

## FAIR WORK COMMISSION

**Matter No:** AM 201/259  
**Applicant:** Media, Entertainment and Arts Alliance  
**Respondent:** Birch Carroll and Coyle Limited and other cinema industry employers and Australian Entertainment Industry Association (trading as Live Performance Australia)

### The issue

1. The Full Bench has asked as to the meaning and effect of clause 13.4 of the exposure draft *of the Broadcasting Recorded Entertainment and Cinemas Award 2010 (BRECA)* and in particular whether the calculation process is one that is based upon a cumulative or compounding process or, in more technical terms, whether the 8% allowance is an allowance for all purposes.

2. That subclause states:

All employees in cinemas will receive a 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties.

3. That clause is derived from clause 14.12 of the Modern Award. That clause states that:

14.12 Employees in cinemas

...

All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.

### Some terms defined

4. The meaning of *all purpose* was itself examined by the Full Bench in the *Four yearly review of modern awards* [2015] FWCFB 4658 (13 July 2015):

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*"[40] Allowances and, less commonly, casual loadings, have been defined as applying 'for all purposes' in awards for many years. The payments were so identified during the Structural Efficiency process, following the disaggregation of allowances such as industry allowances that compensated for the disabilities associated with working in a particular industry, from properly fixed minimum rates of pay. These payments have historically been treated as part of an employee's wages for the purpose of calculating penalties and loadings...*

*[43] The term 'ordinary hourly rate' has been used in contrast to 'minimum hourly rate' in affected awards to make it clear that all purpose allowances must be added to the minimum rate of pay before calculating any penalty rate.*

*[44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate before calculating the loaded rate, that is, there is a compounding effect."<sup>1</sup>*

5. The crucial question is whether the allowance is part of the 'ordinary hourly rate'. What though does that mean?

6. The meaning of allowance was described in *Kucks*<sup>2</sup>:

*"allowance" as "an addition on account of some extenuating or qualifying circumstance".*

7. The meaning of an analogous phrase *ordinary time rate of pay* was defined in *Kucks*<sup>3</sup>:

*"Unless the context otherwise requires, "ordinary time rate of pay" means the rate of pay for the standard or ordinary hours of work in contrast to the overtime or penalty rate of pay for hours of work other than the standard or ordinary hours."*

### Interpreting Awards

8. It is trite that narrow or pedantic approaches to the interpretation of an Award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and

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<sup>1</sup> <http://classic.austlii.edu.au/au/cases/cth/FWCFB/2015/4658.html>

<sup>2</sup> *Kucks v CSR Limited* [1996] IRCA 166 (19 April 1996) (1996) 66 IR 182, <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/IRCA/1996/166.html> at 185

<sup>3</sup> *Kucks v CSR Limited* [1996] IRCA 166 (19 April 1996) (1996) 66 IR 182, <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/IRCA/1996/166.html> at 186

industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the Award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for<sup>4</sup>. Its words must not be interpreted in a vacuum divorced from industrial realities<sup>5</sup>.

9. Nevertheless, as the Full Bench majority stated in *JJ Richards*<sup>6</sup>, the text of a provision, read in context and having regard to the object and purpose of the provision, is always the surest guide<sup>7</sup>. The task is to interpret the award, not to remake it<sup>8</sup>.
10. Context, whether historical or textual, is crucial to the determination of meaning:

*"The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '...the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken' ..."*<sup>9</sup>

#### The historical context

11. The pre modern *Entertainment and Broadcasting Industry - Cinema Award - 1998* seems to have adopted a relatively stable wording [subject to differences in the wage rates and references to some footnoting]:

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<sup>4</sup> *Kucks v CSR Limited* [1996] IRCA 166 (19 April 1996), (1996) 66 IR 182, <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/IRCA/1996/166.html> at 184

<sup>5</sup> *Re City of Wanneroo v Michael Lindsay Holmes* [1989] FCA 369; 30 IR 362 (12 September 1989), <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1989/369.html> at 378

<sup>6</sup> *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia*; [2010] FWAFB 9963 (23 December 2010); (2010) 202 IR 180, <https://www.fwc.gov.au/documents/decisionssigned/html/2010fwafb9963.htm>

<sup>7</sup> at 191, [29]

<sup>8</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 (28 June 2013), <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2013/638.html> at [77]

<sup>9</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union* [2006] FCA 813 (28 June 2006), (2006) 153 IR 426, <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2006/813.html> at [53]

## 16.1 Wage rates

...

The following will be the minimum weekly rates of pay to operate from the first pay period on and from 10 January 2005:

Classification	Base rate per week \$	Penalty averaging per week \$	Minimum rate per week \$
Cinema Worker 1	504.97	40.39	545.36
Cinema Worker 2	546.68	43.73	590.41
Cinema Worker 3	642.64	51.41	694.05

12. That wording makes clear that the allowance was part of the minimum rate of pay for standard or ordinary hours of work. It was paid whether or not the employee actually worked Sundays. It stood in contrast to the overtime or penalty rate of pay for hours of work other than the standard or ordinary hours.
13. The Award clause was varied in 2012. SDP Hamberger described this variation in *Village Cinemas Australia Pty Ltd and others re Modern Awards Review 2012; cinemas - applications to vary the Broadcasting and Recorded Entertainment Award 2010* [2012] FWA 8761 (2 November 2012)<sup>10</sup> at [8] - [9]:

The second change is to clause 14.12. The name of the clause is changed from “Cinema Workers” to “Employees in cinemas”. The clause itself is changed so that it reads:

“All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced Public Holiday penalties.”

This change is designed to ensure that all employees in cinemas, whether they be managerial or ‘cinema workers’ receive the 8% penalty averaging component. Similarly, clause 26.3 is renamed ‘Special provisions for employees in cinemas’ and clause 26.3 (a) is changed to read:

“Clause 26.2 will not apply to employees in cinemas.” (This is instead of applying only to “Cinema Workers”, as now).

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<sup>10</sup> <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWA/2012/8761.html>

14. The Full Bench in application by the Australian Entertainment Industry Association (AEIA) to vary the *Broadcasting and Recorded Entertainment Award 2010* [2009] AIRCFB 998 at [2], [5]<sup>11</sup> described the clause when introduced in the following way:

Penalty averaging clause

The AEIA submits that a penalty averaging clause has been a feature of the *Entertainment and Broadcasting Industry – Cinema Award – 1998* since 1997. The clause provides that cinema workers receive an additional 8% in lieu of Sunday penalty payments and reduced public holiday penalties for casuals. The modern award does not include the penalty averaging provision but includes Sunday penalty rates and increased public holiday penalty rates. It was put by the AIEA that the provisions of the modern award have the effect of reducing the take home pay of those employees who work Monday to Saturday shifts while providing penalty rates for only those employees who are required to work on a Sunday.

In response to the MEAA position the AEIA reiterated that the current penalty averaging provision was negotiated between the parties during the minimum rates adjustment process, was included in the award as part of the minimum rate rather than an all-purpose allowance, and was approved as part of the properly fixed minimum rate when the current award was simplified. It also submitted that the penalty averaging component, which is set as a percentage of the base rate, retains the minimum rates relativities. ...

15. On 16 June 2017 on Transcript<sup>12</sup> in *Four yearly review of modern awards* (AM2014/259), Mr Hamilton of the LPA, at PN64, referred to the history of the Award and advised VP Catanzariti that the 8% loading
- “was never put in to the award as an allowance. It was our submissions in 2009 that it was part of the minimum rate.”

16. The Full Bench summarised the history in *4 yearly review of modern awards-- Award stage--Group 4 awards* [2018] FWCFB 1548 (21 March 2018)<sup>13</sup> as follows.

[243] LPA submitted that the reference in clause 13.4 of the exposure draft to the 8% loading being payable for all purposes is incorrect as the loading is not payable for all purposes.

[244] LPA submitted that the 8% loading was introduced into the relevant pre-reform award by consent between LPA and the Media Entertainment and Arts Alliance (MEAA), and that it was not an all purpose allowance when it was inserted. The loading was reintroduced into the modern award after having initially been excluded. LPA submitted that a Full Bench of the

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<sup>11</sup> <http://www.airc.gov.au/awardmod/databases/general/decisions/2009aircfb998.htm>

<sup>12</sup> Attached Annexure A

<sup>13</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2018fwcfb1548.pdf>

Australian Industrial Relations Commission (AIRC) acknowledged its submission that the allowance is not payable for all purposes in 2009 when the decision was made to reintroduce the loading.

[245] Interested parties advised that they had reached agreement that the 8% loading applies to the minimum rate of pay for each hour worked.

[246] The inclusion of this penalty payment was introduced as a result of a previous Full Bench Decision. That Full Bench explained:

‘[8] The second change is to clause 14.12. The name of the clause is changed from “Cinema Workers” to “Employees in cinemas”. The clause itself is changed so that it reads:

“All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced Public Holiday penalties.”

[9] This change is designed to ensure that all employees in cinemas, whether they be managerial or ‘cinema workers’ receive the 8% penalty averaging component...’

[247] The previous Full Bench did not indicate whether the 8% allowance was payable for all purposes, nor did it indicate whether the allowance was cumulative or compounding, but the intention does not appear to have been to create an all purpose allowance. Interested parties have agreed to the deletion of the words “This loading is payable for all purposes” appearing in clause 13.4 of the exposure draft and to delete the definition in clause 2 of the exposure draft. We will adopt the parties’ agreed position.

[248] We think there is merit in seeking further clarification about how the 8% loading is calculated...

17. The joint submission of the major cinema employers and Live Performance Australia dated 17 April 2018<sup>14</sup> stated at paragraph 25:

The Employers submit that the 8% penalty averaging component is part of properly made minimum rates...

18. In conclusion, it seems from the history that the allowance was part of the rate of pay for the standard or ordinary hours of work and (as submitted by AEIA<sup>15</sup>) was approved as part of the properly fixed minimum rate when the current award was simplified.

#### The textual context

19. That conclusion is reinforced by the textual context. Clause 14.3 of the Award<sup>16</sup> provides a wages structure as follows:

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<sup>14</sup> Attached Annexure B

<sup>15</sup> *Broadcasting and Recorded Entertainment Award 2010* [2009] AIRCFB 998, <http://www.airc.gov.au/awardmod/databases/general/decisions/2009aircfb998.htm> at [5]

<sup>16</sup> [https://www.fwc.gov.au/documents/documents/modern\\_awards/award/ma000091/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000091/default.htm)

The minimum wages for employees in the classifications in clause 14.2, subject to the provisions of clause 14.7 and clause 14.12, [writer's underlining] are:

Classification level	Minimum weekly wage \$	Minimum hourly wage \$
Grade 1	719.20	18.93
Grade 2	739.90	19.47

20. Clause 14.12 states that:

**Employees in cinemas**

...

All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.

21. The conjunction of those clauses provides a regime where the minimum wage is subject to the 8% penalty. The phrase *subject to* includes the following meanings<sup>17</sup>:

b. dependent or conditional upon:

c. under the domination of:

22. That appears consistent with the history of the clause. The effect is that the minimum wage includes the 8% penalty. Those payments together make the ordinary rate of pay. In terms of the definitions set out above, such an allowance is an all purpose allowance.

23. To return to the definition of *all purpose*, an all purpose allowance to which an employee is entitled must be added to the minimum rate before calculating the loaded rate; that is to say it is calculated on a compound basis.

24. The MEAA proposes the following wording:

**13.4** All employees in cinemas will receive an 8% loading for all hours worked regardless of the day(s) of the week on which work is performed. This loading forms part of the base rate of pay and is in lieu of Sunday penalty payments and reduced public holiday penalties. Additional loadings shall be calculated against the adjusted base rate of pay.

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<sup>17</sup> Macquarie Dictionary online

25. That wording would remove many of the ambiguities that have existed so far. It would make clear that the loading was payable regardless of the day of the week worked; is part of the base rate of pay and would be calculated on a compound but not cumulative basis. The wording complies with the obligation that the clause is easy to understand in accordance with s 134(1)(g) of the *Fair Work Act* 2009.



**Ian Latham**  
**20 September 2018**



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1054843

**VICE PRESIDENT CATANZARITI**

**AM2014/259**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2014/259)**

**Broadcasting and Recorded Entertainment Award 2010**

**Melbourne**

**9.01 AM, FRIDAY, 16 JUNE 2017**

PN1

THE VICE PRESIDENT: Thank you. We will take the appearances. We'll start in Melbourne.

PN2

MR D HAMILTON: If your Honour pleases, Hamilton, initial D, the Australian Entertainment Industry Association, trading as Live Performance Australia.

PN3

THE VICE PRESIDENT: Thank you, Mr Hamilton.

PN4

MR SERONG: If your Honour pleases, I won't be appearing. I am just observing.

PN5

THE VICE PRESIDENT: Thank you, Mr Serong. In Brisbane?

PN6

MR J MURDOCH: Yes, thank you, your Honour. Murdoch, initials J.E. for Birch Carroll and Coyle Limited and the Hoyts Corporation Pty Ltd, and Greater Union Organisation Pty Ltd, Village Cinemas Ltd, and the Independent Cinemas Association of Australia and its members.

PN7

THE VICE PRESIDENT: Thank you, Mr Murdoch.

PN8

MS M CHAN: May it please the Commission, Chan, initial M, of Australian Business Lawyers and

Advisors seeking leave to appear for ABI NSW Business Chamber, your Honour.

PN9

THE VICE PRESIDENT: Thank you, Ms Chan. We'll go to Sydney.

PN10

MR K BARLOW: If it pleases the Commission, your Honour, Barlow, initial K, appearing for the CPSU.

PN11

THE VICE PRESIDENT: Thank you, Mr Barlow.

PN12

MR S FORSTER: If the Commission pleases, Forster, initial S, appearing on behalf of the Seven Network Operations Limited, Nine Network Proprietary Limited and Network 10 Proprietary Limited and their related entities.

PN13

THE VICE PRESIDENT: Thank you, Mr Forster. And we have on the phone, Mr Chesher. Can you hear us, Mr Chesher?

PN14

MR M CHESHER: Yes, I can, thanks your Honour. Chesher, initial M, for the MEAA.

PN15

THE VICE PRESIDENT: Thank you. Now, on the last occasion when we met there were going to be discussions between the parties to try to narrow the issues even further. Have those discussions occurred?

PN16

MR FORSTER: Your Honour, it's Mr Forster on behalf of the TV networks. There have been discussions between my clients and the CPSU and my clients and the MEAA in relation to the technical and drafting issues that we have an interest in.

PN17

THE VICE PRESIDENT: Yes. Those documents have been sent to the Commission. So can you advise me where we've landed in relation to the document?

PN18

MR FORSTER: Your Honour, I think at least my clients, the CPSU and the MEAA are in a position to work through and indicate which areas of common interest we have reached agreement on and those issues where we haven't. So we can walk through that if that's possible?

PN19

THE VICE PRESIDENT: Yes. So if we want to go back to the document there which is - the last version of it is February 27 document - whatever. Republished on the 10 May. Is that the document you're working from?

PN20

MR FORSTER: Yes, we've got the 10 May version, your Honour.

PN21

THE VICE PRESIDENT: Yes, okay. Let's work through it then.

PN22

MR FORSTER: So item one is a Director's Guild item. They're not here and haven't been here. We're not really sure whether they're continuing to press that but for what it's worth my client is opposed to the submission that's made there.

PN23

MR BARLOW: Your Honour, the CPSU here in Sydney. That item while it is identified as ADG it is common to a number of issues that are between the parties later on, for example, at items 26 - excuse me - and 29. So it may very well be that that issue can be considered as part of that. This is a debate between the parties that remains a contested matter about whether there are changes in the proposed exposure draft of ordinary rates of pay as opposed to minimum rates of pay.

PN24

THE VICE PRESIDENT: Mr Barlow, at some point the discussions have to come to a close.

PN25

MR BARLOW: Yes.

PN26

THE VICE PRESIDENT: And the matter has to be referred to the Full Bench to deal with it.

PN27

MR BARLOW: Yes.

PN28

THE VICE PRESIDENT: What's your view in relation to this topic? Is it going to be useful having more discussions or is it coming to a close?

PN29

MR BARLOW: Well, I think, your Honour - I think it may very well be there could be useful discussions of that item today but it remains likely to be something that is something outstanding between the parties. And I might add, your Honour, it is probably one of a handful of items that is - you know - that may still be outstanding after this morning's proceedings, given the fact that the parties have reached agreement on a variety of others.

PN30

THE VICE PRESIDENT: All right.

PN31

MR BARLOW: I just wanted to clarify that item one, in my mind, relates to item 29 for example.

PN32

THE VICE PRESIDENT: Yes. Okay.

PN33

MR BARLOW: Or as far as I can understand it - - -

PN34

THE VICE PRESIDENT: Well, okay. Let's go down the slow path, rather than the fast path and we'll invite all the parties then to participate and we'll just go through the list again from the top.

PN35

MR BARLOW: Yes.

PN36

THE VICE PRESIDENT: That may be faster track. So item 1 you want to link when we come

back to 29?

PN37

MR BARLOW: Yes. Yes, your Honour.

PN38

THE VICE PRESIDENT: All right. So item 2 is currently, on my version was agreed. Does that remain the case?

PN39

MR BARLOW: Yes, your Honour.

PN40

MR CHESHER: Yes.

PN41

THE VICE PRESIDENT: Right. Now where do we end up in item three?

PN42

MR CHESHER: Your Honour, it's Mr Chesher here. I - probably starting off in a negative way. This together with the matter just canvassed by Mr Barlow is in MEAA's position one of two or three issues that I don't believe is settled between the parties. There have been discussions. Item three is linked to items 16 and 43 in MEAA's opinion. It goes to the issue of what the minimum hourly rate is for cinema employees.

PN43

THE VICE PRESIDENT: On the last - - -

PN44

MR CHESHER: I'm happy to - - -

PN45

THE VICE PRESIDENT: On the last occasion in relation to your item 16 we didn't reach a landing there either.

PN46

MR CHESHER: No, that's correct. They're connected, your Honour. There is a difference of opinion between MEAA and the cinema representatives about the - effectively what the minimum hourly rate of pay is for cinema employees and whether it incorporates the eight percent loading in clause 13.4 of the exposure draft as part of the minimum rate of pay.

PN47

THE VICE PRESIDENT: Yes. Is that one of yours, Mr Murdoch?

PN48

MR MURDOCH: It's really our sole item so far as we know, your Honour.

PN49

THE VICE PRESIDENT: All right.

PN50

MR MURDOCH: And since our last mentioning before you we have had discussions with representatives of MEAA and it unfortunately hasn't been resolved. The current preliminary exposure draft which is dated 10 May it has a line through their last sentence of 13.4 and the deletion of that resulted from submissions which were made on behalf of our clients. The

submissions made at a point in our view there had been an inadvertent substantive change which had arisen from the drafting exercise.

PN51

Now, initially, we thought we had agreement with the union but at the time of the last mention here it's emerged that so far as 13.4 is concerned that we don't have that agreement. So our categorisation of the difference is that it really is a substantive difference because there is no equivalent sentence in the current award and to introduce the sentence as we see it would change the substantive rights and obligations of the parties.

PN52

THE VICE PRESIDENT: Yes, I must say, Mr Murdoch, I see some force of that argument. It doesn't like it's a tentacle and drafting matter. It has a substantive impact. What do you say about that Mr Chesher?

PN53

MR CHESHER: Your Honour, MEAA's submission is that the eight percent is, in effect, it is compensation obviously as the clause says for public holidays and Sunday work. The cinema representatives from our last informal discussion I think were of the view that it may or may not form part of the minimum rate of pay.

PN54

I think the characterisation of it as an all-purpose loading there might be some issues there but MEAA's endeavour in this respect is to clarify that the effective minimum rate of pay in the Modern Award is the minimum rate as set out plus eight percent and that that applies to all employees, irrespective of the time of their engagement. It's a longstanding compensatory mechanism that has applied to the workforce as a whole. So we're seeking the Commission's affirmation, I imagine, of a Full Bench decision in 2009 which is canvassed in Mr Hamilton's comments some months ago that the - that it is part of the minimum rate rather than an all-purpose allowance. So that's MEAA's position. I mean there may be semantics involved but we're not content presently to have that clause suffer from lack of clarity about what the minimum rate of pay actually is.

PN55

THE VICE PRESIDENT: Yes. Mr Murdoch, anything further you want to say on this?

PN56

MR MURDOCH: No, your Honour.

PN57

THE VICE PRESIDENT: All right. Well, I think - - -

PN58

MR CHESHER: Your Honour - - -

PN59

THE VICE PRESIDENT: Yes?

PN60

MR HAMILTON: Your Honour, if - - -

PN61

THE VICE PRESIDENT: Yes, proceed.

PN62

MR HAMILTON: Sorry, your Honour - may I might be able to give some clarification as to that

clause. Your Honour, in 1997, the Live Performance Australia and MEAA agreed to vary the Entertainment and Broadcasting Cinema Award to include the penalty averaging component and that was in lieu of Sunday penalties and reduced public holiday penalty. And your Honour from that point on until the award modernisation process started in 2009 and with the production of the new Broadcast and Recorded Entertainment Award the rates of pay in the entertainment and broadcasting industry cinema award was set out as a base rate of pay, a penalty averaging amount and then a minimum rate of pay.

PN63

Now, in my submissions to the Commission on the 22 February '17 I referred to the Full Bench decision which was convened on our application because in the initial draft REA award they deleted the eight percent penalty averaging component. And so therefore LPA on behalf of the industry made application to the Full Bench to reinsert that eight percent.

PN64

I have quoted some of the decision of the Full Bench in our submissions in February '17, your Honour, but technically their decision whilst restoring the eight percent penalty averaging did not really reflect the provisions of the pre-reform award. So I suppose there has been some conjecture between the parties about the definition of what a loaded rate is. Also whether it is an allowance. It was never put in to the award as an allowance. It was our submissions in 2009 that it was part of the minimum rate. So, your Honour, I suppose when the Commission came to produce the exposure draft there was none of that history that was afforded the opportunity of the people that are drafting the award and so therefore it would appear that they have introduced words that have never been there.

PN65

So I'm not sure where you want to take this, your Honour, but maybe that has assisted in determining where that eight percent came from.

PN66

THE VICE PRESIDENT: Well, have you and Mr Murdoch had discussions about what the clause should look like?

PN67

MR HAMILTON: Well, your Honour, funny you should say that we have been the main driver of the pre-reform award. If I could call them the majors were never associated with it and whenever there has been meetings with the union we have been failed to be advised or invited to those meetings. So I will leave that there, your Honour.

PN68

THE VICE PRESIDENT: Yes, but if you've got the history of it and it does seem that there ought to be a dialogue between you and Mr Murdoch to see whether this can be thrashed out.

PN69

MR HAMILTON: That would be correct, your Honour.

PN70

THE VICE PRESIDENT: Mr Murdoch, do you think that's an appropriate course?

PN71

MR MURDOCH: Your Honour, we naturally read the submission that Mr Hamilton's clients put in. Our clients are not in agreement with his view as to what the clause should be drafted to mean but having said that we're not adverse to having a discussion with him but- - -

PN72

THE VICE PRESIDENT: Well, it be a curious position if the matter becomes a substantive matter. We'll have one employer group saying one thing and the cinemas say another thing as to what was supposed to be a simple drafting exercise has stemmed from a substantive exercise as to what the clause means. It does seem to me that there might be some utility at least having that dialogue before I pull up stumps on the matter.

PN73

MR HAMILTON: Your Honour, will it assist if I handed up variation to the pre-reform award of how the Commission set out the provisions of the penalty - - -

PN74

THE VICE PRESIDENT: Well, ultimately, before it becomes arbitral matter - - -

PN75

MR HAMILTON: Yes.

PN76

THE VICE PRESIDENT: - - -you've got to convince Mr Murdoch that you can reach a landing. If you can't reach a landing then it becomes a matter that remains in dispute and will have to be resolved by the Full Bench.

PN77

MR HAMILTON: Thank you, your Honour.

PN78

THE VICE PRESIDENT: I can't make a ruling on the matter.

PN79

MR HAMILTON: Yes.

PN80

THE VICE PRESIDENT: We're here to see what's agreed. It's a process of narrowing the issues for the Full Bench. So what I propose to do in relation to this matter is to stand this matter over for a couple of weeks to see whether there is an agreement. It won't be relisted. If there is no agreement then when I prepare the report that goes back to the Full Bench it will be listed as an outstanding matter. That will give an opportunity to have discussion.

PN81

MR CHESHER: MEAA's comfortable with that, your Honour.

PN82

THE VICE PRESIDENT: Yes. Okay. Let's go back to the list then. So we were on - - -

PN83

MR CHESHER: I think we're up to item four, I think.

PN84

THE VICE PRESIDENT: Yes. Item four.

PN85

MR FORSTER: Your Honour, the television networks won't press for the deletion of the second definition. So that item can be removed from the list.

PN86

THE VICE PRESIDENT: Item five?

PN87

MR FORSTER: I understand that's agreed.

PN88

THE VICE PRESIDENT: Item six.

PN89

MS CHAN: That's not pressed, your Honour.

PN90

THE VICE PRESIDENT: Not pressed.

PN91

MS CHAN: No.

PN92

THE VICE PRESIDENT: Yes. Item seven?

PN93

MR BARLOW: Your Honour, it's the CPSU here. There appears - this is a contested matter at this stage. It's in response to a question posed in the exposure draft by the Fair Work Commission themselves and it appears that the parties have a different view as to whether or not this clause which deals with meal breaks should be a flexibility clause that an individual could agree or a group of employees can agree.

PN94

THE VICE PRESIDENT: Yes. And that clause is not just limited to this award. It has been listed in other awards but - - -

PN95

MR BARLOW: Yes, that would be correct, your Honour.

PN96

THE VICE PRESIDENT: So what do you want to do with it? Do you want to have further discussions or you can remain outstanding on it?

PN97

MR BARLOW: I think further discussions would be useful given the fact that it is a facilitative clause that requires employee and employer agreement.

PN98

THE VICE PRESIDENT: It is - that's what it is. So - - -

PN99

MR BARLOW: Yes.

PN100

THE VICE PRESIDENT: - - -well, we'll do the same process.

PN101

MS CHAN: Your Honour?

PN102

THE VICE PRESIDENT: That will be stood over for two weeks to have discussions. If we are advised that the matter is not resolved it will go to the non-resolved list and referred in my report to



the Full Bench.

PN103

MS CHAN: Your Honour, if I might just clarify the ABI's position? In relation to our submission I don't actually believe we're in disagreement with the CPSU. We are still indicating that we believe that it's notwithstanding the actual words the actual text of that particular provision of that agreement can actually be reached on an individual basis as well as for the group of employees. So I'm not sure if that might assist the parties.

PN104

THE VICE PRESIDENT: Yes, well put something in writing once you've reached an agreed position so it's there on the record.

PN105

MS CHAN: Certainly.

PN106

MR BARLOW: Yes, your Honour.

PN107

THE VICE PRESIDENT: Paragraph eight.

PN108

MR FORSTER: It is agreed.

PN109

MR BARLOW: Yes, that's agreed, your Honour.

PN110

THE VICE PRESIDENT: Paragraph nine?

PN111

MR FORSTER: Is agreed.

PN112

THE VICE PRESIDENT: Paragraph 10?

PN113

MR FORSTER: Is agreed.

PN114

THE VICE PRESIDENT: Eleven?

PN115

MR FORSTER: Agreed.

PN116

THE VICE PRESIDENT: Twelve?

PN117

MR FORSTER: Agreed.

PN118

THE VICE PRESIDENT: Thirteen?

PN119

MR FORSTER: Agreed.

PN120

THE VICE PRESIDENT: Fourteen?

PN121

MR FORSTER: Agreed.

PN122

THE VICE PRESIDENT: Fifteen?

PN123

MR FORSTER: Sorry, to break a good run, your Honour. Not agreed.

PN124

THE VICE PRESIDENT: Yes.

PN125

MR FORSTER: This is something that Mr Barlow mentioned earlier. Similarly to how item one relates to item 29. This probably sits with that issue as well. There is general disagreement between the television networks and the CPSU and me or about references to time versus percentage based formulas for calculating penalty rates in the award. As well as disagreement between the parties about references in certain areas to penalties being calculated on the minimum hourly rate of pay as opposed to the ordinary hourly rate of pay which naturally includes certain other amounts such as all-purpose allowances.

PN126

So it's a matter that I suspect we will struggle to reach agreement on but can I suggest given that there have been some other matters that have been stood over for a couple of weeks that we just add that to the list as well. We'll see how we go. We'll provide something to you in writing if we can reach agreement but we don't expect to come back before you again to talk to this point and either way we will know in two weeks whether it's a matter for the Full Bench or not.

PN127

THE VICE PRESIDENT: All right. Well, the same it should have two weeks. Item 16 we've spoken about. That's in the two-week category. Item 17.

PN128

MR FORSTER: Is agreed.

PN129

THE VICE PRESIDENT: Eighteen?

PN130

MR FORSTER: Is agreed.

PN131

THE VICE PRESIDENT: Nineteen?

PN132

MR CHESHER: That's agreed from MEEA's perspective, your Honour.

PN133

THE VICE PRESIDENT: Yes. Mr Hamilton that means that's agreed, isn't it? Yes. All right. That's agreed. Twenty?

PN134

MR BARLOW: I think that's agreed, your Honour.

PN135

MR CHESHER: MEAA had a question about it but in the interests of peace we'll withdraw that question.

PN136

THE VICE PRESIDENT: All right. Twenty is agreed. Twenty-one.

PN137

MR FORSTER: Is agreed.

PN138

THE VICE PRESIDENT: Twenty-two.

PN139

MR FORSTER: Your Honour, this item is one where disagreement appears to have arisen in response to a question posed by the Commission.

PN140

THE VICE PRESIDENT: Yes.

PN141

MR FORSTER: The question is whether an existing reference to the employer's obligation to reimburse employees for the costs of renting a telephone where this is required should be updated to include a reference to mobile telephone costs.

PN142

THE VICE PRESIDENT: Yes.

PN143

MR FORSTER: We say the television networks that a mobile telephone is a telephone and so it's already caught by the provision and to the extent that an employer requires an employee to have a telephone they would be required to meet the rental costs but what they would not be required to meet as is the case in the current award is any call costs because that's a separate item. That's our position - I think - and my friends will no doubt speak to this. As I understood their submission there was more to the point that the clause should be updated to refer to mobile telephone costs but I am not sure whether I am responding to a proposal by them to expand it beyond just rental costs because that then would mean we are in a significant dispute.

PN144

THE VICE PRESIDENT: Yes. I understand that.

PN145

MR FORSTER: As opposed to just a little one, yes.

PN146

MR CHESHER: It's Mr Cheshier from MEAA, your Honour. MEAA wasn't minded to extend the language of 14.3(d) simply to clarify that a telephone includes a mobile telephone.

PN147

THE VICE PRESIDENT: All right. Well, that would resolve it, wouldn't it Mr Forster?

PN148

MR FORSTER: Yes. It's a good point. It would be hard to resist the inclusion of some words, perhaps in parentheses after "telephone" - "including a mobile telephone".

PN149

THE VICE PRESIDENT: Yes.

PN150

MR FORSTER: Or words to that effect.

PN151

MR CHESHER: Perhaps "mobile" or "fixed line".

PN152

THE VICE PRESIDENT: So we can do that. So telephone rent allowances.

PN153

MR FORSTER: That's acceptable.

PN154

THE VICE PRESIDENT: Yes. To include "mobile" or "fixed line" in the definition there and that will resolve 22. All right.

PN155

MR FORSTER: Yes, your Honour.

PN156

THE VICE PRESIDENT: Twenty-three?

PN157

MR FORSTER: Just checking with my friend from the CPSU.

PN158

MR BARLOW: That's fine.

PN159

MR FORSTER: Twenty-three is agreed.

PN160

THE VICE PRESIDENT: Twenty-four?

PN161

MR BARLOW: Sorry, your Honour. Sorry, your Honour. Back to 23. I had understood - I had conversations with Mr Forster. This was where they were proposing to amend part of the annual leave clause to include what they thought was a more specific reference to "defined" or "described" which is to pick up the shift worker annual leave in the NES, your Honour. I understood Mr Forster was considering his position. It may very well be - this is clause 16.2 in the exposure draft.

PN162

THE VICE PRESIDENT: I have it in front of me. Yes.

PN163

MR BARLOW: Yes, thank you. If you can see at the bottom - well, the bottom of the page - 16.2 includes a note that says s 83(1)(b) of the Act does not apply as employees under this clause are not shift workers for the purpose of NES. Seven had proposed to put in - "Are not described or defined as shift workers for the purpose of the NES" - both in this clause and another one further down

which we said - we resisted on the basis that we thought it was fairly clear from that current note and didn't require any further amendment and that was the position. That was the opposition between the parties so maybe Mr Forster can indicate whether he wants to withdraw that proposed inclusion or not.

PN164

THE VICE PRESIDENT: Yes, Mr Forster?

PN165

MR FORSTER: No, I don't want to withdraw it, your Honour. We think it makes the clause clearer. It picks up the language of the statute. I know it's a minor thing but those are my instructions at the moment and unfortunately I wasn't able to obtain instructions on whether or not we should shift that position. So - - -

PN166

THE VICE PRESIDENT: Well, then at this stage it's not agreed it will go in that two-week category.

PN167

MR FORSTER: Certainly. Thank you.

PN168

THE VICE PRESIDENT: To be resolved. All right. Let's go to 24.

PN169

MR FORSTER: That would be in the same category, your Honour. It's the same issue.

PN170

MR BARLOW: Twenty-three and 24 relate to the same issues.

PN171

THE VICE PRESIDENT: Yes, okay. Twenty-five?

PN172

MR CHESHER: I'm not sure whether, your Honour, Commercial Radio's present. MEEA doesn't support - - -

PN173

THE VICE PRESIDENT: No. There's nobody from Commercial Radio.

PN174

MR BARLOW: Well, if I may speak to this item very briefly, your Honour? Commercial Radio sought to change - made fairly significant changes regarding annual leave loading and it's certainly because of an ambiguity in the exposure draft there it's certainly the Seven Network's and the CPSU's position that the changes they propose are not required and instead there needs to be a further reference in that clause to 32.1(d) and the clause otherwise doesn't need to be rewritten. This is to clarify the operation of annual leave loading to shift penalties and so forth, your Honour. So I might just take you to 16.7.

PN175

THE VICE PRESIDENT: Yes. No, I have got that in front of me.

PN176

MR BARLOW: Yes. The issue arises at 16.7(a) and its reference to subject to 32.3(d) which picks up some but not all.

PN177

THE VICE PRESIDENT: Yes. When was the last time you spoke to the CRA, Mr Barlow?

PN178

MR BARLOW: I haven't - I'm afraid I haven't spoken to the CRA regarding this matter, your Honour. Obviously I had clarified that the union - the MEAA, CPSU, and Seven don't think their changes are required but I haven't contacted them specifically about this matter. I was hoping that would be here today to answer.

PN179

THE VICE PRESIDENT: The other employer groups for the moment are supporting the submissions of the CRA presumably. Is there a basis for that? Or are you just supporting Mr Hamilton? Or, Ms Chan? Is there a reason for that or are you just waiting to see what the CRA does?

PN180

MS CHAN: We would be content to see what the CRA does but we have no opposition to what has been agreed between the TV networks and the CPSU either.

PN181

THE VICE PRESIDENT: All right. Well, I think, Mr Barlow the approach then should be that you should speak to the CRA in the next two weeks and see if that can be resolved otherwise it will go in the outstanding category.

PN182

MR BARLOW: Yes, your Honour.

PN183

MR FORSTER: And, your Honour, it's Mr Forster for the TV networks very quickly. Just to clarify it and I think this point was clearly made but for the avoidance of any doubt there is agreement between my clients and the CPSU, at least, that the inclusion of the words 32.1(d) and in 16.7(a) is agreed.

PN184

THE VICE PRESIDENT: Yes. I follow that.

PN185

MR BARLOW: Thank you, your Honour.

PN186

MR CHESHER: That's MEAA's position as well, your Honour, what Mr Forster just spoke to.

PN187

THE VICE PRESIDENT: Yes, thank you, Mr Chesher. I will then go to 26.

PN188

MR CHESHER: It's part of our earlier discussion, your Honour, about ordinary versus minimum.

PN189

THE VICE PRESIDENT: Yes. So that's in the two-week see what's going to survive.

PN190

MR BARLOW: Yes. Yes, your Honour.

PN191

THE VICE PRESIDENT: Twenty-seven.

PN192

MR FORSTER: Your Honour, Forster, for the television networks. We'd proposed to amend this clause. Our proposed amendment is agreed. However, the CPSU has - well, so the idea that we should amend the clause is agreed. The words were not quite agreed and the CPSU have suggested a very minor amendment. We agree to add their minor amendment and with that we think the issue is settled.

PN193

THE VICE PRESIDENT: Okay. So it will become "where applicable" rather than "if applicable".

PN194

MR BARLOW: Yes, your Honour.

PN195

MR FORSTER: That's correct.

PN196

THE VICE PRESIDENT: Okay. So that's agreed. Twenty-eight?

PN197

MR BARLOW: Now, this is an area where the CPSU and Seven have almost reached agreement, your Honour. In some senses the - part of it is agreed and part of it is not agreed.

PN198

THE VICE PRESIDENT: So what does that mean? In the next two weeks you will agree to it? Or will it remain outstanding?

PN199

MR BARLOW: Sorry, I withdraw that, your Honour. I was looking at the wrong item. I can confirm 28 is agreed.

PN200

THE VICE PRESIDENT: Twenty-eight is agreed. Okay. There we go.

PN201

MR FORSTER: Yes, it is agreed. Sorry, your Honour.

PN202

THE VICE PRESIDENT: Okay. Now we'll go to 29.

PN203

MR BARLOW: This is the second branch of the "ordinary" versus "minimum" debate, your Honour, which we need the two weeks for and otherwise will remain outstanding.

PN204

THE VICE PRESIDENT: Yes. I understand that. Number 30?

PN205

MR BARLOW: I believe that's agreed, your Honour - 30.

PN206

MR FORSTER: It is.

PN207

MR BARLOW: But - - -

PN208

MR FORSTER: Just to clarify items 30, 31 and 32 which are all related what is agreed is that in relation to item 30 and item 31 the words "subject to the provisions of clause 32.1(c)" should be added to the start of each of those clauses. What is now also agreed is that the addition of the headings in each of those clauses being nightshift, morning shift and extra shift duty allowance should also be - should be removed. Those headings do not appear in the current award. We think they're unhelpful. The CPSU originally sought their attention but has now agreed that they should be removed too.

PN209

THE VICE PRESIDENT: But just so I am clear - if you look at 32.1(a) you would delete - - -

PN210

MR FORSTER: Yes.

PN211

THE VICE PRESIDENT: - - -nightshift.

PN212

MR FORSTER: Correct.

PN213

THE VICE PRESIDENT: And so the clause begins with "an employee" et cetera.

PN214

MR BARLOW: No. We would reinsert the words "Subject to the provisions of clause" - - -

PN215

THE VICE PRESIDENT: Yes. Sorry.

PN216

MR BARLOW: Yes.

PN217

THE VICE PRESIDENT: Subject to the provisions of clause 32.1(c) an employee who works.

PN218

MR FORSTER: Yes.

PN219

THE VICE PRESIDENT: Right?

PN220

MR FORSTER: Yes.

PN221

THE VICE PRESIDENT: Number (b) "morning shift" is deleted and the clause begins "subject to provisions of clause 32.1(c)".

PN222

MR BARLOW: Yes.

PN223

THE VICE PRESIDENT: That's right? And when we go to (c) we're deleting the title "Extra Shift



Duty Allowance".

PN224

MR BARLOW: Yes.

PN225

MR FORSTER: Yes.

PN226

THE VICE PRESIDENT: And it just reads on "For all ordinary time work".

PN227

MR BARLOW: Yes.

PN228

MR FORSTER: Yes.

PN229

THE VICE PRESIDENT: Yes. Okay. We've got that. Let's go to clause 33. Item 33 - I should say.

PN230

MR FORSTER: So this is an item proposed by the television networks. It relates generally to the issue about how you calculate penalty rates. It's not agreed. It belongs in the two-week basket with those other items.

PN231

THE VICE PRESIDENT: Right. Okay. Item 34?

PN232

MR FORSTER: Is agreed.

PN233

THE VICE PRESIDENT: Item 35?

PN234

MR FORSTER: Is agreed.

PN235

THE VICE PRESIDENT: Thirty-six?

PN236

MR FORSTER: Just to clarify item 35, your Honour. It was a response to a question raised by the Commission.

PN237

THE VICE PRESIDENT: Yes.

PN238

MR FORSTER: I would suggest that we're agreed to the extent that I think that there were common responses that allowance is calculated on the basis of a director's salary, not a producer's rate because they're not actually covered.

PN239

THE VICE PRESIDENT: Yes, I follow that. Thirty-six?

PN240

MR CHESHER: I was of the view that that was agreed, your Honour, which was to retain the current wording of - that is in the BREA - otherwise the typographical issues raised by Mr Forster are supported and I note the CPSU that supports that submission as well. MEAA was of the view that the current clause is clearer than the revised clause in the exposure draft.

PN241

THE VICE PRESIDENT: Yes, Mr Forster?

PN242

MR FORSTER: Yes. We agree with that.

PN243

THE VICE PRESIDENT: Yes. Okay. Thirty-six is agreed. Item 37?

PN244

MR BARLOW: Your Honour, this falls into a subset of the minimum versus ordinary issue mostly because it relates to a different part of the award than what the TV networks are dealing with. This is obviously commercial radio where we say there has been a clear change from ordinary rate in the current award to minimum rate in the proposed exposure draft. Now, I know no one has put on a submission in opposition to us so I don't know where to put this in the category of whether you want me to try to have a conversation with one of the employers about this or whether it can just be fixed.

PN245

THE VICE PRESIDENT: Well, let me just have a look at 40.2. You want to delete in the current exposure draft minimum hourly rate? Is that right, Mr Barlow?

PN246

MR BARLOW: Yes, your Honour.

PN247

THE VICE PRESIDENT: And you want to replace minimum hourly rate with ordinary rate of pay in that clause.

PN248

MR BARLOW: Yes, your Honour. Yes, which we say reflects what the current clause 38.1 in the current award says.

PN249

THE VICE PRESIDENT: Yes. Does any employer have a view? Assuming there's no view then means that there is an agreement.

PN250

MR MURDOCH: Your Honour, just on that, I'd like to reserve our rights on that because that may have an interface with the issue related to the eight percent loading issue.

PN251

THE VICE PRESIDENT: All right. Well - - -

PN252

MR BARLOW: Can I just - your Honour, CPSU here. This is technical staff in radio. I don't think there is any interaction with cinema employees or employers for this part of the award.

PN253

THE VICE PRESIDENT: Well, I'll still give Mr Murdoch the benefit of the two weeks to see where

there's - the problem is.

PN254

MR BARLOW: Yes, your Honour.

PN255

THE VICE PRESIDENT: If there's no problem Mr Murdoch will let us know and that clause will then be agreed as 40.2. So let's go to item 38.

PN256

MR CHESHER: Your Honour, this was in response to a further question by the Commission. MEAA's view was that that needs to be read in conjunction with clause 38 which is the rostering provision for technical staff in radio broadcasting. I am not aware of views to the contrary.

PN257

MR BARLOW: Yes. There is. Your Honour, it's the CPSU here. There is a view to the contrary and I would like to say I withdraw that. That submission was malformed, your Honour, and we agree with both MEAA and the ABI that in many ways the overtime for technical staff needs to be read consistent with the rostering and the ordinary hours of work.

PN258

THE VICE PRESIDENT: Yes. All right.

PN259

MR BARLOW: And we don't suggest there's any ambiguity there.

PN260

THE VICE PRESIDENT: So - - -

PN261

MR BARLOW: I will withdraw that submission at 38, your Honour, and we agree with ABI and MEAA.

PN262

THE VICE PRESIDENT: So, Mr Cheshier, how is clause 43.1 redrafted?

PN263

MR CHESHER: I'd need to submit something, your Honour, but I think a simple cross-reference - - -

PN264

THE VICE PRESIDENT: All right. Well, can you do that in the next two weeks?

PN265

MR CHESHER: - - -to clause 38.

PN266

THE VICE PRESIDENT: Do that within the next - - -

PN267

MR CHESHER: Yes, I will, your Honour.

PN268

THE VICE PRESIDENT: - - -two weeks so that can be then an agreed position. All right?

PN269

MR CHESHER: Okay, thank you.

PN270

THE VICE PRESIDENT: Item 39?

PN271

MR CHESHER: Yes. MEAA again responded in the affirmative to clarifying midnight to dawn. We did answer "yes" as I said but I'm not going to press that response, your Honour.

PN272

MR FORSTER: And your Honour, it's Mr Forster from the television networks. There is a reference to my clients in this item of the table. I think that reference may be included in error.

PN273

THE VICE PRESIDENT: Right.

PN274

MR FORSTER: It cites the source of our submission being paragraph 3.4(c) of our - well, it doesn't specify but it could only be our reply submissions dated 22 February 2017 and in those submissions we were referring, in actual fact, to clause 48 of the exposure draft which relates to journalists. So -  
- -

PN275

THE VICE PRESIDENT: All right. So include - I understand that - in relation to paragraph 44.4 of the exposure draft the clause that currently is there - stands - there's no further changes proposed.

PN276

MR CHESHER: That's correct, your Honour.

PN277

THE VICE PRESIDENT: Yes. That's the position. So that's the answer to the Commission's questions. We're not making any changes - 44 point (a) as it is. All right.

PN278

MR CHESHER: Yes.

PN279

THE VICE PRESIDENT: We then go to item 40.

PN280

MR FORSTER: Yes. It's another one of the television networks items, your Honour. The reference there in the column clause exposure draft to clause 45.1 I believe is an error. It should be a reference to clause 48.1.

PN281

THE VICE PRESIDENT: Right.

PN282

MR FORSTER: And if that reference is corrected - if you go to that clause you will see that we have proposed some minor formatting adjustments which I understand are agreed between MEAA and my clients.

PN283

MR CHESHER: That is the case, your Honour.

PN284

THE VICE PRESIDENT: All right. Well - - -

PN285

MR CHESHER: As corrected.

PN286

THE VICE PRESIDENT: They're not in front of me at the moment. So the actual amendments proposed to 48.1. So that there's no confusion, Mr Forster, I might just put that in writing.

PN287

MR FORSTER: I am happy to do that, your Honour, and for your benefit I should note that attached to our first set of submissions in relation to the exposure draft dated 18 January 2017 there was a marked-up version of the exposure draft that we prepared on behalf of our clients which contains that that revised formatting. So I could still send it through subject to - - -

PN288

THE VICE PRESIDENT: The reason I want it sent through, Mr Forster, is it will avoid the problem later on because this document currently refers to 45.1 and I want to eliminate the confusion so that the table is corrected and we have got the clause clearly as a separate item.

PN289

MR FORSTER: Yes.

PN290

THE VICE PRESIDENT: In the next two weeks so it will make it just easier. So when the exposure draft is being rewritten that the people who have put these documents together will have the right foot out in front of them.

PN291

MR FORSTER: Yes, I understand. Thank you, your Honour. We'll do that.

PN292

THE VICE PRESIDENT: Just given the error that's actually in the table avoids that problem. All right.

PN293

MR FORSTER: Yes, if the Commission pleases.

PN294

THE VICE PRESIDENT: All right. Okay? Let's go to item 41.

PN295

MR FORSTER: I understand this item is agreed. Your Honour for the sake of consistency it might be appropriate if we changed, though - - -

PN296

THE VICE PRESIDENT: To "where applicable".

PN297

MR FORSTER: "Where applicable".

PN298

THE VICE PRESIDENT: Yes. Okay. So item 41 clause 49.1 adding the words "where applicable" at the end of the sentence. Okay? Item 42?

PN299

MR CHESHER: MEAA's position, in essence, is to retain the status quo, your Honour, with respect to clause 51.3 or two rather. Mr Forster might like to add something on that point.

PN300

MR FORSTER: No, I agree with my friend. Your Honour, this again is a question posed by the Commission about how the existing provisions of the award should be interpreted when calculating shift penalties for certain employees. Look, we don't think that there's given the responses much confusion between the parties so it doesn't seem to me that it needs to be clarified at all and the existing provisions can remain.

PN301

THE VICE PRESIDENT: So just so I am clear, Mr Forster, the exposure draft clause currently 51.2 - you're saying is correct and doesn't need to be amended in the light of the question?

PN302

MR FORSTER: That's correct. Can I also make this point of clarification, your Honour? It's actually clause 51.3.

PN303

THE VICE PRESIDENT: Oh, yes.

PN304

MR FORSTER: Not clause 51.2.

PN305

THE VICE PRESIDENT: Yes, right. It's 51.3 does not need to be amended.

PN306

MR FORSTER: Yes. Yes, that's correct.

PN307

THE VICE PRESIDENT: Yes.

PN308

MR CHESHER: That's MEAA's position, your Honour, thank you.

PN309

THE VICE PRESIDENT: All right. So 51.3 in the exposure draft will remain in its current form. We then go to item 43.

PN310

MR CHESHER: Your Honour, that's part of the question of the eight percent.

PN311

THE VICE PRESIDENT: Yes, that's substantive at the moment. Sort it out in the next two weeks. Item 44?

PN312

MR CHESHER: Again, your Honour MEAA does not support a change to the status quo in response to the Commission's question concerning clause 57.3.

PN313

THE VICE PRESIDENT: Well, does anyone want a change? I mean it is a response to a Commission's question, otherwise the clause stands as the part-time employee receives minimum

hourly rates for ordinary hours worked. 57(3)(b). All right. Well, that's then an agreed position at 57 - - -

PN314

MR CHESHER: Sorry, your Honour. I'm just looking at my notes from previous discussions. I think in 57.3(b) MEAA did agitate that the language should be - - -

PN315

THE VICE PRESIDENT: It did agitate a change that's why I asked the question.

PN316

MR CHESHER: Yes. I'm sorry, your Honour. The part-time employee receives no less than the minimum hourly rate is what MEAA proposed I believe.

PN317

THE VICE PRESIDENT: That is correct. Yes. Is there any view on that from anybody?

PN318

MR MURDOCH: Your Honour, it seems superfluous, your Honour, because a minimum rate means just that. Many awards refer to minimum rate.

PN319

THE VICE PRESIDENT: Well, they do. That's why I am a bit troubled by it by this change, Mr Chesher.

PN320

MR CHESHER: I accept that it has restorative as well as confusing aspects so we will withdraw that, your Honour.

PN321

THE VICE PRESIDENT: Okay. So that will be withdrawn - Exhibit 3(b) is withdrawn. We then go to item 45 which is the response of the question by the Commission.

PN322

MR CHESHER: Yes. MEAA's position, your Honour, is that is superfluous to clarify the method of calculation.

PN323

THE VICE PRESIDENT: So that's an agreed position is it? From ABI and the Chamber as well?

PN324

MR CHESHER: It appears to be, your Honour.

PN325

MS CHAN: Yes, it appears to be.

PN326

THE VICE PRESIDENT: All right. We then go to item 46 - there's a climate allowance - a typographical error.

PN327

MR CHESHER: That's a typo, your Honour.

PN328

THE VICE PRESIDENT: Yes.

PN329 MR CHESHER: That appears the exposure drafts been fixed.

PN330 THE VICE PRESIDENT: Okay, that's done. Item 47.

PN331 MR CHESHER: It's Mr Chesher, your Honour. MEAA advised the Commission some months ago that having raised the question some time ago that we weren't pressing that claim. I am not able to speak for the Australian Director's Guild.

PN332 THE VICE PRESIDENT: Yes. Well, who is speaking for the Australian Director's Guild? Or who can speak - - -

PN333 MR CHESHER: Well, I think MEAA can undertake to seek a response from them. Your Honour, I am aware on the Commission's web page that the ADG has proposed pursuing this matter that there has been no contact with them in the last couple of months. But I will make contact.

PN334 THE VICE PRESIDENT: I will leave that to you, Mr Chesher, to see whether it can be resolved otherwise it remains a live issue then. All right. Item 48?

PN335 MR CHESHER: MEAA's position is that the clause should refer to gross agreed remuneration. It's effectively a term of art within the industry that's well understood and amending it to minimum rates would cause immense confusion.

PN336 THE VICE PRESIDENT: Well, ABI and the Chamber want minimum rates. Is that right, Ms Chan?

PN337 MS CHAN: Yes, your Honour. I can seek further instruction about that to see if we - they might be minded to change their position on that but at this point we would be pressing for opposition.

PN338 THE VICE PRESIDENT: All right. Well, that will be in the two-week category as well then. All right. And then the last item is item 49.

PN339 MR FORSTER: Yes, that's something from the television networks, your Honour. I think in the exposure draft in its current iteration there is a table of wages applicable to cinemas. We were suggesting that it might be helpful if there were tables of wages including penalty rates et cetera for the other strands in the award as well. That is really up to the Commission whether or not it's minded to do that.

PN340 MR MURDOCH: Could I just add there that in the current exposure draft that schedule related to cinemas has been removed.

PN341 THE VICE PRESIDENT: That is right.



PN342

MR MURDOCH: Which we support.

PN343

THE VICE PRESIDENT: Yes.

PN344

MR BARLOW: That solved the problem, your Honour.

PN345

THE VICE PRESIDENT: Yes. Well, it had been removed.

PN346

MR FORSTER: Yes. Well, it puts me out on a limb a little bit. Look, I don't think it's an item that we'd press then.

PN347

THE VICE PRESIDENT: All right. Schedule E is deleted.

PN348

MR FORSTER: That's fine.

PN349

THE VICE PRESIDENT: And that means that that matter is resolved - item 49. All right. So that then means that when the next 14 days the parties should confer on the remaining items to see whether there can be agreement. It is clear that the majority of those items - few though that they be - or are unlikely to be agreed that they would then correspond to the Commission and then I'll prepare a report on the matter about the outstanding items so the matter can then be programmed for the Full Bench to deal with the technical and drafting items that remain outstanding. Are there any other questions for today?

PN350

MR BARLOW: No, your Honour.

PN351

MR FORSTER: No, your Honour.

PN352

THE VICE PRESIDENT: All right. The Commission is adjourned.

**ADJOURNED INDEFINITELY**

**[9.59 AM]**

*Fair Work Act 2009*

FAIR WORK COMMISSION

**IN THE MATTER OF: 4 Yearly Review of Modern Awards – Group 4 Awards**  
**Broadcasting, Recorded Entertainment and Cinemas Award 2010**  
**AM2014/259**

**Submissions of Birch Carroll and Coyle Limited  
and other cinema industry employers and  
Australian Entertainment Industry Association  
(trading as Live Performance Australia)**

April 2018

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## 4 Yearly Review of Modern Awards – Group 4 Awards

### Broadcasting, Recorded Entertainment and Cinemas Award 2010

#### Submissions of Birch Carroll Coyle Limited and other cinema industry employers and Live Performance Australia

##### Introduction

1 This submission is made on behalf of:

- (1) Birch Carroll and Coyle Limited
- (2) The Hoyts Corporation Pty Limited
- (3) The Greater Union Organisation Pty Ltd
- (4) Village Cinemas Limited

and Independent Cinemas Association of Australia and its employer members and Live Performance Australia.

2 The employers named at paragraph 1 (the **Employers**) together comprise the overwhelming majority of employers in the cinema exhibition industry and employ virtually all the employees in the cinema exhibition industry.

3 This submission is made to the Full Bench in respect of the Broadcasting, Recorded Entertainment and Cinemas Award 2010 (**BREC Award**). The Commission's review of the BREC Award is matter AM 2014/259 and that matter is in sub-group 4D. The Employers have made submissions in that proceeding in relation to a number of issues affecting cinemas covered by the BREC Award.

4 This submission is made in response to the Full Bench Decision dated 21 March 2018 which requests the filing of submissions by Thursday 19 April 2018 in response to the following:

*... we think there is merit in seeking further clarification about how the 8% loading is calculated.*

5 This is a reference to clause 13.4 of the Exposure Draft of the BREC Award republished on 23 March 2018 (the **Exposure Draft**) where it is stated:

*All employees in cinemas will receive an 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties.*

##### Summary

6 The Exposure Draft, at clause 13.4, restates the effect of current clause 14.12 of the BREC Award 2010.

7 An 8% penalty averaging provision has been in the predecessor award, the Entertainment and Broadcasting Industry – Cinema Award – 1998 (**Cinema Award 1998**) since the award simplification proceedings which resulted in the making of that Award.

8 It is understood that the amount of 8% was arrived at by consent and has not been contested in Commission proceedings since and was reinstated by consent into the

BREC Award by Order of a Full Bench Decision of the Commission on 30 December 2009, i.e. before the modern award took effect and should be retained.

### Submission – The current BREC Award

9 The current BREC Award at clause 14.12 states:

*All cinema workers will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.*

10 The current BREC Award at clause 26.3 states:

#### ***Special provision for employees in cinemas***

(a) *Clause 26.2 will not apply to employees in cinemas.*

(b) *If a weekly employee is required to work on a day to be observed as a public holiday, then, in addition to receiving the normal rate of pay for working ordinary hours, employees will be paid at the rate of single time additional for the hours worked.*

(c) *Casual employees will be entitled to receive double the full-time permanent hourly rate for work on a public holiday.*

(d) *A weekly employee whose rostered time off falls on a public holiday will be allowed an additional day off at a time to be agreed upon by the employer and the employee or the employee will be paid an additional day's pay instead within seven days of the holiday.*

11 When the current award was first made on 4 September 2009 [PR 988989] it did not repeat the provision for an 8% penalty averaging provision which was specifically provided for at clause 16.1 of the predecessor award, the Cinema Award 1998.

12 In 2009, a Full Bench of the Australian Industrial Relations Commission considered an application by the Australian Entertainment Industry Association (**AEIA**) to vary the BREC Award, inter alia, to restore the 8% penalty averaging provision which had not been carried over from the Cinema Award 1998 to the BREC Award. In the Decision of 30 December 2009 ([2009] AIRCFB 998), the Full Bench noted that the Media Entertainment and Arts Alliance (MEAA):

[3] *did not object to the concept of a penalty averaging clause but claimed that it is "incumbent on the AEIA to show how many Sunday and public holiday shifts are compensated for by the 8% penalty."*

13 The Full Bench Decision of 30 December 2009 also noted:

[5] *In response to the MEAA position the AEIA reiterated that the current penalty averaging provision was negotiated between the parties during the minimum rates adjustment process, was included in the award as part of the minimum rate rather than an all-purpose allowance, and was approved as part of the properly fixed minimum rate when the current award was simplified. It also submitted that the penalty averaging component, which is set as a percentage of the base rate, retains the minimum rates relativities.*

14 The Full Bench Decision then stated:

[6] *As the variation is sought to restore a provision of the current award which, if not reinstated could have the effect of disadvantaging some employees and is not opposed by the MEAA, we have decided to grant the application.*

#### **Submission – Entertainment and Broadcasting Industry – Cinema Award - 1998**

15 A penalty averaging component was originally inserted into the Theatrical Employees (Cinema and Drive-in Industry) Award 1983 by Order of Commissioner McDonald on 11 April 1997 (Print N9936). It is understood that the amount of 8% was arrived at by consent of the parties and there is no formal decision other than the variation to this award noted in Print N9936.

16 The Cinema Award 1998, at clause 16.1, under Wage rates, includes *penalty averaging per week* which, for each classification, provides an additional 8% calculated on the “base rate” for the relevant classification.

17 Section 89A of the *Workplace Relations Act 1996* (Cth) confined new Awards to twenty “allowable matters” and limited the Australian Industrial Relations Commission’s power to make new awards dealing with those allowable matters to the making, inter alia, of “minimum rates” awards.

18 Items 49-51 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth)(**WROLA Act**) contained provisions which set out the process by which awards were to be stripped back.

19 In matter C No. 20261 of 1998, by section 33 - action of the Commission’s own motion, the Commission dealt with the Entertainment and Broadcasting Industry – Cinema Award – 1997 under schedule 5 to WROLA Act and made the Entertainment and Broadcasting Industry – Cinema Award – 1998. Representatives of the Media Entertainment and Arts Alliance and employers participated. The Commission will have had regard to allowable award matters including:

*(c). rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage systems.*

The Commission will also have had regard to section 89A(6)

*The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.*

20 The result of the award simplification proceeding C No. 34203 of 1998 was the Order by Commissioner Larkin making the Entertainment and Broadcasting Industry – Cinema award – 1998. The Cinema Award 1998 contained properly fixed minimum rates including, at clause 16.1, a penalty averaging provision of 8% of each award base rate.

21 The appropriateness of the 8% penalty averaging provision has not been contested in the Commission by either the union or employers and so has been accepted as fair and reasonable compensation “*instead of Sunday penalty payments and as compensation for reduced public holiday penalties.*”

22 Based on research and on assistance provided by Fair Work Commission library staff, it appears that there is no available record of the relevant Commission proceedings or the Commission decision which resulted in the 8% penalty averaging provision being included in the Cinema Award 1998.

- 23 Based on the best information available, it seems that no precise formula was developed and used to determine the percentage to be applied to base rates instead of Sunday penalty payments and as compensation for reduced public holiday penalties. Rather, the percentage appears to have been arrived at by mutual agreement between union and employer representatives during the Commission proceedings which resulted in the making of the Cinema Award 1998 and the insertion of the reference, at clause 16.1 of that Award of a “penalty averaging” provision of 8%.
- 24 Based on the parties’ agreed position in 1998, which was accepted by the Commission and incorporated into the Cinema Award 1998, and as standard federal award Sunday penalty rates have remained relatively unchanged and the standard for federal award public holidays rates has remained at 250% since before 1998, it is submitted that the 8% penalty averaging provision at clause 12.14 of the BREC Award continues to be an appropriate percentage of the relevant award base rate to compensate for Sunday penalties and reduced public holiday penalties.

**No change required**

- 25 The Employers submit that the 8% penalty averaging provision is part of properly made minimum rates, has been a provision of the BREC Award and its predecessor the Cinema Award 1998 for more than 20 years, has not been challenged in the Commission by any party as inappropriate and should remain in the BREC Award.

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17 April 2018