

## Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

### The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Australian Entertainment Industry Association (trading as Live Performance Australia)		
Surname			
Postal address	Level 1, 15-17 Queen Street		
Suburb	Melbourne		
State or territory	Victoria	Postcode	3000
Phone number	0419363744	Fax number	
Email address	<a href="mailto:dhamilton@liveperformance.com.au">dhamilton@liveperformance.com.au</a>		

### If the Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Entertainment Industry Association
Trading name of business	Live Performance Australia
ABN/ACN	43 095 907 857
Contact person	David Hamilton, Director Workplace Relations

### Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

**Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?**

Yes – Please specify the assistance required

No

**Does the Applicant have a representative?**



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

**Applicant's representative**



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person			
Firm, organisation or company			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

**Is the Applicant's representative a lawyer or paid agent?**

Yes

No

## 1. Coverage

### 1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Live Performance Award 2010 [MA000081]

### 1.2 What industry is the employer in?

Live performance

## 2. Application

### 2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

### 2.2 What are the details of your application?

See the draft determination in Attachment A

Attach additional pages, if necessary.

### 2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

See Attachment B

Attach additional pages, if necessary.

### Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	David Hamilton
Date	26 June 2020
Capacity/Position	Director, Workplace Relations



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

**PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS**



## ATTACHMENT A

*Fair Work Act 2009*

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

**The Australian Entertainment Industry Association  
(trading as Live Performance Australia)**  
(AM2020/12)

**LIVE PERFORMANCE AWARD 2010**  
[MA000081]

Live Performance industry

JUSTICE ROSS, PRESIDENT  
XX  
XX

MELBOURNE, XX JUNE 2020

*Application to vary the Live Performance Award 2010.*

A. Further to decision [[2020] FWCFB XX] issued by the Full Bench on XX June 2020, the above award is varied as follows:

1. By deleting the words “until 30 June 2020” in clause X.1 in Schedule X – Additional Measures During the COVID-19 Pandemic, and replacing them with the words “until 30 June 2022”.

B. This determination comes into effect on XX June 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after XX June 2020.

PRESIDENT

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## Attachment B

### Grounds relied upon and submission in support of the Application

1. The Australian Entertainment Industry Association (trading as Live Performance Australia (LPA)) seeks a variation to the *Live Performance Award 2010 (Award)* in the terms as set out at Attachment A of the Application.
2. If granted, the proposed variation would result in the extension of the period of operation of Schedule X - Additional Measures During the COVID-19 Pandemic, by two years, to 30 June 2022.
3. The application is made because of the ongoing challenges and uncertainty facing employers and employees in the live performance industry due to the COVID – 19 pandemic (**Pandemic**).
4. The terms of the Schedule expressly contemplate that the period of operation may be extended by the Commission:

*X.1 Subject to clauses X.2.1(d) and X.2.2(c), Schedule X operates from 8 April 2020 until 30 June 2020. The period of operation can be extended on application.*

5. LPA has reached out to the Media Entertainment and Arts Alliance (**MEAA**) for support of the Application, but at the date of filing there has been no response from MEAA.
6. LPA submits that the extension is necessary, including being necessary to ensure that the Award continues to achieve the modern awards objective.

### The Pandemic, its impact on work in the live performance industry, and the necessity of the extended operation of the Schedule

7. On 25 June 2020, in a joint media release by the Prime Minister and the Minister for Communications, Cyber Security and the Arts on a \$250 million Jobmaker Plan to restart Australia's creative economy, the Prime Minister stated:  
  
*"the commercial arts and entertainment sector was one of the first sectors to be impacted by COVID-19 and will be one of the last to come out of hibernation as social distancing restrictions are eased."*
8. In the fortnight following the first announcement on 13 March 2020 to ban public gatherings of more than 500 people, Australia's live performance industry was swiftly shut down. Government directives to close entertainment venues and restrict public gatherings to no more than two people had an immediate and catastrophic impact on the industry. The repercussions of this are wide-ranging and include loss of industry capability and jobs; compromised community arts access; and reduced diversity of Australian works.
9. Hundreds of arts and entertainment companies and venues were forced to immediately cease operations in mid-late March, and either reschedule or cancel programmed shows, festivals, and events for the remainder of 2020. The associated sunk costs are significant for producers, promoters, artists, and live performance venues. These costs are not recoverable.
10. The production and staging of shows, festivals and events is intensive and reliant on multiple, functioning components. Costs are considerable and supplier and artist contracts are often finalised and paid for months in advance of an event. Sunk costs include those related to content development, programming, national and international touring, marketing and promotion, visa fees, payment of deposits for artists and production services, security fees, and ticketing.

11. According to the Australian Bureau of Statistics (ABS), arts and recreation services businesses have recorded the second-highest number of job losses after accommodation and food services with a 19 per cent decline in payroll jobs in the week ending 2 May 2020.<sup>1</sup> This decline in employment is not surprising given 53% of arts and recreation services businesses have closed their doors, more than any other sector.<sup>2</sup>
12. In another telling effect of the Pandemic on the arts and recreation services, the ABS has reported that:

*“Services industries that were exposed to COVID-19 social distancing restrictions showed corresponding large decreases in job vacancies. Arts and recreation services recorded a 95.2% drop in vacancies (in original terms), reflecting the closures of venues such as casinos, theatres, fitness centres, sporting grounds and zoos, and cancellations of events due to social distancing requirements. The next greatest decreases in job vacancies were seen in Rental, hiring and real estate (67.9%) and Accommodation and food services (65.9%)”.*<sup>3</sup>

13. The tenuous financial position of the live performance industry in Australia has had an adverse impact on its workers. Again, the situation will worsen the longer restrictions are in place and, without certainty as to when venues can reopen to full capacity, limit the ability of companies to retain or rehire workers.
14. There is no guarantee as to when companies can resume operations and when venues can reopen to full capacity. Our industry will reopen gradually as venues reopen and productions are developed and delivered over a six to twelve-month period. This will be dependent on the easing of restrictions on mass gatherings and physical distancing.
15. The enormity of job losses in the arts and recreation services sector was highlighted in the recent *Annual Wage Review 2019-20 Full Bench Majority Decision*<sup>4</sup> at paragraph [45] as follows:

*“[45] The decline in total jobs fall broadly into 3 industry clusters (Chart 1.4):*

- Upper cluster—where total jobs fell by 29.1 per cent in Accommodation and food services and by 26.3 per cent in Arts and recreation services (a weighted average<sup>49</sup> of –28.6 per cent);*
- Central cluster—where job losses range from 10.5 per cent in Information media and telecommunications to 4.0 per cent in Manufacturing (a weighted average of –5.9 per cent); and*
- Lower cluster—where the impact on jobs range from an increase 0.4 per cent in Electricity, gas, water and waste services to an increase of 0.5 per cent in Finance and insurance services (a weighted average of 0.5 per cent).”*

16. The Full Bench also provided detail gathered by the ABS on the adverse impacts of COVID – 19 on businesses and at paragraph [55] noted:

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<sup>1</sup> Australian Bureau of Statistics (2020), *Business Impacts of COVID-19 Survey Week Commencing 30 March 2020*, 7 April 2020

<sup>2</sup> Australian Bureau of Statistics (2020), *Business Impacts of COVID-19 Survey April 2020*, 4 May 2020

<sup>3</sup> Australian Bureau of Statistics (2020), *Spotlight: COVID-19 Impacts on Job Vacancies, 6354.0 – Job Vacancies, Australia, May 2020*

<sup>4</sup> [2020] FWCFB 3500

*“...Upper cluster—83.8 per cent of businesses reported that they anticipated reduced demand for goods and services, 87.3 per cent anticipated reduced cash flow, and 70.2 per cent anticipated a reduced ability to pay operating expenses, all well above the all industries average;...”*

17. In recognising the impacts of the Pandemic on the live performance industry, the Full Bench in determining when any increase to the National Minimum Wage should commence, stated at paragraph [164]:  
  
*“[164] The modern awards in Group 3 cover the industry sectors which have been most adversely affected by the pandemic. These are the modern awards that mostly apply to employers and employees that operate within industries located in the upper cluster. We are satisfied that there are exceptional circumstances justifying the variation determinations in respect of these modern awards coming into operation on 1 February 2021. We estimate that just over one third of non-managerial award-reliant employees are covered by the modern awards in Group 3.”*
18. The Live Performance Award 2010 is contained in Group 3.
19. At the present time, the live performance industry is unable to operate as it did prior to March 2020 and as noted by the Prime Minister above, the industry will be one of the last industries to commence operations again.
20. The introduction of Schedule X and in particular unpaid pandemic leave, has, to our knowledge, not been utilised by any employee in our industry due to the fact that the industry has been shut down by government directives and restrictions and that the majority of those employees who are working are doing so from home. Theatres, concert halls and other performing spaces and venues remain idle, as do performers, musicians, creatives, production and support staff.
21. There are now signs that governments are moving cautiously in easing restrictions, which is most welcomed. However, the requirements of physical distancing and limits on the number of people allowed in one place mean that there are limited opportunities for businesses to commence operations.
22. As noted above there is no guarantee as to when companies will be able to resume operations and when venues can reopen to full capacity. With the easing of restrictions on mass gatherings the industry will gradually reopen, but the issue of physical distancing will curtail the ability for organisations to undertake the vital preparation work required to produce a live performance. The ability for creatives to plan a production, to conduct auditions for shows, to rehearse performers, musicians, dancers or other performing artists requires a considerable amount of time and cannot happen quickly. A festival cannot happen within a couple of weeks. Venues are booked up to 2 to 3 years in advance and cannot open and have product on its stage ready to go at a moment's notice. The majority of productions will need at least 6 to 8 weeks of advertising and marketing in order to sell tickets for that show. Combined with the uncertainty of the containment of the Pandemic, it will take time for the industry to get back on its feet.
23. The industry expects that within 6 to 12 months' there will be some live performance activity, but not to the same extent that was occurring before March 2020. Indeed, depending on the prevalence of the Pandemic, the industry does not expect to be back to full capacity before 2023. As the industry moves towards reactivation, employment prospects will become brighter, but in reduced numbers.



24. Action is presently being taken to develop health and hygiene protocols for the industry as we move slowly towards reactivation. Each venue is developing COVID – 19 Safe plans for their employees and for audiences. As venues slowly come back to life, additional training will be required for employees and new ways of operating will be required to ensure physical distancing requirements are met.
25. LPA is seeking an extension of Schedule X for a period of 24 months. As noted above, the industry will be slowly reactivating and will not be back to pre-March 2020 activity for some time.
26. On 1 April 2020 the Full Bench in its Statement<sup>5</sup> on the introduction of additional measures during COVID – 19 pandemic, stated in paragraphs [53] to [55]:

***[53]** As with paid personal leave, it appears that the protection against dismissal under s 352 may not apply to an employee required to self-isolate because they have been exposed to someone infected with COVID-19, if the employee has not tested positive to COVID-19, is not displaying any symptoms and is not unfit for work because of personal illness.*

***[54]** The gaps in leave entitlements and protections against dismissal outlined above could be addressed for employees to whom awards apply, by providing an entitlement to unpaid ‘pandemic leave’ if employees are required to self-isolate or are otherwise prevented from attending work where they are required by their employer to attend, by measures taken by government or medical authorities in response to the COVID-19 pandemic. As well as providing an entitlement to leave to employees who have no existing leave entitlements available to them in these circumstances, such a new leave entitlement would supplement existing leave entitlements and constitute a ‘workplace right’ for the purposes of the general protections under the Act.*

***[55]** The unpaid pandemic leave we are proposing is intended to be a short-term measure to address the ‘regulatory gap’ outlined above.”*

27. LPA submits that the particular circumstances regarding the slow reactivation of the live performance industry warrant an extension of the unpaid pandemic leave provisions for at least 24 months.
28. The Pandemic has not been eradicated and therefore poses considerable risks for the industry to function as it once did. By extending Schedule X, it will ensure the regulatory gap will be addressed during the reactivation of the industry. Unfortunately, this is not a short-term problem for the live performance industry.

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<sup>5</sup> [2020] FWCFB 1760