



FAIR WORK
AUSTRALIA

STATEMENT

Fair Work Act 2009

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

Musicians' Union of Australia

(AM2010/25)

Live performance industry

COMMISSIONER LEWIN

MELBOURNE, 2 JUNE 2010

Application to Vary the Live Performance Award 2010.

[1] Application is made by the Musicians' Union of Australia to vary the terms of the *Live Performance Award 2010* (the Modern Award) regulating archival and reference recording musical performances pursuant to s.158 of the *Fair Work Act 2009* (the Act). The Modern Award came into effect on 1 January 2010. The application was lodged in the Tribunal on 1 March 2010.

[2] Subsequent to the receipt of the Application in Fair Work Australia, Directions were posted on the Award Modernisation website instructing interested parties to file Submissions in relation to the application to vary the Modern Award by the close of business on 17 March 2010. Such parties were also directed to file any Submissions in reply by the close of business on 24 March 2010.

[3] Submissions were filed in the Tribunal pursuant to the abovementioned Directions from Opera Australia, Live Performance Australia and the Australian Ballet. The Musicians' Union of Australia subsequently filed Submissions in reply.

[4] On 20 April 2010 the application was listed for Hearing on 5 May 2010. At the Hearing Mr T Noone appeared for the Musicians' Union of Australia. Mr D Hamilton and Ms S Ong Tan appeared on behalf of Live Performance Australia. Ms B Hayes Appeared for Gordon Frost Organisation. Ms H Williams appeared for the Australian Ballet. Mr A Budd appeared for Opera Australia.

[5] At the conclusion of the Hearing the parties present agreed to confer for the purpose of dealing with non-contentious aspects of the application. Those parties have submitted a draft variation of the Modern Award to give what they consider to be better effect to the pre-existing provisions regulating the relevant archival and reference recordings under relevant federal awards which lapsed on 31 December 2009 in the terms of the Modern Award.

[6] The proposed variations, which would replace the definition of an archival and/or reference recording and include additional provisions relating to audio-visual and audio recordings in clause 31.6 of the Award, are set out below:

“Clause 3.1–by deleting the existing definition of archival and/or reference recording and insert in lieu thereof:

archival and/or reference recording means an audio, visual-only or audio-visual recording of a performance or rehearsal, which is not used for commercial sale or use or public broadcast and where:

- the employer and employee agree in writing to make the recording; and
- the employer keeps a record of all employees who participate in the recording.

An archival and/or reference recording can only be made for the purposes of:

- (a) an historical record or archival reference for use by the employer, rights holders, current employees, students or historians;
- (b) a performance reference for:
 - (i) a performer/company dancer where more than one performer/company dancer is cast to perform the same role; or
 - (ii) for a musician to enable training and teaching;
- (c) a guide to recreate the production when it is restaged, revised or in order to remount future productions.

Should an archival and/or reference recording be used for a purpose not listed above, then payment will be made in accordance with clause 25.7 – Performers and Company Dancers, clause 31.6 – Musicians or clause 44.2 – Production and Support Staff.

Clause 31.6–by adding the following subclauses:

- (d) for an audio-visual or visual-only recording of a performance:
 - (i) 20.70% of the standard rate;
 - (ii) if a Principal, the payment in 31.6(d)(i) and an additional 25%;
 - (iii) for doubling, 25% extra per call; and
 - (iv) for overdubbing, an additional minimum call fee;
- (e) for an audio recording of a performance:
 - (i) 15.12% of the standard rate for which there can be 21 minutes of finished material;
 - (ii) if a Principal, the payment in 31.6(e)(i) and an additional 25%;
 - (iii) for doubling, 25% extra per call;
 - (iv) for overdubbing, an additional minimum call fee;
 - (v) to record more than 21 minutes of finished material, the employee will be paid at time and a half for a minimum of one hour;
- (f) the provisions of clause 31.6 of this Award will not apply to archival and/or reference recordings as defined.”

[7] Subject to the final determination of the balance of the Musicians’ Union of Australia’s application, the Tribunal foreshadows its intention to incorporate the proposed consensual variation as part of the Modern Award subject to any Submissions which may be received in the Tribunal by the close of business on Friday 11 June 2010.

The addresses for the purpose of filing Submissions are:

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COMMISSIONER

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