

# MinterEllison

4 December 2015

## URGENT

Associate to President Ross  
Fair Work Commission  
Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2000

Dear Associate

### **AM2014/300: Four Yearly Review of Modern Awards – Award Flexibility**

We act for News Limited, Bauer Media and Pacific Magazines.

We enclose submissions filed on behalf of our clients.

In short, our clients' position is that the standard TOIL term should not be included in the *Journalists Published Media Award 2010 (JPM Award)*. This is because, under the JPM Award, overtime is compensated by TOIL by default, with payment for overtime by mutual agreement – a provision that originates from the unique arbitral history of the predecessor awards.

For this reason, it is submitted that the issue of whether the standard TOIL term should form part of the JPM Award should instead be dealt with in the Award Stage of the Award Review – like the *Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Seagoing Industry Award 2010*.

Our clients respectfully seek an extension of time to file these submissions. In this regard, our clients' have only just become aware of the hearing on 10 December 2015 for the JPM Award and the associated timetable.

In this regard, while it is accepted that the present proceedings were on the Commission's website page in relation to the award flexibility matter, they were not included on website page modern award review for the JPM Award. Unfortunately, this is the page which was being monitored by us on behalf of our clients.

It is respectfully submitted that our clients' position should not be prejudiced by this.

If this issue is dealt with in the Award Stage of the Award Review, then there will be ample time for the MEAA (and any other interested parties) to consider their position and no prejudice to them.

We are sending a copy of these submissions directly to the MEAA, as the union representing journalists.

Yours faithfully  
**MinterEllison**

*by her partner, Gerald Jones*

Jennifer Patterson  
Partner

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OUR REF:

Four Yearly Review of Modern Awards

Submissions on Behalf of News Limited, Bauer Media and Pacific Magazines (Companies)

1. Introduction

- 1.1 The Companies' position is that the standard TOIL term should not be included in the *Journalists Published Media Award 2010 (JPM Award)*. This is because, under the JPM Award, overtime is compensated by TOIL by default, with payment for overtime by mutual agreement – a provision that originates from the unique arbitral history of the predecessor awards.
- 1.2 For this reason, it is submitted that the issue whether the standard TOIL term should form part of the JPM Award should be dealt with in the Award Stage of the Award Review – like the *Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Seagoing Industry Award 2010 (Building and Seagoing Awards)*.

2. The Journalists Published Media Award 2010

- 2.1 The JPM Award provides for overtime to be compensated by TOIL by the default – with payment for overtime being by mutual agreement (with some limited exceptions). In other words, it is the reverse of the usual provisions for TOIL and the reverse of the Standard Term.
- 2.2 In this regard, clause 22.3 of the JPM Award relevantly provides

*Daily overtime will be compensated for in the following manner:*

**(a) overtime will be banked to be taken as time off instead at single time;**

*(b) time off instead of overtime will be taken as mutually agreed, or by the employer rostering accrued overtime as time off instead, by giving at least 14 days' notice that the employee is required to take such accrued time off instead;*

*(c) time off instead of overtime not taken within 12 months of the overtime being worked must be paid out at overtime rates;*

*(d) on termination of an employee's employment, all untaken time off instead of overtime will be paid out at overtime rates prescribed in clause 22.3(e), subject to the forfeiture for inadequate notice as provided for under clause 11.2;*

**(e) where mutually agreed, overtime may be paid as it is worked at the rate of time and a half for the first two hours and double time thereafter; and**

*(f) any time allowed off duty instead of overtime will be deemed to be ordinary rostered hours for the day or days on which the time off instead is taken.*

- 2.3 This stems from the history of the predecessor awards to the JPM Award (**Predecessor Awards**) – which principally provided for the first hour of overtime each to be compensated by TOIL or, in some cases, to only be compensated by TOIL. There were various other federal and state awards (which became NAPSAs from 2006) which applied to journalists in other newspapers and magazines.
- 2.4 The history of the Predecessor Awards is complex. The main federal award was the *Journalists (Metropolitan Daily Newspapers) Award* in its various incarnations. That award traces its origin to a certified agreement from 1913 and the first award made by Isaacs J in *Sydney Daily Newspapers Employers Association & Ors* (1917) 11 CAR 67.
- 2.5 Importantly, *Journalists (Metropolitan Daily Newspapers) Award* included provision for TOIL by default for an extended period – at least back to 1945, if not earlier. See *The Australian Journalists Association v the Agus and Aystralian Limited* (1945) 55 CAR 566 at 575. In *The Australian Journalists Association v Associated Newspapers Ltd* (1953) 81 CAR 699 at 718, Commissioner Tonkin said

***The existing award allows an employer, subject to certain conditions, to give time off, in lieu of paying the employee for certain overtime.***

*I am of opinion that in this industry this in principle is a desirable thing. The evidence has made it abundantly clear to me that the work of a journalist is exacting and tiring. 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. I am of opinion that, to ensure this, the existing provisions should be tightened up to some extent.*

- 2.6 There were then variations on this, throughout the life of the Journalists Metropolitan Daily Newspaper awards – including that provisions that the first hour of overtime each day be taken as time off in lieu of overtime and the first eight hours of weekly overtime be taken as time off in lieu of overtime.
- 2.7 In its later life and with the rationalisation of media ownership, the *Journalists (Metropolitan Daily Newspapers) Award* split (in effect) into a handful of enterprise based awards. There were also various other federal and state awards (which became NAPSAs from 2006) which applied to journalists in other newspapers and magazines.
- 2.8 By the time of the award modernisation, the journalists awards included the *Journalists (News Limited - Metropolitan Daily Newspapers) Award 2002*, the *Journalists (Pacific Publications) Award 2001*, the *Journalists (ACP) Award 1999* (noting that Bauer has acquired ACP) and the *Journalists (John Fairfax Group) Award 2001*. The first three awards relate to the Companies we represent, while the latter is example of another major journalists award.
- 2.9 These awards included different provisions, each providing for TOIL as the default (with some variations). These awards provided
- (a) for TOIL by default (clause 18.2 of the *Journalists (News Limited - Metropolitan Daily Newspapers) Award 2002*);
  - (b) the power for the employer to direct the taking of TOIL (clause 18.10.1 of the *Journalists (ACP) Award 1999*);
  - (c) the first hour of overtime on any day as TOIL or payment at the employer's discretion, with the remainder paid (clause 19.4 of the *Journalists (Pacific Publications) Award 2001* and clause 19 of the *Journalists (John Fairfax Group) Award 2001*)

**3. Submission that the issue whether the standard TOIL term should form part of the JPM Award should be dealt with in the Award Stage of the Award Review – like the Building and Seagoing Awards**

- 3.1 In its statement in the present proceedings on 16 October 2015 ([2015] FWCFB 7156), the Commission determined that - due to their particular arbitral history – whether to include the standard TOIL term in the *Building and Construction General On-Site Award 2010*, *Joinery and Building Trades Award 2010* and *Seagoing Industry Award 2010* would form part of the Award Stage of the Award Review.
- 3.2 It is submitted that the same approach should be taken with the JPM Award.
- 3.3 As set out above, the JPM Award has a particular arbitral history and a fundamentally different position on TOIL.
- 3.4 It is also important to appreciate that the MEAA is seeking a significant extension of the coverage of the JPM award in the award stage – including the extension to online publications and various exempt employees – and changes to the hours provisions at specialist publications. See the MEAA submissions dated 2 March 2015 at

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014275-sub-MEAA-02032015.pdf>

- 3.5 This means the standard TOIL provisions could potentially be extended to parties who are not presently covered by the JPM Award and, indeed, are largely award free – as well as to new classes of employees. The standard TOIL provisions would also have a knock on effect if there were any changes to the hours provisions at specialist publications.

**MINTER ELLISON**

4 December 2015