



Level 1, 15-17 Queen Street
Melbourne Victoria 3000
T 61 3 8614 2000
F 61 3 9614 1166
W www.liveperformance.com.au
ABN 43 095 907 857

Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF: 4 yearly review of modern Awards

AM2014/259 – Broadcasting and Recorded Entertainment Award 2010

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

22 February 2017

Live Performance Australia

Att: David Hamilton - Director, Workplace Relations

Level 1, 15-17 Queen Street Melbourne 3000

Phone: (03) 86142000

Fax: (03) 96141166

Email: dhamilton@liveperformance.com.au

1. This Submission is filed in response to the Statement and Directions of the President issued on 26 August 2016¹ and the Amended Directions issued on 21 December 2016, with regard to Group 4 awards. Live Performance Australia (LPA) has an interest in the Broadcasting and Recorded Entertainment Award 2010² (the Award) and this submission in reply 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 raised by the Media Entertainment and Arts Alliance (MEAA), Norton Rose Fulbright on behalf of the major cinema chains (the Majors) and questions raised by the FWC in the Exposure Draft.
3. **Clause 2 Definitions**
 - a) **All purposes.** This is a new definition inserted by the FWC and purports to relate to clause 34.2(a) of the Award.

However, clause 13.4 of the exposure draft provides:

“13.4 Employees in cinemas

All employees in cinemas will receive an 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties. This loading is payable for all purposes.”

This clause replaces the current clause 14.12 which provides:

“14.12 Employees in cinemas

All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.”

LPA submits that the nature of the 8% penalty averaging component is being changed with the proposed new clause.

LPA disagrees that the 8% penalty averaging component was inserted into the Award as an “all purpose allowance”. The penalty averaging component was inserted into the pre-reform Award by consent between LPA and MEAA. However, when the current modern award was made, the 8% penalty averaging component was not included. This necessitated LPA to seek a variation to the modern award prior to 1 January 2010 to reinstate this component.

In its Decision ([2009] AIRCFB 998) on 30 December 2009, the Full Bench stated at paragraph 7:

“The penalty averaging provision will be inserted in the modern award in that part dealing with penalty rates for cinema workers and become a new cl.56.1, with consequent renumbering to the remaining parts of the clause”.

¹ [2016] FWC 6062
² MA000091

Indeed, the Full Bench acknowledged LPA's submission on this issue at paragraph 5 as follows:

“In response to the MEAA position the AEIA reiterated that the current penalty averaging provision was negotiated between the parties during the minimum rates adjustment process, was included in the award as part of the minimum rate rather than an all-purpose allowance, and was approved as part of the properly fixed minimum rate when the current award was simplified. It also submitted that the penalty averaging component, which is set as a percentage of the base rate, retains the minimum rates relativities. In relation to the SDA submission the AEIA noted that the SDA does not represent cinema employees and had not provided any material to support the claim that the penalty averaging provision does not provide a fair and effective safety net.”

The FWC has not indicated what has prompted the change to the current clause 14.12, and unless there are pressing arguments for change, LPA strongly supports the retaining of the current provision in the Award.

b) Loaded minimum hourly rate. This definition is new and there is no explanation from FWC as to how it has been derived and its purpose. LPA submits that such phrase will cause confusion and ambiguity especially when read in conjunction with the definition of minimum hourly rate and should therefore not be included in the Award.

This confusion is highlighted in the proposed clause 57.3(b) where part time employees receive “the minimum hourly rate” and proposed clause 57(4)(b) where casual employees receive “the relevant loaded minimum hourly wage”.

The whole issue of the terminology for the payment of wages by the week, hourly and or casual requires to be re-examined. This is especially so when reading **Schedule E – Summary of Hourly Rates of Pay – Cinema workers**, which sets out hourly rates of pay and not weekly for full time and part time employees. Such employees are weekly employees and therefore wage rates should be expressed as weekly rates. Hourly rates of pay are appropriate for casual employees as they are engaged by the hour.

4. **Changes to calculating overtime and penalties.**

MEAA has raised concerns with regard to the way overtime and penalties are expressed as “percentage based” rather than “time based”. LPA would support MEAA's position where it could be shown that employees would be disadvantaged by the introduction of percentage based formulas.

5. **Change to Award title to include cinemas.**

MEAA has submitted in its substantial issues claim, that the title of the present Award be changed to include “Cinemas”. One of the reasons in support of the claim is that employees or potential employees to the industry would not know where to look in the list of Modern Awards for cinema employment and the wages and conditions of employment associated with the cinema industry.

LPA agrees with MEAA's submission that it is difficult for anyone outside the cinema industry to source the wages and conditions of employment for the industry.

However, it is LPA's submission that the more appropriate course would be to make a new modern award for the cinema industry.

The current award is approximately 180 pages long and covers a diverse range of employees. The main focus of the Award relates to the making of, or recording of films and TV programmes and the employees who work in those particular fields, none of which relates to the showing of films in a cinema. In addition, the process of working out the pay rates for cinema workers is not an easy task, and with the proposed changes to the Award outlined in the exposure draft, would in LPA's submission, make it even more difficult to ascertain the correct rates of pay and conditions of employment for cinema workers.

At the beginning of the award modernisation process in late 2008, it was MEAA's and LPA's argument that cinemas should have its own modern award. The main reason for such a position was that working in a cinema had no relation to those that worked on a set of a film or in a TV studio. Those arguments are still relative today and now, it has come to light that those potential employees who wish to work in cinemas, are not able to locate the wages and/or conditions of work for cinema workers, and more importantly, those employees who work in cinemas find it difficult to ascertain their pay rate and conditions of employment.

Therefore, it is LPA's submission that a new modern award be created for employees engaged in cinemas.

MAY IT PLEASE THE COMMISSION