

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*

DAILY MAIL AUSTRALIA

**SUBMISSIONS IN RELATION TO REFERENCES
TO “NEWSPAPERS” IN DEFINED TERMS**

A. Introduction

1. These submissions are filed on behalf of Dailymail.com Australia Pty Ltd (**DMA**) in response to the invitation from the Full Bench in paragraph [50] of the decision dated 20 November 2019 (**Decision**) in relation to the review of the *Journalists Published Media Award 2010* (**Award**).¹
2. In the Decision, the Full Bench determined (among other things) that Part 5 of the Award should apply to online-only publications. The Full Bench’s invitation to make further submissions relates to the MEAA’s proposal to remove references to “*newspapers*” in the Award, and replace that term with “*news publications*” - with the apparent intention of ensuring that online-only publications are appropriately caught. The Full Bench identified that such a change would create issues for the definitions of “*metropolitan daily*”, “*regional daily*” and “*country non-daily*” newspapers.
3. For the reasons articulated below, DMA submits that:
 - a. there should be no change made to the terms “*metropolitan daily newspaper*”, “*regional daily newspaper*” and “*country non-daily newspaper*” or the definitions of those terms; and

¹ [2019] FWCFB 7603

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- b. appropriate adjustments should be made to the operation of the relevant Award clauses relating to penalty rates and other entitlements (which make reference to those terms) to ensure that entitlements for other publications (including online-only publications) are provided for.

B. Which entitlements and working arrangements depend on the type of publication?

- 4. Some aspects of the Award (at least as it currently operates) apply differently depending on whether an employee is employed by a “*metropolitan daily*”, “*regional daily*” or a “*country non-daily*” newspaper or another type of publication.
- 5. Most relevantly:
 - a. the extent of the exclusions from award coverage in clause 4.9 depend on the type of publication on which an employee is engaged;
 - b. in relation to Part 5:
 - i. clause 20.3 (relating to breaks) only applies to employees in *country non-daily newspapers*;
 - ii. parts of clause 21 (relating to shift penalties) apply differently depending on the type of publication on which an employee is engaged, and in particular there are different penalty rates depending on whether the publication is a:
 - 1. metropolitan daily newspaper, suburban newspaper, magazine or wire service, or
 - 2. a regional daily or country non-daily newspaper;
 - iii. clause 22.8 (relating to distant engagements) only applies to metropolitan newspapers², wire services and magazines.
 - c. clause 23.2 (relating to additional annual leave), which appears in Part 6, provides for different entitlements depending on the type of publication on which the employee is engaged. The MEAA’s proposal to change clause 23.2 would impact online-only publications (a matter that does not seem expressly to have been dealt with in the Decision).

² Even though there is no definition of “*metropolitan newspaper*”

C. Should the terms and their definitions be changed?

6. In DMA's submission, based on the Full Bench's approach in the Decision and the MEAA's proposed amendments to the Award, there is no need to change either the terms or definitions of "*metropolitan daily*", "*regional daily*" or a "*country non-daily*" newspaper. References to those terms, and their definitions, should remain as they currently appear in the Award - and any necessary changes to deal with the Full Bench's Decision that Part 5 should apply to online-only publications should be made to the terms of Part 5 itself.
7. In this regard, the substance of the MEAA's proposed variations to the Award (as reflected in its most recent marked up version of the current award)³ would have the following effect:
 - a. there are certain specific arrangements or entitlements for employees working for "*metropolitan daily*", "*regional daily*" or "*country non-daily*" newspapers;
 - b. there are default arrangements for *all other* publications - that is, "catch-all" or "fall back" arrangements for any publications that do not fall within the meaning of the terms above; and
 - c. the MEAA's proposal generally seeks to treat entitlements for online-only publications as part of the "default" entitlements - and those entitlements are proposed to align to "*country non-daily newspapers*" - in particular see clauses 21.2.(b) (relating to penalties) and 23.2 (relating to annual leave) of the MEAA's draft amended award.
8. It is DMA's submission that there is little sense in the definitions of publications (other than print newspapers) making reference either to:
 - a. geographical distribution area; or
 - b. content that relates to a particular geographic area.
9. This is particularly so when considering online-only publications. Such publications *may* have a particular content, or geographic, focus, but are typically accessible and available to any person throughout the world (even if a subscription is required).

³ See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201824-award-mea-200819.pdf>

10. Reference to the geographical distribution or content of publications (other than print newspapers) will very likely lead to recurrent, costly debates about whether:
 - a. the readers of that publication are (perhaps “primarily” or “predominantly”) located in a particular geographical area; or
 - b. the content relates only to (or perhaps relates “primarily” or “predominantly” to) events in a particular geographical area.
11. Likewise, references to the regularity with which publications are produced (for example, “daily” or “non-daily”) also make little sense in relation to most online-only publications - because content can be, and is, published on any day of the week, at any time.
12. Reference to those concepts, insofar as they would attach to online-only publications, would, in DMA’s submission, only add complexity, rather than simplify (bearing in mind the consideration in s.134(1)(g) of the *Fair Work Act 2009*).
13. The references to geographic distribution area and regularity of publication continues to make sense so far as it relates to print newspapers.
14. With the above in mind, DMA submits that the most sensible and practical approach would be as follows:
 - a. the references to “newspapers” in the terms “*metropolitan daily newspaper*”, “*regional daily newspaper*” and “*country non-daily newspaper*” should remain in place - that is, the reference to “*newspaper*” should not be changed to “*news publications*”;
 - b. each of those terms should remain as they are currently defined;
 - c. the Full Bench’s proposed revised exclusion in clause 4.9 should operate by reference to whether a publication is a “*metropolitan daily newspaper*”;⁴
 - d. amendments are made to the relevant provisions of the Award that provide differential entitlements depending on whether an employee is working on a particular type of publication. DMA would not oppose the MEAA’s proposed amendments to clauses 21.2 (late night penalties) and 24.2 (annual leave) of the current Award in this regard (other than the changes to refer to “news publication” instead of “newspaper”)

⁴ See paragraph [91] of the Decision

15. DMA notes that Schedule B to the Award currently provides a “*translation table*” which makes reference to employees engaged on a “*metropolitan daily newspaper*”, “*regional daily newspaper*” or “*country non-daily newspaper*”. Clause 13.8 provides that:

An employee covered by a pre-reform award or a notional agreement preserving a State award, other than an enterprise award, immediately prior to the commencement of the operation of this Award, or an employee covered by a Division 2B State award immediately prior to 1 January 2011, will be classified by reference to the translation table set out in Schedule B.

16. DMA submits that its proposal above would ensure that this Schedule continues to have relevance and that complex questions about how pre-Award classifications translate into the Award will be avoided. As noted in the Decision, employees of online-only publications were not award-covered prior to 2010.⁵

D. Submissions by other parties on this issue

17. DMA has not, at the time of filing this submission, had the opportunity to consider any submissions or alternative proposals to deal with this issue. DMA respectfully requests the opportunity to respond to other parties’ proposals or submissions in this regard, and would welcome the opportunity to address the Commission orally in this regard.

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⁵ See paragraph [37] of the Decision