



# BACKGROUND PAPER

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards—Group 4 Awards—*Broadcasting and Recorded Entertainment Award 2010***

(AM2014/259)

MELBOURNE, 10 AUGUST 2018

*Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.*

### **Background**

[1] The purpose of this paper is to set out the background to the outstanding issues relating to the review of the *Broadcasting and Recorded Entertainment Award 2010* (Broadcasting Award).

[2] The Broadcasting Award is one of the Group 4 awards. A decision relating to the Group 4 awards was issued on 21 March 2018 (the *March 2018 decision*).<sup>1</sup> The [exposure draft](#) based on the Broadcasting Award was republished on 23 March 2018. A further decision issued on 7 August 2018 (the *August 2018 decision*)<sup>2</sup> dealt with a number of the *provisional* views expressed in the *March 2018 decision* and highlighted outstanding issues.

[3] The *August 2018 decision* noted that a conference would be convened before Justice Ross on **Friday 17 August in Sydney at 10.00 am** to discuss a number of the outstanding issues in respect of the Broadcasting Award. These issues are detailed below.

### **Issue 1 – Calculation of overtime**

[4] In the *March 2018 decision* (at paragraph [242]) the Full Bench said that overtime should be calculated by reference to the ordinary hourly rate, not the minimum hourly rate in the exposure draft. The Full Bench asked interested parties to comment on whether any variation to the exposure draft is required to give effect to their interpretation.

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<sup>1</sup> [\[2018\] FWCFB 1548](#).

<sup>2</sup> [\[2018\] FWCFB 4175](#).

[5] The Community and Public Sector Union and Australian Business Industrial and the NSW Business Chamber submitted that no additional drafting amendments were required to the exposure draft.<sup>3</sup>

[6] In the *August 2018 decision*, the Full Bench maintained that overtime should be calculated by reference to the ordinary hourly rate, not the minimum hourly rate, based on the established calculation principle previously determined by a Full Bench.<sup>4</sup> That is, the all purpose allowance must be added to the minimum rate of pay before calculating overtime or any penalty rate.<sup>5</sup>

[7] The Australian Directors Guild (ADG) filed a submission that is not directly related to this issue, however appears to deal with overtime provisions in the Broadcasting Award generally. Their submission states:

‘The earlier ADG submission addressed the issues of the existing and accepted industry practices in relation to ordinary hours worked and the calculation and payment for overtime. The current industry practice and award provisions provide for both scheduled and unscheduled overtime. In recognition of the industry acceptance of a notional 50 hour working week scheduled overtime is provided for and is paid for irrespective of whether it is worked or not worked. Prior to the introduction of the modern award the industry operated on the basis of a 40-hour week. See 2009 AIRCFB 943

In effect the industry practice is to establish a so called consolidated or gross remuneration rate which incorporates the additional scheduled overtime and provides for payment of a 50-hour week rate. This rate is effectively used as an all purposes rate including for annual leave.

The existing limitation to 2 hours of scheduled overtime a day (clause 76 refers) meant that assuming an 8-hour day was worked the typical or accepted working day of 10 hours could be accommodated within the 2 hour daily scheduled overtime limit.

The confirmation and implementation of the 38-hour week in 2009 meant that the daily ordinary hours of duty reduced from 8 hours to 7.6 hours. If the daily limit of 2 hours on scheduled overtime is maintained the maximum daily hours including both ordinary time pre-scheduled overtime are limited to 7.6 plus 2 hours or 9.6 hours per day compared to the actual accepted practice of 10 hours.<sup>6</sup>

[8] In the *August 2018 decision* (at paragraph [138]) the Full Bench indicated that the issues raised by the ADG would be the subject of further consideration.

[9] At the conference on 17 August 2018 ADG will be asked to provide further detail regarding their submission and how it relates to the current provisions for overtime in the

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<sup>3</sup> CPSU [submission](#), 19 April 2018; ABI [submission](#), 20 April 2018, at para 7.

<sup>4</sup> [\[2015\] FWCFB 4658](#) at [43]–[44].

<sup>5</sup> [\[2018\] FWCFB 1548](#) at [242].

<sup>6</sup> [ADG Submission](#), 26 April 2018 at p 3.

exposure draft based on the Broadcasting Award. ADG will be asked to confirm whether they intend to press a substantive variation to the award.

## **Issue 2 – Loaded minimum hourly rate**

[10] In the *March 2018 decision* the Full Bench agreed that the 8% loading set out in clause 13.4 of the exposure draft was not payable for all purposes, but sought clarification on the calculation of the 8% loading. Interested parties were asked to provide submissions about how the 8% loading is calculated.<sup>7</sup>

[11] In the *August 2018 decision* the Full Bench noted that no party had commented on whether the loading was cumulative or compounding.<sup>8</sup>

[12] Live Performance Australia (LPA) filed a detailed submission relating to the history of the 8% loading. Their submission states that ‘an 8% penalty has been in the predecessor award (the *Entertainment and Broadcasting Industry – Cinema Award – 1998*) since the award simplification proceedings’. LPA submits that the 8% loading was inserted by consent into the current Broadcasting Award by the Full Bench during award modernisation proceedings and that the 8% penalty averaging provision:

‘is part of properly made minimum rates, has been a provision of the BREC Award and its predecessor the Cinema Award 1998 for more than 20 years, has not been challenged in the Commission by any party as inappropriate and should remain in the BREC Award.’<sup>9</sup>

[13] The Media, Entertainment and Arts Alliance (MEAA) also filed a detailed submission relating to the 8% loading. They submit that the 8% penalty payment sits at odds with penalty payment levels following the *Penalty Rates Case*.<sup>10</sup> The MEAA raise a concern about the ‘equity’ of the 8% penalty rate in light of the penalty rates that are paid in other awards, such as the *Fast Food Industry Award 2010*, the *General Retail Industry Award 2010* and the *Hospitality Industry (General) Award 2010*.<sup>11</sup>

[14] The relevant extract from the exposure draft is as follows:

### **13.4 Employees in cinemas**

All employees in cinemas will receive an 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties. ~~This loading is payable for all purposes.~~

[15] The current award states:

### **14.12 Employees in cinemas**

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<sup>7</sup> [\[2018\] FWCFB 1548](#) at [248].

<sup>8</sup> [\[2018\] FWCFB 4175](#) at [141].

<sup>9</sup> [LPA submission](#), 17 April 2018 at 25.

<sup>10</sup> [MEAA submission](#), 20 April 2018 at 16.

<sup>11</sup> [MEAA submission](#), 20 April 2018 at 17.

All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.

[16] In their submission, the MEAA propose an amendment to clause 13.4 due to their ‘receipt of anecdotal evidence that not all cinema employers apply the 8% penalty for work performed on all days of the week.’ They propose the following amendment to clause 13.4:

‘13.4 All employees in cinemas will receive an 8% loading for all hours worked **regardless of the day(s) of the week on which work is performed**. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties.’<sup>12</sup>

[17] At the conference on 17 August 2018 the MEAA will be asked to confirm whether they intend to pursue the proposed variation above at [16]. Other parties will be invited to comment on the MEAA’s proposed variation.

### **Issue 3 - Directors Loading**

[18] In their submission of 26 April 2018<sup>13</sup> the ADG raised concerns regarding the application and use of the Director’s loading which is set out at clause 34.2(f) of the exposure draft.

[19] Clause 34.2(f) of the exposure draft states:

#### **34.2 Wage-related allowances**

##### **(f) Director’s loading**

A Director classified as Supervising Director, Director/Specialist or Senior Director will be paid the Director’s loading of 25% of the minimum wage per week for their classification:

(i) The Director’s loading exempts the director from the operation of:

- clause 16.9—Annual leave loading;
- clause 29—Ordinary hours of work and rostering;
- clause 30.2—Meal break penalty;
- clause 31—Overtime (except for clause 31.5); and,
- clause 32—Shift and weekend penalties.

(ii) The Director will be given two clear days off work in each week.

(iii) The Director’s loading is part of the employee’s rate of pay and accordingly is paid for all purposes of the award.

(iv) If by written agreement between the employee and employer the loading is not paid, the prescribed minimum wage per week will be paid. In such cases the exemption from the operation of award provisions in clause 34.2(f)(i) will not apply.

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<sup>12</sup> [MEAA submission](#), 20 April 2018 at 33.

<sup>13</sup> [ADG Submission](#), 26 April 2018.

**(v) Director or Trainee Director**

A Director classified as Director or Trainee Director will not be paid the Director's loading and will not be exempt from the operation of award provisions in clause 34.2(f)(i). If by written agreement between the director and employer the loading is paid the exemption from the operation of award provisions in clause 34.2(f)(i) will apply.

**[20]** In the current Broadcasting Award, the provision dealing with the Director's loading is set out at clause 32.15 and states:

**32.15 Director's loading**

(a) A Director classified as Supervising Director, Director/Specialist or Senior Director will be paid the Director's loading in accordance with clause 32.15(c). If by written agreement between the employee and employer the loading is not paid, the prescribed minimum wage per week will be paid. In such cases the exemption from the operation of award provisions in clause 32.15(c) will not apply.

(b) A Director classified as Director or Trainee Director will not be paid the Director's loading and will not be exempt from the operation of award provisions in clause 32.15(c). If by written agreement between the director and employer the loading is paid the exemption from the operation of award provisions in clause 32.15(c) will apply.

(c) Where applicable under clauses 32.15(a) or (b), an employee's wage will include the Director's loading of 25% of the minimum wage per week for their classification. The Director's loading is, where applicable, part of the employee's rate of pay and accordingly is paid for all purposes of the award. The Director's loading exempts the director from the operation of clause 23.8, clause 27, clause 28.2, clause 29 (except for clause 29.5) and clause 30. However, the employee will be given two clear days off work in each week.

**[21]** The ADG submits:

‘At this stage the application and use of the Director's Loading provided for by Clause 32.15 is unclear to the ADG. The classifications referred to in the provision are not the normal classification titles used. In the event that the provision does apply it should like other facilitative provisions be subject to a better off overall requirement and a formal written agreement between the employee and the employer. The exact history and rationale of the provision is uncertain however a suggestion that a 25% loading based on the minimum rate for the classification is certainly unlikely to provide a no disadvantage situation. Again, the concept of an annualised salary may be a more appropriate approach.’<sup>14</sup>

**[22]** At the conference on 17 August 2018 the ADG will be asked to provide more detail on their proposed amendment to the Director's loading and whether they will be pursuing this proposal as a substantive issue.

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<sup>14</sup> [ADG submission](#), 26 April 2018, at page 4.

## **Conference**

[23] As noted earlier in this background paper a conference will be convened before Justice Ross on **Friday 17 August** in **Sydney** at **2.00 pm** to discuss the above issues.

[24] Parties are encouraged to have discussions among themselves prior to the conference, to explore whether a joint position can be reached on any of the issues identified above.