



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*

**Melbourne**

**10.03 AM, FRIDAY, 22 MARCH 2024**

**Continued from 04/03/2024**

PN33

JUSTICE HATCHER: I'll take the appearances. Ms Minster and Ms Floyd you appear for the applicant?

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MS S MINSTER: Yes.

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

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MR T BORGEEST: Thank you, your Honour.

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JUSTICE HATCHER: All right, Ms Minster. Probably more for my benefit than anyone else's. Can you just talk me through your application and issues it's trying to address?

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MS MINSTER: Yes, I can.

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JUSTICE HATCHER: There's some terminology here which I'm not entirely familiar with so you might need to explain it, including whatever run of play is, I think.

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MS MINSTER: Okay. I think maybe should hand up for run of play there's a section of the Act. It's defined within the Live Performance Award, what a run of play contract is.

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JUSTICE HATCHER: All right.

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MS MINSTER: But in the definitions.

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JUSTICE HATCHER: Right.

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MS MINSTER: So, basically what a run of play is for - - -

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JUSTICE HATCHER: I have access to the award so you don't - - -

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MS MINSTER: Okay. So a run of play contract is where it would be for a performance where the length of the season is generally not known or it needs to be adjusted. So it's a different kind of – it's not really a fixed term contract but

now it does fall within the new definitions. So a performer will be given a start date but it would say, for example, 'run of play in Melbourne'. And then maybe that performance might get extended because of like high demand.

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JUSTICE HATCHER: Yes.

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MS MINSTER: Or maybe it has to be retracted because of low demand or another circumstance. And, in that case, three weeks' notice can be given to end that contract or if the period of the run is less than five weeks, it will be two weeks' notice.

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So, generally, in the industry there would be a run of play associated maybe with a location or a kind of show. So if a performance was running around the country – just take a musical like Moulin Rouge, for example, did nearly all of Australia. Issued in that circumstance was a run of play contract for Australia. So it just kept going continuously.

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But for other shows that maybe don't have the kind of power that somewhere like Moulin Rouge has because it's highly popular they might have – they have this difficulty in securing venues across the country. There's like a venue shortage. I think that's an accepted fact here. So they might issue run of play, Melbourne, Sydney. And then there might be a gap in between and then they might go to Brisbane to somewhere like Queensland Performing Arts Centre.

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And then if the show does pick up and it gets popular maybe someone over in Perth, like Crown, might say, 'We would like that show.' And then another run of play would be issued – run of play, Perth.

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And then often, at the end of Australia, sometimes there might be a run of play, New Zealand. And the history of the run of play is that in the circumstances where tours can't be lined up often performers will be given these two or three, maybe separate contracts often at the same time. Sometimes not at the same time because we don't know if there's going to be another show in future.

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So if there's a gap and the person has worked for like 26 weeks there's a lay-off period in the award that allows the company for a three-week period to lay a performer off during – in between the movement of the show into another State. It's not unpaid. Like the term 'lay-off' is a bit misleading because they do get paid. And often what will happen is perhaps in that period the performance paid back down to the minimum rate of pay but they don't have to go to work. So that's really the gist of a run of play contract.

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Generally, it's been accepted in the industry and there was a decision that we can give to you, that must be in here, where there's been a kind of ongoing discomfort, I suppose, between the union and the producers that run of play contracts shouldn't be issued at the same time. But there was a decision that says that that was acceptable. I think the union may even have a copy of this.

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So what happens, generally, at the moment is that if the gap between performance in the agreement and that three-week period of lay-off, it's been accepted practice that separate contracts can be issued for that next run.

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And so in the context of the limitations in the Fair Work Act the issue that we have, what this application is trying to rectify is that the run of play is a little bit undefinable. And, also, that if you had two consecutive contracts and then you issued a third would mean that that was permanent employment. Whereas, in this circumstance it's widely accepted that a show is for a limited period of time and we're trying to rectify that issue primarily.

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JUSTICE HATCHER: Right. So can you just take me through the variations that you seek and then just talk me through what they're intending to achieve.

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MS MINSTER: Yes, I can. Okay, so with the first set of variations which is to clause 28.4. This is where I believe we can have a pretty productive conversation today because - - -

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JUSTICE HATCHER: Well, let's start with 27.1.

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MS MINSTER: 27.1 – yes, sorry. So I guess what we're trying to do here. The recent run of play is already in the Award but where obviously our issue is like being that allowed to continue where there's consecutive kind of contracts.

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We pick fixed term basis. I think it might be of utility to talk about that a bit later in relation to MEAA's application because they seem to think that that might be – I mean I know that that's something I don't agree with – but I think that just to clarify that with the fixed term, it's more for like shorter shows that are say, like, in a State theatre company.

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If you take, for example, like at Belvoir or an STC, for example, they have these very short runs of productions. But if you weren't allowed to employ a performer in the next production for the next production they become a permanent employee. It's very restrictive to that performer, actually, because they're being a permanent employee there, then they wouldn't be allowed to go and do TV auditions or film or voice work or any other work. If you're a permanent employee of a theatre company you're really restricted to that company.

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So, I mean, I think the utility of talking about it there is that currently our application at the change at 28.6 which is related to that weekly on a fixed term basis is that it says the contracts may be greater than two years. And perhaps there's room to move where they can have a substantial continuity between contracts but it's within this two-year framework. So that's some we'd like to discuss today.

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JUSTICE HATCHER: So, 28.6 - - -

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MS MINSTER: Yes. So there's a week performing - - -

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JUSTICE HATCHER: I mean I thought you were describing fairly short-term things, but this is allowing more than two years.

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MS MINSTER: Yes. So that's what I think we can discuss. Our issue is that when we put in this application we had given these variations to MEAA and hope that we would have a discussion but no discussion was ever had. There were multiple attempts to have those conversations and no one would discuss the variations with us. And so that's where we are today where basically this is the first conversation that we're having about it.

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JUSTICE HATCHER: All right.

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MS MINSTER: So we are very open to discussing all of these variations in the hope that we can meet somewhere.

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JUSTICE HATCHER: Right. So what do you want to talk about first?

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MS MINSTER: Okay. So, I guess, first we would go – I've just kind of gone through our application and through MEAA's position paper. And I'd say considering in their decision paper that they say that they agree or don't contest weekly forms of major or minor play but it's suggested a variation to our – sorry, amendment to our proposed variation. And also that they would say that they will accept a run of play for musicians. So it seems that with the run of play for musicians there's not really much to talk about where if they accept our position because that's agreed. So there's nothing to talk about there.

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JUSTICE HATCHER: Sorry, it's nothing or something?

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MS MINSTER: Nothing.

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JUSTICE HATCHER: You mean in the sense that - - -

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MS MINSTER: In the sense that we've both agreed to that today or the paper agrees to the run of play musicians, variation that we've made. That's what they say in their paper. So if they agree to that variation then we're happy to move on from that which is the run of play for musicians would be there is a bit of an error in our application for the actual clauses in the award, given the mark-up.

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So musicians engaged in run of play where you state in the number of the clauses. So in the application if there's clause 30.2 and clause – I think 31.2. And what it should be is 37.3 and 38.2 in the actual award. So we do agree to those. The parties (indistinct words).

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JUSTICE HATCHER: Right. So that would be a variation to clause 37?

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MS MINSTER: There's 37 and 38.2. So 37.2 and 38.2.

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JUSTICE HATCHER: Yes.

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MS MINSTER: So I guess I was going to outline what – how, I think it would be useful to have the conversation with MEAA. So those two things that are like – I think we can just cross out (indistinct) engaged in minor play unless MEAA think otherwise. We should have a discussion about the difference in the proposed amendments for a run of play performance.

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And there's a list for MEAA's application where they say the things that they do not support and it's where the performer is engaged for a run of play which is (indistinct) to clause 28.6 in the application. So it's a weekly performer enter into two more fixed term contracts that are consecutive contracts for the same or similar week which is basically just what I was talking about before where some maybe greater than two years. So I think that maybe centre around is it acceptable if the sum is less than two years.

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So this position comes out not because of section 333(e)(5)(d)(2) in the Fair Work Act which doesn't permit more than two contracts as substantial continuity of the same or similar work or limits options to extend. So in those kind of contracts as well they're short-term but they may have like at the end of their contract we might extend for another week or one week or two weeks. These are the options because the ticket sales might be high. It might be a really popular show and then they want to add another couple of weeks on to that show.

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So when the contract is signed and the performers are engaged, is a long way before tickets go out and it's very hard to predict, generally, what's going to be popular and what isn't. So there's often a clause at the end of their contract that allows an extra week or two for that show to continue.

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JUSTICE HATCHER: So why can't that be dealt with as a run of play contract?

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MS MINSTER: Well, it can, but it would depend on how the run of play becomes defined once we agree or an amendment is found to that run of play section. So at the moment how the run of play is worded it might not help those contracts. And also there's another issue with those contracts which is a thing called the Major Festival Circuit. So companies often – sometimes very small and independent smaller companies may get – you get onto this festival circuit.

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So you go on the main festivals – Brisbane, Sydney, Melbourne, Perth, Adelaide – and those periods at the festivals can sometimes be like three days across a weekend. And in some festivals they can be two weeks. So if you're going three days to five festivals is that going to mean that then according to this legislation that you're now a permanent employee and need to be paid for the entire year to work about 15 days of that year.

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JUSTICE HATCHER: So why would the legislation make it a permanent employee.

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MS MINSTER: Because you'd have like separate contracts. And once you have two the third contract makes you a permanent employee.

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JUSTICE HATCHER: All right.

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MS MINSTER: So that's an issue we'd like to discuss. The second one was a musician engaged other than for run of play which is the proposed changes 30.3 which is actually 31.3 in the award and (indistinct) is actually 38.3 in the award.

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So it's actually in these applications they say this is targeted at musicians engaged in orchestras. So I will admit that that might be an error in the way I've presented it because that's not what it's meant for. And we can ensure that that's not what a clause will do. What it's for is for musicians attached to those kinds of shows that I've just explained that are for really short periods but there might be many of them across a year.

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The next issue is the company dancer on run of play. So crossed out and there's a proposed amendment. I don't think that's going to be an issue but I'd like to

discuss it because our view is that like if you're not part of an actual company of dancers, which means like if you consider the Australian Ballet that's what is a company of dancers. Because they're employed for the entire year. They go – probably go in every day. They train. They get like mentoring in the – and so it's a full-time job all week. Whereas, if you're a dancer who is pulled in on a project basis to another company, then you're actually – as defined by the award – a performer and not a company dancer because you're not attached to a company.

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So I think that that might cover that. That, you know, once again we haven't had any discussions so I would like to have that discussion.

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And then the last one is probably I would say the most contentious which is company dancers, which is things like the Australian Ballet, Sydney Dance Company, who traditionally have given a fixed term contract each year in order to manage the artistic quality of the company. So their concerns are that if they're not allowed to do that that it would be too difficult to maintain that artistic standard and then it would have that – if they had to revert to some kind of intense performance management aspects that it would be too hard on those dancers to then actually perform at that elite level that's required on stage. If they were being managed over say a six-month period.

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They do get managed in a way now but it's not like how we would probably consider performance management to be carried out. So it's kind of like this positive reinforcement trying to help them pick up what they're doing maybe incorrectly. But it's not a system where they kind of have a notice sort of hanging over their head. But if they don't reach a certain standard that they won't then be offered a new contract next year.

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JUSTICE HATCHER: But to put it bluntly when they get so like getting a bit older.

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MS MINSTER: Sometimes. And sometimes not. I think what actually the main problem in that space is for younger dancers who come straight out of school because the dance companies have reported to me that they're concerned with like making people permanent employees is that it's not enough time to see if that person is going to reach this elite level. And they have said that if they feel that they don't want to take that risk, that they'll start looking to companies probably overseas to get that level of dancers that they require. So the ballet might start looking to the Paris Ballet and things like dance companies might start looking to Europe to get their next corps of dancers.

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So that is a very broad outline of our application. But, as I said, in our position paper we really would like to have a discussion because no discussion has been had.



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JUSTICE HATCHER: All right. Mr Borgeest, what do you want to say to start off? Right. You might start off why haven't there be any discussion about this?

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MR BORGEEST: Well, much of the subject matter has been discussed outside of the correspondence about an award variation. I mean the aspiration just mentioned by Ms Minster concerning the company dancers - - -

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JUSTICE HATCHER: I should have said this earlier. If it's easier to stay seated you can.

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MR BORGEEST: Thank you. It might be - - -

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JUSTICE HATCHER: It's more obvious because you're so tall.

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MR BORGEEST: I mean the companies wish for the existing freedoms about the external contracts for company dancers, for example, has been raised with MEAA previously. And the MEAA has explained squarely its opposition to a special arrangement of those companies.

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JUSTICE HATCHER: Sorry, I might be missing something. So your attachment 'A' applies to what musicians, does it?

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MR BORGEEST: I'm sorry. So the attachment 'A' is – that deals with an alternative drafting for the LPA's variation in respect of weekly performers engaged for run of plays.

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JUSTICE HATCHER: Yes. So that would apply to any category of performer?

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MR BORGEEST: No. Well, I'm sorry. To weekly performers. And that's different from the categories of musician, from company dancers that are treated separately. So this is

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JUSTICE HATCHER: So the issue – so attachment 'A' would deal with people who are brought in for a particular production of any type, that is, musicians, dancers et cetera?

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MR BORGEEST: No. The attachment 'A' is a variation to the LPA's proposed 28.4. So 28.4 fits in within Part 5 concerning performers and company dancers. So not musicians. That's a separate part of the award. 28.4 as drafted in

the application concerns weekly performers and company dancers engaged under run of play contracts and we've said about that.

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Firstly, we don't agree on the inclusion of company dancers. And, secondly, we propose a different treatment of how lay-off time works than it is proposing here. So the category of worker under the award that we're talking about is a weekly performer engaged under one or more run of play contracts.

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JUSTICE HATCHER: So what's a 'weekly performer'?

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MR BORGEEST: Well, it's - - -

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JUSTICE HATCHER: Is it a defined term?

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MR BORGEEST: That's defined at 28.1.

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JUSTICE HATCHER: 28.1.

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MR BORGEEST: So that – a performer is engaged to perform in a production. The part of the Act that this appears, or the award excludes, is not the same part that deals with musicians. Musicians are treated separately. And a weekly performer is a distinct concept of company dancer.

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JUSTICE HATCHER: So is 'company dancer' defined somewhere?

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MR BORGEEST: At page six of the award, within the general definitions, an employee of a dance company who has certain characteristics.

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So a weekly performer is just a performer engaged weekly. Performer is defined at page eight as an employee who takes part in a performance and then there's an inclusive list – actor.

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JUSTICE HATCHER: So what's the difference between a weekly performer and a company dancer?

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MR BORGEEST: A dancer can be a performer. But a company dancer is an employee of a dance company who is engaged to perform as part of a company of dancers. That's the defined term.

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JUSTICE HATCHER: I still don't understand why a company dancer isn't just a subset of a weekly performer but anyway I might be missing something, anyway go on. That is if you take out company dancer I don't understand why the expression 'weekly performer' would still not encompass company dancer. But you'd have to say 'weekly performers' except for company dancers I think. But anyway, go on.

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MR BORGEEST: It's on the question of communication. It's completely fair criticism for this Minister to say that she sought through me to engage in discussions and I had not been responsive. But we put our position in writing some weeks ago and where the LPA can be under no misapprehension that we're opposed to the categories whichever they're opposed to.

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The substance or the position is that we see that there's some merit and utility in permitting, in enlivening the exception for run of play contracts where an extended production might otherwise be captured by the prohibition.

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JUSTICE HATCHER: So what's the distinct point you're making about company dancers?

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MR BORGEEST: I was - - -

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JUSTICE HATCHER: And why are they excluded? What's specific about them which causes you to want them not included in your proposed attachment 'A'?

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MR BORGEEST: Well, we're not talking about a run of play for a particular production in respect of them. We're talking about employees who are engaged as a part of the standing workforce of an enterprise – the dance company – and the dance companies have reasons to prefer the convenience of retaining people on rolling fixed term contracts and we don't see the merit in that.

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It's the same position as with musicians in orchestras. They're very analogous. There are musicians in orchestras, a standing complement of employees who work together in that ensemble and there's – while some orchestras might find it convenient to put people on fixed term contracts, it's just substantially not the practice. The practice with orchestras is permanent ongoing employment.

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And the kind of employment an artist contributing to the work of the group in the orchestra is akin to the role of a company dancer. You're a part of the permanent complement of that group and, again, while it might have been found convenient for employees in that space to have that flexibility, that's not, in our view, a sufficient special reason in the same way as what the run of play concept is.

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With company dancers we're just talking about employers preferring the flexibility of fixed term versus permanent but there's nothing about the position itself, structurally, which compels the necessity for rolling fixed term contracts, as opposed to run of play. If you had a big production – you know – uncertain or variable popularity, uncertain or variable lengths of a tour – could easily run more than two years for big one – there's a logic. There's a logic to permitting the necessity for a sequence of a long contract or a sequence of contracts that might otherwise offend the prohibition, the new prohibition. There's no underlying logic compelling that in the case of either the orchestras or company dancers.

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JUSTICE HATCHER: So if you go to say, Opera Australia, they have an ensemble of permanently employed seniors don't they?

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MR BORGEEST: Yes.

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JUSTICE HATCHER: And then they might give some sort of staff – seeing you in on a run of – on a fixed term contract for one production.

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MR BORGEEST: Indeed.

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JUSTICE HATCHER: So, Ms Minster, why is that different from a dancer?

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MS MINSTER: It's different from a dancer because one thing that stands out to us is that all the senior musicians, I think, are better with age. And dancers don't. And sometimes they do but very rarely. And also like the level of fitness that's required for a dancer is akin to that of like an elite professional sports person. So there really needs to be – also often in a dance companies like Sydney Dance, there's only like 17 performers, and you can't really bring many people in from the outside to work within that ensemble in this kind of physical interaction that's so difficult and so niche in that space.

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Also, a dancer, I feel, is more physical on stage. So it's very harrowing when a dancer is not meeting that elite level.

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JUSTICE HATCHER: Well, the usual approach to permanent employment is that if people aren't performing to standard they get terminated. That is why – why isn't the normal approach to employment appropriate to deal with what you described?

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MS MINSTER: Because our companies report that if you put someone under that kind of level of scrutiny who then has to get up on stage and dance that it is a

major psychological issue. And it becomes degrading and embarrassing in the group for that person to be so heavily scrutinised when their performing work is so public.

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JUSTICE HATCHER: But isn't that what happens anyway?

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MS MINSTER: No - - -

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JUSTICE HATCHER: If someone's on a fixed term contract they know they have to – they'll be under scrutiny and have to perform in order to get the next contract.

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MS MINSTER: I don't think it has the same mental effect if someone is telling you in the middle of the year that if you don't make it up to this level by the end of the year you're gone. If you're getting that kind of – they get coached – and they have physios and coaches that help them throughout the year and they'll give them their feedback and it's kind of positive trying to build their confidence kind of way but if you're then approaching someone to say, 'The standard (indistinct) you're supposed to be at is like the rest of this group but you're not making it. If you can't get there by the end of the year you won't have a contract next year.'

PN146

That person then has to for the next six months - they'll be part of that very tight-knit physical ensemble and perform at an elite level. A company, for example, like Sydney Dance Company is like the premier Australian dance company. And because they operate at that level now choreographers from around the world – very famous ones – will bring their shows to that company.

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They kind of like them for that kind of show. If they can't keep meeting that level that won't happen anymore. And also they won't attract the best dancers anymore. And the reputation in Australia and worldwide will fall. And they won't get work is basically the gist of it at the end.

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JUSTICE HATCHER: So the company have annual contracts.

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MS MINSTER: Yes.

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JUSTICE HATCHER: And if they're not performing they don't get a new contract.

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MS MINSTER: That's right.

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JUSTICE HATCHER: But you're saying they're not told they might not get a new contract. The hammer comes down and some move out the door. Is that what happens?

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MS MINSTER: I think they - - -

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JUSTICE HATCHER: But I understand what you're saying about scrutiny. But surely someone will be told.

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MS MINSTER: I think that what happens is - - -

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JUSTICE HATCHER: In advance they need to lift their game if they want to have another - - -

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MS MINSTER: I think they do but what they say is that in this very kind of gentle way of encouragement. Rather than what we see as a performance management technique, generally, in the workplace which is not meant to be harsh. But it's kind of meant to be this sort of setting a target. And having someone actually know for sure that if they don't meet that target, like a possible consequence of that is the termination of your employment.

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But if you're saying to a performer who has to get up night after – well, not even after night after night – but in each show in front of everybody expected to be at this elite level and you're saying to them, 'We noticed that your technique is not good enough and if you don't improve you're out at the end of the year.' Their confidence is going to drop to the floor and they won't be able to perform at that level.

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JUSTICE HATCHER: Well, that's the current system.

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MS MINSTER: No, it isn't, because they don't say you might not get a contract at the end of the year. They keep getting encouraged to be better. But no one's going to get better if they're told that they're like not up to standard.

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JUSTICE HATCHER: Well, if it's - - -

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MS MINSTER: I think this kind of argument - - -

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JUSTICE HATCHER: If it's permanent and common with a notice period, I'm still struggling why you can't do that in the same thing.

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MS MINSTER: But how would you then manage to implement some kind of performance management that's fair that then prevents like a myriad of unfair dismissal claims every time a dancer gets to meet – because they're not up to standard.

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JUSTICE HATCHER: So is that what this is about?

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MS MINSTER: Pretty much.

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JUSTICE HATCHER: Well, how would - - -

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MS MINSTER: It's also about maintaining the artistic quality of these like elite level world renowned companies.

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JUSTICE HATCHER: Sure. But how do these issues go with an orchestra's and opera companies - - -

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MS MINSTER: Orchestras have some – especially the orchestras that have permanent employment they have some kind of lack of proficiency kind of thing and they end up getting gigantic payouts at the end, if they're kind of asked to leave is my understanding. So I mean these companies don't have that kind of resource.

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JUSTICE HATCHER: Which companies?

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MS MINSTER: Like dance companies. Performing arts companies don't have that kind of resource. Like a ballet or like Sydney Dance Company to be able to do that.

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JUSTICE HATCHER: But that Opera Australia does?

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MS MINSTER: I'm not exactly sure what Opera Australia does in that context. I'd have to ask them and get back to you.

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JUSTICE HATCHER: Right. So - - -

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MS MINSTER: Or if they're in an orchestra, like the span of their career is much longer than that of like a company dancer.

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JUSTICE HATCHER: So what's the typical career of a dancer at that level?

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MS MINSTER: It would depend, maybe like, I think the average is about five years.

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JUSTICE HATCHER: Five years.

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MS MINSTER: As a part of – I would say – as a part of the company. So to maintain the level to be in one of these ensemble companies where you have like a job where you're there for the entire year as part of this ensemble performing the repertoire, I think the average is around five to six years.

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It's possible that at the end of that that's not the end of their career sometimes. Like they might go off and do other kind of work with dance, just not in a company like that.

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JUSTICE HATCHER: Right. So we have an issue with the company dancers. What else do we have an issue about?

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MS MINSTER: I think there's an issue just with their – the proposed amendment from me. We don't agree with that proposed amendment.

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JUSTICE HATCHER: You don't agree with it?

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MS MINSTER: No.

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JUSTICE HATCHER: All right.

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MS MINSTER: Firstly, I did have some – a question to actually ask me in order to properly answer to - - -

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JUSTICE HATCHER: Yes. If you can dialogue that's fine.

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MS MINSTER: Yes. So the first question is that – I mean obviously the dancer part is missing. That's an issue for later I think. But it says in respect of particular production that currently the award is written as production with a plural. And I just wondered if that was intentional or it was an error in the drafting.

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MR BORGEEEST: No. It's intentional.

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MS MINSTER: Okay. So I don't really understand why. It seems to me that - - -

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JUSTICE HATCHER: So, sorry, why would a run of – why would there be a run of pay in respect of more than one production?

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MS MINSTER: Because sometimes you might be on a run of play contract for something like in opera but you might be in two productions at the same time. Because a dancer – if you think of that a performer is – they get paid 38 hours a week where they're often in the performances and they're not going to work 38 hours a week. They go to like maybe eight calls with three and a half hours a day. So there is room for them to be working across productions in the same company. So why can't they do that?

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JUSTICE HATCHER: So do you want to reply to that Mr Borgeest? That is why can't it be plural?

PN195

MR BORGEEEST: Well, I mean it's intended to capture the situation where it's permissible to have prolonged fixed term contracts, otherwise captured by the prohibition if that series relates to a production. Like a run of something is particular, as opposed to an open-ended flexibility to engage in multiple prolonged fixed-term contracts. That could be made up a string of different productions that otherwise should be considered distinctly.

PN196

Now, the purpose of enlivening the exception is to permit those run of play contract arrangements which have that form of character. Many multiple contracts or extended over two years and that relates to a particular production.

PN197

Sorry, yes. That's the end of that question.

PN198

JUSTICE HATCHER: So is there ever a circumstance where currently people are engaged for single run of play contract for all the month production. Has that ever happened?

PN199

MS MINSTER: It can. But I don't think in the circumstance that you're thinking that maybe you're saying, because it seems to be like a commercial (indistinct) production. But often those productions a company is formed for the production. So, you know, like once that play is finished, it's over. And if you were going to go to another show somewhere there's another company that's – you know – the name of the production and you would have a contract with this new company. So I don't really think that it's an issue in that circumstance but it might

be in a company like a State theatre company type arrangement where they have a series of short shows.

PN200

You might have them in something like an opera company where there's a series of shows happening at the same time.

PN201

JUSTICE HATCHER: But why were they entering separate contracts for each show?

PN202

MS MINSTER: Because they have this - - -

PN203

JUSTICE HATCHER: That is - - -

PN204

MS MINSTER: Because they have the same employer.

PN205

JUSTICE HATCHER: Well, that's true. But it seems to me that if this is an issue all they need to do is engage in two separate contracts for two separate productions. That would be entirely - - -

PN206

MS MINSTER: But then how does that work for their provisions that it's like making people a permanent employee after two contracts if they have two ongoing contracts at once.

PN207

JUSTICE HATCHER: Right.

PN208

MS MINSTER: Does that mean if they're offered a third production they become permanent employees? Like these things it seems to me it just doesn't quite click here in the way that engagements and productions are made in this industry.

PN209

JUSTICE HATCHER: All right. So that's an issue. What else?

PN210

MS MINSTER: Another issue is – so in the clause (b)(2)(a) it says, 'The amount which the employee would have been obliged to pay, the weekly employee has the period between the commencement and the second or subsequent run of play contracts succession of the preceding run of play contract being the period of lay-off.'

PN211

So I don't see the purpose of this clause worded in this way because it's not permitted to engage someone like that and it's not even the current practice. So if

you have a contract for one production with the same company if there's a gap of three weeks or less then that should be either paid or you get lay-off.

PN212

So if you haven't worked enough time to accumulate a lay-off period because it's three weeks in a 26-week period, so maybe it's shorter and you've only got a week available to you. But given like what has been long held, the standing principles, given the case that we've handed up to you, is that if you're going to put someone on the contract – another contract – which is less than three weeks gap then you are required to pay that person that entire time.

PN213

If that doesn't happen in some circumstances it's supposed to happen but this isn't trying to clear up any kind of underpayment issue, it's intended to clear up what we are meant to be doing in practice as a minimum. So I don't really understand why that is in there and why it's more appropriate than saying in our proposed 28.4 the use of consecutive run of play contracts is not issued for the purposes of avoiding the operation of the lay off as set out in 33.1 (a)(7) because even in Maher's application, I think it's a little bit like misguided, it's like saying that it's kind of counter to this section 45 of the Fair Work Act where you contravene the provision of a modern award. If you don't pay lay offs when lay off is due then you have contravened the provision.

PN214

JUSTICE HATCHER: Sorry, what was the clause you just cited?

PN215

MS MINSTER: In our application?

PN216

JUSTICE HATCHER: Is there any current provision about this?

PN217

MS MINSTER: About lay off?

PN218

JUSTICE HATCHER: Yes and three weeks?

PN219

MS MINSTER: The lay off is clause 33.1(7).

PN220

JUSTICE HATCHER: Where is the requirement for payment?

PN221

MS MINSTER: The clause is badly written?

PN222

JUSTICE HATCHER: Sorry?

PN223

MS MINSTER: I said the clause is not well written but in practice that is what happens. Because the clause below it talks about lay off and the broken working payments but it actually - on a strict reading of the award I would agree with you but it seems there's no payments required for lay off but that's not industry practice and that's not how that clause is interpreted.

PN224

JUSTICE HATCHER: Subject to an adjustment to accommodate that why can't that be incorporated into the proposal?

PN225

MS MINSTER: Are you asking - - - ?

PN226

JUSTICE HATCHER: I'm asking both of you.

PN227

MS MINSTER: I think it can but I think it needs to be incorporated as our (indistinct) put forward in 28.4 because that seems to be an issue that people are trying to prevent, is that you can't just issue contracts for certain periods so that you don't have to pay this lay off period.

PN228

MS MINSTER: We would be open to putting into 33.1(7) that there should be a payment, because it's the practice anyway. I have to say that I actually didn't realise it until I started to do this that it didn't say you had to pay, because that is just industry practice.

PN229

JUSTICE HATCHER: All right, Mr Borgeest, what do you say about this?

PN230

MR BORGEEST: Ms Minster referred at opening that there's some history of a static between producers and the union about the application of lay-off. So leaving aside the infelicity of the drafting in 31 – sorry, 33.1 - it's a term which is understood to provide a period of paid time when there's a break between productions in usually different locations or the like, but there's a period when work is not required, and subject to accruing enough time, if the break is, you know, of a period of three weeks, then the concept is that the performer gets paid for three weeks.

PN231

This is all in the context of just an ongoing contract, what I'm describing. So you're contracted to – you might be contracted to perform in Melbourne and Sydney, there's three weeks in the middle, and so the concept is okay, well then there's this three weeks' time paid.

PN232

Where this has come to break down somewhat from the union's perspective over time is where the producers, instead of having a contract that runs for Melbourne and Sydney - there's a Melbourne contract and a Sydney contract, and there might

be a four-week – let's say there's a four-week break - the employer could have chosen to have a whole contract, and you've got a four-week break, and we have – one week might be covered by annual leave that's accrued over the Melbourne performance, and the rest of the three weeks is covered by this lay-off entitlement as it's understood.

PN233

But if the employer chooses instead of maintaining employment and affording the annual leave as paid time, but to terminate the contract and pay out the leave, then you have a break, and there's just an end of a contract then, and the start of a new contract then, and no lay-off time afforded. That's the underlying intention.

PN234

So we see in the application from LPA, there's provision enlivening the exception for weekly performers engaged for the run of player plays, and the form of application dealing with this lay-off issue says that you can't make these contracts that are now permitted for the purpose of avoiding the provisions of 33.1, and our simple observation in our paper and response to that is, well, the introduction of an anti-avoidance provision is an indirect and unsatisfactory way of addressing the question.

PN235

The question we're addressing is what should be the direct entitlements in respect of lay-off if we're talking about a series of contracts with gaps between them, which is something that the lay-off provisions of the award don't address properly, in our view.

PN236

JUSTICE HATCHER: So does 33.1(7) – does that currently have any application to a period that's between discrete periods of employment, that is, discrete contracts? Because I don't understand how the clause could apply at all if there's discrete contracts, because the person's not employed. It presumes a single contract of employment, doesn't it?

PN237

MS MINSTER: Yes, it does, but the practice is that even in discrete contracts that are like, you know, traditionally fixed-term, not even run of play, is that if they are issued within a period of three weeks that that is a paid period. So, I mean, if people in the industry aren't doing that, like, we want to know about it, because that is what the industry practice is.

PN238

Just if I may, your Honour, I just wanted to take you - - -

PN239

JUSTICE HATCHER: I mean that may or may not be the case, but I don't understand how an award clause could make a requirement for payment for a period when there's no contract of employment in place. How could it - - -

PN240

MS MINSTER: It's not so much that it operates in that way, but what the practice is that contracts shouldn't be issued with a gap of less than that period.

PN241

JUSTICE HATCHER: But that is, if it's a single contract for - - -

PN242

MS MINSTER: No – well, yes, but – so if someone then issues two contracts without that gap in between, we say that that's not an acceptable practice to do so. That big gap has been acknowledged as being three weeks, given that it was contested many years ago and found that that was adequate.

PN243

So now we're saying that we don't think industry practice should be that contracts are issued within a period of three weeks' time of each other. If that's the case, then it should be one continuous contract, and people should be paid for that time at their rate, not dropping back to a minimum level that you can on lay-off, is that usually on one continuous contract and be paid that entire time.

PN244

JUSTICE HATCHER: Well you can put someone on a continuous contract at the start in anticipation that - - -

PN245

MS MINSTER: Yes, you - - -

PN246

JUSTICE HATCHER: - - - you'll be going to another city, that's one option - - -

PN247

MS MINSTER: Except that sometimes, for some shows, you don't know that there's going to be that other city.

PN248

JUSTICE HATCHER: Or, if towards the end, say we're in Melbourne, you get towards the end of the contract, and it's clear you're going to move to Sydney, you can vary the contract - - -

PN249

MS MINSTER: That does happen.

PN250

JUSTICE HATCHER: - - - to encompass Sydney.

PN251

MS MINSTER: That does happen.

PN252

JUSTICE HATCHER: That's another way, and there'll be continuity of employment.

PN253

MS MINSTER: Yes, that does happen - - -

PN254

JUSTICE HATCHER: But if you've got two contracts where one ends and another begins some weeks later, you can't have an award provision that applies in the gap, because there's no contract of employment to which the award can apply.

PN255

MS MINSTER: So we can say it, but I just don't think the way it's stated in here is clear, the way that the proposed variation that MEAA has put - - -

PN256

JUSTICE HATCHER: I'm only talking about your variation, that is, if there's any separate contracts - - -

PN257

MS MINSTER: Well I think that what MEAA's point is is that people would issue a contract that is one week, say a couple of days over this period, and you wanted to avoid paying someone in that period of time. So we say that's not the practice.

PN258

The other issue is Mr Borgeest says that producers choose to do this, choose to give people multiple contracts throughout the duration of a show, but that's actually not true, because the producers prefer not to give multiple contracts, because they don't want gaps in between their shows. Because what do they do with these gigantic sets and the costumes and everything? They have to store them, and it's costly. It's better to have a show in production.

PN259

There is an actual issue in Australia about venues. There's not enough venues, and there used to be a system where you got pencilled in and you didn't get rubbed out, but now a bigger show comes where more audience will come and take over the bar, and then these smaller productions they just get kicked out of the venue.

PN260

So it's very hard for them to line up their shows back-to-back like that anymore, and there's another issue coming, which is that the Arts Centre in Melbourne is going to be closed, so that's another few theatres down. The Comedy Theatre in Melbourne is going to be closed. That's another theatre down. QPAC has a theatre that's been under renovation for quite some time, which they don't know when is re-opening.

PN261

So it's very hard for producers who aren't making the biggest blockbuster-type shows to secure venues at all, let alone in a succession of time.

PN262

JUSTICE HATCHER: Mr Borgeest, just looking at Ms Minster's 28.4, is the issue about paragraph 30?

PN263

MR BORGEEST: Yes. Yes, that topic, the topic of the way lay-off payment works, was the area where we had suggested a change, and (b) is – as I said, is an unsatisfactory tool, because it's expressed as an anti-avoidance provision, and we would submit that if there's going to be something that addresses the question of the lay-off entitlements, that's much better expressed as a direct entitlement rather than some circular or indirect anti-avoidance provision.

PN264

JUSTICE HATCHER: So why can't (b) just say the gap between contracts can't be more than three weeks, and the performer must be paid for the three weeks? That is, why can't it just say that?

PN265

MS MINSTER: I think it probably could. It would definitely maintain the status quo, which I think is what we're trying to do here, and because we've had these discussions with government as this legislation came through, we've actually been given correspondence from the Minister that says it's not his intention to disrupt these kinds of contracts.

PN266

We can hand those letters to you and to the union if you like, but we've been told on multiple occasions, because this was the main issue for us, and we went to government - - -

PN267

JUSTICE HATCHER: Let's just stay on focus.

PN268

MS MINSTER: Okay.

PN269

JUSTICE HATCHER: Will that work? Mr Borgeest, will that work?

PN270

MR BORGEEST: There's a question about using other – about the making use of other accrued entitlements in the same time, but the concept – the concept has an elegant simplicity.

PN271

JUSTICE HATCHER: Can you have a think about that, Ms Minister? You might want to draft something.

PN272

MS MINSTER: Yes.

PN273

JUSTICE HATCHER: We should just say as one of the conditions for 28.4, the condition in (b) would be, what, a period of three weeks, plus any period of accrued paid leave that an employee has, and a cross-reference to a requirement for payment for the three weeks?



PN274

MS MINSTER: Sorry, just to clarify that, at the moment the status quo is that it's three weeks. So the condition is a period of three weeks, but some will be paid out their leave if they're not employed anymore in that three-week period.

PN275

JUSTICE HATCHER: All right.

PN276

MS MINSTER: So we're not - - -

PN277

JUSTICE HATCHER: That would only work if it's a single contract - - -

PN278

MS MINSTER: Yes. That's not acceptable to LPA I'd have to say, but the - - -

PN279

JUSTICE HATCHER: But you're happy to say the gap's no more than three weeks?

PN280

MS MINSTER: Absolutely.

PN281

JUSTICE HATCHER: Then they'll be paid.

PN282

MS MINSTER: Yes.

PN283

JUSTICE HATCHER: Then leave – they don't need to take leave, do they? They'll be paid out – because these are separate contracts, they'll be paid out anyway?

PN284

MS MINSTER: Unless it's - - -

PN285

MR BORGEEST: There's a question of how much. Sorry, I think there's a question about whether there's lay-off time – there's a maximum amount of lay-off time that can be paid, and I suspect that limiting – just regulating the gap on the assumption that it would be covered by lay-off time might not always be right, depending on how many contracts and gaps you have.

PN286

MS MINSTER: I would say that regulating the gap is the easiest thing, because then if someone is working less than three weeks, the contract in effect becomes continuous, because they're not allowed to have a contract anymore – well, they're not - - -

PN287

JUSTICE HATCHER: I thought this was protection. So if you want to do this with multiple contracts, these are the conditions which apply, including no more than a three-week paid gap. If you're going to do it some other way, it's not allowed; this doesn't fall within the exemption which the award is going to provide. And the only other way to do it would be to have a single continuous contract.

PN288

MR BORGEEST: Yes. No, that makes sense.

PN289

JUSTICE HATCHER: What else? So we've got company dancers, we've got the expression of single approval productions. What else is in dispute?

PN290

MS MINSTER: I'd say that the clause – it's expressed here as 'B(b)' – 'BR' – B(2)(b). The amount of three weeks' leave - - -

PN291

JUSTICE HATCHER: Sorry, whose document - - -

PN292

MS MINSTER: Sorry, this is MEAA's proposed attachment A to this same clause:

PN293

*The amount of three weeks' wages at the rate applicable for the performer as at the commencement of the second or subsequent run of play contract.*

PN294

So, firstly, does this actually – I'm a bit confused about what it means. It seems that on a second contract – so at the moment the legislation allows a second contract anyway, so it's unnecessary, and also 'the amount of three weeks' wages at the rate applicable at the commencement of a second contract,' does that mean that any contract you have, a second contract, you get some kind of bonus payment of three weeks?

PN295

JUSTICE HATCHER: What is the point is the - - -

PN296

MS MINSTER: What does it mean?

PN297

JUSTICE HATCHER: What is the current practice?

PN298

MS MINSTER: There's – it's - - -

PN299

JUSTICE HATCHER: What is the current practice?

PN300

MS MINSTER: The current practice is that you either get a continuous contract, or if you have more than three weeks, and as expressed with this new clause, you get two separate contracts.

PN301

JUSTICE HATCHER: Yes, that's what I just – I thought this was about the rate of pay during the three weeks. Is that what this is about?

PN302

MR BORGEEST: No – your Honour, this can all be set aside if we're on the track that we were on a moment ago about - - -

PN303

JUSTICE HATCHER: Yes.

PN304

MR BORGEEST: - - - a replacement term for the LPA's - - -

PN305

JUSTICE HATCHER: Yes. I'm just trying to get clear, what does everyone agree upon, if they agree, is the rate of pay that applies over the three-week period.

PN306

MS MINSTER: You have to have a continuous contract, because it's three weeks or less, and you should be paid at your normal rate of pay – your ordinary rate of pay. Not the award rate - - -

PN307

JUSTICE HATCHER: All right. So - - -

PN308

MS MINSTER: Whatever you get paid.

PN309

JUSTICE HATCHER: Yes. So you'll just continue to get your normal week's pay?

PN310

MS MINSTER: Yes.

PN311

JUSTICE HATCHER: So if it's two contracts and this is the gap, how does that work?

PN312

MS MINSTER: There shouldn't be a gap, so you should be paid that amount. If you've got two contracts then the gap should be larger than that, and it's two separate – two distinct periods of employment; two distinct engagements.

PN313

JUSTICE HATCHER: I'm confused. Paragraph (b) –paragraph (a) in MEAA's proposal is where there's a single contract, okay?

PN314

MS MINSTER: Okay.

PN315

JUSTICE HATCHER: Paragraph (b) is where there's more than one contract. So you've got a Sydney contract, and you've got a normal contract, is that right?

PN316

MS MINSTER: Okay. So you don't get paid anything?

PN317

JUSTICE HATCHER: So you don't get paid anything for the three-week gap?

PN318

MS MINSTER: If they're – you shouldn't be issued a contract like that. That's not permitted here. It has to be larger than that gap, and then you don't get paid. That's the status quo. That's what it is at the moment. That is the practice now.

PN319

JUSTICE HATCHER: Go back to your clause 28.4, Ms Minster.

PN320

MS MINSTER: Yes.

PN321

JUSTICE HATCHER: What is that about?

PN322

MS MINSTER: That is about maintaining the status quo. So at the moment - - -

PN323

JUSTICE HATCHER: This is where you could have two or more run of play contracts - - -

PN324

MS MINSTER: Yes.

PN325

JUSTICE HATCHER: - - - which might be across multiple locations?

PN326

MS MINSTER: Correct.

PN327

JUSTICE HATCHER: I thought we just agreed that you can do that, that is, you can have more than one contract provided the gap is no more than three weeks.

PN328

MS MINSTER: Correct.

PN329

JUSTICE HATCHER: Do you get paid during the three weeks?

PN330

MS MINSTER: No, you get – well, if it was three weeks, yes.

PN331

JUSTICE HATCHER: I mean if it's more than three weeks on your proposal, you can't do it.

PN332

MS MINSTER: Correct. No, hang on a minute. If there's two – so contract (a) finishes, contract (b), for example, starts two-and-a-half weeks later. That should be paid the whole time. It shouldn't happen; shouldn't be issuing two contracts. You'd have one contract, and you should be paid that entire time, unless there's lay-off, which you would – you know, you might get paid for later.

PN333

Anyway, if the gap in between productions is greater than three weeks, then you can issue two distinct contracts. You can have one run of play Melbourne, one run of play Sydney, completely separate employments periods, completely separate relationships and engagements.

PN334

JUSTICE HATCHER: I understand that, but what is 28.4 addressing?

PN335

MS MINSTER: 28.4 is addressing the fact that if you had to have a third contract, under the current legislation you would become a permanent employee.

PN336

JUSTICE HATCHER: Yes.

PN337

MS MINSTER: Despite the duration of the period of employment. So you could be employed for less than a year, but you're a permanent employee of this company. But this kind of employment doesn't lend itself to permanent employment. It's a distinct defined (indistinct) production - - -

PN338

JUSTICE HATCHER: I understand that. I just think you're arguing about two completely different things. I just thought what we were talking about, 28.4 would be a condition under this award by which you could enter into two run of play contracts - - -

PN339

MS MINSTER: Yes.

PN340

JUSTICE HATCHER: - - - authorised by the award, provided that the gap wasn't longer than three weeks. Is that what we were just talking about?

PN341

MS MINSTER: Providing that the gap – sorry - - -

PN342

JUSTICE HATCHER: That's what we were just talking about, wasn't it?

PN343

MS MINSTER: Yes.

PN344

JUSTICE HATCHER: I'm getting confused.

PN345

MS MINSTER: So you're saying – sorry, say that again. A weekly performer – 'A company dancer may enter into two or more run of play contracts for the same or similar work where there is substantial continuity' – so it would meet the definition, whatever that - - -

PN346

JUSTICE HATCHER: Yes. So it's the same production – it's the same production, that's the continuity.

PN347

MS MINSTER: Yes.

PN348

JUSTICE HATCHER: But I thought we were talking about a condition.

PN349

MS MINSTER: Yes - - -

PN350

JUSTICE HATCHER: So the gap between the two contracts is not more than three weeks?

PN351

MS MINSTER: Yes. No, it is more than three weeks. You can enter two contracts if they are more than three weeks apart. Otherwise you have to have one contract. I think that we agreed to that with what you've suggested that you have a (indistinct) - - -

PN352

JUSTICE HATCHER: Well, I mean if somebody wants to do it that way, and the gap's more than three weeks, why shouldn't the legislation apply to it, and if they want to then issue a third one that's their risk?

PN353

MS MINSTER: Well I guess that - - -

PN354

JUSTICE HATCHER: They could've done it by a single contract. They've chosen not to. They've decided to do these productions. They're more than three weeks apart. If they do it a third time, that's their risk, isn't it?

PN355

MS MINSTER: They haven't chosen to do so though. This is the only way that you can mount these shows in Australia, sometimes – like, not everyone does it – because there's nowhere for them to keep continuously going. So it will shut down these kind of productions. It will prevent employment. It will prevent a third season, maybe another one. Maybe a show that would have gone to Perth, and people would have had four months more employment, won't get that opportunity if they can't commit this way - - -

PN356

JUSTICE HATCHER: I think we're telling them that the producers don't want lengthy gaps between - - -

PN357

MS MINSTER: No, they don't. They absolutely don't want that. There's a venue shortage in Australia. Where they used to be able to book in these venues and they would hold their booking, now a better show comes along, they throw a smaller show out. Even, like, super large shows - - -

PN358

JUSTICE HATCHER: Well in that case the production comes to an end, doesn't it?

PN359

MS MINSTER: And then everyone doesn't have a job.

PN360

JUSTICE HATCHER: But what's that got to do with this? You're talking about a venue shortage. What's that got to do with this?

PN361

MS MINSTER: Because they can't keep the production going. Like, these productions exist because they can tour, and if they can't keep touring, they won't even have the first show.

PN362

JUSTICE HATCHER: I'm going to stop you. Look, I think I might break and just see the parties separately in private conference. I'm just going to organise a conference room down the corridor, if we can. So just stay where you are and my associate will tell you what the arrangement is. I want to see the applicant first, and then I'll see the respondent. I'll just adjourn until that's organised.

**OFF THE RECORD**

**[11.11 AM]**

**ADJOURNED INDEFINITELY**

**[11:11 AM]**