

## **In the Fair Work Commission**

**(AM2016/4)**

### **Broadcasting and Recorded Entertainment Award 2010 (BREA)**

1. In the course of submissions and conferences before the Fair Work Commission (the Commission) to consider proposed variations to the BREA from 2015 to the present date, MEAA has advanced what it believed to be clarifications to the Award's application.
2. The first proposal requested changes to the Award's title and definitions of 'industry' (in clause 3) and 'coverage' (in clause 4) to expressly include the word 'cinema' or 'cinemas' to enable cinema workers covered by the Award to better identify the BREA as the Award that regulated their terms and conditions of employment.
3. MEAA also proposed the replacement of the term 'single-time additional' with the term 'double-time' in clause 74.2 of the BREA.
4. Although MEAA acknowledge that one submission favoured a stand-alone modern award for the cinema sector, MEAA has proceeded on the basis that the above proposals were acceptable to the parties at large.
5. This submission therefore does not address these matters, which we note were canvassed in Senior Deputy Hamberger's Report to the Full Bench dated 22 February 2017.
6. Beyond the matters raised above, MEAA seek amendments to the BREA to:
  - Clarify that dancers are covered by the BREA; and
  - Modernise the language used in Part 10 to incorporate television and other productions in addition to 'film' productions.

#### **Clarifying that dancers are covered by the Award**

7. To understand the BREA in its present form, it is necessary to examine the pre-reform awards from which the BREA drew its terms.

***Entertainment and Broadcasting Industry – Dance Company Award 1998<sup>1</sup>***

8. This Award defined an 'Artist', inter alia, as '***an employee who is a dancer and who is engaged to perform as part of the company of dances***'.
9. The Award provided for a Training Level and Seven other levels of employment. It was directed at regulating the pay and conditions of dancers employed by established companies, not stand-alone or freelance dance professionals.

***Actors Etc (Television) Award 1998 – Attachment 1***

10. This Award explicitly dealt with the conditions of employment of dancers. Clause 3.2 of the Award stated:

**3.2** *This award shall cover all work (other than that covered by the Actors Television Programmes Awards 1973) done by actors, singers, dancers<sup>2</sup>, variety acts, comperes and other performers (excepting instrumental musicians, who do not speak, sing, act or mime and who could not be classified as a variety act and members of the staff of any employer) and who are employed by an employer for performances capable of transmission by television whether live or recorded by means of film, tape or any other process.*

**3.3** *This award shall not apply to the performance of work in or in connection with advertising film of or relating to a cause of a charitable nature. An actor if in doubt as to the bona fide nature of the charity may refer the matter to the Media Entertainment and Arts Alliance.*

**3.4** *This award shall apply only to employees employed on a casual basis.*

11. Clause 4.10 of the Award stated:

**4.10** *Performer means an employee of the classification referred to in subclause 3.2 except an extra as defined in subclause 4.6.<sup>3</sup>*

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<sup>1</sup> The Award's respondents included the Sydney Dance Company, The Queensland Ballet and Australian Dance Theatre. This Award appears to have had greatest application in the live performance industry rather than the broadcasting and recorded entertainment industry.

<sup>2</sup> Emphasis added

<sup>3</sup> Clause 4.6 stated:

***Extras, Crowd extras, Supernumeraries or Walk-ons are persons who are part of a crowd, mob, ensemble or atmospheric scenes, and who appear only incidentally or in backgrounds, do not speak dialogue except in the mass and who are in accordance with industry practice not featured provided that the employer may, for the purposes of authenticity invite members of the public in civilian dress to join in a scene and such members of the public shall not be regarded as employees and shall not otherwise be covered by this award.***

**Actors Feature Film Award 2002 ('Film Actors Award') – Attachment 2**

12. Defined an 'artist' as:

*'each and all of those persons engaged by the producer to take part audibly and/or visually in the production of the film<sup>4</sup> including performers, doubles, extras, stand-ins and stunt artists'.*

13. This is the definition of 'artist' used in Part 10 of the BREA.

14. The Actors Feature Film Award also defined 'performance' as: 'the work done by an artist in a film'. This is the same as the definition of performance in the BREA – see current clause

15. Performer was defined as 'an artist other than those defined in sub-clauses 4.7 (crowd extra), 4.9 (double), 4.11 (extra), 4.28 (stand-in), 4.29 (supernumerary) and 4.33 (walk-on extra)'.

16. This Award also defined performers class 1 and class 2:

**4.17** *"Performer Class 1" means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance who is required to speak more than two lines of dialogue and who has the necessary skills to the required standard to effectively audition, prepare, rehearse and perform the role required.*

**4.18** *"Performer Class 2" means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance, which is required to speak more than two lines of dialogue and has been classified by an employer as a Performer Class 2 on the basis of experience and quality of performance. Where there is a dispute between employee and employer on whether an individual should be classified as a performer Class 2, it may be referred to an independent arbitrator agreed between the parties.*

17. This Award, as is the case with BREA, provided for dancer 'warm-up' and 'rest break' provisions at clauses 27.1 and 27.2.

**Actors Television Programs Award 2001 –Attachment 3**

18. This Award defined the following:

**4.3** ***Artist** means each and all of those persons engaged by the employer to take part audibly &/or visually in the production of the program including performers, doubles, extras, stand-ins and stunt artists.*

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<sup>4</sup> Emphasis added

**4.16** *Performance* means the work done by an artist in a program.

**4.17** *Performer* means an artist other than those defined under paragraphs 4.9 (double), 4.12 (extra) and 4.33 (stand-in).

**4.19** *Performer Class 1* means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance who is required to speak more than six lines or fifty words of dialogue and who has the necessary skills to the required standard to effectively audition, prepare, rehearse and perform the role required.

**4.20** *A Performer Class 2* means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance, who is required to speak more than six lines of dialogue or more than fifty words and:

**4.20.1** possesses the skills of a Performer Class 1; and

**4.20.2** has worked professionally for a minimum as five (5) years as a performer; and

**4.20.3** has gained one hundred and fifty (150) points under the Experienced Point Structure set out in 4.21:

19. This Award also provided for dancer warm-ups and rest breaks at clauses 29.1 and 29.2, as is the case with the BREA.

20. Payment was regulated in Part 5 – see Part 5 of Attachment 3. Provision is made for payment for both ‘artists’ and ‘performers’ class 1 and 2.

#### **MEAA Comment**

21. With respect to dancers, MEAA submits that the BREA is an amalgam of the provisions of pre-reform Awards that regulated dancers’ terms of employment.

22. With respect to the BREA, Clause 3, Definitions, does not define ‘artist’, ‘dancer’, ‘performer’ or ‘performance’. The terms ‘artist’ and ‘performer’ are set out in Part 10 and Schedule F of the BREA respectively.

23. In Part 10, clause 59, Special Definitions, the BREA defines ‘artist’ and ‘performance’ as follows:

- a. **‘artist** means each and all of the those persons engaged by the producer to take part audibly and/or visually in the production of the film including performers, doubles, extras, stand-ins and stunt artists’

- b. **'performance** means the work done by an artist in a film'

24. MEAA therefore propose amending the definition of 'artist' in Part 10 to state:

- a. *artist means each and all of those persons engaged by the producer (or their equivalent) to take part audibly and/or visually in a production in the broadcasting and recorded entertainment industry including performers, dancers, doubles, stand-ins and stunt artists*

25. MEAA further propose amending the definition of 'performance' to align it with the BREA's industry coverage.

*performance means the work done by an artist in a production including but not limited to short films, feature films, advertising and promotional films, television commercials, television programs and any performance of an artist which is recorded, captured, simulcast and/or broadcast in any media or format, including but not limited to digital media platforms, mediums and services*

#### **Schedule F – Actors**

26. Schedule F of the BREA defines Performer Class 1 and Performer Class 2, but refers to these positions as ones where lines of dialogue are spoken.

27. To ensure the Award's application to dancers, MEAA seek to amend clauses F.1.4 and F.1.5 at Schedule F by incorporating the bolded and underlined language below:

***F.1.4 Performer Class 1 means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance who is required to speak more than two lines of dialogue (except in the case of a dancer, mime artist or puppeteer who may not be required to speak any lines of dialogue but who is engaged to take part in a performance in that capacity) and who has the necessary skills to the required standard to effectively audition, prepare, rehearse and perform the role required.***<sup>5</sup>

**a. Indicative tasks:**

**(i) Audition**

*take direction with minimum instructions;  
integrate rapid instructions in an instant performance;  
present character effectively and instantaneously.*

**(ii) Preparation**

*analyse character in terms of script and scene requirements;  
find appropriate emotions to express script requirements;  
interpret demands of production.*

**(iii) Rehearsal**

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<sup>5</sup> MEAA seek the inclusion of the highlighted and underlined parenthesised words in F.1.4

*integrate skills to production and character requirements;  
take direction and interpret instructions and display necessary flexibility,  
versatility and adaptability;  
communicate effectively and develop professional working relationships with the  
Director, other performers and production staff.*

**(iv) Performance**

*achieve the quality of performance to the required standard and be able to  
repeat performances to that standard;  
maintain the emotional, physical and vocal continuity required for the  
performance;  
perform convincingly under diverse and adverse physical and mental conditions.*

**In relation to the indicative tasks of dancers that are classified as performers class 1, a dancer is able to:**

- a. demonstrate a sound dance technique;**
- b. demonstrate appropriate skills and knowledge for learning, rehearsing and performing dance roles;**
- c. demonstrate an ability to perform in public;**
- d. demonstrate screen craft skills;**
- e. undertake all responsibilities associated with make-up and costume as required;**
- f. demonstrate musicality as appropriate to performing as a dancer; and**
- g. interpret physically and emotionally the choreographic content of a production.**

**F.1.5 Performer Class 2 means an artist who takes part in a performance and/or is engaged to take part in a rehearsal for a performance, who is required to speak more than six lines of dialogue or more than fifty words (except in the case of a dancer, mime artist or puppeteer who may not be required to speak any lines of dialogue but who is engaged to take part in a performance in that capacity) and:**

- a. possesses the skills of a Performer Class 1;*
- b. has worked professionally for a minimum of five years as a performer; and*
- c. has gained 150 points under the Experienced Points Structure set below (excluding dancers).*

**Limitations of the word 'film'**

28. As noted above, clause 59 of Part 10 of the BREA defines an 'artist' as:

- a. 'each and all of those persons engaged by the producer to take part audibly and/or visually in the production of the film<sup>6</sup> including performers, doubles, extras, stand-ins and stunt artists'*

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<sup>6</sup> Emphasis added

29. The clause defines 'performance' as:

*'the work done by an artist in a film.'*<sup>7</sup>

30. MEAA contend that the use of the words 'the film' may erroneously limit the application of the award to film settings.

31. This term also conflicts with the Award's industry coverage. This form of words is believed to have been drawn from the pre-reform Award and the Actors Feature Film Agreement, an unregistered but widely used agreement within the Australian film sector.

Clause 3.1 of the BREA states:

*a. **broadcasting and recorded entertainment industry** means the production (including pre-production and post-production), broadcasting, distribution, showing, making available, and/or sale of audio and audio/visual content **including but not limited to feature films, television programs** (including series, serials, telemovies and mini-series), **news, current affairs, sport, documentaries, video clips, digital video discs, television commercials, training films and the like whether for television exhibition, theatrical exhibition, sale to the public, digital media release or release in any other medium.***<sup>8</sup>

Clause 4.1 of the BREA states:

*b. **This award covers employers throughout Australia in the broadcasting and recorded entertainment industry and their employees in the classifications set out in this award to the exclusion of any other modern award***<sup>9</sup>

32. MEAA therefore seek the removal of the term '*the film*' wherever occurring (clauses 59 – other than the term 'feature film', 60, 61, 62, 64 and 65) in Part 10 on the basis that it reflects the terminology used in a single – feature-film related – pre-reform Award (the Actors Feature Film Award 2002) and in 2017, can be viewed as anachronistic<sup>10</sup> given the use of non-film based methods of recording, including digital means.

33. Where necessary the word 'film' should be replaced with the word 'production'.

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<sup>7</sup> Emphasis added

<sup>8</sup> Emphasis added

<sup>9</sup> Emphasis added

<sup>10</sup> The term 'film' originates from the practice of using photographic film to make frames on plastic film using a photochemical process to record a visual image which is then shown through a movie projector onto a large screen.

34. As noted above, MEAA proposes that the definition of performance in BREA clause 59 be amended to state:

***performance** means the work done by an artist in a production including but not limited to short films, feature films, advertising and promotional films, television commercials, television programs and any performance of an artist which is recorded, captured, simulcast and/or broadcast in any media or format, including but not limited to digital media platforms, mediums and services*

**Quarantining application of clause 62.11 – Release Allowances**

35. MEAA has provided an undertaking to the Screen Producers Association (SPA) to ensure current clause 62.11 does not extend to dancers.
36. One obstacle to this undertaking is that Part 10 uses the terms ‘artist’ and ‘performer’ (noting the latter is not defined in Part 10 of the BREA) interchangeably.
37. While industry convention is that release allowances apply to actors, the title of Clause 62.11 is:

***‘62.11 Release allowances payable to performers – feature films only’***

38. It can be seen that the term ‘performer’ is used. MEAA therefore propose that the title of clause 62.11 be amended to read:

***‘62.11 Release allowances payable to actors – feature films only’***

**Headings**

39. In addition, some consequential changes may be required to titles in BREA clause 14.7, which sets out payments, BREA Part 10 and BREA Schedule F. These headings currently state, ‘Actors’.
40. MEAA presently believes that it would be beneficial to amend these headings from ‘Actors’ to ‘Artists’.

May it please the Commission.

17 April 2017