

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26110-1

COMMISSIONER LEWIN

AM2010/25

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

**Application by Musicians' Union of Australia
(AM2010/25)**

Live Performance Award 2010

(ODN AM2008/35)

[MA000081 Print PR988941]]

Melbourne

10.09AM, WEDNESDAY, 5 MAY 2010

PN1

THE COMMISSIONER: Good morning, I'll take the appearances please.

PN2

MR NOONE: Terry Noone for the Musicians' Union of Australia.

PN3

THE COMMISSIONER: Thank you Mr Noone.

PN4

MR HAMILTON: If the Commission pleases, David Hamilton, and Ms Soolin Ong Tan for Live Performance Australia, and with me this morning is Ms Bernadette Hayes from the Gordon Frost Organisation, Mr Alex Budd from Opera Australia, and Ms Helen Williams from the Australian Ballet if the Commission pleases.

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THE COMMISSIONER: Thank you, Mr Hamilton could you just let me know who Gordon Frost Organisation is please?

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MR HAMILTON: I'm sorry Commissioner?

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THE COMMISSIONER: Could you let me know who the Gordon Frost Organisation is?

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MR HAMILTON: The Gordon Frost organisation Commissioner is one of the largest, if not the largest commercial producer of theatrical production in Australia at the moment. At the present time they have a production of Wicked in Sydney, Calendar Girls.

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THE COMMISSIONER: That's fine, the name doesn't necessarily tell you much.

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MR HAMILTON: Sorry?

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THE COMMISSIONER: The name doesn't necessarily tell you much.

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MR HAMILTON: No.

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THE COMMISSIONER: It could be a halfway house.

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MR HAMILTON: The chief executive of that organisation is Mr John Frost, you may have heard of him.

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THE COMMISSIONER: I haven't, I'm sorry. I think his name's probably more familiar to those in the body of the court than to me.

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MR HAMILTON: Probably Commissioner.

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THE COMMISSIONER: Yes, well I listed this matter because I'm not sure that I'm perfectly clear on what the issues are in relation to the matter arising from the process that's been followed in dealing with the application. And it may help me to actually understand a little bit more about the commercial implications of this for for example the Gordon Frost Organisation. I think I'm reasonably clear on what the rationale is in relation to the ballet and the opera, but how the variation sought would effect the type of theatrical production undertaken by the Gordon Frost Organisation or any like organisation, it would help me just to start with that, just explain how this variation would effect such companies or organisations.

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MR HAMILTON: Commissioner would you want Ms Hayes to - - -

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THE COMMISSIONER: Well that's up to you, she's appearing with you Mr Hamilton.

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MR HAMILTON: It might be best if we did put Ms Hayes in the witness box Commissioner so you - - -

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THE COMMISSIONER: Well I wasn't needing evidence unless there's a contest. So if you could just outline how it would affect – the effect of the application on those types of productions.

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MR HAMILTON: Well if I can kick of Commissioner, for many years, probably going back to at least 1991 commercial producers have for their productions organised what's called a scratch band of musicians (indistinct), and those scratch bands are usually engaged in each city around Australia where that production may be touring. And it's usually the capital cities, and depending on the size of the production and the musical score, it will depend on the number of musicians engaged in that scratch band. In engaging the musicians those musicians have been engaged in terms of the previously the Musicians General Award 1971, and then after the simplification process the Musicians General Award 1998.

PN23

Those musicians have been contracted in terms of that award, and have been engaged in accordance with a letter of agreement or a contract which is a pro-forma contract which had been developed by my organisation for the use of members. And each of the producers would use that type of letter of agreement; they could vary it as they saw fit, but as long as they kept to the provisions of the award. Now Commissioner I've got a number of those type of contracts - - -

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THE COMMISSIONER: No I don't think I need to see those, how would the variation affect these performances.

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MR HAMILTON: Well Commissioner under the provisions of the award, that's

both the 71 award, the 98 award, and the present Live Performance Award, the award provisions are silent with regard to archival recordings. And it has been common practice between the producers and the musicians that they engage that – and there is a provision in the contract that basically states that an archival recording of the production will be undertaken for which there will be no payment being made. In all other circumstances where a musician is recorded for broadcast the musician is paid an allowance in accordance with the award, in addition to the musical weekly wage. In my submission - - -

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THE COMMISSIONER: So in fact this would – this variation would affect that archival recording?

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MR HAMILTON: Basically yes.

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THE COMMISSIONER: And there would be one archival recording presumably of the performance, it's not necessary to have more than one.

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MR HAMILTON: I - - -

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THE COMMISSIONER: It's not necessary to have more than one archival recording.

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MR HAMILTON: Not usually Commissioner, occasionally if there is a change of cast when they move from city to city they may undertake - - -

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THE COMMISSIONER: An additional recording.

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MR HAMILTON: - - - an additional archival recording, those musicians engaged at that new centre would be new - - -

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THE COMMISSIONER: And would therefore be subject to the variation?

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MR HAMILTON: Correct, and so - - -

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THE COMMISSIONER: And have you identified what the additional cost would be in these circumstances?

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MR HAMILTON: Well depending on the - - -

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THE COMMISSIONER: Size of the band.

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MR HAMILTON: Size of the band.

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THE COMMISSIONER: Size of (indistinct) - - -

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MR HAMILTON: And it would be – the allowance would be approximately about \$100 per musician. I'm not sure where Mr Noone has placed the - - -

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THE COMMISSIONER: What would be the characteristic size of the scratch band?

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MR HAMILTON: Twenty-two to 28 Commissioner and that would affect every commercial production. It not only would affect commercial production, it would also affect those - - -

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THE COMMISSIONER: Just for the moment I'm interested in the commercial productions, we'll come to the others in due course. So it would be between 22 \$28,000 per production, possibly double that in some circumstances.

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MR HAMILTON: That's correct Commissioner, yes. It should be noted Commissioner that in any archival recording of a commercial production that no employee is paid an additional amount, including performers and stage crew.

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THE COMMISSIONER: Is that usually done as a live – is that an archival recording of a live - - -

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MR HAMILTON: Of a live production?

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THE COMMISSIONER: An event that would otherwise occur which the musicians (indistinct) paid in any event.

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MR HAMILTON: Yes.

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THE COMMISSIONER: Now in the contract, it may be appropriate to look at one now that deals with this question of archival recording?

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MR HAMILTON: Sorry Commissioner?

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THE COMMISSIONER: Now in the contracts that you mentioned.

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MR HAMILTON: Yes Commissioner.

PN54

THE COMMISSIONER: It may be appropriate now to look at one of those that mentions the archival recording?

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MR HAMILTON: Certainly.

PN56

THE COMMISSIONER: Would it be your submission that safeguards ensure that the archival recording is for reference purposes only, and can't be used for any other commercial purpose?

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MR HAMILTON: That is correct Commissioner, that is what the producers want
- - -

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THE COMMISSIONER: In the contract, whereabouts is that?

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MR HAMILTON: In that - - -

EXHIBIT #1 CONTRACT

PN60

MR HAMILTON: Clause 12 Commissioner.

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THE COMMISSIONER: Right, so the principle is that the archival recording cannot be used for commercial purposes except with the agreement of the musicians involved.

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MR HAMILTON: That's correct Commissioner. If the archival recording was to be used for any other purpose other than the archival recording there would be a separate negotiation with the musicians for any payment that may be required depending on the use of that recording. Usually Commissioner the archival recording is not of a quality that would allow exploitation of that recording. It is usually of one or two camera shoot.

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THE COMMISSIONER: I understand. Now (indistinct) the variation now and just for clarity Mr Noone might be able to help me with this.

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: What it seems to do is to sort of add a filmed performance because the existing provisions of the modern award seem to relate to television and radio and broadcast.

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MR NOONE: Correct Commissioner.

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THE COMMISSIONER: And then seeks to I gather deal with the sound recording, although the word sound is not used in proposed Sub-clause E.

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MR NOONE: What - - -

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THE COMMISSIONER: You'll need to stand Mr Noone, it's a hearing today.

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MR NOONE: I'm sorry, I beg your pardon. What the proposed amendment strives to do is to deal with what is stated at the beginning of the relevant clause as it was the original statement in the Musicians General Award previously. And it talks about where an employee is broadcast, telecast, filmed or recorded. So
we - - -

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THE COMMISSIONER: Is E meant to address the subject of a sound recording?

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MR NOONE: We think recorded is specifically a sound recording as opposed to being filmed, or telecast, or broadcast, and that's - that argument is supported by the fact that a previous award governing the employment of musicians in sound recordings alone is quoted as one of the rates in there.

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THE COMMISSIONER: I'm sorry I'm not terribly clear on what your answer to my question is. Is the object -sound recording of proposed Sub-paragraph E, or is it larger than that?

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MR NOONE: Sound recording.

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THE COMMISSIONER: It is sound recording.

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MR NOONE: Yes.

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THE COMMISSIONER: So it's filmed performances and sound recordings of performances.

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MR NOONE: Yes, correct.

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THE COMMISSIONER: So potentially in an orchestral setting the sound recording for archival purposes might be the issue, is that right Mr Hamilton?

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MR HAMILTON: Yes, that's correct Commissioner, but Commissioner a distinction may be that the proposed variation does in E4 provide for overdubbing where an additional minimum call fee is required. With an archival recording there would be no such overdubbing. It is just a straight take from the desk, and put in a can for the producers records.

PN81

THE COMMISSIONER: All right, just let me put something to you for my own verification. It seems to me that as far as the circumstances that would arise are concerned there are potentially sound recordings which would be used for archival purposes, and for other purposes. Is that right?

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MR NOONE: I believe so Commissioner.

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THE COMMISSIONER: And both of them are covered by Sub-paragraph E?

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MR NOONE: That would be our intention Commissioner.

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THE COMMISSIONER: My understanding Mr Hamilton is Live Performance Australia's concern is reference works, archival works?

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MR HAMILTON: Sorry?

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THE COMMISSIONER: My reading of your submissions is that your primary concern is - - -

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MR HAMILTON: Is the archival - - -

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THE COMMISSIONER: - - - to maintain the ability of in particular Opera Australia, Australian Ballet, and live commercial production - - -

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MR HAMILTON: And all the - - -

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THE COMMISSIONER: - - - houses to be able to archive their productions without additional payment.

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MR HAMILTON: That's correct Commissioner, and - - -

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THE COMMISSIONER: And if that principle can be preserved you don't object to the variations, is that right?

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MR HAMILTON: In our submission Commissioner we said if we quarantined archival reference recordings we would have no objection to those allowances that existed in the pre-reform rule – award as - - -

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THE COMMISSIONER: That goes to amount does it?

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MR HAMILTON: Sorry?

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THE COMMISSIONER: Both scope and amount or just amount?

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MR HAMILTON: We would – I believe Mr Noone sought to just include those award provisions that – in the pre-reform award. And we would have no objection to - - -

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THE COMMISSIONER: To the maintenance of those provided there's a – shall we say to use the terrible management terminology, a carve out of the archival and reference activities.

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MR HAMILTON: Archival – that's correct Commissioner.

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THE COMMISSIONER: That's the substantive issue here.

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MR HAMILTON: Yes, and those archival provisions in the old Orchestral Musicians Award, which covers all the ABC – old ABC orchestra's, the Opera & Ballet Orchestra Award, have been provided for in separate clauses.

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THE COMMISSIONER: And my understanding is that your case is that as a matter of fact as opposed to contested interpretation of liability under the previous industrial instruments. That work has occurred without additional payments?

PN104

MR HAMILTON: That's correct Commissioner, and also in 1991 - - -

PN105

THE COMMISSIONER: I've read all that, I'm just talking about historic - -
-

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MR HAMILTON: As a matter of fact there has been no payment to my knowledge of any musicians for archival recordings, that goes back 15 years, and to my knowledge the only dispute we have ever had about the archival recordings was in 1998 - sorry 2008, which I refer to in my submissions in front of Deputy President Ives, and that was more to taking of the second archival recording in the production of Phantom of the Opera, not the first archival recording.

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THE COMMISSIONER: Well that was a dispute about whether or not the musicians had agreed to one or more.

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MR HAMILTON: That's correct.

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THE COMMISSIONER: All right, thank you. Mr Noone, am I correct in identifying the scope of the variation sought encompassing archival recordings as the substantive issue here?

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MR NOONE: If I might step back a little Commissioner. I think we can simplify a little. In our last submission we did in fact request permission to amend our application to make it clear - - -

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THE COMMISSIONER: Yes, well let's assume you've got it.

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MR NOONE: So I have a proposed amendment which says basically anyone covered previously by the – anyone covered previously by the Orchestral Musicians Award, or the Opera & Ballet Award this clause would not apply to them.

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THE COMMISSIONER: That won't address the commercial and live productions though will it?

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MR NOONE: Yes, only the commercial live productions we would be talking about.

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THE COMMISSIONER: All right.

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MR NOONE: So the whole opera and ballet, we're not - - -

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THE COMMISSIONER: But you now propose the commercial live productions should be subject to the variation so that they would have to pay the additional amounts of the archival.

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MR NOONE: Well Commissioner yes, initially but - - -

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THE COMMISSIONER: Initially?

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MR NOONE: Initially Commissioner yes.

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THE COMMISSIONER: Why initially?

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MR NOONE: Because - I think there's actually two issues here. The first issue if I might submit is the transmission of the actual provisions in the original Musicians General Award into the new Live Performance Award.

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THE COMMISSIONER: Yes.

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MR NOONE: The second issue is dealing with this whole argument about archival recordings. Now we are not opposed to coming to some arrangement about archival recordings. But we do note that there's no definition of them in the award, there's no amount specified, there's nothing to - - -

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THE COMMISSIONER: Let's assume all those problems can be solved.

PN126

MR NOONE: If we could sort out – and I'm not assuming Commissioner that it would be a zero payment, but it may in fact be a considerably less payment than what another recording gets, or it may be a zero payment. We don't actually have a position on it. But we would be concerned to basically say we're just going to by customer practice say well the award was flaunted for 15 years, so therefore we'll continue to do so.

PN127

THE COMMISSIONER: That's an argumentative aspect of the situation isn't it, and there's no barrier to that being addressed, but in practical terms for the immediate situation do you quarrel with the proposition that currently commercially produced theatrical productions make an archival recording for which payment is not and has not been made?

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MR NOONE: We're aware this is frequently the case, and we always advise our members not to sign contract of that nature.

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THE COMMISSIONER: That's right; you did allude to that in your materials.

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MR NOONE: And we point out that they are in fact not enforceable because we believe they're contrary to what the award provisions are. We're also aware of the pressure that's on individual musicians in this sort of area, which is quite - - -

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THE COMMISSIONER: All right, well that brings me to another question, what's the meaning of the current award then? I mean I look at it and I think well the issue seems to be this sort of filmed or sound recording if you look at its terms – is it because of the technology the distinctions arising?

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MR NOONE: I don't believe so Commissioner, no. I believe that the problem actually rises from some, if I might describe it is perhaps some careless wording in the putting of these clauses into the original Musicians General Award many years ago.

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THE COMMISSIONER: Well I don't want to go back there; I don't think we're going to be served by dredging up industrial relations issues from that long ago given the nature of the modern award process. The modern

award's by definition has swept away a great deal of industrial history. You only have to reflect on it for a little while and understand that just about every modern award is now basically incorporating dozens of instruments that previously existed in a hybrid form. So continuity's been broken in many respects, and I don't think – I think we could spend a lot of time arguing about what happened a long time ago with not much value. But can I just put this to you, if you have a look at Clause 31.6, when I read it I thought well if – this is for television and radio broadcast, there's no - these allowances in the Live Performance Award, Clause 31.6.

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MR NOONE: I'm sorry I don't actually have a copy of the award in front of me Commissioner, I apologise. I believe I've got a copy of the relevant clause in one of our (indistinct).

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THE COMMISSIONER: You may've therefore not understood what I was raising with you about the technology.

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MR NOONE: Yes, I beg your pardon Commissioner, yes I - - -

PN137

THE COMMISSIONER: Because the award currently says that if you broadcast, telecast films or recorded, and filmed or recorded is what we're concerned with here. The allowances currently exist for a televised performance or for a radio broadcast performance, or for a simulcast.

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: And what you're proposing is to expend it to situations where the performance is not televised, is not broadcast on radio, is not simulcast.

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MR NOONE: Yes Commissioner, specifically the two areas that are mentioned at the beginning of the clause, when they talk about something being filmed - - -

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THE COMMISSIONER: Are you making up the argument, I'm just – it seems to me you confirm that really this is about filming and sound recording.

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MR NOONE: Correct Commissioner.

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THE COMMISSIONER: Where there is no televised performance, no radio broadcast, or no simulcast.

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MR NOONE: Correct, yes.

PN145

THE COMMISSIONER: Now is it your submission that historically the award required the payment of any allowance in the circumstances that are now sought to be provided for.

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MR NOONE: Yes,

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THE COMMISSIONER: You do, as to Musicians General Award.

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: And how do you make that out by reference to that award, have we got that?

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MR NOONE: In the original - - -

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THE COMMISSIONER: All right, I have a Musicians General Award.

PN152

MR HAMILTON: I set it out in my submissions the appropriate clause as well, yes.

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MR NOONE: Seventeen 17 I think Commissioner.

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MR HAMILTON: Yes.

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MR NOONE: Which starts off in the same way as the one in the current Live Performance Award.

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THE COMMISSIONER: But does it specify the allowance

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MR NOONE: What it does, it says the,

PN158

"In addition to the appropriate (indistinct) the employee will be paid the existing rate for each broadcast, telecast, filmed or recorded call."

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So it states that they will be paid the allowance, then it says such time will be varied in accordance with the following awards, and then lists - - -

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THE COMMISSIONER: Sorry let me just read it again.

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MR NOONE: Yes.

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THE COMMISSIONER: It's that wording that you alluded to earlier is it?

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: That it's potentially ambiguous, but it's only as to the amount isn't it?

PN165

MR NOONE: Well we're submitting that what's currently in the Live Performance Award doesn't provide an amount for the two areas that we discussed earlier Commissioner, the filmed and the recorded, and we're attempting to clarify that.

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THE COMMISSIONER: So what are the words that are the problem here in this clause? These are – the employee will be paid for each broadcast, telecast, filmed or recorded call. And there is no existing rate; is that what you're saying?

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"In addition to the appropriate rate of pay the employee will be paid the existing rate for each broadcast, telecast filmed or recorded call. Such sum will be varied in accordance with the following awards as are varied from time to time.

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Is that the meaning that you said was confusing?

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MR NOONE: To me it would mean that the relevant award depending on the type of work that was involved would be the one that would be the source of the allowance. So for example the musician's casual employment and records for sale to the public would be the one for the recorded call. The feature film and documentary would be the one for a filmed call and so on. Now unfortunately in the Live Performance Award, we only get the two definitions, and we don't get anything for a filmed or a recorded call.

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THE COMMISSIONER: And Mr Oakley therefore none was paid?

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MR NOONE: Well we would argue historically it was paid and I don't think everyone would disagree if the call was filmed or recorded; people were paid in accordance with these other awards on top of the normal payment.

PN172

MR HAMILTON: If the Commission pleases there might be cross-purpose
- - -

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THE COMMISSIONER: I think there is, I'm having a little bit of difficulty following what you're putting to me Mr Noone. I understand that what you're saying is that 17.7 becomes 17.71 and et cetera, through to the

17.17.53.

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: So people were to be paid those amounts that are specified there?

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: Right, and does the Live Performance Award adequately capture all of that?

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MR NOONE: Well we don't believe so Commissioner because - - -

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THE COMMISSIONER: All right, so for instance persons working previously under the Musicians & Casual Employment et cetera award, and the Musicians Television & Radio & Commercial Jingles et cetera award, casual employment in television – the way the current award operates those allowances are no longer payable, is that what you're submitting?

PN180

MR NOONE: For the filmed and recorded call Commissioner, yes.

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THE COMMISSIONER: All right, whereas they were payable for filmed and recorded calls unambiguously under the Musicians General Award?

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MR NOONE: I think – well it's certainly our position, Mr Hamilton may have
a - - -

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THE COMMISSIONER: So they're not now payable at least in relation to those awards that are nominated there?

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MR NOONE: Yes, correct Commissioner.

THE COMMISSIONER: Isn't that the primary issue then, if the modern award hasn't captured an existing entitlement – that is the first step isn't it?

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MR NOONE: Yes Commissioner, we believe that that's the first - - -

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THE COMMISSIONER: Now the question of how these archival recordings are to be treated is probably the second step.

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MR NOONE: I'd agree with that Commissioner, yes.

PN188

THE COMMISSIONER: Do you agree with that Mr Hamilton?

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MR HAMILTON: Yes Commissioner, if I refer you to my submissions in Paragraph 3 I sought to explain each of those provisions in 17.17.

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THE COMMISSIONER: Yes I do recall that.

PN191

MR HAMILTON: Yes.

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THE COMMISSIONER: I was just wanting to hear what Mr Noone has to say in relation to those.

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MR HAMILTON: And what Mr Noone is saying is – if I remember correctly the Live Performance Award provides for TV allowance, for radio allowance, and simulcast, it doesn't provide for casual recording, records for sale or the documentary provisions.

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THE COMMISSIONER: Yes, so Mr Noone wouldn't the prudent course of action be to vary the award to ensure that the pre-existing entitlements of musicians in these particular situations that we're talking about are in fact prescribed by the Live Performance – the – yes, the Live Performance Award?

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MR NOONE: We believe so.

PN196

THE COMMISSIONER: And insofar as there's an issue about archival recordings to say that these provisions not apply to archival recordings as defined, made by designated organisations such as the Australian Ballet, Opera Australian, and commercial theatrical productions subject to the definition being satisfactory.

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MR NOONE: If I might just - - -

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THE COMMISSIONER: And then step three would be for you, if you think it's appropriate that they should be paid for, to argue that the award should be varied so as to introduce a payment.

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MR NOONE: If I might Commissioner, there is another element here, that with regard to Opera Australia and the Australian Ballet, I think it is important that what we're attempting to apply doesn't apply to the musicians to work in this area. Because they come from award – they were originally covered by awards - - -

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THE COMMISSIONER: Well they can be catered for.

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MR NOONE: So we actually have an amendment to our application.

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THE COMMISSIONER: Right, so the course of action that I've outlined would be satisfactory?

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MR NOONE: Well the only difficulty we have Commissioner is that from our position we believe that the current entitlement should be that an archival recording should be paid for. Now if we were then to say these will be exempt, well then we're abandoning that position, and then having - - -

PN204

THE COMMISSIONER: Well I'm not suggesting you're abandoning, you would pursue separately the concept of payment for those.

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MR NOONE: If that – if the Commission we would be then in the position of having to argue for what could be put in as a new allowance which we don't think it is a new allowance.

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THE COMMISSIONER: Well that's a matter of argument though isn't it? I don't think that changes anything, I mean you're meeting that argument now.

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: I mean in the context of a decision that was made to vary the modern award, which exposed all of this, and identified the three step process. If that was amenable - - -

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MR NOONE: We'd be certainly amenable to adjusting and going to the three - - -

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THE COMMISSIONER: Well the first step would be to reiterate those entitlements that have been lost in the preparation of the modern award, so that musicians who had those entitlements in the past continue to enjoy them. The second step would be to identify an archival exemption which would be clearly subject to further proceedings, and to identify what constituted an archival recording. And that would be where I would think that following the practice of Live Performance Australia, a contract is entered into, which provides appropriate terms regulating the making of an archival recording, and the prohibition on its commercial sale and use, et cetera, with the agreement of the musicians (indistinct). The third step would be for you to argue in due course as to why it's appropriate that some additional payments should be made for those archival recordings. Now if you can identify that strictly speaking there was an entitlement under an award, but that's in dispute now, then that's one aspect of your case. If on the other hand it was decided that no, historically there has been no such entitlement but it is appropriate that sort of additional payment be made, in the merit of that argument it would have to be made out

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MR NOONE: Yes.

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MR HAMILTON: Commissioner - - -

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THE COMMISSIONER: But isn't that the situation you would face, at least in relation to that very last step, the situation you face now in relation to say the Australian Ballet or Opera Australia? That's the argument that you're having now, but you don't solve the other problems till you solve that problem. This is just ordering the solutions isn't it?

PN214

MR NOONE: Yes, I agree Commissioner, but I do stress there is no argument with Opera Australia or the Australian Ballet, and we're not asking to change anything that affects the musicians that they use.

PN215

THE COMMISSIONER: All right, well that fits with the step two proposition of mine. All right, so are you happy to proceed down that path?

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MR NOONE: Yes Commissioner.

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THE COMMISSIONER: All right, Mr Hamilton?

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MR HAMILTON: Thank you Commissioner. Commissioner I mentioned in my written submissions that we had actually addressed those type of issues in our – one of our exposure drafts, and on discussion with Commissioner Deegan at the time it was decided that there was too many provisions relating to musicians, because we had provisions in there with orchestral musicians, the opera and ballet orchestra. However in the definitions of the Live Performance Award there is a definition of archival and of reference recording that has retained there. Unfortunately all the other provisions that were in our exposure draft were taken out when the Commission was rationalising all those musician provisions. So I believe that that definition does come from either the Orchestral Musicians Award, or the Opera & Ballet Award, or a combination of both, that there is already a definition in the award as it currently stands. We've got no problems with the process that you have just outlined to Mr Noone, yes those two provisions with regard to - - -

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THE COMMISSIONER: I think that you need to actually tighten up the archival and/or reference recording definition. I think you need to put the contractual element in it.

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MR HAMILTON: Yes, and I don't think we will have any issue with that.

PN221

THE COMMISSIONER: And do you understand why, I'm assuming you're very industrial experienced, but you can see – I think there might be some

jurisdictional boundaries in this definition, for the enforceability of which is questionable without the presence of a contract.

PN222

MR HAMILTON: Yes.

PN223

THE COMMISSIONER: And I think that's why you've provided for that in your custom of practice in relation to your membership. You understand that the contracts the foundational basis of this definition being legally affective.

PN224

MR HAMILTON: That's correct.

PN225

THE COMMISSIONER: Do you follow what I'm saying Mr Noone, I'm assuming you do.

PN226

MR NOONE: Yes.

PN227

THE COMMISSIONER: All right, yes I think you need to actually specify that it is a recording made in accordance with a contract such as the one you've evidenced in the proceeding, and then the award can legally govern the use of – the workers performed in payment for that. And if it's not the subject of a contract then obviously the additional payment would have to be made for it in the sort of hypothetical structure of the variation to the award that I'm moving towards. So in other words the allowances would be payable for television, radio, simulcast, filming, sound recording, but the cart out would be if the contractually agreed archival performance or recording. Mr Noone?

PN228

MR NOONE: Yes Commissioner.

PN229

THE COMMISSIONER: I think that would make things a lot clearer wouldn't it?

PN230

MR NOONE: With the reservation that we would like the argument that there should be a payment - - -

PN231

THE COMMISSIONER: And I see a little bit of movement amongst the parties behind Mr Hamilton, but I suspect that for Opera Australia and the Australian Ballet there is no significance given that they are currently governed by enterprise agreements, and I assume they have been for some time since the introduction of certified agreements in 1994, and are likely to remain that way.

PN232

MR HAMILTON: If I could just address the Commission on that point. Commissioner there are occasions where Australian Ballet pay (indistinct) where they may actually be having a scratch band I believe, no? No you can't confirm that, they've also – but with Opera Australia just recently they did do a musical My Fair Lady, where they engaged musicians under the old Musicians General

Award 1998. The provisions of - - -

PN233

THE COMMISSIONER: Well presumably there was a contract for that, that show?

PN234

MR HAMILTON: There was a contract Commissioner, but it was not – they did not use the opera and ballet orchestra musicians.

PN235

THE COMMISSIONER: No, but the point that I'm making is that if this award applied to that employment there'd still be a contract.

PN236

MR HAMILTON: There would still be a contract, yes.

PN237

THE COMMISSIONER: And all the employer would have to do is put the archival term into the contract. It doesn't seem to me to present any problems for the employer, at that term it might be slightly different to the one that you currently distribute in order to create alignment with the award in terms of text, but nothing more than that I would think?

PN238

MR HAMILTON: Yes, thank you Commissioner.

PN239

THE COMMISSIONER: All right, well if we were to go down this path I think some sort of conference at which the initial draft was prepared is probably the most appropriate course?

PN240

MR NOONE: Yes Commissioner.

PN241

THE COMMISSIONER: What I suggest is if the parties – have I made myself clear enough? I'm acutely aware of the fact that Mr Hamilton and Mr Noone are very experienced industrial advocates in this area, and are probably familiar with the sorts of issues that are on my mind more elaborately than I've explained them on the record, and I'm hoping that you may be able to bring me if not an agreed draft, then at least alternative drafts, and we could confer and see whether we can construct a draft that would take us to steps one and two. And the decision if we get to some meeting of minds could reflect the steps that have been taken and the proposed further consideration of the application in relation to any payment for archival recording. Is that suitable Mr Noone?

PN242

MR NOONE: Yes Commissioner, thank you.

PN243

THE COMMISSIONER: And Mr Hamilton?

PN244

MR HAMILTON: Thank you Commissioner.

PN245

THE COMMISSIONER: Good, very well, well I'll adjourn the proceedings to a date for the purpose of conducting a conference to draft an appropriate variation, to reflect the agreed staged process which has been identified today, to deal with the application. Good, I'll let you know, my associate will confer with representatives of the parties as to a convenient date, thank you.

PN246

<ADJOURNED INDEFINITELY

[10.56AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #1 CONTRACT.....PN60