

IN THE FAIR WORK COMMISSION

Matter No: AM2018/24

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

FURTHER SUBMISSIONS OF NINE ENTERTAINMENT CO. PTY LTD

1. Introduction

- 1.1. These submissions are filed by Nine Entertainment Co. Pty Ltd (**Nine Entertainment**), including on behalf of its various subsidiaries which employ award-covered journalists, photographers, and other editorial employees.
- 1.2. On 8 July 2019, Nine Entertainment filed its submissions (**July Submissions**) in response to 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 and evidence filed on 2 May 2019, and the MEAA marked up exposure draft of the Award filed on 1 March 2019. Nine Entertainment filed further submissions on 26 July 2019 dealing with the MEAA's proposed changes to Part 5 of the Award with respect to online only publications.
- 1.3. On 20 August 2019, the MEAA wrote to the Fair Work Commission regarding matters which were canvassed in these proceedings before the Full Bench at hearing on 8 August 2019 and providing a further marked-up copy of the Award (**August MEAA materials**).
- 1.4. The August MEAA materials suggest two primary changes of concern to Nine Entertainment:
 - (a) firstly, it has reformulated the MEAA claim about exemptions so that clause 4.9 of the Award says that “*up to*” x positions on a masthead may be exempt. The MEAA has otherwise retained the proposed requirement that employees fill a “senior managerial role” on an ongoing basis and earn at least the Level 11 salary (**Further Exemptions Variation**); and
 - (b) secondly, the MEAA had changed its claim to define a newspaper and its associated online publications based on the geographical reach of the publication's usual subject-matter, rather than referring to the principal area of “distribution” (**Content Variation**).

Lodged by:

Seyfarth Shaw Australia for Nine Entertainment Co.
Pty Ltd

Address for Service:

Level 40, Governor Phillip Tower, 1 Farrer Place
Sydney NSW 2000

Telephone: (02) 8256 0400

Fax: (02) 8256 0490

Email: dperry@seyfarth.com

- 1.5. The MEAA also makes further submission in relation to the **News Publications Variation** dealt with in section 5 of the July Submissions, being that the term “newspaper” should be replaced with the term “media publication”.
- 1.6. Nine Entertainment opposes these additional proposed variations. We deal with each of these variations in detail below.

2. The Further Exemptions Variation

- 2.1. Nine Entertainment repeats its contentions in part D of the July Submissions in relation to the Exemptions Variation.
- 2.2. The Further Exemptions Variation does not actually address what Nine Entertainment understood to be the Full Bench’s concerns raised at hearing about the clause previously proposed by the MEAA, namely that:
 - (a) there is still no specification of which positions are exempt due to the vague term “senior managerial role”; and
 - (b) providing for different numbers of exemptions in different States may be a State-based difference of a kind not permitted by the *Fair Work Act 2009* (Cth) (**Fair Work Act**).
- 2.3. At hearing, the Full Bench invited Nine Entertainment to make submissions in relation to an alternative wording for clause 4.9 of the Award. In this regard, Nine Entertainment notes that the MEAA’s proposal does not:
 - (a) acknowledge or deal with the anomalies that its proposed wording may create for some publications, such as the fact that employees of regional daily newspapers cannot be classified at above level 10, which would effectively mean that they would not be able to be exempt regardless of their seniority (as set out paragraphs 3.6 and 3.17 of the July Submissions); and
 - (b) provide any guideline for what the term “senior managerial role” actually means, which may cause inconsistency between newspapers and also lead to unnecessary disputes.
- 2.4. Accordingly, Nine Entertainment submits that:
 - (a) any salary requirement needed to be met in order to invoke an exemption should be linked purely to that salary amount, rather than the classification of the exempt employee. For example, if an employee of a regional daily is classified at level 10, but is paid at the level 11 rate then they would be eligible for exemption despite their classification; and

- (b) if the concept is to be adopted, guidance in relation to the meaning of “senior managerial role” is also required. It is often the case in many newspapers that those employees with senior managerial functions are also required to perform editorial functions from time to time (this is especially true of newspapers with a small number of staff), it needs to be made clear that this would not preclude them from meeting the definition of an exempt employee.

2.5. Nine Entertainment submits that any uncertainty can be dealt with by words to the effect of:

4.9 *The Award does not cover:*

(a) *employees employed as editor, editor in chief and chief of staff of a metropolitan daily newspaper; and*

(b) *employees who occupy positions with an annual salary greater than the level 11 rate of pay, and who the employer (acting reasonably) determines are employees who have the appropriate experience, skill or capability to provide leadership to a section or function; or to assume the responsibility of editor if required.*

2.6. With regard to the second concern raised by the Full Bench, Nine Entertainment submits that the differences between States are not differences of a kind that are inconsistent with the *Fair Work Act*¹. The provisions in question are coverage provisions only; they do not deal with “terms and conditions of employment” that are “determined by reference to state boundaries”². Once an employee is covered by the Award, their geographic location has no bearing on their terms and conditions of employment.

2.7. Should the Full Bench nonetheless wish to remove the state based numbers of exemptions, it could do so by adding them together to create a single national number of exempt positions.

3. The Content Variation

3.1. The MEAA submits that the definition of a metropolitan daily newspaper should be one “*whose content concerns news and commentary regarding the metropolitan area of...*”. It also makes equivalent submissions in relation to country non-daily newspapers.

3.2. If this wording is accepted, the impact of it would be that it would limit the ability of those newspapers to publish certain content without fundamentally recharacterising their categorisation under the Award. For example, it would mean that if a metropolitan newspaper in Newcastle published a national story, it may no longer fit within the Award definition. This effectively limits the ability of newspapers to report on stories which would be of interest to

¹*Fair Work Act*, s 154.

²s154(1)

their readership if those stories do not relate to the particular area where the newspaper's offices are located.

- 3.3. With respect, Nine Entertainment submits that it would be inappropriate for the Award to dictate the kind of content which a newspaper is able to publish. It does not follow that a metropolitan newspaper that publishes content that is national, or indeed global in nature should no longer be considered a metropolitan newspaper. It is not unreasonable for a reader to turn to a metropolitan paper to provide it with local news as well as issues of broader concern.
- 3.4. As an alternative to the MEAA's proposal, should the Full Bench conclude that the definition requires amendment to operate effectively in an increasingly digital environment, Nine Entertainment submits that the following wording would be more appropriate, and reflective of the actual nature of region specific newspapers:

***Metropolitan daily newspaper** means a newspaper published Monday to Saturday or published only on a Sunday and which is principally produced, distributed or targeted at audiences in the metropolitan area of one or more capital cities or the metropolitan areas of Newcastle or Wollongong.*

4. The News Publications Variation

- 4.1. Nine Entertainment repeats its contentions in part D of the July Submissions in relation to the News Publications Variation.

Seyfarth Shaw Australia

Solicitors for Nine Entertainment Co. Pty

Ltd

27 August 2019