Vice President Hatcher
Fair Work Commission
80 William Street
EAST SYDNEY NSW 2001

By email: chambers.hatcher.vp@fwc.gov.au
cc: amod@fwc.gov.au

4 December 2019

Dear Associate,

4 Yearly Review of modern awards – Overtime for Casuals (AM2017/51)

I write with respect to the Fair Work Commission's (the Commission) proceedings concerning overtime for casual employees, with particular reference to the Live Performance Award [MA000081] (the award).

MEAA has not fully participated in the casual overtime proceedings to date. We apologise for this late expression of interest in the matter.

Following a conference with President Ross on 26 November 2109, the President issued a report (of 29 November 2019), which stated with respect to Vice President Hatcher's carriage of the casual overtime issue, that:

> *'The parties are to give further consideration to how they wish to proceed in respect of this issue. If any party seeks to vary the award to resolve any ambiguity in relation to the calculation of overtime payments for casuals they must contact Vice President Hatcher's chambers by no later than **4pm** on **Friday 6 December 2019** and inform the Vice President of the course of action they propose. Any proposed variation will be dealt with by the Casuals and Part Time Full Bench (AM2014/196 and AM2014/197).'*[1]

MEAA and the Australian Entertainment Industry Association (trading as Live Performance Association) of Australia have now conferred on the matter and submit as follows:

1. We note the positions advanced by Australian Business Industrial in previously filed submissions, which articulated that the casual loading is payable on overtime and that the cumulative method of calculation should apply[2];[3]
2. We submit that following a review of the award's provisions concerning performers, company dancers, musicians and production and support staff, that the award, as in force and as foreshadowed in the most recent exposure draft, ought to be amended

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[1] Full Report **attached** – paragraph 3, point 2
[2] See: Australian Business submission of 10 October 2019, paragraph 2.2, page 4
[3] See also paragraph 15 of Vice President Hatcher's Draft Statement and Directions of 3 December 2019

to reflect the pre-reform positions in the discrete awards that came to form the award and provide clarity as to casual employees' access to overtime and rates upon which casual loadings were calculated; and

3. Furthermore, we are presently of the view that the award should provide for the compound calculation of overtime, not the cumulative position advanced by industry groups.

The parties are mindful of that part 3 of Vice President Hatcher's Draft Directions calls for variations to exposure drafts to be submitted by 5.00pm on 13 December 2019. The parties will adhere to this direction.

Yours sincerely,

Matthew Chesher
Director, Legal and Industrial

REPORT

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Live Performance Award 2010*
(AM2019/17)

JUSTICE ROSS, PRESIDENT MELBOURNE, 29 NOVEMBER 2019

[1] An Exposure Draft for the *Live Performance Award 2010* (the Award) was last published by the Commission on 5 April 2019. Two submissions were received following the publication of the Exposure Draft:

- Live Performance Australia dated 29 April 2019 (LPA)
- Media, Entertainment and Arts Alliance dated 30 May 2019 (MEAA)

[2] A Background Paper published on 25 November 2019 identified a number of outstanding issues in relation to the Live Performance Exposure Draft. A conference of interested parties was held on 26 November 2019. A transcript of the conference is here.

[3] The following issues were discussed at the conference.

1. ***The Live Performance Exposure Draft***: On 27 June 2019, MEAA submitted the draft award agreed to by MEAA and LPA (the parties' draft award).[1] The draft award submitted by MEAA does not include:

   - all of the common issues determined by the Commission during the course of the Review;
   - the plain language restructure of modern awards (see Attachment A); or
   - the amendments made to exposure drafts during the exposure draft finalisation process (see [2019] FWCFB 7173).

   A revised Live Performance Exposure Draft will be prepared by the Commission taking into account the agreed draft award submitted by MEAA. Interested parties will be afforded an opportunity to comment on the revised exposure draft (and the associated draft variation determination) in accordance with the process determined for the finalisation of all exposure drafts.

2. ***Overtime for casuals***: A Full Bench Statement issued on 4 December 2017 identified the Live Performance Award as ambiguous in relation to whether overtime is payable

[1] MEAA submission, 27 June 2019.

to casuals, when overtime commences and at what rate overtime is payable.[2] The Commission published an Issues Paper on 5 February 2019 making several observations on casual overtime provisions in the Live Performance Award.[3] A Full Bench Statement [2019] FWC 7087 issued on 14 October 2019 identified the Award as the subject of discussion between the parties.

The parties are to give further consideration to how they wish to proceed in respect of this issue. If any party seeks to vary the award to resolve any ambiguity in relation to the calculation of overtime payments for casuals they must contact Vice President Hatcher's chambers by no later than **4pm** on **Friday 6 December 2019** and inform the Vice President of the course of action they propose. Any proposed variation will be dealt with by the Casuals and Part Time Full Bench (AM2014/196 and AM2014/197). If no request is made to Vice President Hatcher within the time prescribed the Commission will proceed on the basis that the parties do *not* wish to vary the award to resolve any ambiguity in respect of casual overtime payments, at this time. Further, the revised Exposure Draft to be prepared by the Commission (see Item 1 above) will simply replicate the provisions of the current award which are relevant to this issue.

3. ***Time Off in Lieu of Overtime***: In its submission of 29 April 2019 Live Performance Australia submitted that the adaptation of the model TOIL term for the circumstances of the industry covered by the Live Performance Award had not been resolved. The parties are in discussions in respect of this issue and will file a joint report setting out how they propose to deal with the outstanding issue.

4. ***Queensland Ballet objection:*** Queensland Ballet objected to the drafting of the General Employment Conditions in the exposure draft because it removed the option for musicians to be employed on a full-time basis and required that all Musicians are engaged on a casual, weekly or part-time basis only. The parties advised that the issue raised by Queensland Ballet had been resolved by proposed clause 37.6 of the draft award submitted by MEAA.

PRESIDENT

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[2] 2017] FWCFB 6417 at Attachment A.

[3] Issues paper. 5 February 2019, at 22 – 24.