



21 December 2016

Associate to Hon Justice Iain Ross AO
Fair Work Commission
Victoria Registry, Level 4, 11 Exhibition Street
Melbourne Vic 3000

By email: amod@fwc.gov.au

Dear Associate,

Re: 4 Yearly Review of Modern Awards – Live Performance Award 2010 (AM2014/276) – GROUP 4 – Technical and Drafting issues - Exposure Drafts

1. The Media, Entertainment and Arts Alliance (**MEAA**) refers to the Fair Work Commission (**the Commission**) Statement and Directions dated 26 August 2016 requesting the parties file submissions on the technical and drafting issues related to exposure drafts in Groups 4D, 4E and 4F.
2. MEAA, as the union representing employees in the broadcasting and recorded entertainment industry has an interest in the Live Performance Award 2010 (**the Award**). MEAA makes the following submissions on the technical and drafting issues relating to the Exposure Draft of the Award – Live Performance Award 2016.
3. MEAA has made separate submissions dated 2 March 2015, identifying the nature of proposed changes which MEAA is pressing in relation to the Award. MEAA has also, by separate correspondence to the Commission dated 14 and 21 October 2016 respectively, confirmed its intention to press for those changes to the Award and provided Draft Determinations to that effect. Accordingly, these submissions deal only with the technical and drafting issues MEAA has identified in the Exposure Draft of the Award – Live Performance Award 2016.

Facilitative provisions for flexible working practices

4. The new clause 7 in the Exposure Draft of the Award incorrectly refers to cyclic rostering in clause 52.1(g) as being an agreement between an employer and individual. That is not correct. Cyclic rostering can only occur pursuant to an agreement between an employer and a majority of employees.¹ MEAA submits that the words “*An individual*” be replaced with “*The majority of employees*” in clause 7.2 where reference is made to clause 52.1(g). MEAA refers also to paragraph 16 below in support of this submission.

¹ Clause 52.1(g) – Exposure Draft – Live Performance Award 2016; clause 45.1(f)(i) – Live Performance Award 2010



Changes to calculating overtime

5. MEAA is concerned about any changes to the Award which may result in a reduction in the take home pay of employees. Of particular concern is the change to provisions relating to overtime – from being determined by “time” based formulas to “percentage” based formulas and in many circumstances, with a further limitation being included so that the rate of pay is calculated as a multiple of the “minimum weekly rate” or “minimum hourly rate” or “ordinary rate” or “ordinary hourly rate”. We are concerned that this proposal represents a change to the Award which would result in a substantive change to minimum entitlements. Of particular concern for MEAA are the following clauses:

11.3(b)
21.4
21.5
33.2(g)(ix)
33.3(e)(ii)
33.4(b)(i)-(iii)
33.4(d)
35.1(a)-(c)
35.2
35.4(a)(v) and (vi)
35.4(b)
35.5(a)(i),(ii) and (b)(ii)
37.4(a)
38.2(f)(ii)
38.2(f)(v)
41.1
41.2
41.3
41.6(a)(i) and (ii)
42.3(g) and (h)
42.4(h)
42.5
48.1(c) and (d)
52.1(c)
53.1(c) and (d)
53.3(a) and (b)
54.1
54.2
54.3
54.4



6. MEAA submits that changing the wording from “time” based formulas to “percentages” or multiples of the “minimum weekly rate” or “minimum hourly rate” has the unintended effect of reducing the take home pay of employees who are receiving rates of pay higher than the Award minimums. Such
7. a change will substantially affect the relative living standards and the needs of the low paid. It will also affect the current modern award objective to provide additional remuneration for employees working overtime or shift work, or unsocial, irregular or unpredictable hours including on weekends and public holidays.²
8. Accordingly, MEAA submits that the “time” expression clauses referred to above be restored and references to “minimum weekly rate” or “minimum hourly rate” that have been added to those relevant clauses be removed.

Part 8 – Production and Support Staff – Types of employment

Full-time employees: clause 49.1

9. Clause 49.1 now provides that “[a] full-time employee will be engaged to work 38 ordinary hours or an average of 38 ordinary hours per week and subject to the provisions of clause 52 – Ordinary hours of work and rostering.” MEAA submits that this unfairly broadens the scope of the provision such that a full-time employee can now be engaged either on the basis of 38 hours per week or on an averaging basis over a four week period. Clause 52.1(g) is a facilitative provision which currently provides sufficient flexibility for employers by enabling cyclic rostering. However, an important qualification to the operation of clause 52.1(g) is that cyclic rostering can only be implemented at an enterprise by agreement between the employer and the majority of employees concerned. **[MEAA’s emphasis]**. There is no ability to implement cyclic rostering by agreement between an employer and an individual employee. MEAA therefore submits that clause 49.1 be restored by removing the words, “or an average of 38 ordinary hours.”

Part-time employees: clause 49.2

10. Clause 49.2 has been amended such that a part-time employee is now defined as, inter alia, an employee who has reasonably predictable hours of work.³ This has been changed from the current provisions in the Award which provides inter alia, that a part-time employee “works an agreed usual number of ordinary hours less than 38 each week.”⁴ MEAA submits that the change proposed in the Exposure Draft of the Award diminishes the rights of the employee and accordingly, MEAA submits that the former wording be restored and clause 49.2 (a)(iii) be amended as follows:

² Section 134(1), Fair Work Act 2009

³ Clause 49.2(a)(iii), Exposure Draft - Live Performance Award 2016

⁴ Clause 42.2(a) – Live Performance Award 2010



~~Has reasonably predictable hours of work works an agreed usual number of ordinary hours; and~~

11. MEAA notes that there is a typographical error at clause 49.2(b).

“For each ordinary hours worked...”

Responses to questions in the Exposure Draft

Below are MEAA’s responses to the questions asked by the Commission throughout the Exposure Draft:

12. Clause 3(b) Definitions regarding archival recordings

“Archival and/or reference recording means... which is:

(b) is only made...”

We note the repetition of the word ‘is’.

13. Clause 3(c) Definitions regarding archival recordings

MEAA submits that this is appropriate for inclusion in the Live Performance Award and reflects the wording in relevant enterprise agreements and policies in live performance. It is important that the owners of the recording are aware of their responsibility in relation to protecting archival recordings. This footage is directly related to the employment relationship.

14. Clause 12 Weekly employees

Weekly employees are full time employees who accrue paid leave. They are known as ‘weekly’ because of the weekly nature of their engagements. In live performance there is often no ability for an employer to fix the term of a contract, or engage someone as an ongoing employee because productions run for shorter or longer periods of time than can be ascertained upfront. Weekly employees are not casual employees.

15. Clause 15.3(f)(ii) misrepresentation of place of residence

MEAA submits that this clause is indeed required and reflects the wording in related enterprise agreements and industry policies. The clause ensures that employers must adhere to the provisions of the Award in relation to providing travel allowances and ensures that there is no incentive for employers to engage performers only if they agree to misstate their true place of residence. The relative scarcity of jobs in the sector means that



employees can be tempted to misrepresent residence in order to cost the employer less and therefore be a more attractive proposition. The intention of the Award is clearly that performers working away from home be suitably accommodated and be provided with meal and incidental allowances. This clause ensures that the intention of the Award is realised.

16. Clause 17(3)(c) Annual leave loading

MEAA submits that this clause does indeed need to be reviewed on the basis that annual leave accrues progressively. The way the clause currently operates is out of step with the way the annual leave clause of the Live Performance Award operates and should be updated to bring the loading into line with annual leave accrual.

17. Clause 31.3 Performers in school tours

MEAA submits that there is no need for this to refer to the performer category 1 grade 1 rate as some performers on school tours are entitled to be engaged at a higher grade.

18. Clause 31.4 Weekly part-time supernumeraries

This is a minimum payment.

19. Clause 33.2(f) Substantially whole time performances

33.2(a)(iv) sets out that a whole time performance is one where the minimum time credited is 2.5 hours as opposed to a performance of up to one hour in duration. Any performance that is longer than one hour in duration would be considered a performance 'substantially whole time in nature'.

15. Clause 33.2(g) School tours breaks

Clause 33.2(g)(iii) is in paid time. Clause 36.2 relates to musicians. They are contracted differently to performers.

20. Clause 53.1 Delayed meal breaks

MEAA agrees that Clause 53.1(c) appears to have been deleted in error. If this was reinserted at the proposed Clause 53.1(c), however, it would replicate the provision Clause 53.3 (a), which applies to *all employees*. Similarly, Clause 53.1(d) is the same as the current Award but replicates the provision in Clause 53.1(b) other than the fact that the wording has not been updated.

Thank you for the opportunity to comment on the exposure draft.

Yours faithfully,

Matthew Chesher
Director, Legal and Policy