

FAIR WORK COMMISSION

Matter No AM 201/259

Applicant: Media Entertainment and Arts Alliance

Respondents: Birch Carroll and Coyle Limited and other cinema industry employers and Australian Entertainment Industry Association (trading as Live Performance Australia)

1. The Media Entertainment and Arts Alliance [MEAA] makes these submissions in accordance with the directions of the Commission dated 11 February 2019.
2. Since the MEAA submissions of 19 September, Birch Carroll, Hoyts Greater Union, Village and Independent Cinemas [the cinemas] by letter dated 27 September 2018 have submitted that the wording of the penalty averaging clause should remain unchanged on the basis that the award modernisation process is not an appropriate place for a change to a longstanding and substantive award provision.
3. That submission appears to be an indirect reference to *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*, [2014] FWCFB 1788(2014) 241 IR 189 at [23] where the Full Bench held that:

where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

4. The Full Bench should not adopt that submission for the following reasons:
 - a. This application is not one for a variation beyond the asserted meaning of the sub clause. The application is for a variation pursuant to s 160 to remove an ambiguity or uncertainty;
 - b. There are differences in interpretation of the existing clause that gives rise to an ambiguity or uncertainty;
 - c. Keeping the current wording will not resolve the differences of interpretation;
 - d. The task of the Commission is to resolve such ambiguities even in circumstances contrary to the wishes of the parties.
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The differences in interpretation

5. The differences in interpretation are stark. The MEAA and the Australian Entertainment Industry Association [the AEIA] believe that the rate was part of the minimum rate and the calculation process should be a compounding one. As Mr Hamilton for the AEIA stated on 16 June 2017¹:

*"It was our submissions in 2009 that it was part of the minimum rate."*²

6. The cinemas adopted a different position leading to the Vice President stating on transcript³

"Well, it be a curious position if the matter becomes a substantive matter. We'll have one employer group saying one thing and the cinemas say another thing..."

7. The cinemas submit that the calculation process is a cumulative one and further that *"major employers have, for many years, applied award clause 14.12 in a different way"*⁴.
8. The wording suggested by the MEAA is intended to reflect a compounding calculation process.

The role of the Commission

9. The Commission's role in the 4 Yearly review has been the subject of significant discussion. The review process is not an inter partes proceeding. The review is not dependent upon an application by an interested party and the Commission is not constrained by the terms of a particular application⁵. It is not necessary for there to have been a material change in circumstances for a variation to be

¹ AM 2014/259 4 Yearly Review of Modern Awards transcript PN 64

² That position was confirmed in a letter dated 17 April 2018 where the EIEA and the cinemas: Hoyts, Greater Union, Birch Carroll and Coyle, Village and employer members if the Independent Cinemas organisation stated that ***"the 8% penalty averaging provision is part of properly made minimum rates"***.

³ AM 2014/259 4 Yearly Review of Modern Awards transcript PN 72

⁴ Letter 27 September 2018

⁵ *Re 4YMA – Horticultural Award* 270 IR 253 at [19]

made⁶. The Commission may vary a modern award in whatever terms it considers appropriate subject to its obligation to afford procedural fairness and the relevant statutory provisions⁷.

10. Should the Commission require a formal application in order to vary the Award, the MEAA encloses an application to vary.

11. Clearly s 160 looms large. The exercise of the powers to vary in that section are predicated upon the removal of an ambiguity or uncertainty. In the absence of ambiguity there is no jurisdiction to vary a modern award under the section⁸. The first step then is determine whether there is an ambiguity or uncertainty. The task has been described as involving an objective judgment as to whether the wording of a provision is susceptible to more than one meaning⁹. While it is not necessary for the Commission to determine in this case, it may be that that formulation is too narrow. Spigelman CJ writing extrajudicially has said that:

“the word “ambiguity” itself, perhaps ironically enough, is not without its own difficulty. Frequently, in the context of statutory interpretation, the word “ambiguity” is used in a more general sense. It is applied, not only to situations in which a word has more than one meaning, but to any situation in which the intention of Parliament with respect to the scope of a particular statutory situation is, for whatever reason, doubtful¹⁰”.

12. The *Horticultural Award* case dealt in some detail with the notion of ambiguity or uncertainty. In adopting *Tenix*, the Full Bench held that:

“The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention¹¹. “

⁶ *Re 4YMA – Horticultural Award* 270 IR 253 at [34]

⁷ *Re 4YMA – Horticultural Award* 270 IR 253 at [19]

⁸ *Property Sales Association of Queensland, Union of Employees re Real Estate Industry Award 2010* [2012] FWA 10134 (29 November 2012) at [15] adopted in *Four yearly review of modern awards* [2016] FWCFB 4418 at [66]

⁹ *Master Builders Australia Limited* [2012] FWAFB 3210 at [39]

¹⁰ The Honourable J J Spigelman AC, *Statutory Interpretation: Identifying the Linguistic Register*. (1999) Newc LR Vo14 No 1 at p 2

¹¹ *Re 4YMA – Horticultural award* 270 IR 253 at [151]

13. While the various parties are each convinced as to the correctness of their interpretation, there are clearly rival contentions as to the meaning of the sub clause. The MEAA accept that a self-serving contention does not create jurisdiction where none would otherwise exist ¹². The Commission would clearly be empowered to remove the ambiguity even in the absence of any of the 'parties' seeking that course.
14. The Commission has a broad discretion as to whether or not to do so. It should do so because the implementation of the rival contentions are having significant consequences as to the calculation of pay rates. The sub clause offends the Modern Award objectives in s 134 as to an *easy to understand ... modern award* . To the extent that the Award deals with minimum wages, the existence of different pay calculation processes offends the principle of equal remuneration for work of equal or comparable value under s 284 of the Act.
15. The MEAA seeks a variation to resolve the ambiguity or uncertainty in the terms set out in the earlier submissions. That variation is consistent with the history, context and text of the existing sub clause and the objectives of the Act.
16. The MEAA does not seek a retrospective date of operation.

Ian Latham

¹² See generally *Master Builders Australia Limited re Building and Construction General On-site Award 2010* [2012] FWA 62 at [39]

Form F46 Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the Fair Work Act 2009.

The Applicant

Title Mr Mrs Ms Other please specify:

First name(s)

Surname

Postal address

Suburb

State or territory

Postcode

Phone number

Fax number

Email address

If the Applicant is a company or organisation please also provide the following details

Legal name of business Media, Entertainment and Arts Alliance

Trading name of business As above

ABN/ACN

Contact person Matthew Chesher

Does the Applicant need an interpreter?

Yes—Specify language

No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

Yes— Please specify the assistance required

No

Does the Applicant have a representative?

Yes—Provide representative's details below

No

Applicant's representative



These are the details of the person or business who is representing the Applicant.

Name of person	Matthew Chesher		
Organisation	MEAA		
Postal address	245 Chalmers Street		
Suburb	Redfern		
State or territory	NSW	Postcode	2016
Phone number	0422 411 772	Fax number	
Email address	matthew.chesher@meaa.org		

1. Coverage

1.1 What is the name of the modern award to which the application relates?

Broadcasting, Recorded Entertainment and Cinemas Award 2010

1.2 What industry is the employer in?

Cinema industry

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

a determination varying a modern award

a modern award

a determination revoking a modern award

2.2 What are the details of your application?

The Applicant seeks the insertion of the following clause:

***13.4** All employees in cinemas will receive an 8% loading for all hours worked regardless of the day(s) of the week on which work is performed. This loading forms part of the base rate of pay and is in lieu of Sunday penalty payments and reduced public holiday penalties. Additional loadings shall be calculated against the adjusted base rate of pay.*

2.3 What are the grounds being relied on?

1. The variation is necessary to ensure that the modern award is easy to understand and fair to both employers and employees in terms of the Modern Award Objectives in s 134 of the Act.
2. The variation is necessary to remove an ambiguity or uncertainty under s 160

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature



Name

Matthew Chesher

Date

25 February 2019

Capacity/Position

Director, Legal and Policy

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS