



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

2.00 PM, MONDAY, 29 APRIL 2024

Continued from 08/04/2024

PN468

JUSTICE HATCHER: Ms Minster, you continue your appearance for the applicant.

PN469

MS MINSTER: Yes, your Honour.

PN470

JUSTICE HATCHER: And, Mr Borgeest, you continue your appearance for the Media, Entertainment and Arts Alliance.

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MR BORGEEST: I do, thank you, your Honour.

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JUSTICE HATCHER: We're on the record. What's the position, if you want to say it on the record or off the record or - - -

PN473

MS MINSTER: I guess, first of all, we've exchanged some correspondence. I got some correspondence this morning from Mr Borgeest about company dancers, how that might be amended. We sent MEAA about a week and a half ago what we thought the mark-up should be, but we haven't had a chance, really, to discuss it, because I got their view this morning. So we were having a conversation before you came in and I'm halfway to understanding what their position is, but it seemed to me from their drafting that it was a little bit different to what we had agreed in principle in the last session, so I'm not sure if that's intentional or if that is what the - - -

PN474

JUSTICE HATCHER: When you say their drafting, you mean their drafting of an award variation - - -

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MS MINSTER: Yes.

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JUSTICE HATCHER: - - - to give effect to part A of the draft agreement.

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MS MINSTER: My understanding is that we agreed that a first-year dancer, in their first professional year, would be afforded a maximum of three years on fixed-term contracts, whether they progress through classifications or not, and it seemed to me that MEAA's drafting seems to say that only those dancers could be engaged on a fixed-term contract and no other dancers would be able to be engaged on a fixed-term contract, which would extend the statutory limitation further, because - - -

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JUSTICE HATCHER: Only what dancers would be - - -

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MS MINSTER: What we agreed last time was say you're a first-year dancer, you've got no professional experience - - -

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JUSTICE HATCHER: Yes.

PN481

MS MINSTER: - - - or you've previously undergone a trainee program with that company, then from your first year you could have three years of fixed-term contracts as a young dancer who's been trained. So it seems to me that MEAA's drafting suggests that they would be the only kind of dancer that would be able to be engaged on a fixed-term contract and any other dancer coming into a company in a first year - because you could have been somewhere else, you come in as a - maybe they assess you as a level 5 - that then you wouldn't be able to have any fixed-term contracts, which is extending the statutory limitation, because if nothing was changed, they would be able to have two years of fixed-term contract like any other employee.

PN482

JUSTICE HATCHER: Yes. I thought we were dealing with the circumstances in which we could go beyond the limitation in the Act.

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MS MINSTER: Yes.

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JUSTICE HATCHER: Is that incorrect, Mr Borgeest?

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MR BORGEEST: No, I think that is what we were focused on when we addressed this on the last occasion. I think that there's - so the idea of the drafting that's being developed was to bring greater precision to the concepts that were agreed, and I think that Ms Minster has identified a point that we can accommodate. I don't think that there's a substantial concern about that and that the drafting that we have proposed can be refined so that the exception here, the exception that this drafting is directed to, is the exception in relation to the first year or junior people and is not intended to exclude the Act otherwise. I think there's room for that to be dealt with.

PN486

JUSTICE HATCHER: All right. So with that clarified, what's the differences in drafting that need to be resolved?

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MS MINSTER: Our view is that our drafting was very simple and quite easy to understand, and so at first, reading MEAA's draft, like, whatever the intention is, it was difficult to kind of understand. So if we have to read it a few times - we want our companies to be able to pick it up and understand what it says, so we're trying to make it as simple as possible.

PN488

I don't know if you would like to see both forms of the draft and see what you think about that. We can send them to you and maybe you'd like to express an opinion on what you think states what we're trying to achieve. Otherwise, I mean, I guess we have to go away and work it out, but it seems that it's not really working so far. So if we can achieve the same goal, if something's proposed today, that would be excellent.

PN489

JUSTICE HATCHER: All right. Well, that's A, so we'll come back to that. What about B?

PN490

MS MINSTER: B, with the extension, so we've agreed that something could be written into the award as a temporary amendment to the award. I've only just read this part that MEAA has proposed. I think they're happy with our drafting, to a degree, it seems to me, but there's something else you've written about - - -

PN491

MR BORGEEST: If I could just put it simply. There were two ways of going about it. One is asking the minister for a special regulation, the other was building in a time limited variation. We're content with the substance of our friend's proposal for the time limited variation in the award. What we've proposed to them is let's agree that once that has done its work, that we'll agree between ourselves that we'll come back and do a consent variation to take it out. So the - - -

PN492

JUSTICE HATCHER: I think we're at cross-purposes. You're talking about items 4 and 5 in the document. I actually jumped ahead to B.

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MS MINSTER: '2. Existing employees may be offered ongoing - on a further fixed-term contract of up to one year.'

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JUSTICE HATCHER: Is that the bit that required the extension?

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MS MINSTER: No, it is an additional year under a fixed-term contract for current dancers, so maybe that's been a bit confused. The first one is to delay - either to extend the current regulation that gives an exemption for these dancers on fixed-term contracts. The second part is that - 'May be offered ongoing further fixed-term contract of up to one year.' So that is for - actually, yes, we did the wrong way round. You're right. So then instead of putting that into a regulation, we have agreed between us, the parties, that we would accept a variation to the award that reflected that.

PN496

MR BORGEEST: On the document in front of you, your Honour, we're talking about point 1.

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JUSTICE HATCHER: Yes. So we're not talking about B, just to be clear, okay, we're talking about what's necessary to effect item 4. Is that what we're talking about?

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MR BORGEEST: No, to effect item 1.

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JUSTICE HATCHER: Item 1.

PN500

MS MINSTER: So there's two issues. I'll break it down, but yes.

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JUSTICE HATCHER: I see, sorry. Item 1, yes.

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MS MINSTER: So there's two issues. One is that it was agreed that ongoing, without limitation, that junior dancers, so level 1, in their first year of professional dancing, would be able to have fixed-term contracts of up to three years, whether that be one contract of three years or ongoing rolling - like, one year, two year, third year. So that's the first issue, and that seems to have been agreed, just that I think that MEAA's drafting doesn't reflect that in a way that is very, very clear, and so we really want to make sure - - -

PN503

JUSTICE HATCHER: Yes.

PN504

MS MINSTER: - - - that if we're going to agree to any changes, that they're super clear.

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JUSTICE HATCHER: So that's item 2.

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MS MINSTER: That is 1, yes, further fixed-term contract up to one year - no, item 2 - so that's the first issue. So 1 and 2 is the issue of that at the moment - - -

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JUSTICE HATCHER: I see. Sorry, yes.

PN508

MS MINSTER: So we've agreed to delay, up to the end of this year, the effect of the statutory limitation on all dancers, and that's to give them time to develop either guidelines or performance review and performance management so that when we start to implement that at the end of the year, that these companies have had time to, like, understand, develop systems and undergo training in order to properly effect that.

PN509

JUSTICE HATCHER: Can I just relay that back to you? So the statutory limitation will not apply at all to company dancers for the rest of the year.

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MS MINSTER: Correct.

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JUSTICE HATCHER: And the proviso is that - so what's the effect of 2?

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MS MINSTER: You can be an existing employee and no matter how many fixed-term contracts you've had up to this point, you can get another one up until the end of this year.

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MR BORGEEEST: That's another way of saying what - - -

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JUSTICE HATCHER: End of this year or end of next year?

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MS MINSTER: No, end of this year. So by, say, at the end of this year, you can be offered one more fixed-term contract for a year.

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MR BORGEEEST: Yes.

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JUSTICE HATCHER: So for another year.

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MS MINSTER: Yes.

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JUSTICE HATCHER: For another year after.

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MR BORGEEEST: Yes.

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JUSTICE HATCHER: Worst case scenario, to the end of 2025.

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MS MINSTER: Correct, yes.

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JUSTICE HATCHER: Yes, okay. Item 3 doesn't need an award variation.

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MS MINSTER: No.

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JUSTICE HATCHER: Item 4 is the ongoing position that newly engaged dancers can have an additional year.

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MS MINSTER: Yes, that's correct.

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JUSTICE HATCHER: What about 5?

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MS MINSTER: Well, I only got MEAA's position on this this morning. We started to talk about it before, in the short while before you walked in, so we haven't had a long discussion about that.

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JUSTICE HATCHER: It might be useful if the parties can have some communications between Commission sessions rather than waiting till the day of. That's what I thought 5 meant, but anyway. All right. So what's the position with respect to number 5, Mr Borgeest?

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MR BORGEEST: There's no difference between the drafting that's been exchanged. They refer to a dancer in their first year, which is effectively the - and there's language for a particular classification in the award which picks that up. So there has been no controversy in how it's expressed between the parties in their respective drafting. Both sets of drafting refer to a company dancer in their first year as a professional dancer, and the award uses that language, a professional dancer in their first year, and that's given a particular classification.

PN531

JUSTICE HATCHER: How does that translate to the definitions in schedule A?

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MS MINSTER: It will be level 1.

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JUSTICE HATCHER: Level 1.

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MS MINSTER: A level 1 company dancer, which is - - -

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JUSTICE HATCHER: A live performance employee level 1.

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MS MINSTER: No, live performance employee level 7, company dancer level 1.

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JUSTICE HATCHER: Level 7. All right. Let's have a look. Yes, all right. Is that agreed?

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MR BORGEEST: Yes, your Honour.

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MS MINSTER: Yes. That's our position.

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JUSTICE HATCHER: All right. So just go back to the delay. Is it agreed that that should be done by an award clause, is it?

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MS MINSTER: Yes, I believe so. I think there's some kind of caveats put on it by MEAA, but I'm yet to properly read those, so I'm just looking at them now.

PN542

MR BORGEEST: The term that's been proposed ceases to have work to do at the end of 2025. So it permits all company dancers to be engaged under a fixed-term contract at any time if it's entered into by the end of December 2024, so that term would cease to have any work to do at the end of 2025, and what we've simply put to LPA in the correspondence is, 'Let's agree that we'll tidy the award and make an application to get rid of that new term in the award', which will have, by that time, ceased to have any work to do, and that we just remove junk from the award. That's the supplement that we put in correspondence.

PN543

JUSTICE HATCHER: Okay. It seems to me that you do agree on A, but we have two different drafts as to how to give effect to that. I can either give you more time to try and resolve that or else you can just give me both your drafts and I'll have - we have internal drafting specialists. We can form our own view as to what's needed to give effect - - -

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MS MINSTER: That is my preference, that we give you both of our drafts and that the drafting team can give what they think is the best version.

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JUSTICE HATCHER: Mr Borgeest, that would seem to be a preferable course to get things done quicker, since there doesn't seem to be a lot of communication between the parties going on.

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MR BORGEEST: Happy to cooperate with that, your Honour, and I take the largest part of the responsibility in that respect.

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JUSTICE HATCHER: All right. B. Have we got a variation for that?

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MS MINSTER: Hang on one moment. No, there was no discussion had on any of these items in the last couple of weeks.

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JUSTICE HATCHER: Do you have a draft variation to give effect to that?

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MS MINSTER: I do not, but what I do have is something to say. We've considered our options more - sorry, I'm just having a bit of computer trouble. At this point, LPA's position is that the history of how the award has operated allows for run of play contracts to continue as they have historically, considering the subject matter and the history of the award, however at this point it's unclear to us whether MEAA agrees to that. They've said that they're not going to - they expect us not to press the issue of variation to the award in that respect any further.

PN551

Our intention is not to vary the effect of the award as it existed to date, so that was really the purpose of our application. We just want to ensure that the statutory - the new limitations on fixed-term contracts are not written in a way that make the award unclear when people are dealing with fixed-term contracts. So we're really looking for a concrete unclear way to proceed. Because we don't know MEAA's position, our view is to make sure that there's no future disputes in an industry where a lot of employers don't have the means to manage such disputes, need absolute clarity when moving forward with contracting.

PN552

Our preference is for there still to be no doubt about the meaning of the award, and we prefer that today if we could have a conversation to build on what we agreed in the last session in our in-principle agreement and perhaps a simple variation could be agreed, and this could be possible with a simple drafting just to ensure that clauses - which is 27.1(a) and 36.1(a) of the award - can continue to operate as they do currently.

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So if MEAA is amenable to this, we might seek a short period to put forward some drafting that would cement that so that we don't come back here and to use time because the parties haven't agreed about what the award means. In our view, it is clear that we can rely on the exception. I think it's the 333F(h) - - -

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JUSTICE HATCHER: Just remind me, what exception are you saying applies?

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MS MINSTER: 333F(h).

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JUSTICE HATCHER: Yes. So the point was that the award currently allows run of play contracts without limitation, and that's the requisite authorisation for the purpose of 33F(1)(h).

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MS MINSTER: That is our view, yes.

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JUSTICE HATCHER: Yes. What's your view about that, Mr Borgeest?

PN559

MR BORGEEST: We understood from what LPA sent to us that arising out of the last occasion and discussion of how the statutory exception might apply to the award as presently set out, that it was open for LPA to adopt that reading of the exception and the award and withdraw those parts of its application and step back from what had been happening up to that point.

PN560

What had been happening up to that point was some discussion around regulation of run of play contracts, including addressing the matter of concern to MEAA as to one-off payments and so forth. So what we understood from what LPA said to us is that they had considered what happened and taken the view that they will pull the application and rely on the statute and the current terms of the award, and we accept that that's what's open for them to do.

PN561

If there's some future examination of that somewhere, we might engage with that, I don't know, but your Honour and the parties here have both looked at the exception and the award and we understand that Live Performance Australia have taken a view and so withdrawn from that discussion we were having about run of play and lay-off and the rest of it.

PN562

JUSTICE HATCHER: I understand all of that, but my question was what's your organisation's view about it.

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MR BORGEEST: I'm sorry, I didn't hear the - - -

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JUSTICE HATCHER: My question was what is your organisation's view about it?

PN565

MR BORGEEST: Well, it's the view I put on the last occasion, that that has considerable force to it, the argument that the exception applies to the award as presently drafted. We don't have a view that we will or won't advance any contention in some other proceeding at any time in the future on that issue. If there was a reason to look at it in a particular proceeding, we would look at it.

PN566

JUSTICE HATCHER: Right. Well, we're not going to get very far with that, but that might - I mean, if it's likely that this is going to lead to disputes down the track, which what you've just said indicates, that might be a good reason to give clarity now. That is, employers don't want to be put in the position where they act on a particular view of how the Act works and find out they're wrong five years down the track and end up with all sorts of problems about liability.

PN567

MR BORGEEST: Indeed, and that was one of the considerations that was for Live Performance Australia to consider in deciding to pull from the table the work we were doing in precisely that domain. We were doing the work in addressing,

'Okay, if we're going to regulate how fixed-term contracts work in this area concerning run of play contracts, then let's do that', and we were deeply engaged in that, and we were advancing the matters of concern to us and were very close to agreement on that, and it was LPA's choice to say, 'Well, we don't want to engage in that anymore. We'd rather rely on the application of the statute.' With respect, I mean, if LPA wants to return to the question of regulating in the award, then we can pick up where we left off.

PN568

JUSTICE HATCHER: Okay. So that gives you three options, Ms Minster. You can either simply proceed with this part of the application and have it arbitrated, you can go back to try and negotiate a compromise with MEAA or you can withdraw this aspect of the application.

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MS MINSTER: At this point, just - - -

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JUSTICE HATCHER: Sorry, just to add one further thought, and that is this, that even if you reached an understanding with MEAA about what the Act means, at the end of the day it doesn't mean anything, because until a court rules on it, MEAA's view about it doesn't give you any certainty, in reality.

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MS MINSTER: I think - - -

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JUSTICE HATCHER: It only takes one individual to take a court action - - -

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MS MINSTER: Yes. I understand.

PN574

JUSTICE HATCHER: - - - and you're stuck with the results.

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MS MINSTER: Unless, of course, we agree to vary the award at the moment to make it - in a more simple way than we've currently put forward in our application and we were to suggest an amendment, which we would do by the end of the week, in a way that's a bit more simple, that just explains what it is now, that 27(1)(a) and 36(1)(a) can continue to operate as they currently do, and perhaps that's just to say that run of play contracts can be period of engagements that are longer than two years and that other kind of consecutive restraints in the statutory limitations perhaps don't apply to the kind of way that we contract, just to make it clear in the award. So at this point I would say that we're not prepared to fully withdraw, but we might put a proposal forward by the end of the week varying our application.

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JUSTICE HATCHER: All right.

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MS MINSTER: If you would permit that.

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JUSTICE HATCHER: All right. Paragraph C is agreed.

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MS MINSTER: We agreed to it last time.

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JUSTICE HATCHER: Yes, that's agreed.

PN581

MS MINSTER: So we haven't changed our position, yes.

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JUSTICE HATCHER: Is there agreed text to give effect to that?

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MS MINSTER: No, there's been no discussion, although I have to say that in the drafting of the way that the amendments have been made to assist with the company dancers, LPA has drafted into - I think it's clause 27, to say that a way that company dancers and performers can be engaged is on a fixed-term basis, but MEAA have removed that from their draft. So I would say that that's in conflict with what we agreed at point C last time, to remove that performers can be engaged on a fixed-term basis where we said we would in the last session, and now it seems that that's not something that they're willing to include in the award.

PN584

JUSTICE HATCHER: Mr Borgeest?

PN585

MR BORGEEST: I confess, I didn't follow that summary. What we had understood from what we received from LPA was that in the consideration of the question about the exception and the subsequent - well, it was apparent that there was a significant narrowing of what parts of the application they chose to pursue, that we had understood from that that the only remaining award variation that was live was that with respect to company dancers, where the LPA put drafting to us.

PN586

If that's not the case in respect of C, then we've misunderstood them and we'll need to re-engage with the drafting in respect of that, but otherwise, with B and D, I had understood that the discussion we've just had about run of play and the exception, that those just fall into the same bucket.

PN587

JUSTICE HATCHER: I thought with D that both parties had agreed that the substantial continuity requirement would not apply where they're different productions. Is that - - -

PN588

MS MINSTER: No, we're in disagreement, actually.

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JUSTICE HATCHER: In disagreement about that.

PN590

MS MINSTER: We had agreed when we were in the session, speaking with your Honour, and then when we went off to have a chat on our own, MEAA decided that they didn't agree that point after all.

PN591

JUSTICE HATCHER: All right. So let's go to D. What's the position with D?

PN592

MR BORGEEST: We had understood, from what we received from LPA last week, that certainly for run of play contracts, LPA was relying on the exception, and so we hadn't closed the book on that. If that is still pressed, then again, we'll need to re-engage with that drafting.

PN593

JUSTICE HATCHER: Right. Just go back to C again. I'm just struggling - what's the difference between you about this?

PN594

MS MINSTER: What I was thinking, or my understanding, was that we had agreed on that in the last session, but then when we wrote 'on a fixed-term basis' into clause 27.1 as a type of employment in the industry - it's been removed from MEAA's drafting that they sent us this morning, and I don't know why.

PN595

JUSTICE HATCHER: So you proposed that 27.1 be varied how?

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MS MINSTER: That we would add 21(c), or wherever it goes, 'on a fixed-term basis'.

PN597

JUSTICE HATCHER: Wouldn't the variation just say, 'On a fixed-term basis for a single production'?

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MS MINSTER: We think it can be on a fixed-term basis for multiple productions. So that's very narrow.

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JUSTICE HATCHER: I'm only reading what you agreed to in paragraph C.

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MS MINSTER: Yes.

PN601

JUSTICE HATCHER: Is that now not what you understood you agreed to?

PN602

MS MINSTER: No, because it seems the only thing that wasn't agreed to was point D, which was, 'Engagement for the same play or on different productions for run of play contracts.' That's what - - -

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JUSTICE HATCHER: Yes. Let's put aside D.

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MS MINSTER: Yes.

PN605

JUSTICE HATCHER: I'm just talking about C. So C talks about a single production.

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MS MINSTER: Yes. So we would be hesitant to agree to that right now, as - - -

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JUSTICE HATCHER: But you did agree to it.

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MS MINSTER: Yes, we do, but we didn't narrow it down to say that it was only for that. This was the points of agreement. We didn't say there wasn't further things, but because we haven't engaged - I mean, we offered to meet last week every day except for Thursday. So we have tried to engage further, and there has been no engagement. And it should be in 36(1)(a) for musicians as well.

PN609

JUSTICE HATCHER: All right. Anything else, Mr Borgeest?

PN610

MR BORGEEST: No. Not for now, thank you, your Honour.

PN611

JUSTICE HATCHER: We might just go off record.

OFF THE RECORD

[2.30 PM]

ON THE RECORD

[2.37 PM]

PN612

JUSTICE HATCHER: I've had the benefit of further off the record discussions between the applicant organisation and the Media, Entertainment and Arts Alliance. Without referring to its contents, where you have been having those discussions by reference to a document which identifies four issues designated as items A, B, C and D, to move the matter forward it's been agreed that the applicant will by the end of this week send to my chambers the draft variations to the Live Performance Award which it considers appropriate to implement its position with respect to items A, B, C and D.

PN613

Within seven days thereafter, MEAA will respond with a marked-up version which sets out its variations, if any, it would propose for the four issues. I will then consider those documents and public a recommendation which will identify the variations, if any, I think are appropriate to deal with the four items. If that recommendation is not accepted or otherwise leads to an agreement between the parties, I will list the matter for hearing before a differently constituted Full Bench. All right. Anything further?

PN614

MS MINSTER: No, thank you, your Honour.

PN615

JUSTICE HATCHER: All right. I thank the parties for their attendance. We'll now adjourn.

ADJOURNED INDEFINITELY

[2.39 PM]