



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AM2024/10**

**s.158 - Application to vary or revoke a modern award**

**Application by Australian Entertainment Industry Association t/a Live  
Performance Australia  
(AM2024/10)**

*Live Performance Award 2020*

**Sydney**

**2.08 PM, MONDAY, 8 APRIL 2024**

**Continued from 22/03/2024**

PN363

JUSTICE HATCHER: I will take the appearances. Ms Minster and Ms Floyd, you continue appearance for Live Performance Australia?

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MS S MINSTER: Yes, that's correct.

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JUSTICE HATCHER: Mr Borgeest, Ms Chappell, Ms Rae and Mr Davies, you appear for the Media, Entertainment and Arts Alliance?

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MR T BORGEEST: Yes, thank you, your Honour.

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JUSTICE HATCHER: Do the parties wish to proceed on the record initially or go off the record?

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MS MINSTER: Yes, we would like to proceed on the record.

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JUSTICE HATCHER: On the record?

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MS MINSTER: Yes, initially.

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JUSTICE HATCHER: All right.

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MR BORGEEST: No objection to that.

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JUSTICE HATCHER: All right. Who would like to report on where we're up to?

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MS MINSTER: I would like to. Would you like me to stand or sit today?

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JUSTICE HATCHER: I don't mind, whatever's easier.

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MS MINSTER: All right. Obviously, our first issue is the run of play contracts, the issue being consecutive contracts for the same or similar work being reduced to a maximum of two under the limitations under the Fair Work Act, which, as we now know, occurs in the live performance industry and mostly for performers engaged in two or more separate run of play contracts for the same production, where there's a break between cities on a tour, or production is remounted, meaning the play is produced again in the same city.

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JUSTICE HATCHER: Sorry, could you just slow down. So you're reading out the definition, are you?

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MS MINSTER: No, I'm not reading out the exact definition; I'm paraphrasing it.

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JUSTICE HATCHER: All right.

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MS MINSTER: To hopefully make it more understandable.

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JUSTICE HATCHER: Yes.

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MS MINSTER: This has arisen because section 333E of the Fair Work Act prohibits the use of two consecutive contracts for the same or similar work. This takes effect in the live performance industry on 1 July 2024 as the Fair Work Amendment (Fixed Term Contracts) Regulations 2023. Regulation 2.15(5) provides for those covered by the Live Performance Award - provides an exception for those.

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LPA seeks to amend the Live Performance Award to enliven this exception to this limitation at section 333F(1)(h), which permits these fixed term contracts in circumstances where the Fair Work Act limits the use of such employment contracts.

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LPA has consulted with its members, as we were asked to do last time we were here, and has had some discussion with Ms Rae and Ms Chappell. As yet, no firm position has been reached, but we have not articulated the view of our membership to MEAA completely until just before - we just sent them some documentation. I can run through that a little bit for everyone's benefit now.

PN385

Considering the application of fixed term contract provisions in the Fair Work Act, we note that if no amendment was made to the award, any employer seeking to engage performers on two consecutive contracts would be able to do so without paying any gap between those contracts at the moment, whether it be one, two, or three weeks or more.

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With that in mind, LPA has put forward two potential positions to MEAA to consider. We hope that MEAA can accept one of the following options, or at least discuss where we might find some common ground today.

PN387

Position 1: separate consecutive contracts for the same or similar work can only be issued where there is a gap of three weeks and one day. This partly reflects LPA's original amendment in our original application, but leaves out the part about those contracts going for two years, like separate contracts adding up to two years.

PN388

It is LPA's view that this is fair because it means that the period between the first and second contract must be paid, where, otherwise, there is no requirement to do so under the new limitations to fixed contract rules in the Fair Work Act. Where employers are not issuing in excess of two contracts, then this would ensure that, where there is a period of three weeks or less, the performers receive payment of wages and continuous employment, which, otherwise, they would not be entitled to.

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This should also be applied to weekly performers engaged on a fixed term contract which has not run a play, which is an issue we didn't really discuss the last time we met.

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Position 2: separate contracts can only be issued for more than two consecutive contracts for the same or similar work for the same production where, between the second and third contract, the time between performance venues is more than three weeks and one day, or, not so much performance venues, but the time between the contracts. The time between the contracts cannot be covered with the use of lay-off and/or annual leave under the award. In this scenario, we would like that the employer would be able to direct an employee to take that leave at that time, which we understand would be contrary to other provisions in the award which we would have to address.

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Our view is that this is fair and reasonable because it means that between a second and third and any subsequent run of play contract must be paid where there is a gap of three weeks and one day, or if there is entitlement to lay-off and/or annual leave that exceeds three weeks and one day.

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The current position really is that lay-off is not really activated unless there is a single run of play contract; therefore, extending this position to gaps between contracts is fair and reasonable, and this view has been articulated by Polites SDP in *MEAA v Gordon Frost*, which we refer to as the Sound of Music case, and by Jones C in another *MEAA v Gordon Frost* case called the South Pacific case, and I am happy to share those as we go on through the day.

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Also to clarify, my understanding is that it has been agreed between MEAA and LPA that where a performer is contracted for a run of play for a production and then is contracted for a run of play for a new or different production with the same employer, so a whole new show - one show ends, another show begins - a completely different production - the new production is considered to be a new

employment relationship. In other words, this wouldn't be considered the same or similar work, and then that follow on of contracts would be a whole new - they would start at contract 1.

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It is the LPA's view that either option, if accepted, should take effect on 1 July 2024, which is when the Fair Work (Fixed Term Contracts) Regulations ceases to operate.

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JUSTICE HATCHER: All right. Ms Minster, that's all a bit complex to take in in one go. Do you have this in writing that you can send it to me and the union?

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MS MINSTER: I can share the letter that I sent to MEAA, which pretty much reflects what I have just said.

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JUSTICE HATCHER: When was that letter sent to MEAA?

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MS MINSTER: They requested that I send them something in writing this morning, so I sent it to them - wrote it this morning and sent it to them just before now.

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JUSTICE HATCHER: Can you send a copy of that letter to my chambers' address, so I can follow it.

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MS MINSTER: I can do that. Yes, we will do that.

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I can continue on with the other matters that are also reflected in that letter, which brings us to the matters that we were talking about last time.

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JUSTICE HATCHER: I thought the other main matter we were dealing with was

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MS MINSTER: Was company dancers?

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JUSTICE HATCHER: - - - for fixed term contracts for company dancers.

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MS MINSTER: Okay. So there has been some ground made on company dancers, is my understanding. LPA had a meeting with Ms Rae and Ms Chappell last week and we spoke about how this could be moved forward.

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LPA's understanding from that meeting is that MEAA would agree to an extension to that exception, so that the agreement is that the limitation on fixed term contracts for company dancers would be delayed, and we propose that it be delayed until the end of January next year and, during that time, dance companies would have the opportunity to implement proper performance review and performance management systems, which they haven't done before, so that when they implement them at the start of next year, that it runs smoothly, because there is some agreement that when these have been implemented previously in such companies, it didn't work very well and caused a lot of disruption to both employers and employees. So this will enable dance companies to create a performance review and management process.

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My understanding is that LPA and MEAA agree to work together to develop this training and industry guidelines over the course of 2024 to assist dance companies to implement these processes in their companies, which they would not have had to implement widely before, and therefore this prep time helps them have a healthy workplace over that period.

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At the beginning of 2025, we would envisage that dance companies should be ready to implement a system of performance review and performance management, and the limitations on fixed term contracts would then apply.

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JUSTICE HATCHER: So that requires, what, some joint approach to the minister to extend the operative date?

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MS MINSTER: Unless we can put something temporarily in the award to extend that, or we could say that something applies only from 31 January, or whatever date it is that we agree, potentially.

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JUSTICE HATCHER: The prohibition is prospective, so is anybody going to breach the prohibition between now and the end of the year? I'm not sure. If they've got (indistinct) contracts, I'm not sure how they could do that.

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MS MINSTER: Because at the end of the year is when the dance companies then make the determination, I suppose, under the current system, who gets a contract next year.

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JUSTICE HATCHER: So in the period, they get the chance to make one more extension; is that the idea?

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MS MINSTER: That's right.

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JUSTICE HATCHER: All right.

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MS MINSTER: There was also some talk about how it might be good to have a bit of extra time for younger dancers. So there was some discussion. There hasn't been any - we haven't reached agreement on it, but we had a discussion about trainees or dancers with no professional experience being contracted for a period of three years before the limitation to fixed term contract applies. Nothing was agreed at this stage, but we have now proposed that this would apply to a level 1 dancer, or equivalent, under the award, meaning that a company would have an extra year to assess the appropriateness of giving that person a permanent job within that company.

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So that's where we had reached last time. Those were the two issues we were talking about.

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We have also put forward a position in respect of other parts of our application to MEAA. I am happy to go through those now.

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JUSTICE HATCHER: Let's pause there. Mr Borgeest, let's start off with the fixed term contracts for company dancers. What is MEAA's position there?

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MR BORGEEST: Yes, so that's where, you will recall, we started off with just a blanket objection to that part of the application. So it's correct that there is agreement that, one way or another - we haven't descended to whether it's a question of joint approach to the minister for any regulation, or some language in the award, or something else - but, one way or another, agreement to facilitate a continued exception in respect of company dancers from the operation of the prohibition of the Act for the balance of this calendar year, within which time it is agreed that MEAA and the dance companies, through Live Performance Australia, would be cooperating on developing best practice systems for performance management and the like, so that's a matter of furious agreement between us now.

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Further, with respect to the trainees, MEAA has also compromised its objection to the extent of being open to an award variation with respect to entrance at the trainee level, and there will be a reference to a particular classification in the award for there being flexibility for up to three fixed term contracts, so that in that period, it addresses what LPA articulated on the previous occasion about assessing whether a new dancer, a trainee dancer, is appropriate for the company on an ongoing basis.

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So in principle, we are agreed in both of those areas. I think if there's anything that remains to be agreed on that trainee level award variation, it's to do with drafting and details as to the particular classification we are talking about,

perhaps, but that's an area where discussions between the parties have been most fruitful.

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JUSTICE HATCHER: If I can pause there and address this to you both: what do you see is the next step? Just try to narrow that down into something we can implement.

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MS MINSTER: I think we would probably come, hopefully, to an agreed amendment to the award that we could jointly draft and put to you, put to your chambers.

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MR BORGEEEST: Separate from that and outside the award variation proceeding, I imagine, is agreement on a mechanism for effecting the delay and, secondly, just documenting our agreement about collaboration with the dance companies around supporting the workers envisaged for the rest of this year. So that's just formalising that understanding that we believe exists and agreeing on the exception, of the extension, those being sort of outside of the award variation application - proceeding with those three things.

PN426

JUSTICE HATCHER: All right. I am happy to leave you to do that. Alternatively, if you simply put in writing what you have agreed upon, I can have staff of the Commission draft a variation for your consideration, if that would be easier.

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MR BORGEEEST: Might I say something just about the drafting of the variations in general. We are still, from our perspective, talking about agreements or disagreements at levels of principle mostly. In general, there will be a question of making sure that we are drafting permissive or facilitative provisions into the award permitting certain kinds of fixed term contracts. It will need to be accompanied by clear language that otherwise prohibits - - -

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JUSTICE HATCHER: I'm not sure you need a prohibition in the sense that the Act sets up the prohibition and the only role of the award is to set up where the limitations of the Act don't apply.

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MR BORGEEEST: With respect, that's not my understanding of how that works. I can take you to the sections, if required, but the essence of it is that the Act directs prohibition and then says that if an award term permits contracts with any of these characteristics, then, with respect to that category of employee, the prohibition does not apply to that employee. So if there's a permissive term to any extent with respect to a category, then it's as if the Act is not there.

PN430



JUSTICE HATCHER: Well, it depends what's permitted. I mean you can permit them globally, you can permit them in a confined space, so it's a case of if you have a permissive provision of fixed term contracts for company dancers, it would permit certain things, subject to certain conditions, and otherwise not permit them. Is that what you are trying to say?

PN431

MR BORGEEST: It could permit - say for company dancers, it could permit, with respect to trainees, that there be a number of contracts up to a maximum, and the effect of that permission is that the entire prohibition in the Act cannot apply to that category of employee.

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JUSTICE HATCHER: I think we're saying the same thing, aren't we?

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MR BORGEEST: Yes. Anyway, I'm foreshadowing something that will arise at the drafting stage, but I think we're still at the level of principle.

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JUSTICE HATCHER: All right. So how long do you need to do that?

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MS MINSTER: For company dancers, I think we would need two weeks.

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JUSTICE HATCHER: Two weeks. So if I stand over that bit for two weeks, can I expect that the parties will have a draft agreed variation by that time?

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MS MINSTER: I do expect so, but I think that - like we have discussed this issue before about how the Fair Work Act operates, and I don't think we actually agree because my understanding is - Mr Borgeest having brought up this issue before - that MEAA's view is that if you permit any kind of fixed term contract for any dancer, then it applies to every dancer, but my view is that that's not right because if you draft it in a way that's specific, then it would be specific to that category of dancer.

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JUSTICE HATCHER: Well, I think that's right, but - - -

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MS MINSTER: So I hope that's our common understanding because - - -

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JUSTICE HATCHER: Well, I mean, the award - tell me if I'm wrong - the award doesn't currently have provision for fixed term contracts; it assumes they can be done, but it doesn't - - -

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MS MINSTER: That's right.

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JUSTICE HATCHER: So it seems to me that the term would - let's assume this is about ballet dancers, trainee ballet dancers. The provision would say trainee ballet dancers may be employed for no more than three fixed term contracts of a period not exceeding one year and otherwise fixed term contracts are not permitted.

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MR BORGEEST: That's the extent of it.

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JUSTICE HATCHER: Is that the same thing you are saying?

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MS MINSTER: Yes, that's my understanding.

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JUSTICE HATCHER: I'm not sure what the difference is. So that's that part. All right.

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Run of play contracts - has the union had a chance to consider the new proposals yet?

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MR BORGEEST: No. This was delivered to us at 2 o'clock. There were detailed discussions about what is an appropriate way, in principle, to preserve and protect employees receiving the lay-off pay. That was discussed between the parties, including, most recently, last Thursday, and there was one draft reflecting LPA's position in the form of a draft award variation that was provided to us on Friday, and then that's been withdrawn after further discussions internal to LPA and its members, until we just received this.

PN449

I must confess, I haven't followed the way its logic works, particularly - well, either of the proposals. So from our perspective, what we have been seeking to ensure is that there is a term which facilitates multiple and extended fixed term contracts for performers engaged for run of plays, but there is some certainty that, just because there's different contracts, there isn't the loss of the three-week lay-off pay, and the letter that I have just read, and we haven't discussed together ourselves, I just don't follow how it achieves the objectives that were being pursued in the discussions last week.

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Our position has been, and remains, that we can consent to an award variation permitting multiple contracts, or extended fixed term contracts, if it's always the case that there's paid lay-off, or an equivalent entitlement, in between contracts.

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JUSTICE HATCHER: Well, the question was what happens if it's more than three weeks, wasn't it? That's where we got to. So I think there's no dispute that if it's under three weeks, the payment applies. Is that where we got up to?

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MS MINSTER: Yes, we did.

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JUSTICE HATCHER: You were concerned about multiple run of play contracts where the gap between the contracts is more than three weeks because of some issue about theatre availability, or some other reason. Isn't that where we got to?

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MS MINSTER: That's my understanding, yes.

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MR BORGEEEST: Yes. So if the gap is not greater than - excuse me - if the gap can be covered by the equivalent of accrued annual leave and lay-off, then, one way or another, whether it's by having a single contract or by having separate contracts, then the entitlement should be triggered.

PN456

What I'm doing is summarising my understanding of issues of principle that were discussed last week, but that was reflected - that discussion produced some award variation language on Friday that was withdrawn yesterday, and we have got a new letter, that I don't quite understand, that arrived at 2 o'clock.

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MS MINSTER: I am happy to assist with that.

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MR BORGEEEST: Yes.

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JUSTICE HATCHER: You are happy to what?

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MS MINSTER: I am happy to assist with that.

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MR BORGEEEST: I would be most assisted by just having my colleagues and I talking about the letter first.

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JUSTICE HATCHER: All right.

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MS MINSTER: If you like, I can provide some further explanation to how we just define, sort of, the logic behind the position that we have put forward.

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JUSTICE HATCHER: I think, before you do that, it is just necessary for the union, and probably me, to actually sit down and read the letter to understand what it says before we know what we need to know about it.

PN465

What I am inclined to do is - I'll let the union go off into the conference room down the hall and have a careful read of the letter and have a think about it, and I just want to see Ms Minster and Live Performance Australia off the record to have a short discussion about this as well.

PN466

My associate will guide you to the conference room and then we will close the conference, and I just want to have a short discussion with Live Performance Australia about one aspect of this problem.

PN467

So we will go off the record now.

**OFF THE RECORD**

**[2.31 PM]**

**ADJOURNED INDEFINITELY**

**[2.31 PM]**