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*Fair Work Act 2009*

FAIR WORK COMMISSION

**IN THE MATTER OF:        4 yearly review of modern Awards**

**AM2014/276 – Live Performance Award 2010**

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

18 January 2017

**Live Performance Australia**

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1. This Submission is filed in response to the Statement and Directions of the President issued on 26 August 2016<sup>1</sup> and the Amended Directions issued on 21 December 2016, with regard to Group 4 awards. Live Performance Australia (LPA) has an interest in the Live Performance Award 2010<sup>2</sup> (the Award) and this submission concerns the technical and drafting issues related to the exposure draft of the Award, published on 25 November 2016.
2. This submission addresses the technical and drafting issues and questions raised by the FWC in Clause order.
3. **Clause 3 Definitions – Archival and/or reference recording.** The FWC has requested comment on whether the provision in paragraph (c) of the definition is an appropriate provision to include in an award.

LPA strongly supports the retaining of this provision in the Award. It is an issue that pertains to the employment relationship and ensures that an artists' image cannot be exploited for purposes contrary to the original purpose of the recording. Without paragraph (c), paragraphs (a) and (b) of the definition would not provide the safeguards afforded to artists as outlined in paragraph (c).

4. **Clause 7 Facilitative provisions for flexible work practices.**

In addition to the clauses highlighted in clause 7.2, clauses 33.3(c) (iv), (vi), and (viii) should be added. Clause 52.1(g) should be changed from “an individual” to “the majority of employees”.

5. **Clause 8 Types of Employment and Clauses 9, 10, 11 and 12.**

On 28 September 2016, LPA made the following submission with regard to the present clause 10 Types of Employment of the Award:

- a. “The provisions of clause 10 are made redundant due to fact that the “Types of Employment” for each category of employees covered by the Award are set out in the specific Parts of the Award.
- b. Part 4 of the Award sets out the terms and conditions of employment for Performers and Company Dancers. In particular, clause 23 Types of employment, overrides the provisions of clause 10 with regard to performers and company dancers.
- c. Likewise, clause 29 in Part 5 Musicians, clause 35 in Part 6 Striptease Artists, and clause 42 in Part 7 Production and Support Staff, all override the provisions set out in clause 10.
- d. LPA submits that the most efficient way to resolve this issue would be to amend clause 10 to state that the Types of Employment for particular categories of employees are found at the clauses listed in paragraphs (b) and (c) above.
- e. This issue will be argued on its merits. The suggested variation to the Award is reflected in the Draft Determination attached.”

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<sup>1</sup> [2016] FWC 6062

<sup>2</sup> MA000081

LPA submits that this issue should be addressed during the technical and drafting stage of the review of the Award.

6. **Clause 12 Weekly employment.**

The FWC has asked to clarify “weekly employment”. This term relates to the definition in Clause 3 Definitions “engaged by the week” meaning the employee is engaged for at least a week of employment. The term “weekly engagement” reflects the nature of the live performance industry which is characterised by short engagements ranging from 2 weeks to maybe 2 years if a performer is engaged on a long running musical production which tours to the capital cities of Australia. However, it is more likely that engagements will be between 4 and 8 weeks, and hence the term “weekly engagement”. Weekly engagements will work a 38 hour week and attract all leave entitlements.

For performers and company dancers this is reflected in clause 30, musicians in clause 36 and Production and Support Staff in Clause 49.

7. **Clause 14 Minimum wages.**

LPA submits that the way the Classifications and the minimum weekly and hourly rates of pay are set out in the exposure draft, is not user friendly and requires a sound knowledge of the industry to decipher rates of pay for classifications such as performers and musicians. It is suggested that this matter be discussed further in conference between the parties to ensure that rates of pay for all classifications are readily accessible.

8. **Clause 14.6 School-based apprentices.**

The FWC has asked whether the school-based apprentices schedule be deleted. LPA submits that the schedule should not be deleted.

9. **Clause 15.3(f)(ii).**

The FWC has asked whether clause 15.3(f)(ii) is required.

LPA submits that this clause causes some problems for employers when casting for a show/production and employees who wish to audition for a show/production which is outside of their place of residence. The clause assumes that the employer knows where all employees reside who audition for a role/s in a production. The way the travelling allowance works, is that any employee who works away from their “usual place of residence” is entitled to be paid travelling allowances for that period of engagement they are away from their usual place of residence.

The clause has the effect of:

- a. Employers refusing to audition or cast performers who do not live in the town or city where the production will play (i.e. a local show mentioned in clause 15.3(f)(i) which is not defined in the Modern Award but was defined in the pre-reform award as follows:

“**Local show** means a show specified as such by the employer where the production is scheduled to take place in one location only and where the employer shall engage for such production only employees who reside in that local area.”

- b. Employees stating that they live in a certain town or city which could result in the employee receiving travelling allowances in all towns and cities if the show is a touring production.
- c. Effectively stops an employee from outside the local area auditioning or being cast in a local show because the employer would be required to pay travel allowances to such employee.
- d. Employees stating that their place of residence is in a particular town or city but in fact reside elsewhere.

LPA acknowledges that the travelling provisions can and have caused problems for both the employer and employee over the years. The present provisions were introduced in the late 1980's and have not been reviewed or updated since. It is noted that MEAA is seeking changes to the travel allowances in its substantial claim, so it is LPA's submission that the travel allowance provisions be reviewed as a whole during the course of this Review.

#### **10. Clause 17.3(c) Annual Leave Loading.**

The FWC has asked whether clause 17.3(c) should be reviewed.

The taking of annual leave by employees engaged on a show/production provides unique problems in the live performance industry due to the fact that employees are usually engaged for a specific period of time and undertake a specific task during that period. The issue of annual leave loading should not be reviewed and clause 17.3(c) should remain as is.

#### **11. Clause 31.3 Performers in school tours.**

Performers engaged on school tours are engaged on the appropriate classification level as defined, and therefore there should be no reference to a particular classification level.

#### **12. Clause 31.4 Weekly part time employees (supernumeraries).**

This is a minimum payment.

#### **13. Clause 33.2(f) substantially whole time performances.**

The FWC has asked to clarify what is meant by "substantially whole time production". This phrase can also be found in clauses 33.2(iv), 33.3(a)(vi), 33.3(d)(iii), 33.4(a) and (b).

Clause 33.2(iv) provides that the minimum time to be credited to an employee for each "whole time" performance or dress rehearsal will be 3.25 hours for performers and clause 33.3(a)(vi) 3.75 hours for company dancers (both minimum times include warm-up, dressing and undressing time). The only other mention of performance duration is that of less than one hour, and therefore the phrase "whole time" (nature/performance/production) refers to any performance longer than 1 hour.

It is suggested that a definition of "whole time performance" be inserted into Clause 3 Definitions.

**14. Clause 33.2(g)(ii) and clause 36.2.**

The FWC has asked to clarify the interaction between the above clauses. There is no interaction between the clauses as clause 33.2(g)(ii) relates to the employment of performers and clause 36.2 relates to the employment of musicians.

The breaks provided in clauses 33.2(g)(ii) and (iii) are unpaid.

**15. Clause 38.2(f)(vi).**

Clause 38.2(f)(vi) has been amended by the FWC without any notation in the exposure draft. The change to the clause deletes the words “Subject to an agreement” from the beginning of the second sentence of the clause. There is no explanation as to why these words have been deleted.

In the Decision of Commissioner Lewin,<sup>3</sup> dated 14 January 2011, the Award was varied to ensure that there was no payment of a broadcast or recording allowance to musicians when undertaking an archival recording of a production. It was agreed that where an employer agreed to any payment to a participating musician in an archival recording, then the rates as provided in the award would be payable.

LPA submits that the second sentence of clause 38.2(f)(vi) should be deleted in its entirety as it makes the clause ambiguous and confusing. In addition, to LPA’s knowledge, there has been no payments made to musicians for an archival recording. It has been industry practice for many years that there are no additional payments made to any performer, company dancer, musician or crew for an archival recording.

**16. Clause 53.1(c).**

LPA agrees that this clause has been inadvertently deleted from the Award and should be reinstated.

**17. Clause 54.2(b).**

LPA submits that the word “ordinary” should be inserted after the word “eight” to ensure it is clear that overtime is payable after ordinary hours are worked.

**18. Schedule A.5.1.**

The title of Schedule A.5.1 should be amended to delete the words “Production and Support Staff Level 4 (Theatre)” as there is no such classification in the Award.

**19. Schedule A.6.1**

The title of Schedule A.6.1 should be amended to delete the words “Production and Support Staff Level 5 (Theatre)” as there is no such classification in the Award.

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<sup>3</sup> [2011] FWA 230



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**20. Schedule A.8.2**

The title of Schedule A.8.2 should be amended to delete the words “Production and Support Staff Level 6 (Theatre)” as there is no such classification in the Award.

MAY IT PLEASE THE COMMISSION