flat structure may prevail in some newsrooms and especially some digital start-up environments, but this is not the case within The Age's business presently.

**Alex Lavelle**

**8 July 2019**