AM2014/300 – Four Yearly Review of Modern Awards - Award flexibility

Submissions on behalf of the MEAA

RE JOURNALISTS PUBLISHED MEDIA AWARD 2010

1. The submission of the Companies is a simple one. It is that the Journalists Published Media Award 2010 [the Award] meets the modern awards objective in s 134 of the *Fair Work Act* 2009 (Cth) [the Act] and that there is no warrant to amend the current provision.

2. That submission does not properly describe the statutory test.

<u>The statutory test</u>

3. It is almost invariably useful when interpreting a statute to start with its text. Section 154 provides for the four year review. Section 134 requires the Commission to ensure that modern awards … together with the National Employment Standards, "provide a fair and relevant minimum safety net of terms and conditions" taking into account, amongst other things, the specific criterion in s 134(1).

4. As the Full Bench held[1]:

> No particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award. There is a degree of tension between some of the s 134(1) considerations. The Commission's task is to balance the various s 134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions.

5. The relevant criterion in section 134 appear to be

> (1) (a) the needs of the low paid; and…
> (da) the need to provide additional remuneration for:
> (i) employees working overtime; or
> (ii) employees working unsocial, irregular or unpredictable hours; or
> (iii) employees working on weekends or public holidays; or
> (iv) employees working shifts; and…
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards…

[1] *Re 4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 at [32], [33].

The needs of the low paid

6. The phrase *low paid* is inherently ambiguous. As the Full Bench stated in the 2009 Annual Wage Review:

> There is no consensus among the parties and other commentators with respect to a definition of the low paid. Because there is a continuous distribution of wages, there is no wage threshold just below which people are clearly low paid and just above which people are clearly not low paid. Rather, the lower the wage, the more "low paid" is the employee. People earning above or near median earnings are clearly not low paid in an absolute sense[2]:

7. A similarly relativistic view was taken earlier in the *Safety Net Review*[3]:

> Neither "needs" nor "low paid" is a term with a precise meaning… Although there was some diversity of opinion about the identity of the low paid, we think that there was a reasonable consensus that they at present have the following characteristics:
>
> * their wages are not prescribed in workplace or enterprise agreements;
> * their award classifications are toward the lower end of the award structure; and
> * they receive no, or only small, over award payments.

8. This requirement seems directly relevant to the task before the Commission. There seems little analysis of its meaning. The *Explanatory Memorandum to the Fair Work Amendment Bill* 2013 states, rather unhelpfully, that

> [i]tem 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:
>
> employees working overtime;
> employees working unsocial, irregular or unpredictable hours;
> employees working on weekends or public holidays; or
> employees working shifts.
>
> This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

The need to provide additional remuneration

9. The Companies are correct to say that 134(1)(da) should not be read so as to predominate over the other criterion. It should, however, not be set at naught. The

[2] *Annual Wage Review* 2009-10 [2010] FWAFB 4000 (3 June 2010), (2010) 193 IR 380 at [237]
[3] (1997) 71 IR 1 at 51

Commission needs to take account of it; that is to "pay attention to in the course of an intellectual process" or "take into consideration"[4].

The Company's submissions

10. The submissions in essence are that:

    - The existing Award is a modern award and that any person seeking to change the Award must advance a merit case [the merit case argument];
    - Time off in lieu at the initiative of the employer is consistent with the nature of journalism [the nature of journalism];
    - Time off in lieu at the initiative of the employer is consistent with the history of the Award [the history of the award].

11. The first argument is incorrect but not an impediment in any event. The second argument is fatuous. The third is not a sufficient reason to prevent the introduction of a model clause.

The merit case argument

12. At base, this is a question about who has to make their case. There are two aspects to that; the first is the legal onus which never shifts. The second is the evidentiary onus which will shift depending on who has to prove their particular assertion[5].

13. It is doubtful how far the notion of legal onus of proof is relevant at all to Commission proceedings. Where a matter commences on the Commission's own motion, which is essentially the case here, no party bears any direct onus but the Commission must be satisfied that a proper basis for exercise of power in the matter is established[6].

14. As the Full Bench held in the Four yearly review[7]:

> Our provisional view is that the variation of modern awards to incorporate the model term is necessary to ensure that each modern award provides a fair and relevant minimum safety net, taking into account the s 134

[4] *Roads Corporation v Dacakis* [1995] 2 VR 508
[5] *Teterin and others v Resource Pacific Pty Limited* [2014] FWCFB 4125 (2 July 2014) at [24] - [27]
[6] *Royal District Nursing Service Ltd v Health Services Union* [2012] FWAFB 1489; (2012) 218 IR 276 at [20]
[7] [2015] FWCFB 4466, (2015) 252 IR 256 at [279] – [280]

considerations (insofar as they are relevant) and would also be consistent with the object of the Acts. This is so because of the various safeguards provided within the term itself and because it facilitates the making of mutually beneficial arrangements between an employer and employee.

As mentioned earlier, we accept that flexible working arrangements, such as TOIL, may encourage greater workforce participation, particularly by workers with caring responsiblites. We also accept that increasing interest workforce participation can result in increased economic output productivity...

15. The Companies submit that that a party seeking a proposed change to an Award in these circumstances bears the risk of failure if they cannot satisfy the Commission that there is no proper basis for the exercise of the power. That is true, but not really to the point.

16. That test works differently if the case involves the introduction of a model clause. In those circumstances, it is necessary to take into account the need to create a simple, easy to understand, stable and sustainable modern award system. An easy to understandable and stable modern award system requires the use of standard clauses across industries. In those circumstances, where a party is seeking to vary, or oppose, a model Award clause; the person seeking to prevent the variation must advance a merit argument in support of the proposed variation. The extent of the merit argument required will depend on the variation sought[8].

17. In any event, the MEAA has adduced such evidence.

18. Further, the model clause needs to be examined[9]. It states relevantly that:

> **A.1 Time off instead of payment for overtime**
> **(a)** An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

19. As the FWC Full Bench stated in July 2015:

    a. The model term facilitates agreements between an employee and their employer to take TOIL instead of payment for overtime at a time or times agreed, subject to appropriate safeguards.[10]

---

[8] *Re 4 Yearly Review of Modern Awards — Common Issue — Award Flexibility* [2015] FWCFB 4466, (2015) 252 IR 256 at [14].
[9] 4 yearly review of modern awards—Award flexibility [2016] FWCFB 6178 at Attachment A
[10] *Re 4 Yearly Review of Modern Awards — Common Issue — Award Flexibility* [2015] FWCFB 4466, (2015) 252 IR 256 at at [268]

20. The model provision does not mandate an outcome. The provision states that an employer and employee 'may agree in writing' to taking TOIL instead of receiving overtime payments. The model provision's principal functions are to ensure that work beyond normal weekly hours be acknowledged and compensated. There is an election to be made by employers and employees about the form of compensation with respect to TOIL. The model provision does not mandate overtime *or* TOIL as an outcome.
21. That course is consistent with flexibility arrangements that devolve decision making on such matters down to the employer and employee subject to appropriate safeguards.
22. It is presumably for such reasons that the Commission has thus far approved the variation of 72 modern awards to include the model TOIL provision.[11] Those awards set out a variety of ways of calculating and taking TOIL.

The evidence

23. The Companies' submissions are not constrained by any reference to any contemporary evidence. That is unfortunate. The Commission is given no evidentiary basis to contradict the desirability of inserting the proposed clause.
24. On the other hand, there is evidence supporting the introduction of the proposed clause.
25. The decision leading to the making of that Award[12] explains the reason for the TOIL provisions. In reflecting upon the 'exacting and tiring' craft of journalism, Commissioner Blackburn stated at 718 that:

> "it is better that some of the overtime should therefore be used for extra rest than merely paid for, provided that there is a reasonable opportunity for such rest." [writer's underlining]

26. That reasoning is becoming less relevant to the modern workplace. The move to a 24 hour news cycle and the reduction of journalistic staff which is referred to in detail in the statement of Mark Skulley, has meant that there is a decreasing capacity to take time off work. That has meant in practice that journalists paid according to the modern award work unpaid overtime. In addition there is an understandable reluctance in print media organisations for employees to draw attention to the performance of additional (and excess) working hours for the purposes of its acknowledgement and the provision of TOIL and/or overtime.

---

[11] FWCFB Decision 31 August 2016 [2016] FWCFB 6178 at [6]
[12] *The Australian Journalists Association v Associated Newspapers Ltd & Ors* (1955) 81 CAR 699 at 703

27. The model clause will not abolish time in lieu. It will however give employees on a base award wage the option of taking overtime payments instead of TOIL that they know that they can not realistically take advantage of. As set out in the statement of Ms McInerney; the majority of those MEAA members surveyed who preferred to receive payment cited the reason as being that the additional payment would boost their low income and would help them become more financially secure in an uncertain industry.
28. MEAA's concern is that without the model TOIL provision, the prospect of orderly recording of excess hours worked and the means by which these hours are compensated will fall into further disrepair and disuse.
29. On the other hand, the model provision is in no way inimical to the functions and needs of contemporary newsrooms and news-making environments. It is unlikely that a journalist will stop work on a half-complete story. It is unlikely that a journalist will curb their present commitments to factual and timely reporting. It is likely that practices will be maintained, even in the post-internet 'hothouse' news media environment.

<u>The nature of journalism</u>

30. The nature of journalism is described in terms of an ever humming machine staffed by a unique occupation and greased by the flexibility of time in lieu. In that narrative, journalists are unable to transfer their highly personalised work to anyone else. They work late until the story is finished and then take the time off at some later stage.
31. There are some difficulties with that narrative.

<u>Unique characteristics?</u>

32. The first is that each industry has unique characteristics and that each job within these industries has unique characteristics. There can be no doubt that the historical record reflects important qualities (and combinations of qualities) that are attributed to journalists. They record the esteem attached to the craft of journalism and the critical role that journalists played in providing accurate and often critical information and analysis to the Australian community.
33. These historical reflections do not require that journalists be uniquely disentitled to the payment of overtime for additional hours of work. Journalists have never been uniquely regulated in all aspects of working conditions. Many of the clauses in the Journalists

award are clauses that are standard across awards generally[13]. Further the NES apply to all employees regardless of Award coverage. While journalists have special aspects to their work; they are not so unique that they should be isolated from standard award provisions.

34. There are many jobs that involve work that is not easily able to be transferred to another in the way for example the process worker was able to transfer their work to a worker in the next shift. Those jobs are generally ones where is a necessity for personal involvement in the work and where the workload itself is dictated by external factors. Many white collar professional and semiprofessional jobs fall into this category. There is nothing about the nature of that work that makes the payment of overtime any less desirable.

A history of payment for overtime

35. Second, overtime payments have almost always been part of the Award regulation of journalists, at least at the time of termination or at times of excessive time in lieu. Journalists have experienced a mix of overtime and TOIL provisions in Awards and enterprise agreements. A good example is the Journalists (Metropolitan Award Daily Newspapers) Award referred to in some detail at paragraph 17 and 18 of the submissions of the Companies. The Companies say of that Award that it allows the employer *subject to certain conditions*, to give time off in lieu of paying the employee for certain over time. Those conditions are of course the payment of overtime[14].
36. There has been no 'standard' or single form of compensation over many decades. This is made clear in the summary of pre modern award provisions as to TOIL and overtime. It is also the case that the current modern award provision provides for both TOIL and overtime. The current award does no more than rank the order in which compensation for additional hours should be made.

The history of the award

---

[13] Award flexibility – see clause 7; Dispute resolution and consultation provisions – see clause 9; Termination and redundancy – see clauses 11 and 12

[14] Clause 28(c) dealt with 'daily overtime', which was all work exceeding 11 hours in one working day. It provided that the first additional hour may be allowed off duty and if permission was not granted, the hours of work would be paid at time-and-a-half. Overtime beyond one hour and up to three hours was also to be paid at time-and-a-half. All following hours were to be paid at double-time.

37. The references to the history of the award show a narrative of late working journalists given time off at a later and quieter time. That history is fascinating but the notion that it should forever guide the future is counter intuitive. On that basis, test cases could never succeed and the modern award system would never have been introduced.

38. The history is in any event somewhat different to that suggested. MEAA's 13 March 2009 proposal substantially differed to that proffered by the Companies. The MEAA sought the following clause to be incorporated into the award:

> **27. Overtime**
>
> **27.1** Any amount paid to an employee in excess of the minimum award rate of pay for the employee's grade shall not be regarded as a set-off against overtime worked.
>
> **27.2** The hourly rate for overtime purposes shall be calculated by dividing the minimum award rate of pay for the employee's grade by 38.
>
> **27.3** <u>All overtime payments due to an employee shall be made within eighteen days of the end of the week or fortnight, as the case may be, in which the overtime was worked</u>.
>
> **27.4** **Daily overtime** represents all time worked outside an employee's rostered hours of duty, except for time worked on a rostered day off. Daily overtime shall be compensated for in the following manner:
>
> **(a)** Up to and including the first hour of overtime shall either be given off as time in lieu 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)** <u>Overtime in excess of one hour shall be paid for at the rate of time and a half for the first hour and double time thereafter.</u>
>
> **(c)** <u>An employee may, by mutual agreement with his or her employer, opt to take time off in lieu at the rate of single time within the next twelve months. Such agreement shall be recorded in writing.</u>
>
> **27.5** Any time allowed off duty in lieu of overtime shall be deemed to be ordinary rostered hours for the day or days on which the time off in lieu is taken.

39. MEAA's submissions of that time did not reflect acceptance of a provision that favoured TOIL ahead of the payment of overtime. Quite the opposite was proposed. The presentation of a consolidated party draft award to the then AIRC that preferred TOIL ahead of overtime payments, as stated in paragraphs 48 and 49 of the Companies' submissions, ought not be interpreted as MEAA's acceptance of such a formulation in 2009 or since.

Conclusion

40. The recent TOIL provisions are no longer an adequate way of dealing with extra time worked. The opportunity to gain time off for rest is diminishing. The provisions provide no adequate compensation for the time worked. There is nothing so special about journalism that journalists should be excluded from provisions now standard in most industries.
41. In conclusion, the Full Bench should vary the Award to include the model provision.

Ian Latham

16 November 2015