

Fair Work Act 2009

FAIR WORK COMMISSION

s. 156 - 4 yearly review of modern Awards

AM2019/17 - Finalisation of Exposure Drafts – Tranche 3 Awards

AM2014/276 – Live Performance Award 2010

Submissions of the Australian Entertainment Industry Association (trading as Live Performance Australia) on the Exposure Draft Award.

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Live Performance Australia

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1. This Submission is filed in accordance with the Decision of the Full Bench issued on 29 January 2020¹. Live Performance Australia (LPA) has an interest in the Live Performance Award 2010² (the Award) and in accordance with the Directions attached to the Decision, this submission relates to the exposure draft of the Award, published on 29 January 2020.
2. LPA has reviewed the Exposure Draft and provides the following submission:
3. **Clause 2 Definitions.**

(a) The following definitions have been deleted by the FWC

double time means in the case of a weekly employee twice the ordinary hourly rate which is obtained by dividing the employee's applicable rate per week by 38 hours, and in the case of an employee engaged by the hour twice the employee's hourly casual rate

and

time and a half means in the case of a weekly employee, one and a half times the ordinary hourly rate which is obtained by dividing the applicable rate per week by 38 hours, and in the case of an employee engaged by the hour one and a half times the hourly casual rate

The above definitions were contained in the 5 April 2019 Exposure Draft and LPA disagrees with the removal of these definitions.

These definitions were inserted in accordance with [2018] FWCFB 4175 at [314], and to LPA's knowledge have not been changed by the FWC.

The deletion of these definitions will introduce an ambiguity regarding payment of overtime for casual employees who currently enjoy overtime payments of either double the casual hourly rate of time and a half the casual hourly rate.

LPA submits that these definitions should remain.

This would result in requiring changes to all the Overtime and penalty rates clauses in the award.

(b) The following definition be inserted in alphabetical order:-

Performers' Overtime Rate for the purposes of the clause 32.3 (Number of Performances) and Clause 34 (Overtime and penalty rates) and shall be based on the Performer's Negotiated Weekly Rate of Pay or the Negotiated Casual Rate of Pay provided that, for the purposes of this definition, where the Performer's Negotiated Weekly Rate of Pay or Negotiated Casual Rate of Pay is in excess of 133.33% of the applicable Minimum Rate then the Performer's Negotiated Weekly Rate of Pay or Negotiated Casual Rate of Pay will, for the purposes of calculating the relevant entitlements be deemed to be 133.33% of the Minimum Rate (for avoidance of doubt 133.33% means the Minimum Rate plus an additional 33.33%).

The inclusion of this clause reflects the provisions of the pre-reform award and provides for a cap on the amount paid for overtime. This clause is essential for the better off

¹ [2020] FWCFB 421

² MA000081

overall test in enterprise agreements for performer's as this clause is replicated in those agreements.

- (c) Parties have been asked to comment on the difference between “whole time performance” and “substantially whole time performance”. LPA submits that the word “substantially” should be deleted.

4. Clause 13.3(c) and (d)

The wording of these clauses could lead to misinterpretation and ambiguity. The accommodation allowance provided in clause 13.3(c) is to apply when employees are required to travel for period of less than one week, that is from 1 to 4 nights, whilst clause 13.3(d) applies when the employee is travelling for 5 nights or more. LPA submits that the clauses be amended as follows:

- (c) Accommodation allowance – ~~one week (five 5 working days) or less~~ 1 to 4 days

Where the employee does not accept employer-provided accommodation and the period of travel involved is ~~less than~~ one week ~~or less~~ the Employer shall pay an allowance of \$168.51 per night.

- (d) Accommodation allowance – more than one week (five 5 working days ~~or more~~)

Where the employee does not accept employer provided accommodation and the period of travel involved is ~~more than one week or more~~, the Employer shall pay an allowance of \$128.56 per night up to a maximum of \$642.88 per week

5. Clause 14.3

Parties have been asked to comment on the use of “child performer” in the context of clause 14 Superannuation.

LPA disagrees with the amendments proposed in the Exposure Draft and should retain the existing wording.

Performers aged 16 years and over are treated and paid as adult performers. Under the various State legislation dealing with employment of children, the legislation refers to “child employment” and such legislation specifically provides for the number of hours of work and the number of performances a child performer may do in a working week in the live performance industry.

The proposed changes will disadvantage those employees aged 16 to 18 who work full time, part time or casually and satisfy the criteria for the payment of superannuation.

In addition, clause 30.5 is still headed “Child performers”.

6. Clause 32.3(b)(i), (ii) and (iii)

With the inclusion of the definition of “performers overtime rate” consequential amendments are required as follows (in red):

- (i) in the case of additional performances of a substantially whole time production (excepting pantomimes), the employee will be paid 12.5% of their ~~overtime~~ ~~minimum weekly~~ rate for each additional performance exceeding ~~eight~~8;

- (ii) in the case of additional performances of pantomime exceeding ~~eight~~8 but not exceeding 12, the employee will be paid an additional 12.5% of their ~~overtime minimum-weekly~~ rate for the first performance exceeding eight~~8~~ and then an additional 6.25% of their minimum weekly rate for each performance in excess of the ninth performance in any such week; and
- (iii) in the case of performances up to one hour in duration, an additional payment of 10% of their ~~overtime minimum-weekly~~ rate for each performance exceeding 12.

7. Clause 33.3

Parties are asked to comment on the redrafted clause 33.3. Clause 33.3 has been deleted in the Exposure Draft.

However, the clause as it reads does not cover the case of breaks for casual employees, so the parties propose the following new clause 33.3:

33.3 Casual employees

No employee will be required to work continuously in excess of four hours, or by agreement with a majority of the cast involved five hours, without a substantial break for a meal, recuperation and/or refreshment

8. Clause 33.5 Missed breaks

Clause 33.5 is repeated at clause 34.2 and it is submitted that clause 33.5 should be deleted.

9. Clause 34. Overtime and penalty rates

With the inclusion of the definition of the performers “overtime rate”, amendments are required to clause 34 as highlighted in red. In addition, the clause has been amended to address the overtime for casuals issue.

34.1 Performers engaged by the week or for a longer period

- (a) All time worked in excess of ~~eight~~8 hours on any one day will be paid for at 150% ~~of the minimum hourly rate~~ for the first ~~two~~2 hours and 200% ~~of the minimum hourly rate~~ after that ~~at the performers overtime rate~~.
- (b) Subject to 34.1(c) all time worked in excess of 38 hours in any one week will be paid at 150% ~~of the minimum hourly rate~~ for the first ~~two~~2 hours and 200% ~~of the minimum hourly rate~~ after that ~~at the performers overtime rate~~.
- (c) All hours worked in excess of 38 in a week as per clause 32.1(a) shall be displayed on the employee’s pay slip as a negative balance and where less than 38 hours are worked in a subsequent week the difference in hours shall be added to the negative balance until this reaches zero. If at the completion of the engagement or the completion of 12 months from the first date of engagement, whichever is earlier, the balance has not reached zero, the employee will be paid at 150% at the ~~performers overtime rate~~ for the outstanding hours. An employee will be paid 150% ~~of the minimum hourly rate~~ ~~at the performers overtime rate~~ for all hours worked in excess of an average of 38 hours per week during an engagement, or during each 12 month

period from the first date of engagement, whichever is the earlier. The overtime will be paid at the end of the period for which the payment is made.

34.2 General—applicable to weekly or casual engagements

Where any of the intervals or breaks due to an employee are restricted or extended beyond the hours specified under this award, the employee will be paid overtime at the rate of 150% of the ~~minimum hourly rate~~ **performers overtime rate** for each 15 minutes or part thereof of the restriction or extension.

34.3 Performers engaged casually other than supernumeraries

- (a) An employee required to work beyond the hour of 11.30 pm or who is detained for work or any other reason beyond the hour of 11.30 pm by the employer will be paid at the rate of 8.3% of the appropriate casual call rate for such employee for each half hour or part thereof beyond 11.30 pm that the employee is required to work or is detained, in addition to any other payments for overtime, etc. and the ordinary fee applicable to such employee.
- (b) If the performance call is longer than ~~three~~3 hours or if the employee is detained by the employer during an engagement for more than three3 hours (excluding dressing/making up and dressing/removing make-up etc.) the employee will be paid at the rate of 16.7% of the casual rate for each half hour or part thereof in excess of three3 hours that the employee is detained by the employer.
- (c) The third or any subsequent call (**other than short performance calls**) on any day will be paid at the rate of ~~time and a half~~150%, unless a higher penalty applies.
- (d) **All time worked in excess of eight hours on any one day will be paid at 150% for the first two hours and 200% after that.**

10. **Clause 34.5**

The parties have been asked to comment on the redrafted clause 34.5 and LPA submits that the clause reflects the parties proposed changes.

11. **Clause 35**

LPA submits that the note in clause 35 has been addressed. Refer to the Report issued by President Justice Ross on 29 November 2019 in AM2019/17.

12. **Clause 40.2**

The parties have been asked whether the term “minimum call rate” should be defined. LPA submits that clauses 39.2 and 3 clarifies this issue.

13. **Clause 40.2(b)**

The Supply of Music allowance amounts have been unintentionally reversed to provide a greater amount paid per call than paid by the week. The clause should be amended as follows (in red):

40.2(b) Supply of music

An employee required to supply their own music will receive the following allowance:

- (i) weekly employee— ~~\$11.21~~ \$34.21 per week; or
- (ii) casual employee— ~~\$34.21~~ \$11.21 per call

The corresponding amendment will be required in Schedule B1.1

14. Clause 43.1

To ensure that overtime and penalty rates apply to all employees including casual employees, it is submitted that clause 43.1 be amended as follows:

43.1 All time worked by any employee on Monday to Saturday over or outside the prescribed time of any call will be paid for at 150% of the appropriate call rate. ~~minimum rate~~

15. Clause 43.6

Musicians are engaged by the call, a call being 3 hours, and therefore to ensure there is no ambiguity in applying the Sunday penalty, it is submitted that clause 43.6(a) be amended as follows:

43.6 Sundays

- (a) Except as otherwise provided in this award, all work performed on Sundays will be paid for at the following rates:
 - (i) Weekly employees—200% of the appropriate call rate. ~~minimum rate with a minimum payment as for three hours.~~
 - (ii) Casual employees—200% of the appropriate call rate. ~~minimum rate~~

16. Clause 62.6

The Exposure Draft has changed the wording of the “penalty averaging component” to “loading averaging component”. It is submitted that the words “averaging component” be deleted after the word “loading”.

To ensure that the loading applies to all employees engaged by sound and/or lighting companies, clause 62.6(a) be amended as follows (in red):

62.6 (a) All touring sound and/or lighting employees will receive a 17.5% ~~penalty~~ loading averaging component instead of overtime and penalty provisions for all purposes of this award

17. Clause 62.7

To ensure the special provisions applying to crewing services employees apply to all crewing services employees including casual employees, the clause heading be amended as follows (in red):

62.7 Special overtime and penalty provision for all crewing services employees

18. Time off in Lieu of Overtime (TOIL)

As reported by President Justice Ross on 29 November 2019 (AM2019/17), the parties are in discussions on the appropriate wording on a TOIL term. Those discussions are still continuing, and it is envisaged that a term will be submitted before 27 March 2020.

19. LPA disagrees with the conversion of fractions to decimals especially relating to the additional payments and overtime provisions for performers.

As a general rule, performers engaged by the week, work 8 performances in a 6 day week. It has been a long standing award requirement and practice, to apply additional payments or overtime payments on the basis of $1/8^{\text{th}}$ if it is to do with performance work, or $1/6^{\text{th}}$ if it is to do with weekly payments. This has been the case since one of the first performers' award came into effect in December 1920 and has become institutionalised in the industry.

Therefore, LPA respectfully submits that the use of fractions, especially $1/6^{\text{th}}$ and $1/8^{\text{th}}$ relating to performers be reinstated, rather than the use of decimals.

MAY IT PLEASE THE COMMISSION