

Fair Work Commission

Modern Awards Review 2023-24 | Arts and culture sector

AM 2023/21

SUPPLEMENTARY SUBMISSION OF MEDIA, ENTERTAINMENT AND ARTS ALLIANCE

The MEAA has contributed to a joint submission together with the ACTU and Professionals Australia, including by nominating a number of occupations or roles working in screen and broadcasting production, and/or working in live performance, that were there said not to be covered by a modern award but in our view should be (ACTU/MEAA/PA submission at page 5).

It was suggested, during the conference convened by Deputy President Millhouse on 20 December 2023, that further information or submissions would assist interested parties and the Commission in the consultation phase of the review, and the MEAA offered to provide further information or submissions.

Below, the MEAA's contentions as to coverage gaps, under the *Broadcasting, Recorded Entertainment and Cinemas Award 2020 (BREaC Award)* and the *Live Performance Award 2020 (LP Award)*, are elaborated (and in some parts, withdrawn).

1. BREaC Award

1.1 Audio book recording, and Schedule B

'Audio book recording' is one example of an activity or enterprise, involving potentially a number of different occupations, which may be examined to illustrate one form of coverage gap apparent from the terms of the BREaC Award.

The coverage gap arises from (a) a part of the industry definition which embraces a range of enterprises of a particular kind, (b) the specification of a number of occupations in one of the schedules to the Award which may have broad reach within that subset of enterprises, while (c) the terms of that schedule restricting the coverage of occupations to a subset of the particular part of the industry. The coverage gap may be addressed without expanding the range of particular

occupations specified in the schedule.

The ‘broadcasting, recorded entertainment and cinema industry’, as defined in the Award (cl 4.2), includes ‘production ... of audio ... content ... for ... sale to the public, digital media release or release in any other medium’.

That part of the description of the industry which refers to the production of audio content straightforwardly contemplates the enterprise of audio book recording and publishing.

Audio book recording, in the sense of reading and performing, is a mode of vocal performance. The enterprise of audio book recording and publishing commonly (and perhaps universally) necessitates the engagement of a voice actor as performer.

It is not here suggested that a voice actor or performer is an occupation which falls in a coverage gap. A voice actor engaged in audio book recording would, it may be accepted, work under the classification of Performer Class 1 or Performer Class 2 specified under Schedule E (‘Artists’).

The enterprise of production of audio books requires more than engagement of a voice actor as performer. Various technical or production occupations are necessarily engaged also.

Technical or production employees associated with the production of audio books, or production of ‘audio ... content ... for ... sale to the public, digital media release or release in any other medium’ more broadly (such as, for example, audio content in the nature of podcasts), appear not to fall within classifications specified in any schedules of the BREaC Award.

Schedule A and Schedules C-G (inclusive) plainly have no application to the subject of the engagement of technical or production employees in the production of audio content for sale to the public (etc).

Schedule B (‘Radio Broadcasting’) identifies some generic classifications which resemble or may (subject to the removal of some words of limitation) apply to technical and production staff involved in the production of audio content for sale to the public (etc) (eg engineer, technician).

It appears from the title to Schedule B and some of the text in that schedule that the classifications or occupations there specified are intended to apply only within that part of the industry which is associated with radio stations and broadcasting. That limitation would appear to exclude coverage of occupations in that part of the industry associated with the production of audio content outside radio stations and broadcasting

That exclusion might be remedied by adjusting Schedule B to enlarge that part of the industry to which it refers, not specifically to provide additional classifications, but to apply more generally to the production of audio content within the scope of the industry definition, not merely to the

production of radio broadcasting.

It is suggested that, in the course of its investigation of coverage gaps, the Review may consider the question of expanding the reach of the Schedule B classifications beyond radio stations and broadcasting to embrace enterprises within the scope of that part of the industry definition which contemplates the production of audio content for sale to the public (etc).

1.2 General comments in respect of remaining nominated occupations

In respect of the balance of the occupations nominated by the unions' joint submission as working in screen and broadcasting production (Choreographer, Intimacy coordinator, Safety Coordinator and Chaperone) different questions arise as between employees working in that part of the industry identified as television broadcasting (Schedule A), and that part of the industry identified as motion picture production (Schedule G).

Schedule A (Television Broadcasting) is a schedule organised around a structure specifying particular occupations (eg 'captioner', 'supervising technician', 'senior audio director' etc). The structure is an exhaustive list. Employees engaged by enterprises within the 'television broadcasting' part of the industry definition, and who work in occupations not specified in that exhaustive list, fall within a coverage gap. Each of the abovementioned occupations or classifications (Choreographer, Intimacy coordinator, Safety Coordinator and Chaperone) is an occupation which falls outside the scope of the exhaustive list.

By contrast, Schedule G (Motion Picture Production) is a schedule enumerating generic classification levels, each of them a genus which is characterised by 'indicative' 'standards and tasks'. The set of indicative standards or indicative tasks characterising or illustrating the genus is not an exhaustive list of particular classifications. The structure of generic classification levels in Schedule G is directed to distinguishing relative seniority. There is no evident exclusion of any particular occupation which might be engaged by an enterprise within the Motion Picture Production part of the industry definition. When understood in that way, Schedule G can be accepted as contemplating each of the abovementioned occupations (Choreographer, Intimacy coordinator, Safety Coordinator and Chaperone).

Against that background, the relevant occupations will be addressed, below, as instances of coverage gaps within the television broadcasting part of the industry, but not as coverage gaps within the motion picture production part of the industry.

1.3 Choreographer

The occupation of choreography is identified in the ANZSCO unit groups cited in Chapter 2 of the discussion paper prepared by staff assisting the Commission. The discussion paper records (at

Table 1) that preliminary analysis performed by staff assisting the Commission concluded that none of the Awards under consideration (including the BREaC Award) cover the occupation of choreographer.

For the reasons set out above, it is submitted that while there is no express reference to the occupation of choreographer in the BREaC Award, the generic classification levels in Schedule G (Motion Picture Production) are sufficiently broad to embrace the occupation of choreographer. The coverage gap under consideration here is limited to that arising in relation to Schedule A (Television Broadcasting).

In its 4 December 2023 submission, ACCI has suggested (paragraphs [75]-[77]) that choreographers might be excluded from award coverage by s 143(7). There is no presently apparent reason to conclude that that is so, and certainly no reason for the Review to decline to investigate the potential coverage gap for choreographers on that basis.

Subsection 143(7) provides, at (a), that a modern award must not be expressed to cover classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States).

Subsection 143(7) does not operate to prohibit terms expressed to cover classes of employees merely or simply because a term identifying that class has never before appeared expressly in any award. Subsection 143(7)(a) operates as a limitation only where the Commission can be satisfied that the fact that a term identifying that class has never before appeared expressly in any award can be shown to have arisen for a particular reason: that because of a particular appreciation of the ‘nature or seniority’ of the role, it has become ‘traditional’ that it thus never appear. The Commission would require some material upon which to achieve that state of satisfaction.

1.4 Intimacy coordinator

The occupation of Intimacy Coordinator is a relatively new role to be performed in various enterprises of the kind falling within the industry definition of the BREaC Award.

An Intimacy Coordinator may perform functions akin to an assistant director in the sense of directing an aspect of a performance, and also functions of an advocate or guardian of the interests and welfare of a performer called upon to perform scenes involving nudity and/or sexualised intimacy.

In recent years, MEAA has developed and promoted Intimacy Guidelines for Stage and Screen (November 2020).¹

¹ <https://www.meaa.org/wp-content/uploads/2020/11/MEAA-Intimacy-Guidelines-for-Stage-and-Screen.pdf>

The Guidelines were prepared in discussion and collaboration with other industry organisations. The Guidelines illustrate the range of issues which an Intimacy Coordinator might be engaged to address, or tasks which may commonly be performed.

1.5 Safety Coordinator

The role of ‘safety coordinator’ (howsoever styled, including ‘safety officer’ and ‘safety supervisor’) is an occupation contemplated by the *National Guidelines for Screen Safety* (Version 11, February 2022) produced by the Media Entertainment & Arts Alliance and Screen Producers Australia.²

The Guidelines were produced with the support of Film Victoria, Media Entertainment & Arts Alliance, Screen Australia, Screen New South Wales, Screen Producers Australia, Screen Queensland, Screen Tasmania, Screenwest and the South Australian Film Corporation.

1.6 Chaperone

The role of ‘chaperone’ performs the function of supervising child performers, with the authorisation of the child's parent(s) or guardian(s), and in otherwise in accordance with appropriate regulations, codes and guidelines concerning the employment of children and employment of children in entertainment industries: eg. *Children and Young Persons (Care and Protection - Child Employment) Regulation 2015* (NSW); *Mandatory Code of Practice for the Employment of Children in Entertainment 2014* (Vic); *Child Employment Regulation 2006* (Qld). A common requirement would be that the person performing such a role be an adult with training or experience in the care of children of the age of the child to be supervised.

1.7 Occupation nomination withdrawn

MEAA does not further press consideration, as a subject matter for investigation in the Review, the occupation ‘cultural and cultural safety consultant’.

2. LP Award

The MEAA’s contribution to a joint submission (together with the ACTU and Professionals Australia) included nomination of a number of occupations or roles working in live performance (that is, employed by enterprises within the scope of the industry definition in the LP Award) that were there said not to be covered by a modern award (cf ACTU/ MEAA/ PA submission at page 5).

² <https://www.screensafety.com.au/safety-guidelines>

MEAA's revised contention is that, among those nominated occupations, most are likely to be covered by the LP Award and some of those nominations are to be withdrawn; however, for some of them there may be some ambiguity or uncertainty that might be investigated as a potential coverage gap.

The possibility of ambiguity or uncertainty arises by reason of the structure of the terms regulating or specifying classifications under the award.

The LP Award is expressed to cover 'employers throughout Australia in the live performance industry and their employees in the classifications set out in this award' (cl 4.1). The 'live performance industry' is defined at 4.2(a). The 'classifications in which employees may be employed' are set out in Schedule A ('Classification Definitions') (cl 10).

Schedule A combines different kinds of specification of classes of employee.

There are 15 levels of classification of 'Live Performance Employee'. Within those levels, there is a mix of specific and generic description of classes of employee.

The schedule includes specification of various single classifications associated with a single particular occupation, expressed either with very brief explanations or no explanation at all (opera principal, musician, Musician required to accompany artists, Technical Manager, Principal Musician, Vocalist and Conductor-Leader). The schedule also includes multiple classifications, at different levels, for 'company dancer' and 'performer'.

The most expansive and generic set of classifications in Schedule A are those referable to 'production and support staff'.

The specification of various levels of 'production and support staff' involves the enumeration of generic classification levels, each of them a genus which is characterised by 'indicative tasks' and/or 'indicative positions'. A set of indicative tasks and indicative positions characterising or illustrating a genus is not an exhaustive list of particular occupations. The structure is evidently directed to distinguishing relative seniority; there is no evident exclusion of any particular occupation which might be engaged by an enterprise within industry definition, so long as that occupation (a) may properly be characterised as falling within the genus 'production and support staff', and (b) does not otherwise fall within any of the particular identified other occupation classifications.

2.1 Choreographer

The occupation of choreographer is identified in the ANZSCO unit groups cited in Chapter 2 of the discussion paper prepared by staff assisting the Commission. The discussion paper records (at

Table 1) that preliminary analysis performed by staff assisting the Commission concluded that none of the Awards under consideration (including the LP Award) cover the occupation of choreographer.

The occupation of choreographer might be said to be covered by the LP Award if it could be contended that choreographer is a species of the genus 'production and support staff'. In the MEAA's view that contention is unlikely to be sustained.

On that assumption, there is a coverage gap. There is no specified classification for the particular occupation of choreographer in the LP Award.

Contrary to submissions of ACCI and Live Performance Australia, subsection 143(7) is no obstacle to the rectification of the identified coverage gap.

Subsection 143(7) does not operate to prohibit terms expressed to cover classes of employees merely or simply because a term identifying that class has never before appeared expressly in any award. Subsection 143(7)(a) operates as a limitation only where the Commission can be satisfied that the fact that a term identifying that class has never before appeared expressly in any award can be shown to have arisen for a particular reason: that because of a particular appreciation of the 'nature or seniority' of the role, it has become 'traditional' that it thus never appear. The Commission would require some material upon which to achieve that state of satisfaction.

ACCI and LPA rely on an asserted identity between the occupations of choreographer and artistic director, and impute to the role of choreographer the asserted managerial responsibilities of the role of artistic director. The asserted managerial responsibilities are then relied upon as a foundation for a claim that the role of choreographer is thereby within a class of workers traditionally excluded from award coverage by reason of the role's 'nature and seniority' (ss 143(7)(a)). That reliance is misconceived.

The role of a choreographer is one of composition and performance direction, more closely and essentially akin to a composer of music than to a managerial artistic director.

The variety of choreography roles in enterprises within the industry definition may include, on the one hand, roles in which composition and performance direction functions are combined with the functions of company leadership and managerial artistic direction. On the other hand, choreography roles may be restricted to composition and performance direction, free of managerial artistic direction responsibilities.

Assuming (without any concession) that it could be established, upon proper material, that managerial artistic direction roles, or roles including managerial artistic direction functions, are excluded from award coverage generally, or excluded from expression in the LP Award in

particular, it would remain open to craft an occupation classification definition for a choreographer role which expressly excluded application to those workers who combine strictly choreographic functions with relevant managerial artistic direction functions.

2.2 Intimacy coordinator

The occupation of Intimacy Coordinator is a relatively new role to be performed in various enterprises of the kind falling within the industry definition of the BREaC Award.

An Intimacy Coordinator may perform functions akin to an assistant director in the sense of directing an aspect of a performance, and also functions of an advocate or guardian of the interests and welfare of a performer called upon to perform scenes involving nudity and/or sexualised intimacy.

In recent years, MEAA has developed and promoted *Intimacy Guidelines for Stage and Screen* (November 2020).

The Guidelines were prepared in discussion and collaboration with other industry organisations. The Guidelines illustrate the range of issues which an Intimacy Coordinator might be engaged to address, or tasks which may commonly be performed.

The MEAA considers that the role of intimacy coordinator falls within the generic classification structure of 'production and support staff'.

This is so notwithstanding that the MEAA has identified no particular 'indicative tasks' or 'indicative positions', set out in any of the particular production and support staff classification level descriptions, which might be strongly associated with the tasks or role contemplated by the intimacy coordinator occupation. As noted above, a set of indicative tasks and indicative positions is not an exhaustive list of particular occupations.

If, upon investigation, the Review concludes that there is ambiguity or uncertainty as to whether the role of intimacy coordinator falls within one or more of the 'production and support staff' classification levels, the Review might consider the merits of identifying that role as an 'indicative position' at one or more of those levels.

2.3 Chaperone

The role of 'chaperone' performs the function of supervising child performers, with the authorisation of the child's parent(s) or guardian(s), and in otherwise in accordance with appropriate regulations, codes and guidelines concerning the employment of children and employment of children in entertainment industries.

Live Performance Australia has developed and maintains the *LPA Code of Practice: Child*

Employment in Live Entertainment (August 2016). That Code of Practice was developed including by consultation and discussion with MEAA. The Code contemplates (as an alternative to supervision of a child performer by the child's parent or guardian) the engagement of a person to provide adequate and direct supervision, the person being an adult with appropriate training or experience in the care of children of the age of the child to be supervised.

The MEAA considers that the role of chaperone falls within the generic classification structure of 'production and support staff'.

This is so notwithstanding that the MEAA has identified no particular 'indicative tasks' or 'indicative positions', set out in any of the particular production and support staff classification level descriptions, which might be strongly associated with the tasks or role contemplated by the chaperone occupation. As noted above, a genus characterised by indicative tasks and indicative positions is not an exhaustive list of particular occupations.

If, upon investigation, the Review concludes that there is ambiguity or uncertainty as to whether the role of chaperone falls within one or more of the 'production and support staff' classification levels, the Review might consider the merits of identifying that role as an 'indicative position' at one or more of those levels.

2.4 Occupation nominations withdrawn

MEAA does not further press consideration, as subject matters for investigation in the Review, the occupations of

- Music Teacher / Educator
- Clowns and birthday party entertainment
- Automation, rigging and fly systems technician
- Broadcast specialist
- Drone operator
- Festival and events staff
- Cultural and Cultural Safety Consultant

MEAA

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