



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT MILLHOUSE**

**AM2023/21**

**s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective**

**Modern Awards Review  
(AM2023/21)**

**Melbourne**

**10.00 AM, MONDAY, 22 JANUARY 2024**

**Continued from 21/12/2023**

PN1

THE DEPUTY PRESIDENT: Please take a seat. Thank you. Welcome. Thank you, everyone, for making yourself available today. It's wonderful to see so many of you here in person, and also our attendees via Teams today.

PN2

I hope you can see me sufficiently well. Perhaps you can see the back of my head. I elected to take the approach of sitting here at the Bar table with you all today. I really want to generate some discussion rather than sitting too far away from you up here.

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I'll start by taking the appearances in the order that they've been provided to me. Mr Kemppi, you appear for the ACTU.

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MR KEMPPI: Yes.

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THE DEPUTY PRESIDENT: Mr Borgeest for the MEAA.

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MR BORGEEST: Thank you, Deputy President.

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THE DEPUTY PRESIDENT: Ms Minster for Live Performance Australia.

PN8

MS MINSTER: Thank you.

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THE DEPUTY PRESIDENT: Mr Lowe for TNA.

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MR LOWE: Thank you.

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THE DEPUTY PRESIDENT: For NAVA, we have Ms Benton.

PN12

MS BENTON: Yes.

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THE DEPUTY PRESIDENT: And Mr Fuller from Commercial Radio. Thank you. We also have via Teams, Ms Angus. You appear for Screen Performance Australia.

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UNKNOWN SPEAKER: I think it's Screen Producers Australia.

PN15

THE DEPUTY PRESIDENT: Sorry, Screen Producers Australia. Thank you very much.

PN16

MS ANGUS: Sorry, I was on mute. Thank you, Your Honour.

PN17

THE DEPUTY PRESIDENT: Thank you. Ms Tinsley for ACCI.

PN18

MS TINSLEY: Yes, that's correct. Thank you.

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THE DEPUTY PRESIDENT: And Ms Vincent for ABI and Business New South Wales.

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MS VINCENT: Yes. Thank you, Deputy President.

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THE DEPUTY PRESIDENT: I also understand we have Ms Schaffner and Ms Byrne for Creative Australia that are observing in the gallery, together with Ms Floyd from Live Performance Australia. Thank you, and good morning, everyone.

PN22

Now, I wanted to just indicate to you at the outset that these sessions, consistent with the approach that was taken when we were by Microsoft Teams, are being recorded. You will have seen from the listing on the Commission's website that we have some conference rooms that are booked should you consider it necessary or desirable to step out and confer with other parties in the conferences rooms, and we encourage that to occur in those rooms where necessary.

PN23

In terms of the approach to conducting these consultation sessions moving forward, I know a big issue that was raised by parties in December, when we were last together, was about perhaps an agenda or a process for ensuring that adequate parties are available at the appropriate times.

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Now, I'll be interested in hearing from anyone that wishes to contribute to that, as a consequence of now having the opportunity to review some supplementary or reply submissions that have come through, about whether and how we might break down our time together.

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For my part, whilst I did start with perhaps a more detailed specific list of topics, it really did, for me, synthesise into two broad areas, being the proposed coverage gaps under the Broadcasting, Recorded Entertainment and Cinemas Award, and the Live Performance Award, and that particularly draws on the submissions that were filed by Mr Borgeest on behalf of the ACTU, and MEAA, and Professionals

Australia, this morning. And secondly, potential coverage gaps insofar as it concerns visual arts, craft, and design roles, and that really draws upon the helpful submissions that were produced by you, Ms Benton, on behalf of NAVA.

PN26

Now, there may be some subsets of issues that need to be interrogated within each of those broad categories. For instance, insofar as it concerns visual arts, design, and craft, the extent to which the roles that have been identified fall within the scope of this review, and the submissions that might have arisen addressing that point, but I'd be interested in understanding at the outset, from you all, whether you have identified any other particular significant topics that might sit outside of those two broad categories and, otherwise, if there are any particular points that you'd like to arise. If we can identify that, we might be able to come together and identify the most appropriate agenda for proceeding today and moving forward might be.

PN27

So, look, I'd like to try and approach these sessions today with a pretty healthy open dialogue. We've all come together previously. I don't think that it's necessary specifically for me to invite each of you to make submissions. If you've got something that you'd like to contribute, I really encourage you to make that known.

PN28

For the purposes of the transcript, and for our colleagues or our parties that are attending via Teams, it might just be helpful at the outset to identify who you are and where you're appearing from. But I really do welcome now the opportunity to hear from you about whether there's any particular order, or agenda item, that you'd like to see included within those two broad categories that I've nominated.

PN29

MS MINSTER: Yes.

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THE DEPUTY PRESIDENT: Go ahead, Ms Minster.

PN31

MS MINSTER: I would say that the coverage issues identified by Live Performance Australia, and Theatre Network Australia, and the latest submissions that were filed today by Media, Entertainment and Arts Alliance, because I've heard that that narrows down the scope of what the coverage is of those awards, so that will be the first thing.

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THE DEPUTY PRESIDENT: Yes.

PN33

MS MINSTER: And it's also – excuse me, because I haven't thought about this until, like, over the weekend – is that there is another significant issue that affects the Live Performance award at the moment.

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THE DEPUTY PRESIDENT: Right.

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MS MINSTER: And it came out of the limitations on fixed term contracts.

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THE DEPUTY PRESIDENT: Yes.

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MS MINSTER: And so you may or not be aware that there's a regulation at the moment, that obviously is a product of the exception, where the Minister can make a regulation that exempts the Live Performance Award from the rules on fixed term contracts, but it's set to expire in the middle of the year.

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And the reason is that – so how that came about was we put a submission to the Department of Workplace Relations, we met with the Minister's office, they made the regulation, there was a little bit of disagreement at the time between Live Performance Australia and MEAA.

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THE DEPUTY PRESIDENT: M'mm.

PN40

MS MINSTER: And so this regulation was then made in its current form. And basically the Minister's office told us and MEAA to go away and sort it out ourselves, and at that time they said, 'You probably have three options, and one option is this review; another option is to come together and agree on a permanent exception in the regulations; or that we either agree or disagree and file a matter in the Commission to vary the award, because there's certain kinds of contracts in the live performance industry that really aren't suited to that kind of limitation, or probably can't work, or can work only to a certain agree.

PN41

And so MEAA and LPA had one meeting, and then, probably due to a change of staff, MEAA haven't replied over the last, like, I think since the end of October to LPA, but I understand that Mr Borgeest said he has a reply coming to us because we've suggested some amendments to the award.

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So I just thought, considering that there's not a lot for us to discuss about the Live Performance Award, and we have all this time, that perhaps this would be a forum where we could talk about that.

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THE DEPUTY PRESIDENT: To what extent does it form part of this aspect of the Modern Awards Review. That is, does it identify a gap in coverage or does it identify difficulties with the engagement of employees in the manner in which you have traditionally been engaging them?

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MS MINSTER: It does identify, actually, the manner in which employees are engaged, yes.

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THE DEPUTY PRESIDENT: Okay. So to that end, perhaps one of the issues that I'd need to explore with you is to what extent then should it form part of significant discussion as part of this aspect of the review if it's not going to be something that is relevant for further consideration by the Full Bench in relation to the arts culture sector, and potential coverage gaps.

PN46

MS MINSTER: Okay.

PN47

THE DEPUTY PRESIDENT: That said, this is not an issue about which I've given any thought to, or done any reading about. So it may be that you're in a position to identify certain aspects of it that you consider do fall within the scope, and I'm certainly open to considering those at the relevant point in time. And alternatively, to the extent that the Commission and its conference rooms can be used as a mechanism for driving some direct discussion between you and Mr Borgeest today perhaps about those matters, then I would absolutely encourage that to occur.

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MS MINSTER: Okay, great. Thank you.

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THE DEPUTY PRESIDENT: All right. Anything else that anyone would like to add?

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MS BENTON: Yes.

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THE DEPUTY PRESIDENT: Mr Benton.

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MS BENTON: Maybe one other dot point, again open for discussion on whether that's a thing. But numerous submissions draw attention to the coverage gaps for artists who are in many ways not considered an employee. There = that might be something that is discussed separately across these two dot points, so it could be something that's discussed altogether.

PN53

THE DEPUTY PRESIDENT: Yes. So to that, you're referring to the submissions that recognise that there is a high degree of engagement through independent contracting means, and there's been some various responsive submissions which say that a variation to the awards is not going to cure that issue, that's an engagement issue. So what is it about that submission in response that you would like to interrogate broadly, Ms Benton?

PN54

MS BENTON: I don't – I don't know if any of the submissions that were raised, that the issue with artists having lack of coverage, have a response to. I think it's just an opportunity for us to work out what that might look like.

PN55

THE DEPUTY PRESIDENT: One of the questions that I might have – and this might be something that we explore as part of that aspect of our discussions concerning the matters that are raised by you in your responsive submissions – is about this concept of whether there is a general approach to the engagement of individuals as contractors in this industry, and whether that's a bi-product of difficulties that you say arise from the awards system, or whether, regardless of what happens with the awards, those individuals are always going to be engaged in this manner. And that's something that I might be interested in hearing from you, or any relevant parties that have some information, about that at the appropriate time.

PN56

All right. So we can include that as part of the aspect of this consultation process, considering the matters that are raised insofar as visual arts, craft and design. Are there any other issues or topics that anyone would like to add to the agenda? Anyone on the Teams link? Okay, I'll take that as a no.

PN57

MR KEMPPI: (Indistinct.)

PN58

THE DEPUTY PRESIDENT: Go ahead, Mr Kemppe.

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MR KEMPPI: One of (indistinct) made (indistinct). The issue around (indistinct).

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THE DEPUTY PRESIDENT: Yes.

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MR KEMPPI: (Indistinct) - - -

PN62

MS ANGUS: Sorry, Deputy President, Mr Kemppe can't be heard can't be heard by Teams.

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THE DEPUTY PRESIDENT: He's not miked here.

PN64

MR KEMPPI: Sorry.

PN65

THE DEPUTY PRESIDENT: Thank you.

PN66

MR KEMPPI: Thank you. There's one discrete issue around video game development. It's a fairly discrete issue, I understand, between Professionals Australia and ACCI primarily.

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THE DEPUTY PRESIDENT: M'mm.

PN68

MR KEMPPI: But it would be nice to have some time devoted to that, at which either I can arrange for Professionals Australia to be here for that, or I can simply just take instructions and put their view on those matters.

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THE DEPUTY PRESIDENT: Yes. It was certainly a question that I had arising from the responsive submissions that were filed by the unions, If I can just refer to today's submission in that way, because it's obviously not addressed in the supplementary material.

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MR KEMPPI: No.

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THE DEPUTY PRESIDENT: And was a focus point of your December submissions.

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MR KEMPPI: Yes.

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THE DEPUTY PRESIDENT: All right.

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MS ANGUS: Your Honour, might I interject there?

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THE DEPUTY PRESIDENT: Yes, Ms Angus. ???

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MS ANGUS: Yes. Zoe Angus from SPA to Mr Kemppi. Screen Producers Australia has produced some members who make games, so we have an interest in that quite directly rather than ACCI. So, Mr Kemppi, I wasn't aware that the ACTU had made any submissions in relation to games, and game production. So, I don't know, could you perhaps advise me where to look in relation to that, because I haven't found anything so far from the ACTU, and if there are any discussions around that, we would ask to be involved in those discussions?

PN77

MR KEMPPI: Certainly. It's in our first submission. The combined submission.

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MS ANGUS: Okay, I'll follow that up. But, Mr Kemppi, if you're having discussions with ACCI about that, can we be included in those discussions, please?

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MR KEMPPI: We shall do.

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MS ANGUS: Thanks.

PN81

THE DEPUTY PRESIDENT: All right. Well, having regard to where we've landed, and those two broad themes, I think we have the option of kickstarting straight into the visual arts issues, and proceeding in that way, or appreciating that the union's submissions did only come in this morning, and parties might not have had a significant amount of time to absorb the content of that material yet, it does appear that the issues that are in contest have been significantly narrowed.

PN82

And if that's right, there may be some utility in commencing with the issues that arise in relation to the union's submissions, and the supplementary submissions, because it may be the case that some of the attendees don't have a need to participate in these consultation sessions beyond the discussion of issues that concern the Broadcasting Award or Live Performance Award. Of course, you're welcome to remain, but it appears to me that the issues that concern visual arts appear to be topics that we're going to need to go into in a little bit more depth, and likely to take a little bit more time. Is there any broad disagreement with that view? Mr Borgeest?

PN83

MR BORGEEST: No. Well, I'm not across everything that's in the visual arts, so I won't make a comparison.

PN84

THE DEPUTY PRESIDENT: Okay.

PN85

MR BORGEEST: But certainly, I think that the consequence of the MEAA submission was intended to indicate its narrow field discussion.

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THE DEPUTY PRESIDENT: All right. Well, to that end, does - yes, Ms Minster.

PN87

MS MINSTER: I think that the only thing that – I mean, I don't have to stay for this discussion, but it was raised before by NAVA that if we start to wade into this territory of, like, artist who is generally a contractor, is a worker, or something like an employee-like, we would like to then be brought into that discussion.

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THE DEPUTY PRESIDENT: Sure.

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MS MINSTER: Even just to observe to understand what the premise of that is.

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THE DEPUTY PRESIDENT: Absolutely. And by trying to differentiate the two broad topics, it's not my intention to preclude anybody from remaining in these sessions, and participating where you seek that to be desirable. Because the Commission seeks input from all of you, and that's the intention of this process, to invite your views and to give you an opportunity to say what you consider is appropriate and desirable, and you'd be given that opportunity to be heard. Ms Tinsley, you've raised your hand?

PN91

MS TINSLEY: Yes. Thank you, Deputy President. So in terms of ACCI's involvement in these proceedings, we're happy to remain fluid in terms of our attendance, but we imagine here that – well, essentially our participation is we would prefer to be talking about general principles. You've got some great industry associations also attending here, and you'll always be better off, I think, having a discussion between the actual industry participants on those different matters. So I don't – I don't think that our participation will be necessary for, I'd say, the majority of these conferences. So I just wanted to flag that.

PN92

However, as Mr Kemppi's identified, there may be something where there is no other industry association that's present or when we're talking potentially about the independent contractor, where it kind of goes to a more general principle, it would be good to be invited along to those sorts of – those sorts of discussions. But generally, our preference would be to defer to our industry association counterparts.

PN93

THE DEPUTY PRESIDENT: Sure. And I certainly appreciate that. The difficulty that I have, Ms Tinsley, is the approach of being invited to participate. I imagine that some of these discussions are going to be quite organic, and it's not immediately apparent to me how long they might take. It might be that, once everybody's had an opportunity to convey their views, you're otherwise content to rely upon the written material, such as to significantly condense the need for ongoing oral consultations.

PN94

Alternatively, we might identify issues that really require a deep dive, and we have the time available and set aside to explore those issues in depth where it becomes necessary to do so. It follows that it's not going to be immediately apparent when we might be speaking about the employee contractor issue, but to the extent that it's possible, I'd like to try and convey to parties a possible agenda for particular days so that you do have an idea as to whether you might like to participate at all.

PN95

So I'll really be guided from all of you as well about how to approach that, and I think we will start to have a better idea collectively about that process once we really do start to embark upon some discussions. Because at the moment, it's not apparent to me just how much each of you might have to say. All right. Are there any other initial matters, or administrative matters, or agenda-related issues, that anybody would like to raise at the outset?

PN96

MS MINSTER: I do have one issue.

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THE DEPUTY PRESIDENT: Sure.

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MS MINSTER: We have to, me, has to appear in the Commission on the 31st in the morning for a conciliation. So in the morning of the 31st, I won't be - - -

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THE DEPUTY PRESIDENT: Yes, you're an apology (indistinct). Absolutely fine. All right. Thank you.

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MR FULLER: Sorry, Deputy President.

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THE DEPUTY PRESIDENT: Yes, Mr Fuller.

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MR FULLER: If we're talking about availability, there's one day where I would not be available. It's the 29th.

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THE DEPUTY PRESIDENT: Yes, 29th.

PN104

MR FULLER: I don't think that would significantly disrupt the conference.

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THE DEPUTY PRESIDENT: No, that's fine. Thank you for indicating that to me.

PN106

MR FULLER: Given that the matter's not specifically got to be dealt with.

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THE DEPUTY PRESIDENT: And is there anything in particular, Mr Fuller, that you would like to contribute to the agenda discussion?

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MR FULLER: As I alluded to, based on what's been presented in submissions, I didn't see we'd necessarily be a particular participant, per se.

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THE DEPUTY PRESIDENT: Yes.

PN110

MR FULLER: I do need to absorb the submission which was presented today, I haven't actually had the opportunity. But I do note that it does specifically refer to our section of the award, being schedule B, so there may well be implications associated for our members. But that's something I need to go away and digest, and perhaps take some advice on as well.

PN111

THE DEPUTY PRESIDENT: Well, there's a couple of approaches really. It might be that, recognising that those submissions have come in this morning, if there is a need to defer that aspect of our discussion to allow any opportunity to consider and take instructions in relation to them, then there might be an appropriate basis to allow that to occur, and commence with Ms Benton's supplementary submissions in visual arts. But I'd be guided by you. Do you consider that you'd like to hear from Mr Borgeest and the unions this morning about the supplementary submission and go from there?

PN112

MR FULLER: Yes, and in whatever form. I just wish to understand, just get some clarity around it. And as I've said, I've not had an opportunity to really digest this. I think the matters pertaining to our members are very narrow with respect to this review.

PN113

THE DEPUTY PRESIDENT: Yes.

PN114

MR FULLER: It may well be that we can have a separate discussion however that framework appears.

PN115

THE DEPUTY PRESIDENT: Yes.

PN116

MR FULLER: Just so I can get a better understanding and clarify this area, which some are broad at the moment, so I'd just like to get a better understanding.

PN117

THE DEPUTY PRESIDENT: All right. Well, I think that there might be some benefit in inviting you, Mr Borgeest, and Mr Kemppi, to the extent necessary, to speak to the supplementary submission that has been filed today. That will at least allow those present, who haven't had a significant amount of time to absorb its contents, to at least understand if there are particular issues they'd like to interrogate, and then give them the opportunity to make those enquiries as the day progresses.

PN118

We can always loop back and continue further discussions about your aspect of the review if we consider that some time is required for people to take some instructions more generally. Are you comfortable speaking to your material, Mr Borgeest?

PN119

MR BORGEEST: Yes, certainly. Firstly, the documents they gave this morning is – it arises from the discussion we had on 20 December, and MEAA agreed to go away and come back with some more material. So this submission is prepared by, and speaks only for, MEAA. So it certainly doesn't speak of anything that Professionals Australia contributed to the joint submission.

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THE DEPUTY PRESIDENT: I see.

PN121

MR BORGEEST: It's not a submission of the ACTU.

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THE DEPUTY PRESIDENT: I see.

PN123

MR BORGEEST: It's just a supplementary submission from MEAA. And what it does is go back to the occupations that were nominated in two lists appearing on page 5 of the original joint submission. There's a list of occupations nominated described as 'Roles working in screen and broadcasting production', and another list of roles working in live performance. And what was said at that time was that each of those occupations were not covered by a modern award, but ought to be.

PN124

So in the intervening – and one of the aspects of general feedback, that came particularly from Screen Producers Australia and Live Performance Australia in that setting, was wanting a better understanding of how it was put that there was a coverage gap in the Broadcasting, Recorded Entertainment and Cinemas Award, and Live Performance Award, respectively. Because in a number of cases - so it was put the industry association said, 'We think those roles are covered'.

PN125

So what is done, in the submissions circulated this morning, is some withdrawal of some of the nominated roles from the December submission, most particularly a number of roles nominated with respect to live performance, and that's at the end of the document. So there is a number of withdrawals, and then, for what remains, there are statements of how it is put that there is a gap. And that's put in, well, in various ways depending on which occupation we turn to. I won't, at this stage, go and rehearse each of them. But what emerges, I think, are significantly in the original submissions, and the reply submissions of SPA and LPA, is tension around, well, whether an occupation is traditionally covered by awards.

PN126

So what we are – we've identified some remaining occupations which we say represent coverage gaps based on a particular analysis - various analyses of

existing award terms, and the predominant submission in response to that is not traditionally award covered. And in some cases, in fact, not employees. People in that category of work are engaged as contractors.

PN127

With respect to schedule B, in particular, our friend from Commercial Radio has that particular interest.

PN128

THE DEPUTY PRESIDENT: M'mm.

PN129

MR BORGEEEST: The way that arises is that in the Broadcasting, Recorded Entertainment and Cinemas Award, one of the occupations that was nominated in the December submission was described as 'audiobook recording'. And - - -

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THE DEPUTY PRESIDENT: Was described as – what - - -

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MR FULLER: Sorry, I missed that too.

PN132

THE DEPUTY PRESIDENT: Yes, I missed the title.

PN133

MR BORGEEEST: So the schedule B issue arises because we have nominated, in a December submission, the audiobook recording as a role working in screen, and broadcasting production, it's not covered. And so section 1.1 of this morning's submission explains how that arises, explains how we say audiobook recording refers to, or are shorthand for, a number of occupations that are subject to a coverage gap.

PN134

And what is proposed, at that section of this morning's submission at 1.1, is that schedule B, which is the only schedule which addresses in terms technical roles involved in the production – which could be involved in the production of audio content, that schedule is restricted, it appears, to radio stations and broadcasting while there is no schedule which otherwise contains classifications including technical and production occupations that may be engaged in that part of the industry, which includes production of audio content for sale to the public, et cetera, which is a subset of the industry that would include the production of audiobooks.

PN135

Schedule B presently contains a number of technical occupations; technicians, producer. And what is suggested at that part of our submission is that schedule B be expanded in its coverage beyond radio stations and radio broadcasting in such a way that would include that part of the industry which includes production of audio content for sale to the public, et cetera. So the classifications in schedule B

would become applicable not merely to employees in radio stations, but also to enterprises producing audio content more broadly.

PN136

Were that to be embraced, it would involve introducing language to schedule B to expand its operation. But it's not proposed here in the MEAA submissions that any particular new occupational classifications for audiobook recording be produced. It's simply that the existing classifications be picked up and given wider application. There's no variation term to schedule B advanced in this submission. It's simply advancing the concept of expanding that schedule.

PN137

THE DEPUTY PRESIDENT: And so insofar as it concerns the concept of audiobook recording, you've accepted, in your submissions, that vocal performance, and engagement of vocal actor, is already sufficiently covered, and this aspect of your submission focuses on the technical and production employees associated with that body of work.

PN138

MR BORGEEST: Yes, engaged in production of audio content for sale to the public.

PN139

THE DEPUTY PRESIDENT: And it follows that your position is that schedule B appears to contemplate the types of duties that you would contemplate technical or production employees would perform, but schedule B is presently limited to radio broadcasting.

PN140

MR BORGEEST: Yes. I mean, from the title of the schedule that is apparent, and from some language and some of the classification descriptions, you can infer that it's restricted in that way. And so the concept advanced here at 1.1 is that that general language about the applicability of those occupation or classifications already in schedule B, be given that wider application to – within the broad part of this aspect of the industry rule.

PN141

But, yes, Deputy President, it's certainly correct that with the way we read it, understand it, the voice actor is a performer under schedule E.

PN142

THE DEPUTY PRESIDENT: All right.

PN143

MR FULLER: Sorry, what was that last – a voice actor is what, sorry?

PN144

MR BORGEEST: So audiobook recording, voice actor is already covered over in schedule E as a performer, artist (indistinct).

PN145

THE DEPUTY PRESIDENT: Mr Fuller, do you have any particular questions that you'd like to ask Mr Borgeest about that submission, appreciating that you do need to give it some thought?

PN146

MR FULLER: Yes, I do need to give it some thought. My initial reading, as I said, very preliminary, is that it does seem to – the proposition that's presented certainly does, I would interpret, is a much broader aspect of coverage around a whole range of different roles, which is much broader than just specific – I think the term 'audiobook recording', I think the second submission goes much broader than that, and that may well have implications. And, you know, audiobook recording is not radio broadcasting. I suppose my (indistinct) is why has it been put into radio broadcasting when it's not radio broadcasting. But I do need to take – as I said, I really have not had an opportunity to digest the document, but I do see that – I see that the unions certainly - - -

PN147

THE DEPUTY PRESIDENT: Just a moment. Ms Angus, I will come to you. I know that you've got something to add.

PN148

MR FULLER: It just appears to me that the proposal from the union has been significantly broadened and generalised from what was initially, in the first submission, much more narrow and specifically referring to radio book recording, it seems much broader than that now.

PN149

THE DEPUTY PRESIDENT: Yes. I think the position advanced, at least initially, was that there was no coverage at all, was that right, for audiobook employees full stop, in that it didn't appear to be covered by the award.

PN150

MR BORGEEST: Well, it was a very summery submission. The various roles working in screen broadcasting are not covered, including audiobook recording. So that has been developed to make it clear that MEAA's not raising an allegation about voice actors, but we're focusing attention on technical and production staff engaged in enterprises within production of audio content for sale to the public.

PN151

THE DEPUTY PRESIDENT: Ms Angus?

PN152

MS ANGUS: Thank you, Your Honour. Our members do, in fact, make audiobooks, screen producers make audiobooks, and apologies to the gentleman from the Commercial Radio, I'm afraid I didn't catch his name, but I think he's hit the nub of it, and that is radio broadcasting is not – as a matter of practice, as a matter of fact on the ground, my understanding is that audiobooks are never made by radio broadcasters.

PN153



I think there will be some radio broadcasters in the industry that make podcasts. If you think about the ABC will convert some of its stories to online podcasts, and I don't know if the commercial radio companies do any of that work, but audiobooks are commissioned from the independent production sector. And I think, in large part, that's because there's a whole lot of purchase and assignment of legal rights to the books from the publishing companies. You know, there's a legal reason for that as a matter of practice.

PN154

So I guess, from SPA's perspective, we're very happy to talk about audiobooks being covered by, and our view is that audiobook activities are in fact covered by the BRECA. I don't know of any of the large media company radio broadcasters that have ever made, or have any intent to make, audiobooks. But certainly the independent production sector does, and the independent production sector is covered, in terms of its technical capacities, by schedule G, which MEAA, in its submissions this morning, as I've hurriedly read them, also agrees with the SPA position that the way that classification sector works, it is experience and skills-based so it can encompass any classifications, any technical work, that falls within the coverage of the award broadly, and so it's certainly our position. And I think MEAA accepts that, certainly in terms of audiobooks, and this is something that I will need to clarify today, that they would fall - if it was work undertaken by the independent sector, then that would be schedule G of the classification structure, and that would fall within the classification structure.

PN155

So I guess we then go back to the question about, 'Is there a need for' - under the schedule B, radio broadcasting production activity, 'Is there a need for audiobooks to be covered by that?' That is not our area of coverage, radio broadcasters, the big media companies, so that's not really for us to speak to. Having said that - even though that's a matter for - apologies, from the Commercial - - -

PN156

THE DEPUTY PRESIDENT: Mr Fuller.

PN157

MR FULLER: Mr Fuller.

PN158

MS ANGUS: Mr Fuller, is it?

PN159

MR FULLER: David Fuller, yes.

PN160

MS ANGUS: Hi, David. I apologise for that. Mr Fuller, you know, is more appropriate to speak to that. But from SPA's perspective, we would oppose an expansion of the classification structure under both schedule B, i.e. the radio broadcasters, and schedule A, which is the television broadcasters, because that is independent production sector work.

PN161

So if you think about it – I mean, I'm now making some more general points about Mr Borgeest's submissions because he also talks about perhaps altering schedule A, which is the television broadcasting, which is (indistinct), to ensure that their classification structure is expanded to encompass another series of occupation types, and that also we have concern with because, as a matter of fact, the television broadcasters do not, for example, do, other than Channel 7, who are not here attending, they don't do in-house narrative drama, for example.

PN162

So to expand the classification structure to encompass classifications like choreographer, intimacy coordinator, and chaperone, is to not just, in a formal sense, provide those classification structures, occupation types are available to Channel 9, ABC, SBS, for in-house drama, but also to alter the dynamic of the industry more broadly because it is the independent production sector that makes those type of programs on commission from the big media conglomerates.

PN163

So it's of much further consequence if we are talking about, (a) technical jobs rather than artists, but (b), in our submission, more directly we are altering what different sectors of the industry, what production activity they engage in, which is an activity that extends beyond the scope of this enquiry.

PN164

So we're very happy to talk about whether or not classification structures, the occupations listed in each of the various sectors of the industry, are sufficiently fulsome, you know, to capture everyone. But if we are identifying certain organisations with the industry, and expanding them, then we also need to take account of whether they are in fact doing that work, and what it means to expand them without their presence here.

PN165

THE DEPUTY PRESIDENT: So - - -

PN166

MS ANGUS: Sorry, back to the original point. Radio broadcasters do not make audiobooks, but the independent production sector does.

PN167

THE DEPUTY PRESIDENT: And so to that extent, Ms Angus, the position – and Mr Borgeest might like to speak to this a little further – my understanding of the submission by MEAA is not that radio broadcast does audiobooks, but rather that within the schedule that is aligned to radio broadcast, there are indicative occupations or classifications that would seem to apply to the technical and production work that MEAA says has not been caught insofar as it relates to the production of audiobooks. Does that distinction – is that distinction clear?

PN168

MS ANGUS: No, to be honest. I'm just looking at the classification structure at the moment for schedule B, radio broadcasters.

PN169

THE DEPUTY PRESIDENT: Mr Borgeest, you might like to step in here because I think we need to better understand the position that MEAA has advanced.

PN170

MR BORGEEST: So the assumption that our submission proceeds on - I think, Ms Angus you correctly identified - we'd say that the way we read schedule G is that - I mean, it's a schedule that is entitled 'Motion picture production', and then proceeds from there with, as we're in furious agreement, of generic skills from seniority based classifications.

PN171

So our submission proceeds on the understanding - and we stand ready to have that demonstrated to be wrong - but on the understanding that those classifications do not extend to enterprises engaged in the production of audio content as expressed in the industry rule, and more particularly within enterprises producing audiobooks. So we say we don't find any classifications there that apply. We say schedule E picks up the voice actors, but then where is the coverage for the people who might be involved in the technical and production work?

PN172

We go to schedule B, and we observe that that is entitled 'Radio broadcasting', and so we would expect that, if there was a contest about the construction of that schedule, that the tribunal or a court would say, 'Well, the classifications described here are restricted to enterprises in that part of the industry rule which can be summarised as "radio broadcasting enterprises", and that is reinforced by language in some of the classification descriptions, so we observe that restriction'.

PN173

But then the proposal, we say, instead of creating some new schedule, or some other location, which reinvents a number of technical or production classifications specifically for enterprises in the production of audio content, it's envisaged that the schedule B classifications, such as engineer and technician, very well may be picked up and perhaps re-expressed to have more generic language than language such as 'Technical staff of a broadcasting station', but more generic language which includes what's there but permits reference to enterprises beyond radio broadcasting, and expands the scope of schedule B.

PN174

So it's not suggested by MEAA that any kind of amendment proceed on the assumption and expectation that employers in the radio broadcasting part of the industry should be treated as if they are producing audiobooks or other audiobook content within the industry rule; that's not how this submission proceeds. It's simply observing that the engineer and technician-type roles, in support of a production of audiobooks, as we read it, is not covered by the award. If you tell me that schedule B does that work, then I'll be interested in due course to hear how that's so. But for the time being, the proposal is to expand beyond radio broadcasting in the scope of enterprises within the industry rule to which schedule B applies, and that would require some general language.

PN175

MS ANGUS: Could I suggest I think there might have been a misunderstanding because of the title. So when we look at schedule G, it's called, 'Motion picture production', which is, I think, actually a bit of a legacy term from what the Americans might have called – that does not mean that the classification structure in the motion picture production schedule G list only applies to audio visual, i.e. it's got to have a motion picture. What that schedule G applies to is the classification structure of the entire independent production sector that makes, back to coverage, audio and audio visual screen productions, or just productions as distinct from schedule B, which is the classification structure that applies to radio broadcasters, which is the media, you know, those very large radio broadcasting companies, or schedule A, which is the in-house television broadcasting, so that applies to the ABC, to Channel 9, and so I think that's perhaps where it may be – I don't know, Mr Borgeest, but it may be that – and I'm certainly not advocating that we change the name of schedule G from motion picture production because that's just the terminology that is wider known in the industry, but schedule G does not only apply to motion picture production, it applies to the independent sector as a whole, which also makes audio content.

PN176

THE DEPUTY PRESIDENT: And so what do you rely upon in support of that submission, Ms Angus?

PN177

MS ANGUS: Industry knowledge.

PN178

THE DEPUTY PRESIDENT: Yes.

PN179

MS ANGUS: And (indistinct).

PN180

THE DEPUTY PRESIDENT: So your position, if I understand it, is that this is the way it applies, but there's not necessarily anything that you can point Mr Borgeest to within the terms of the award that expressly support the position that you've just made.

PN181

MS ANGUS: Maybe I'll take that on notice, and see if I can find something to assist.

PN182

THE DEPUTY PRESIDENT: Sure.

PN183

MS ANGUS: Yes.

PN184

THE DEPUTY PRESIDENT: Because it appears, at least from the submissions that have been made by MEAA today, and a review of the titles of the schedules,

that it does imply that these schedules apply to radio broadcasting, to motion picture, and that has to have a particular meaning. Although, I'm not sure if those particular terms are specifically defined in the award. I haven't yet had the opportunity to conduct that scope of work within the instrument itself, but that might be something that you can take a look at this morning for us, Ms Angus, and come back to us.

PN185

Mr Borgeest, does that broadly allow you to address the submissions insofar as it concerns audiobook recording? Is there anything else that you'd like to say about it at this stage?

PN186

MR BORGEEST: No, I don't believe so. Thank you.

PN187

THE DEPUTY PRESIDENT: With the benefit of hearing those discussions, Mr Fuller, is there any supplementary questions or issues you'd like to raise, appreciating that you'll now take those issues on notice?

PN188

MR FULLER: Yes, I'd need to do my research as well, and just check a few things. But I understand we're talking about audio recording, and – sorry, what's the actual language we use? Audiobook recording – I'm not entirely satisfied that the way we're seeking to define it would actually necessarily represent the position that it's only going to be referring to audiobook recording. I see that the additional subset within the submission goes beyond just audiobook recording, so that would still be, I believe, an issue which we'd like clarification on.

PN189

THE DEPUTY PRESIDENT: Yes. In general terms, what would be your approach to taking instructions and providing you with an adequate amount of time to come back to the Commission to address those particular issues, bearing in mind that the time is allocated for this consultation period? Are those enquiries you can make today, for instance, and take offline with - - -

PN190

MR FULLER: I believe so. And, yes, this is an issue that we can take offline. If it is only a specific issue between two parties and it doesn't necessarily involve any others, I'd be comfortable to do that. But I'm hesitant to, sort of, commit to a time. I need to go away, obviously, to ensure my lawyer is available, and give him an opportunity to – if I'd need to consult the members, that may take a few days as well.

PN191

THE DEPUTY PRESIDENT: Sure. Okay.

PN192

MR FULLER: I'm sorry.

PN193

THE DEPUTY PRESIDENT: No, that's fine.

PN194

MR FULLER: So I didn't commit to a date – a time, I'm sorry. But, yes, I'd need a few days.

PN195

THE DEPUTY PRESIDENT: No, that's fine. My question was really just so that we can keep in mind a process or a facility - - -

PN196

MR FULLER: Yes.

PN197

THE DEPUTY PRESIDENT: - - - that allows you to return to the Commission to provide some responsive views.

PN198

MR FULLER: Yes, thank you.

PN199

THE DEPUTY PRESIDENT: And we'll ensure that that process is made available to you.

PN200

MR FULLER: Yes.

PN201

THE DEPUTY PRESIDENT: But I would urge you, of course, to address those issues as quickly as you can regarding those views so that we're in a position to come together and discuss those as a collective during the course of this consultation period.

PN202

MR FULLER: I just want one clarification. Would that require me to be face to face for those – as I think I did address with you previously that it does create difficulties in the nature of the way we're structured, the nature of my role, and a sole person within our function.

PN203

THE DEPUTY PRESIDENT: No, that's fine. Consistent with the approach - - -

PN204

MR FULLER: Yes, thank you.

PN205

THE DEPUTY PRESIDENT: - - - that we've established today, I'm comfortable proceeding in a hybrid manner. I did think, and I still maintain, that there is great benefit in coming together, even at least initially, so that we have the opportunity to crystallise some initial issues, step outside into the conference room, and have some discussions offline. But certainly, if there's a need for you to request a video link facility, then that can be accommodated, Mr Fuller.

PN206

MR FULLER: Thank you.

PN207

THE DEPUTY PRESIDENT: Okay. All right. Well - - -

PN208

MS ANGUS: Your Honour?

PN209

THE DEPUTY PRESIDENT: Yes, Ms Angus.

PN210

MS ANGUS: Sorry. Can I just put a proposal on the table for the unions to consider, because I think this may go a significant way to addressing their concerns. I think it might be – and we wouldn't have objection to it, because we actually think it doesn't represent a change in the status quo at all, but it would make clear, if you use that, I think, seem to be motivating report behind where Mr Borgeest is from - and that is if the classification – sorry, if the coverage clause was to be amended to add two additional points - so that's at 4.2 and it lists all of the various, you know, audio and audio visual - if it were to be amended to add in –sorry, I'm just jumping to it now. It's effectively a list, an inclusive list, of all of the sort of things that are covered. And if it were added to that long list, news, current affairs, or documentary video clips, digital video clips, a lot of those are actually audio visual elements, if we were to add to that list, and audio recordings and games.

PN211

From SPA's perspective, they are already covered, but they're not expressly covered. And both audio recordings, if you think about podcasts, audiobooks, and games, are parts of the industry that really have emerged in quite significant ways since the award's inception. So if we were to expressly set those two out, then it's probably a benefit to all covered by the award.

PN212

MR BORGEEST: Deputy President, if I may?

PN213

THE DEPUTY PRESIDENT: Of course.

PN214

MR BORGEEST: I'm just addressing what you've raised in connection with audio. I say nothing about games. That's not a topic we're concerned in. As to the treatment of audio recordings in the industry definition, that you've referred to at 4.2, we have no concerns about the current industry rule. The way our submission proceeds is that we see that, when you read parts of the existing industry rule, which are extracted in our submission. So at the top of page 2, the first complete paragraph on page 2, the broadcasting, recorded entertainment and cinema industry, as defined in the award for clause 4.2, includes, quote, 'Production', and there's an ellipsis, 'Production of audio', another ellipsis, 'Production of audio content or sale to the public', et cetera.

PN215

And so what we're saying is that we already have an industry definition in the award, which includes within it a part of that defined industry which is sufficiently well expressed that, on our submission, that includes enterprises involved in the production of audiobooks. So we think there's nothing necessary to add to the definition of industry. What we observe, however, is that the award goes on to say that the award covers employers in the industry and their employees within classifications set out in the award. And when we look to the classifications set out in the award, we don't see any classifications that would apply to audiobook production house technical and production employees.

PN216

MS ANGUS: Well, there's a technician role.

PN217

MR BORGEEEST: That would not be cured by further expanding the industry definition.

PN218

MS ANGUS: So your concern is when an audiobook is produced in-house in a radio broadcasting - - -

PN219

MR BORGEEEST: No.

PN220

MS ANGUS: No.

PN221

MR BORGEEEST: Nothing to do with radio broadcasting enterprises. We're not interested in those. We're interested in an enterprise that produces audiobooks. And we're looking for - - -

PN222

MS ANGUS: So that falls within schedule G.

PN223

MR BORGEEEST: We sought to avoid the introduction of new occupation or classifications, but to pick up the classifications we find in schedule B – so observing that they are presently restricted to radio broadcasting, but saying, 'Let's expand B so that B applies to radio broadcasting, and we can use those classifications also in other parts of the industry. Namely, the production of audio content'.

PN224

MS ANGUS: So your proposal is – what concretely is the proposal here? I'm not – it's still not clear to me whether you want to expand the classification structure at schedule B - - -

PN225



MR BORGEEEST: Schedule B might – how the particular language might work would be a further conversation. But conceptually, it's schedule B becomes a schedule about and relevant to that part of the industry which includes radio broadcasting, and other enterprises within the definition of the industry and the award.

PN226

MS ANGUS: Well, that has far reaching consequences. Because currently schedule B is the classification structure that relates to radio broadcasting, and it has a whole part, part 8, which sets out particular arrangements for hours of work for announcers, broadcasters, rosters, meal break, and what I now understand your proposal to be is to extend the classification structure in the schedule of radio broadcasting to encompass a whole new, sort of, series of occupations that apply to audiobooks, which means that the equivalent part, radio broadcasting, would then apply to all audiobook book production which is currently covered by the independent production sector in schedule G.

PN227

So that would be a significant change in the status quo, because all of the producers currently engaged in making audiobooks, who are covered under part 14 of the Act – sorry, part 13, motion picture production, would now shift to a different part of the award. So that is - - -

PN228

THE DEPUTY PRESIDENT: All right. Ms Angus has just frozen. The Teams connection's dropped. But if I can understand the position that's been put, to the extent that I need to synthesise it, the position, it seems, at the workplace level is broadly to acknowledge that the award covers, by recognition of – I'm sorry, Ms Angus, the line dropped out, so I've just stepped in to synthesise my understanding of what it is you were saying based on your view that there are particular approaches to the application of the award at a workplace level, and recognising MEAA's view that audio is already covered in clause 4.2. It seems that the position is that for audio employees, they're already being given the terms and conditions that apply in part 13, motion picture production.

PN229

Now, that application is one that I can see you're raising your eyes about, and Ms Angus has confirmed that she's going to take offline and perhaps provide us with a bit more information about why it is that the industry applies part 13 in this way to those employees. So subject to us understanding that position, the issue, as I understand Ms Angus raising, is that the amendment that's proposed by you would have the effect of incorporating or applying part 8, radio broadcasting, and all of the terms and conditions that apply in clauses 35 to 46 of the award to these employees when, at an industry level, right or wrong, the clauses 77 to 84, which fall under part 13, motion picture, are already being applied to those employees.

PN230

So what seems to be apparent is that there is an issue with respect to the application of the award insofar as it concerns the employees you've identified. I don't have a view at this time about whether that approach that's taken at an industry level is reflected – Mr Kemppi, you might raise a view in just a moment

– but that appears to be the issue and it relates to the resistance that Ms Angus has raised just now.

PN231

MR BORGEEEST: I mean, firstly, I've only introduced this concept by circulating a document this very morning. So in some ways it's a bit unfair to others, particularly those who aren't concerned with this award – I think we get into too much detail when we – we have an unresolved issue about whether there is - - -

PN232

THE DEPUTY PRESIDENT: A coverage gap.

PN233

MR BORGEEEST: - - - the coverage gap at all.

PN234

THE DEPUTY PRESIDENT: Exactly.

PN235

MR BORGEEEST: And that proceeds the question of whether - if there was consensus around meeting that gap somehow, we haven't got there - - whether the proposal, that we floated this morning, creates more difficulties that it solves. But I think we need to deal with those issues in a systematic way, perhaps, starting with myself and Ms Angus offline on the first one about whether a coverage gap - - -

PN236

THE DEPUTY PRESIDENT: Arises at all.

PN237

MR BORGEEEST: - - - arises at all, and I've been a bit self-conscious about this, continuing with exploring the concept that I only introduced this morning - - -

PN238

THE DEPUTY PRESIDENT: Yes.

PN239

MR BORGEEEST: - - - in a document, while there are other items on the agenda.

PN240

THE DEPUTY PRESIDENT: Sure. Look, I agree with that. I think that it's appropriate, perhaps, for you and Ms Angus to take that issue offline. We're interested in the focus of this part of the review about coverage gap. So if you might have a discussion about those particular issues, that will feed into the work that Mr Fuller is going to explore. Because, to the extent that you might come to a view that there's no coverage gap at all, the proposed amendments to incorporate, or to adjust schedule B, won't come to pass.

PN241

So perhaps if you can have a discussion amongst yourselves about that particular issue, we can revert to it at the appropriate time. Before we move on from it, Mr Kempfi, was there anything that you sought to add just now?

PN242

MR KEMPPPI: Thank you, yes. I did just want to talk about both these issues that are perhaps a slightly more abstractive level. There does appear to be, for the audiobook production, and video game production, a very clear inclusion at the level of the industry rule. Clause 4 is fairly clear in terms of what it is meant to include, and then, as Mr Borgeest points out, and this would be equally true for the video game production, when you get down those schedules, to those actual classifications, when you look for the employee, even though the employer is covered, when you look for the employee, there's no neat fit there in those schedules. And at the very least, that would create an ambiguity if you were to test it in the Commission or in a court around the interpretation principle.

PN243

The final point I'd make is that for both of these, certainly for the video game production, it might well be the case that there's been an industry practice of slotting people into schedule G, but that that, at a principal level, shouldn't necessarily be determinative. It's almost like the duck and rooster kind of issue. We would certainly say that, at the very least, in light of that ambiguity, there does need to be some level of solution here for both of these cohorts. And, in fact, the industry practice of slotting everybody into schedule G probably evidences the very ambiguity there.

PN244

THE DEPUTY PRESIDENT: Sure. Thanks, Mr Kemppe. Anything in response to that, Ms Angus, before we move on to another topic?

PN245

MR BORGEEST: I think she's waving now.

PN246

THE DEPUTY PRESIDENT: Thank you.

PN247

MS ANGUS: Sorry. No, I was trying to get my mike back on.

PN248

THE DEPUTY PRESIDENT: Thank you very much.

PN249

MS ANGUS: No, let's have a direct discussion first to explore the issues, and then we'll come back to you.

PN250

THE DEPUTY PRESIDENT: Thank you very much, everyone. All right. We might stick with you, Mr Borgeest. Would you like to move on to address the other occupations that you've identified insofar as it concerns the broadcasting award? I will just observe, I think, for these classifications. Some of them also come to pass later in your submissions when you're considering coverage gaps, and their potential under the live performance award.

PN251

MR BORGEEST: Yes. Well, put choreographer aside for just a minute, and come back to it, but the remaining three are intimacy coordinator, safety coordinator, and chaperone. I mean, they're identified as occupations that are embraced by schedule G, we say, in respect of motion picture production. That's because they are capable of being understood as production – excuse me – they're capable of falling within just the generic classifications under motion picture production. And what we're met with is submissions in a general way that these are classifications or occupations that are not traditionally covered by awards and/or managerial function.

PN252

Now, that general topic of how section 143(7) of the Act needs to be understood here is, one topic that needs to be nussed out, because I think that's squarely put against us by, in particular, Live Performance Australia, and ACII in their respective submissions, repeatedly, but in a fairly superficial way to the effect that if something has not been expressly put in an award, that that's the same thing as employees who, because of their nature and seniority of their role, have traditionally not been covered by awards.

PN253

Now, what we've said in our submission is that it's not the same thing. Subsection 143(7) does not bite really, because it's an occupation that may not have been seen in an award before in terms. And that's a question which appears repeatedly in submissions we were investigating.

PN254

But, I mean, the particular – I mean, I don't have much to add to what's said in the submission about those three occupations. They're plainly understood by the industry associations. What we're talking about when we refer to intimacy coordinator, safety coordinator, chaperone, they're occupations about which, you know, there's been discussion between organisations including cooperation in establishing codes of practice and the like.

PN255

The proposal with respect to schedule A, however, is different. Schedule A, dealing with television broadcasting, does not have the same generic skills-based progression classifications as does schedule G. Schedule A is confined to an exhaustive list. And so what is proposed there is that the list be expanded to embrace these kinds of occupations.

PN256

Lastly, choreographer is - - -

PN257

THE DEPUTY PRESIDENT: I'm sorry to interject. Expand the list specifically at schedule B or A, did you say?

PN258

MR BORGEEST: A. So for those occupations, the distinction between the treatment in schedule A and schedule G is in that part of the submission at point 1.2, 'General comments in respect of remaining nominated occupations'. So there,

schedule A, television broadcasting is identified as being structured around an exhaustive list, not including those three occupations which is proposed to be included, where schedule G explains there that there's some generic classifications.

PN259

THE DEPUTY PRESIDENT: Yes, I understand.

PN260

MR BORGEEEST: Choreographer – I'm sorry, choreographer is in the same category. It's to be treated in the same way as I've just described with intimacy coordinator, safety coordinator, and chaperone. I singled that out because it is actually treated a little bit differently, in our submission, under the Live Performance Award.

PN261

THE DEPUTY PRESIDENT: Yes.

PN262

MR BORGEEEST: Again, just with choreographer, what we've been met with – I mean, the most substantial submission in ACCI's initial submission from December is again to say that subsection 143(7) applies because it's traditionally not covered by awards. Well, we say that's a case that needs to be demonstrated. It's not demonstrated by observing the absence of express use of that term in an award in the past. A subsection is not a prohibition on using a word that hasn't appeared before. It's only a restriction where it's traditionally – a tradition has developed that it not be covered by awards because of the nature or seniority of the role. So that requires an historical development resulting in a tradition based on an appreciation of the nature of seniority of the role, and we don't see that historical development with respect to choreographer, or any of these positions, but we're all ears if that's to be put.

PN263

THE DEPUTY PRESIDENT: And I think you unpack, a little later in your submission, insofar as you address the role of choreographer, and the Live Performance Award, some of the aspects of the role of a choreographer that you consider might differentiate based on the particular engagement, such as some choreographers who hold a more managerial or director kind of role, and others who are focused on the performance of perhaps some different duties.

PN264

MR BORGEEEST: That issue really arises over in live performance, on our understanding, more so that in screen production. What's raised in some of the employer submissions is an identification between the role of choreographer and artistic director as if those are very tightly bonded concepts or interchangeable. What we understand is being spoken of there, is the concept of a choreographer who might be the key figure or leader of a dance company.

PN265

THE DEPUTY PRESIDENT: Yes.

PN266

MR BORGEEEST: So the artistic director, in the sense of directing the artistic vision of a company together with exercising lots of managerial functions in leadership of that company. So in the live performance section of the submission, we say, well, if you demonstrate that a person performing the managerial functions of an artistic director is traditionally not covered by an award, or not covered by this award, assuming that you do that, that's not the same thing as saying all and every choreographer employee must necessarily be excluded from the award; it might be.

PN267

But if we demonstrate that a managerial artistic director is not traditionally award covered, and we make no concessions about that, but if that's demonstrated, then it may be that what flows from that is that there would be a reason to distinguish between choreographer employees in the live performance industry, other than those who combine choreographer functions with managerial artistic director functions.

PN268

THE DEPUTY PRESIDENT: M'mm.

PN269

MR BORGEEEST: That was the submission that was developed under that heading in respect of the Live Performance Award.

PN270

THE DEPUTY PRESIDENT: So then just coming back to the broadcasting award for now.

PN271

MR BORGEEEST: Coming back to the broadcasting, that wasn't - I mean, the artistic director company leader role, we didn't see that issue arising as prominently in screen, and as more likely to arise in respect of live performance.

PN272

THE DEPUTY PRESIDENT: Yes.

PN273

MR BORGEEEST: So that's the way it received prominence over (indistinct).

PN274

THE DEPUTY PRESIDENT: Yes, I understand. So with the result, then, that it's MEAA's position that the roles of intimacy coordinator, safety coordinator, chaperone, and choreographer, fall within coverage gaps insofar as it concerns a broadcasting award?

PN275

MR BORGEEEST: No - - -

PN276

THE DEPUTY PRESIDENT: Or is it the case that there are not coverages gaps, but an argument as to whether or not they fall within the award as a consequence of seniority issues?

PN277

MR BORGEEEST: Outside schedule G.

PN278

THE DEPUTY PRESIDENT: Yes, okay. Okay. Ms Tinsley, I know that you had taken the view, at the outset of the session today, that you didn't initially propose to get involved in some of the deeper level discussions about particular roles or occupations, suffice to say that it appears to be ACCI's general view that the roles that have been discussed, or at least choreographer role, is akin to something like an artistic director, and is therefore at a level of seniority that steps then outside the terms of the broadcasting award. I'm comfortable for you to rely upon your written submissions, but if there's anything else that you wanted to contribute to that discussion, you're welcome to do so.

PN279

MS TINSLEY: Thanks, Deputy President. That would be an accurate reflection of our submissions, as you say, set out in our written submissions here. Going back to our friend's characterisation of our argument here, I was referred to the section, being 143(7), there still needs to be – so here we're talking about someone who performs work that is not of a similar nature to the work that has traditionally been regulated by such award.

PN280

So our argument's not that just because they haven't been covered by an award traditionally, that they won't be in the future, it's more that you do need that sufficient nexus being a similar nature to work (indistinct). But otherwise, happy to rely on our written submissions, and probably point this as an example of where there are industry associations that are far better placed, than MEAA to be able to explain the nitty-gritty, so to speak, of this particular occupation.

PN281

THE DEPUTY PRESIDENT: Thanks, Ms Tinsley. And to that end, is there anybody else that wanted to address these particular roles within the context of broadcasting award here today? No. If you're all content then, we might move to the aspect, that I'm sure Ms Minster and Ms Floyd are particularly interested in, which is that component of your submissions, Mr Borgeest, which address the Live Performance Award?

PN282

MR BORGEEEST: Thank you. So the remaining occupations that are live are choreographer, intimacy coordinator, chaperone. And the proposition is that an intimacy coordinator and chaperone are within the generic classifications of production and support staff in schedule A of the Live Performance Award.

PN283

Choreographer could not most likely fall within generic production and support staff classifications, and there's no specific classification in terms that would

include choreographer. So our view is that there is a coverage gap for choreographer, but that for intimacy coordinator and chaperone, our contention is that they fall within the generic classifications, and if there's any doubt about that, we'd like to flush that out.

PN284

So what we're met with, with all of these three, again, is the submission resting on 143(7), whether these are additional or similar to existing classifications. The contention that these are not traditional award classifications is – well, it's yet to be developed, but that seems to be the most substantial thing that's foreshadowed from the employer associations.

PN285

Anyway, it's only now three occupations, and in two categories, (1) choreographer, plainly coverage gap; and (2) intimacy coordinator and chaperone where we are flushing out whether there's a different view.

PN286

THE DEPUTY PRESIDENT: Ms Minster?

PN287

MS MINSTER: Having received the submissions only this morning, we haven't had a chance to properly review them. So I guess I would say, at this moment, our response is kind of one that we've tried to put forward to help the Commission in this review, without really knowing where MEAA or the ACTU was coming from. So we'd prefer to, like, have a further look - - -

PN288

THE DEPUTY PRESIDENT: Sure.

PN289

MS MINSTER: - - - before we make any more submissions or respond to that.

PN290

THE DEPUTY PRESIDENT: Sure.

PN291

MS MINSTER: I'm not sure there's anything else to say other than that we do also put forward, prior to having saw information, that it's not just intimacy coordinators are not historically covered, there's also, I will explore that, most of them are not engaged as employees. And apparently, my understanding is, it might be different for screen, I'm not sure, is that there's only about three intimacy coordinators in Australia, and they all have their own businesses.

PN292

THE DEPUTY PRESIDENT: Right.

PN293

MS MINSTER: So I don't really see what the benefit would be of including them in the award. It's kind of a different sort of role, and a role that's probably not on the set all of the time, or in a rehearsal or a show all the time. So it's a kind of



very niche specialised type of role that is often not an employee. But I will definitely – I think we need to go back and talk a bit more to our members as well.

PN294

THE DEPUTY PRESIDENT: Sure.

PN295

MS MINSTER: Because these are very specific, and new sort of roles.

PN296

THE DEPUTY PRESIDENT: Can I explore with you the idea – and it starts to pick up on this theme that we were talking about, about engagement of individuals as contractors as opposed to employees – noting that it's quite a niche role, particularly new, it won't arise in all cases, do you think that the approach to engaging those individuals on a contract basis, as opposed to being engaged as an employee, is a bi-product of the fact that the award doesn't seem to contemplate that new type of role, or – and this might be a little bit speculative, but it's just something that seems to be coming up a little bit – and whether there's any industry knowledge that you hold about the fact that they're always going to be engaged in this contractor style method, such that any variation to the award, to capture this type of role, is going to be fairly broadly meaningless for this particular type of work in the industry?

PN297

MS MINSTER: My initial view is that, yes, because they're kind of engaged, on my understanding, but I want to dig a bit deeper with our members, is that they kind of form a consultant role. So they should maybe have an ability to be able to speak a bit more freely to the employer, and to work on a set or in a rehearsal, because the issues are, like, very sensitive.

PN298

One problem that we have is that – I know that, after briefly learnt there's some intimacy coordinator guidelines, but the fact that LPA members haven't been consulted about those for screen, that have then somehow been imposed on, or expected to be imposed on, live performance industry which has different needs and different ways of working.

PN299

THE DEPUTY PRESIDENT: M'mm.

PN300

MS MINSTER: And at the moment, we're negotiating an agreement with MEAA, and we have agreed, at the end of that negotiation, to develop these kind of guidelines.

PN301

THE DEPUTY PRESIDENT: Right.

PN302

MS MINSTER: And so I would prefer to leave that kind of discussion to them, because we really haven't had that discussion with MEAA and the industry.

PN303

THE DEPUTY PRESIDENT: Sure.

PN304

MS MINSTER: So mostly, our members would use intimacy coordinators because they recognise a need to do it. Rather than have an imposed guideline, they do it anyway. So that's kind of how new it is, and there's not even a course available in Australia for someone to be, it's my understanding at the moment, to be qualified as an intimacy coordinator. That's why, maybe, there's so few people who undertake that occupation, so to speak.

PN305

THE DEPUTY PRESIDENT: I think it's entirely appropriate that you take the opportunity to consider the submissions by MEAA, insofar as it concerns those aspects of your reply submissions that remain in issue. How long do you anticipate that process might take?

PN306

MS MINSTER: Certain aspects will be easier than others. I think we can do it by the end of this week.

PN307

THE DEPUTY PRESIDENT: Okay. So if we broadly recognise that to be a topic that would be addressed next week, that's going to provide you sufficient time to garner that information and crystallise some thinking.

PN308

MS MINSTER: Yes, I think so.

PN309

THE DEPUTY PRESIDENT: All right. Does anybody have any views about that proposed timetable, that we would defer this issue and Live Performance Australia's specific response to the proposed variations to the LPA to capture these particular roles that have been raised by MEAA and confer about them next week?

PN310

MR BERGEEST: That would be fine.

PN311

THE DEPUTY PRESIDENT: Okay. I'm just taking a note of that, folks, won't be a moment. All right. Thank you. There are just a couple of perhaps residual questions for you, Mr Borgeest, in relation to your reply submissions. The first concerns dance teacher. That's not contemplated. Is that something that you've deferred to Mr Kemppi, together with video game, to address, or do you have a view about the roles that were initially contemplated within your December submissions concerning dance teacher? Page 4. You've said that that role should more appropriately be dealt with via the Live Performance Award, and Live Performance Australia have specifically addressed that role at paragraph 9 onwards of its reply submissions.

PN312

MR BORGEEST: We're not addressing that. MEAA has addressed the classifications – sorry, the occupations in the two lists – the two top lists in page 5. Sorry, dance teachers – I'm not advancing a submission about dance teachers.

PN313

THE DEPUTY PRESIDENT: All right. Is that something, Mr Kemppe, that falls within the ACTU's ambit?

PN314

MR KEMPE: No.

PN315

THE DEPUTY PRESIDENT: Is the Commission then to understand that there is no longer a perceived gap insofar as the role of dance teacher is concerned?

PN316

MR BORGEEST: Would you allow me to take that on notice, and I'll have an investigation about that?

PN317

THE DEPUTY PRESIDENT: Yes. As I understand your initial submissions, you had indicated that they are typically engaged, on your understanding, or at least on the union's combined understanding under the Fitness Industry Award, you didn't think that was appropriate. You thought that they ought appropriately be dealt with under the Live Performance Award, and Live Performance Australia has specifically addressed that submission within its January reply submissions. I'd like to understand if that's a role that continues to be in contest.

PN318

MR KEMPE: No.

PN319

MR BORGEEST: My apologies, Deputy President. I'll get back to LPA as soon as possible today to clarify that, and deal with it tomorrow morning here.

PN320

THE DEPUTY PRESIDENT: Thank you. To the same end, I've noted, Mr Borgeest, that you've specifically not addressed the various roles working in video game development, which were initially addressed in your December submissions.

PN321

MR BORGEEST: In the union's joint submissions?

PN322

THE DEPUTY PRESIDENT: In the union's joint submissions.

PN323

MR BORGEEST: That was Professional Australia's - - -

PN324

THE DEPUTY PRESIDENT: Yes. And that's what you alluded to earlier this morning, Mr Kemppe, to the extent that there's going to be ongoing dialogue about that, you'd like Professional Australia to be involved.

PN325

MR KEMPE: Yes.

PN326

THE DEPUTY PRESIDENT: Perhaps then, the prudent approach might be to invite Professionals Australia to attend tomorrow morning, at which time we'll discuss the roles that have been identified as potential coverage gaps concerning video game development, and we'll address any residual issues that arise in relation to the role of dance teacher vis-a-vis the Live Performance Award.

PN327

Broadly speaking then, Mr Borgeest, do you feel that you've adequately addressed the issues that you've raised in your supplementary submissions, filed on behalf of MEAA, which have been circulated this morning, and are there any other matters that you might like to raise for consideration by the group so that we can plan for when we might further address them?

PN328

MR BORGEEST: Look, there's nothing in particular I wish to add. I was certainly mindful of the fact that interested parties only saw this document this morning, and was very content to deal with issues of substance remaining between us at a time when people have had a chance to review it properly.

PN329

THE DEPUTY PRESIDENT: Yes.

PN330

MR BORGEEST: So I don't wish to consume more time elaborating on a document that people are just getting their heads around and instructions on.

PN331

THE DEPUTY PRESIDENT: No, I appreciate that. And I appreciate that we've devoted a little bit of time to it this morning. But I think it's helpful, in terms of then seeing what falls out of it, so that we can make a plan for when we might discuss them. So thank you for taking time to take us through it.

PN332

I think then, unless there's anything that anybody else would like to raise by way of specific response to the supplementary submission of MEAA that was received this morning, I'll otherwise invite your responses to that document when we commence tomorrow morning, so that you've had adequate time to give it a little bit further thought overnight.

PN333

All right. I appreciate that you've been - - -

PN334

MR FULLER: I'm sorry, may I just clarify?

PN335

THE DEPUTY PRESIDENT: Yes, Mr Fuller.

PN336

MR FULLER: When you say by tomorrow morning, in relation to the specific issue that we've discussed, are you requiring a response from - - -

PN337

THE DEPUTY PRESIDENT: No.

PN338

MR FULLER: Sorry, I just want to clarify.

PN339

THE DEPUTY PRESIDENT: That probably wasn't particularly clear. Insofar as there are particular topics that have been taken offline - - -

PN340

MR FULLER: Yes. Sorry, I just - - -

PN341

THE DEPUTY PRESIDENT: - - - then that dialogue will absolutely occur. And I appreciate that, between you, Mr Borgeest, and Ms Angus, there are some matters that you might like - - -

PN342

MR FULLER: Okay, thank you. I just - - -

PN343

THE DEPUTY PRESIDENT: - - - to discuss, and you'll bring those back to the table.

PN344

MR FULLER: Yes.

PN345

THE DEPUTY PRESIDENT: My statement just now was really more so directed to the fact that this document only came in this morning, and people might have something they'd like to say in response to it, but just haven't had a chance to crystallise that thinking because you've been here appearing since 10 o'clock.

PN346

So if there's anything that you'd like to raise, you'll be certainly given the opportunity upon request tomorrow morning to advance any particular issues that you'd like to generate some discussion about.

PN347

Now, you've been sitting for a little while. I'm in your hands. Does everyone want a short comfort break before lunch? I think we're getting a few

nods. Would you be happy to take a 15 minute break now followed by, perhaps, another hour of power before we take lunch? Will that work? All right, let's proceed on that basis. Thanks, everyone.

**SHORT ADJOURNMENT**

**[12.04 PM]**

**RESUMED**

**[12.26 PM]**

PN348

THE DEPUTY PRESIDENT: All right. Now, subject to any arising views or anything that fell out of the short break that we had, I thought we might go for the next – until about 1.15, perhaps, by inviting Ms Benton to start speaking to NAVA's position, if you're comfortable to do that.

PN349

MS BENNETT: Sure.

PN350

THE DEPUTY PRESIDENT: Thank you.

PN351

MS BENTON: Thank you. I think maybe I can start with an observation that being in this space and listening to detailed discussion about the Live Performance Award and broadcasting, it's been really interesting, and I guess really even further cemented the need for that kind of focused dedication to the visual arts sector, which has a lack of clarity in coverage for the visual arts, craft and design sector, which is to date vast and confusing. The lack of clarity has been confirmed based on advice given to various organisations across the sector from Fair Work directly. And numerous legal experts, when giving employees advice about what award they may be covered under, from what I hear is always, 'This isn't quite the right fit. I don't know what the answer is, but you could probably try this and make it work.' I think that's very clear in the submissions that we've made. We probably don't need to spend too much time on it.

PN352

I think there was a question – just because you made eye contact with me when you were referring to the question around contractor, and the instances where a contractor may be a contractor in this kind of process, or if you made any change to it, (indistinct) coverage would be meaningless, I suppose. While there absolutely would be instances of that in our sector, I really need to note that that's not the case for a broad range of contractors in the visual arts who are often contracted for administrative ease, particularly through really I guess bureaucratic systems, like local government or the universities, where it's just much easier to get someone to invoice for payment rather than to put them on the books.

PN353

But in all other circumstances, they would be deemed to be an employee. They'd be given defined hours to turn up to work, to take a break, to leave, given a set number of tasks to do or undertake, and will have a supervisor and be expected to comply with the organisation's set way of doing things. So there are multiple people working in that way. And I said when we met in late December, just

coming back to the lack of clarity around existing award coverage, when we surveyed the sector, only two respondents from more than a hundred are applying the Miscellaneous Award, and only 27 are applying the Amusement, Events and Recreation Award, and in wildly different ways.

PN354

One organisation says that these rules are covered, another organisation will say that those rules are excluded, so there's just so much confusion. I guess speaking further to that, it would be useful if there were specific questions I could speak to. And also, given we have a two-week period, I do have a number of colleagues based in Melbourne and artists based here who would be willing to come in and speak to various components of this review, if I was to give them notice of what type of information is needed.

PN355

THE DEPUTY PRESIDENT: Sure. Well, perhaps a prudent way of proceeding is to work through the supplementary submission that you have filed, because that submission really speaks to, as I understand it, particular roles that you envisage to fall within coverage gaps. And it might be then that that can generate some discussion amongst those present about any alternative views that they might have in relation to those particular matters, such as to, where possible, narrow the scope of any of the issues, any of the roles that have been identified.

PN356

MS BENTON: Do you want me to just speak to that submission?

PN357

THE DEPUTY PRESIDENT: Thank you. That would be great. Sorry. That was a long pause.

PN358

MS BENTON: So as discussed in the December meeting, to give clarity on I guess the list that I provided on page 9 of NAVA's initial submission, which was a list of occupations that we believe have no existing coverage, or very unclear existing coverage. I've started this second submission explaining the types of work that artists do, and I have separated artist to arts worker. And I think that some in some ways, in the Fair Work Commission's discussion paper does address this topic of the artist, and recognising that Revive has made very deliberate intentions that the artist be recognised as worker.

PN359

And that may not be resolved under award coverage as such, but it has been raised by the Fair Work Commission as what to do with artists, and I'd be interested in having that conversation. It's probably not something that we can resolve this afternoon, but I think it is a big part of this opportunity for us to look at. But, that said, there are lots of activities that artists undertake in our sector that could be absolutely be considered to apply as an employee or through an award process, and actually are already. There are many organisations who are doing this as a practice to test out how that might work, and they are putting on artists on the payroll in recognition that they are grossly underpaid, and have a great deal of job

insecurity, and this is one way that organisations are starting to make a commitment to address that as a concern.

PN360

And the types of activities that I have listed out there the artists will do, initially talking through that they will conceive and develop ideas to make an artwork. Beyond that, they will also develop applications for funding, and they may do that in collaboration with organisations who have commissioned them, but don't actually have enough money to pay them. So they'll work on applications together, to seek additional funding to undertake a major project. They will contribute to education packs that are aligned with exhibitions for schools, develop and teach workshops, do talks, judge an art prize, be part of peer assessing; particularly in the case of public artists, will attend many, many meetings, and also work as an artist-in-residence. An artist-in-residence could be something that you do for a month, or it could be actually even up to a year.

PN361

I've also gone into a public artist, which I define a bit differently, because generally, the nature of public artwork is that it can take years to undertake, much like an architect or an engineer. And that I guess would put some indicative duties that a public artist would undertake, but I also recognise that public artwork would range between a very small-scale mural that people would do quite quickly, right through to a major public sculpture that would take an integrated artwork into a building, which could take five years. Should I pause there if we want to talk to anything?

PN362

THE DEPUTY PRESIDENT: No. I think we're probably comfortable – well, you're about to embark upon a discussion about arts workers outside of this.

PN363

MS BENTON: That's right, yes.

PN364

THE DEPUTY PRESIDENT: Let's proceed. I think that at the appropriate time, Ms Vincent in particular – I know that some of this supplementary information was sought by your colleague, Mr Scott, and it may be that you have some submissions that you'd like to make in response. Is that the case?

PN365

MS VINCENT: Yes, that's the case. Thank you, Deputy President.

PN366

THE DEPUTY PRESIDENT: Would you propose to do that, Ms Vincent, by reference firstly to the category of artists and public artists that has been discussed, or would you like to hear from Ms Benton in relation to the arts worker classifications also at this stage?

PN367

MS VINCENT: Our submissions at this stage are more of a generic sense, from a threshold perspective. So, subject to your thoughts, Deputy President, I'd be open



to raising it now if that would be suitable. Alternatively, I'm more than happy to wait for Ms Benton to finish her submissions.

PN368

THE DEPUTY PRESIDENT: All right. Let's allow Ms Benton to finish. Thank you, Ms Vincent. Go ahead, Ms Benton.

PN369

MS BENTON: Thank you. All right. So then I have listed the arts workers, who we have not been able to determine where they would fit in the existing award. The first one is access coordinator, and I make a note in the appendix that this is a relatively new position, but increasingly growing, as organisations and galleries become more conscious about making their spaces and their exhibitions accessible. The next one we have is an advisor, who, as I say, they could be an artist or an arts worker with specialised knowledge, who acts in an advisory capacity. And this could be a one-off thing, but more likely it's something that people do for a number of years, on either a monthly or biannual or even quarterly basis that they will be participating in an organisation.

PN370

A business operations or general manager – different terms that people are using – will oversee the day-to-day operations of a gallery. They will be responsible for risk management, WHS, but also financial management of the gallery, and, depending on the size of the gallery or organisation, will undertake a really broad range of activity. There's some detail here on conservators and registrars, with a differentiation between conservators, who are primarily responsible for the physical care, preservation and restoration of artworks, and registrars, who focus on the administrative and logistical aspects of art collections, proper documentation of the art collection, moving and caring of those items, a specialisation and understanding of artwork, as opposed to I guess historical documents, and I need to make that distinction there. It's a requirement of this type of work.

PN371

Then we look at curator, and there's I guess a number of different levels that a curator would go through, which starts with curatorial assistant, which is sort of a starting level role; a senior curator, and a curator. And some galleries will have all three tiers, and others will just have one. They again will typically have a bachelor degree or a master's in curatorial studies, and some indicative duties are listed there. A development or fundraising manager would work on raising funds for the gallery. This generally does require knowledge about the art gallery and its stakeholders, I suppose, which is why I've included it in here.

PN372

I have included director, even though I note that it's not typical that a director would be included in an award. But I felt it was important here, and I do recognise that (indistinct) organisations do have CEOs listed in their award. So I thought it would be useful for this case, but of course a director directs the operations of an organisation, such as galleries, oversees governance, develops the organisational vision, and manages facilities, with particular focus on funding and managing the budget.

PN373

We then have education and public programs officers and managers, who design, develop and deliver contemporary arts and cultural experiences for children, young people and adults that are integrated into a gallery's programs and collection. Again, typically you would have tertiary qualifications in contemporary art, curatorial studies, arts management, and a good knowledge particularly of the Australian contemporary arts sector. And an education coordinator typically would be focused on aligning programs with the school curriculum, both at the state level and national. And a public programs officer would typically create programs for the general public to engage through the exhibition.

PN374

We then have an executive assistant or administration officer. Again, they'd need to be highly knowledgeable about the Australian contemporary arts sector and sector stakeholders, and quite often they would be providing administrative support to the executive. Having an understanding of the sector and its relationships is pretty key to a role like that. Then we have exhibitions, touring and collections, which have been put together because they generally will be in the same department. Then an exhibitions manager or coordinator would be responsible for planning, organising and implementing exhibitions, and they would have a direct working relationship with a curator.

PN375

A touring manager or coordinator would organise touring exhibitions that move from one gallery to another. Tours can happen across a 12-month period, but they can also go across five years. And a collections manager or coordinator is responsible for the care and documentation of an organisation's or a gallery's permanent collection, which is generally a mixture of living Australian artists as well as international practitioners. I've got three roles here for First Nations arts centres, and that includes a manager position, a studio coordinator, and a studio arts worker, and the types of roles that they undertake.

PN376

In some cases, particularly for a studio art worker, and increasingly, an identified First Nations position, particularly as First Nations arts centres are looking to train people up, but the higher roles at this point are not specifically First Nations. And we have a front-of-house or visitor services. The type of ways that people will be engaged, or the level that they'll be engaged will depend on the scale of the gallery. This type of role would welcome visitors to the gallery, often answer questions about the exhibition. If it's a contentious piece of work, they'll need to respond to issues raised and concern from the general public. So having type of confidence to answer that type of query from the general public is really important.

PN377

In some situations they would also be involved in the gallery shop, which in some cases would stock the types of I guess artworks from local practitioners. A gallery assistant or attendant; I've got just general indicative duties here. Again, would greet gallery visitors, and that would depend just on the previous that I've

mentioned. Front-of-house would depend again on the scale of the gallery, and whether or not they have both of these roles or just one of them.

PN378

I have marketing and communications manager or coordinator in here, who would work in communicating and promoting the gallery and its exhibitions. Having knowledge of contemporary art, particularly in regard to Indigenous cultural and intellectual property – ICIP – and artist intellectual property is really key to a role like this. Knowing and understanding what artists' rights are, not to have their image cropped, stretched, have text overlaid; making sure that the artists are properly attributed, their names are spelt correctly, all of this information is key that type of role.

PN379

A producer for a visual arts festival; I've got some indicative duties here, that they would be negotiating, preparing and finalising artist contracts, being involved in I guess the programming of the festival and the delivery of different types of artwork that would have I guess different scale and different interactions with the public. I hope this pace is all right, because I'm actually nearly finished. Then we're up to specialist technician, production and installation. This is quite a large area, and I think in our initial submission we did mention that there are lots of galleries who will employ technicians and installation staff for short periods of time, just for the de-installation and installation or the crossover of exhibitions. And then there'd be no work for them for six weeks to three months, depending on how often exhibitions turn over.

PN380

Many of these types of workers are generally paid on a contract basis. But as I mentioned before, they are told what time to turn up, what works to hang, how to hang them. So I think in all other ways would be deemed to be employees, regardless of how they're being paid, similar to a casual gallery installer, who may be just starting out. Typically, sculpture students, or I guess people who have a practice in sculpture get into this type of work, who have a good sense of working with space, how to install exhibitions, and various types of work and handling expertise.

PN381

And the last role here is a volunteer coordinator, and that is a role to coordinate a team of volunteers. And the volunteers may be running tours of an exhibition, they could be – if I could give an example of the Sydney Biennale, it obviously relies very heavily on volunteers to I guess be present and greet people at each station where an artwork or a component of the exhibition is being staged. There are all sorts of different things that volunteers undertake across the sector. There are multiple studies that demonstrate how much the sector relies on volunteers, and having someone to coordinate that type of work is pertinent.

PN382

THE DEPUTY PRESIDENT: Thank you, Ms Benton. Before I go to you, Ms Vincent, and invite your submissions, I might just make an initial inquiry to you, Ms Minster. The role of producer, visual arts festival, that's nominated on page 14 of Mr Benton's supplementary submissions. I've just got a question mark in

my own mind about a visual arts festival. Would that fall within, in your view, the scope of the Live Performance Award?

PN383

MS MINSTER: No, it wouldn't.

PN384

THE DEPUTY PRESIDENT: It would be excluded?

PN385

MS MINSTER: Yes.

PN386

THE DEPUTY PRESIDENT: All right. Thank you. Ms Vincent, what is it that you would like to - - -

PN387

MS VINCENT: Actually before I – sorry, it's only half the answer.

PN388

THE DEPUTY PRESIDENT: Yes, go ahead.

PN389

MS VINCENT: Yes and no, because sometimes – well, often a visual arts festival is not only visual arts. Often it would have a component like performance.

PN390

THE DEPUTY PRESIDENT: Yes.

PN391

MS VINCENT: So we would represent a festival, but there might – often the festival is not really employing everybody. There's certain organisations that would put a show in a festival. So some of the live performance organisations like (indistinct) companies, et cetera, would be part of the festival. So that would fall under, but if someone had an exhibition in an art gallery, a visual art exhibition, and put it into that festival, it wouldn't be covered by the Live Performance Award.

PN392

THE DEPUTY PRESIDENT: I see.

PN393

MS BENTON: Can I add to that. Thank you. I completely agree, and additionally there are also lots of multi-art form spaces that are particularly run by local government, but they'll have a gallery, a theatre, and some other music kind of space. And that type of space will run festivals, but also just in their general practice of how they work, are exactly the type of organisations, festivals or spaces that say visual arts needs something like the Live Performance Award, because it's so – when they're employing artists or arts workers to do the live performance component, everybody understands how much they should be paying people and what the terms are.

PN394

And then come to the visual arts, it's very ad hoc, and that's where people are referring to our code of practice, which is a monetary instrument, and people are unable to negotiate. There's a great deal of uncertainty about whether or not superannuation applies to works in the components of a festival where the live performers will confidently submit their invoices with their superannuation form attached. The visual artists are unclear about what their rights are, and it will really just be determined by negotiations, and how much confidence people have.

PN395

THE DEPUTY PRESIDENT: And so this is a very general question at this stage, but would you accept that there may be some potential coverage for individuals that are employed within the broad coverage of some of the public sector awards, where they're engaged by publicly run organisations?

PN396

MS BENTON: Absolutely there are some situations of that, particularly state-based galleries.

PN397

THE DEPUTY PRESIDENT: Yes.

PN398

MS BENTON: Not all of them, but most of them are working to the state-based award. But the museums and galleries in the Northern Territory, for example, is not working to a state-based public sector award. Instead, it's adapting some components of the Amusement, Events and Recreation Award. For other staff who started before 2014, they're employed on an enterprise agreement, and for others they're just sort of making it up.

PN399

THE DEPUTY PRESIDENT: All right.

PN400

MS BENTON: But each gallery or organisation – and also local government is similar. Some of the larger level government will follow the Local Government Industry Award. But some of the smaller ones have traditionally had – they may have a council who are not friendly to the gallery. A lot of that work is put off to the side, and there are multiple local government galleries who are relying completely on volunteers, or they are relying on NAVA's code of practice, but they're not referring to the Local Government Award. It's mostly the larger governments that are looking at the award.

PN401

THE DEPUTY PRESIDENT: So is that an elective-based approach? They're choosing not to comply – I'm certainly not inviting you to do anything in there, but is that because the Local Government Award carries complexity, and it's too difficult for such a small organisation or a small component, or are there some other issues at play?

PN402

MS BENTON: I think it's very likely a combination of that, but also I guess a deep history of not recognising art as work. And that is really the centre of Revive, and that has come from this systemic issue, longstanding issue that art is something that is fun, and not actually work.

PN403

THE DEPUTY PRESIDENT: All right. Thank you. Ms Vincent.

PN404

MS VINCENT: Thank you, Deputy President. We of course thank NAVA for obviously filing the additional materials following the December consultation sessions, including what appear to be a number of position descriptions. We do have two threshold matters that we would like to raise in respect of NAVA's position, if we may. Firstly, we would just be interested to know whether the position descriptions that have been provided are reflective of actual real-life duties of specific employees, or whether they're hypothetical in nature. Because some of them, in reading them from the external perspective, did appear to be hypothetical in nature, rather than indicative of actual roles in practice.

PN405

MS BENTON: Every single thing in here has been drawn from job descriptions provided to me by organisations across the sector. Perhaps you could give an example of a hypothetical duty, and I could respond to you.

PN406

MS VINCENT: No, that's all right. So just to clarify in that respect, so these are amalgamations of duties from various organisations, is that correct?

PN407

MS BENTON: Correct.

PN408

MS VINCENT: All right. And that turns to our second threshold issue, is that notwithstanding obviously that the provision – the position descriptions have been provided, the challenge we're grappling with is that in our opinion, there remains an absence of context regarding the roles in question. Notwithstanding, obviously, these position descriptions are very helpful, but that mainly relates to character of the employer. And it's not our intention to be pedantic in this respect, because I know my colleague Mr Scott did address this in the December consultations, but we consider that the absence of information pertaining to the character of the employer is problematic, as award coverage will most certainly be dependent upon the character of the employer.

PN409

So, naturally, of course, to the extent that these position descriptions have been drawn from different employers, it's very possible that dependent upon the character of the employer, that the relevant employee may in fact be covered by different awards. Now, as a result of that, we consider that this threshold issue has yet to be resolved. And so whether by reason of these sessions or separately, by way of written material, we kindly request if NAVA was able to put forward some additional particulars which would provide us with greater insight as to

character of the employers involved in engaging these particular employees, so that we could ultimately form the view as to award coverage.

PN410

And in that respect, ultimately, as a result of that, our position is that any views that we will be able to put forward today are more likely than not to be preliminary in nature. And so it's quite possible that hopefully, once NAVA is in a position to provide some additional particulars in this respect, that we would actually seek to file some further written submission with our views in this respect.

PN411

MS BENTON: I can provide that the majority of these workers come out of the small-to-medium sector. A large cohort in the information has been put together by NAVA over multiple years as the basis of our code of practice, which sets out payment standards for artists and arts workers. And we actually had detailed a lot of this information in previous iterations of the code. It was left out in this latest revision because of the scale of work required, which I actually just undertook at the end of this year, so we could actually include it into the code now. But also, the Contemporary Arts Organisations Australia, which are a network of particularly galleries in every state and territory, have provided multiple job descriptions from each of their respective galleries, which have been a lot of the basis of this new work.

PN412

MS VINCENT: If I may interject there, Ms Benton. Can I just clarify, is what you're saying that each of these roles are actually engaged by private gallery owners?

PN413

MS BENTON: No. They're all not-for-profit. They're publicly funded, and also run by contributions from private donors. But they're not private galleries, no. They're public galleries.

PN414

MS VINCENT: And when you say public galleries, do you mean government-owned galleries?

PN415

MS BENTON: No, they're not government-owned.

PN416

MS VINCENT: All right.

PN417

MS BENTON: The ways that they would be set up would be varied, and I could take that on notice to be more specific. I'd need to look that up. But they're not-for-profit public galleries – independent, I should say.

PN418

MS VINCENT: All right. But they would otherwise just – each of the relevant roles are engaged solely by galleries, is that correct?

PN419

MS BENTON: A gallery or an organisation, yes.

PN420

MS VINCENT: And what sort of additional organisation would be engaging with these relevant employees?

PN421

MS BENTON: As I said, some local governments will be employing these types of positions, and it is my understanding that this range and the level of detail is not provided in the Local Government Industry Award, in which case they'd be referring to NAVA's code. And that may be because the positions are – they can't fit in the Local Government Industry Award, or, in some situations, the councillors may not agree that the art component of the work is recognised under the award.

PN422

MS VINCENT: All right. That's really helpful. I'm very conscious that at the end of the day, this issue does not ultimately concern a number of the parties. Subject to the Commission's views, it would be really helpful from our perspective if NAVA or any other relevant party would be in a position to provide us with a list of employing entities for each of the relevant positions, so that we can ultimately form a view as to award coverage, and whether we have any further submissions that we'd like to put in that respect. Because unfortunately, at present we have concerns that we just do not have sufficient information regarding the character of the employer to do so.

PN423

THE DEPUTY PRESIDENT: I think that's a really good idea. Subject to other views, I think the more information that's shared, the more engagement you're going to get from some of these other organisations about the issues that the Commission will have to bring to bear for the purposes of the report. Mr Kempfi.

PN424

MR KEMPFI: Thank you. I just wanted to make one suggestion, and I'll be guided by Ms Benton on this. It appears to be the case that NAVA put a submission and was asked for further particulars they've provided as particulars, and there's a danger here that we could get into a bit of a never-ending story of, 'Well, I still can't really see what you're saying. I still can't see what you're saying', and there's just obstacles put in the way. It seems like there's never been a call for a list of employing entities, which I think would be asking NAVA to put far too much of an evidentiary case before the Commission for this process. Perhaps it might make sense to keep that categorical; this type of gallery, that type of gallery.

PN425

THE DEPUTY PRESIDENT: As opposed to the identity of the galleries themselves.



PN426

MR KEMPPPI: Exactly, as opposed to putting NAVA to the task of having to list every single gallery in Australia.

PN427

THE DEPUTY PRESIDENT: Sure. I think there's some logic to that, Ms Vincent. I understand that the nature of the request is about allowing your organisation to provide some further submissions about whether this work might fall within the Local Government Award, whether it's applied or not, or whether it's a private organisation, and therefore there are other considerations to bring to bear.

PN428

MS VINCENT: Yes. That's the case, and I very much agree with Mr Kemppli's submissions in that respect. It was not our intention that – and apologies if I was unclear in this respect – that Ms Benton should put forward a specific number of entities. Our concern is more related to what the character of those employing entities is, such that would potentially vary award coverage.

PN429

THE DEPUTY PRESIDENT: All right. So assuming that Ms Benton is agreeable to that course, and assuming that it's not a particularly onerous request for you to circulate that material in writing, my question, then, is for you, Ms Vincent, in terms of when you consider that your organisation might be in a position to adequately respond with that supplementary information.

PN430

MS VINCENT: It's hard to say, obviously, without having the benefit of receiving that information. But I would be hopeful that if we receive that information, we'd be in a position to turn around a written response, or, if required, a verbal response; say, for example, within a week, potentially less, dependent upon the timing, and obviously how these consultations do progress over the next week or so.

PN431

THE DEPUTY PRESIDENT: All right. Are there any other views to add to that at this stage? In terms of your views, Ms Vincent, do you consider that there are aspects of Ms Benton's submissions that can be further explored, pending the submissions that you're proposing to provide in response by way of writing or orally in a week?

PN432

MS VINCENT: No. Apologies, Deputy President. At this stage we do not have any further submissions to make, until hopefully obviously we're in a position to get a better understanding of the character of employer.

PN433

THE DEPUTY PRESIDENT: All right. I'm conscious of the very confined time frame that we have for the purposes of the consultation. It's going to be really important for us to adhere to that as best we're able, not only because you all have other work to do, but also because this runs parallel to other aspects of the review,

and you might seek to be involved in other aspects. And it's not intended by the Commission that your opportunity to do so would be curtailed by continuing to extend consultation in relation to this or other aspects of the review process, with a desire to meet our own goal of delivering the report as soon as possible. And so to that end, what I would suggest is that if Ms Benton is able to crystallise some particular employing entities, not by name, but by general identification, for instance, local government or other information that's going to be particularly relevant to identify whether and if they might fall within scope of some of the existing modern awards, then, the sooner that's done, the sooner I can press Ms Vincent for some responsive submissions, in writing or otherwise.

PN434

MS BENTON: Yes. Depending on what time we finish here today, I could probably do that this afternoon.

PN435

THE DEPUTY PRESIDENT: Great. Well, assuming that you have that, say, by close of business today, Ms Vincent, or at least when you open your laptop tomorrow morning – we have the balance of the week, recognising that Friday is a holiday – I personally may have some limitations on Monday next week, which could be resolved if we really needed the day. And Tuesday – I think it's Tuesday – Ms Minster, that's the day that you've nominated as having some other - - -

PN436

MS MINSTER: Wednesday.

PN437

THE DEPUTY PRESIDENT: Wednesday. All right. So there is capacity for us to come together for a full day Tuesday, whichever way that occurs, in a hybrid manner or electronically, we can talk about that, to discuss that issue, subject to Ms Vincent providing some responsive material by midday on Monday next week. Would that provide sufficient time, Ms Vincent?

PN438

MS VINCENT: Yes. I'm hopeful that it would, Deputy President.

PN439

THE DEPUTY PRESIDENT: All right. That's a really preliminary idea. I'm really loathe to lose too much time for the purposes of this consultation, but if we think that that information is going to be particularly helpful in generating further discussion about the gaps, then I'm inclined to allow it to happen. Ms Benton, do you have anything to say?

PN440

MS BENTON: I guess a reservation that we've allocated two weeks here, and to carve out four days, waiting just to analyse the types of galleries or employing entities, seems like a long time. It feels like a shame and a lost opportunity, because this review is really a pivotal moment I think for our sector, in addressing at least perceived massive gaps, and I'm very keen to work with the Commission on resolving that.

PN441

THE DEPUTY PRESIDENT: Yes. All right. Taking into account Ms Benton's view, Ms Vincent, it might be that it's really unlikely that your organisation is going to require all of that time once you've received the list of employers. You've now got the list of indicative duties. It's either going to be sort of a separation of whether they're employed by local government or some public organisation, or private, really. It's not going to be too much more detailed than that. One might say that you might have already been able to crystallise some thinking about that approach in advance of actually knowing who the indicative employers might be. I think tomorrow we've earmarked Professionals Australia to attend in the morning, and Mr Kemppi might say something about that now.

PN442

MR KEMPPPI: Yes. I am seeking confirmation from them, and as soon as I know, I'll let your associate know.

PN443

THE DEPUTY PRESIDENT: Great. What I'm hoping is that we're able to use some time to discuss those matters with Professionals Australia, perhaps while some of this other work is being, and that would allow us to use Tuesday quite productively. But then we have available time on Wednesday, and I'm really reluctant to lose it. Can that material be produced by Wednesday, Ms Vincent, at least if you say not in writing, but by way of inviting you to make oral submissions on the point when we resume on Wednesday.

PN444

MS VINCENT: Yes. I'd be prepared to provide oral submissions on Wednesday, should our attendance not be required tomorrow. And I'm just obviously very conscious that we are a little bit unclear at this stage as to the agenda for this forthcoming week, and so there, obviously I don't want to undertake to prepare a component of work which ultimately we don't have the necessary time to dedicate because we're attending these relevant sessions.

PN445

THE DEPUTY PRESIDENT: Sure. All right. So a couple of issues then arise. Responsive submissions in writing whenever sought or requested or timetabled. As you'll recall, the Commission has been open to receiving materials in writing, but that was really the purpose of these consultation sessions, to see what fell from the material produced, and gave us an opportunity to discuss it together as a group. So to that end, it's a matter for ABI whether it wishes to put anything in writing.

PN446

It's not sought, it's not requested, but you're not precluded from doing so, and you might consider it to be helpful, Ms Vincent. But any written submissions that you do produce would need to be provided within the week that was indicated. And subject to the views, I would expect your organisation to be in a position to discuss those matters at the consultation sessions on Wednesday, assuming, as Ms Benton has said, she can circulate that material by close of business today.

PN447

MS VINCENT: That's not a problem, Deputy President.

PN448

THE DEPUTY PRESIDENT: Thank you. In terms of tomorrow, I really am probably in the hands of Mr Kemppi and how well he can persuade somebody from Professionals Australia to come and discuss the issue of video gaming with the Commission. But that's what I had initially set aside for discussion perhaps tomorrow morning, and so interested parties can participate in that session at their election. But then we have the balance of the day tomorrow afternoon to further discuss some of those issues. Now, we haven't heard from you yet, Mr Lowe. You've helpfully put in some supplementary material.

PN449

I anticipate that after lunch, and subject to whether Ms Benton has any additional submissions she'd like to make, upon reflection perhaps during the lunch break too, I would propose to invite you to speak to the supplementary submissions that you've raised, which have been directly addressed by Ms Minster, and whether, as a consequence of now seeing the submissions that Ms Minster has raised, whether that has had the effect of evolving or changing anything that you've put into your submissions insofar as it concerns the Live Performance Award.

PN450

Now, with all of that said, I remain open to discussing any issues as they crop up throughout the course of today and tomorrow. I'll absolutely be guided by all of you. But if you're content, Ms Benton, that you've at least touched on the initial issues you wanted to raise, I would propose that we take a lunch break now for an hour, unless you wanted to come back sooner. Content for an hour?

PN451

MR KEMPPI: Yes.

PN452

THE DEPUTY PRESIDENT: All right. We'll return at 2.15. Thanks, everyone.

PN453

MS BENTON: Thank you.

**LUNCHEON ADJOURNMENT** **[1.15 PM]**

**RESUMED** **[2.16 PM]**

PN454

THE DEPUTY PRESIDENT: All right. Now before the lunch break Ms Vincent had, perhaps reluctantly agreed but agreed nonetheless, to using Wednesday as an opportunity to make some oral submissions in response to the material that Ms Benton is going to file. During the course of the break Ms Vincent advised my chambers in writing that there is in fact a conflict with her capacity to attend on Wednesday, if I understand your position correctly, Ms Vincent, such that you're able to attend tomorrow and again on Thursday, and thereafter. And as a

consequence you have foreshadowed some difficulties with making those oral submissions on Wednesday. Have I understood your position correctly?

PN455

MS VINCENT: Yes, that's correct. And I do apologise for the oversight, Deputy President.

PN456

THE DEPUTY PRESIDENT: No, that's quite all right. Thank you for raising it with me. You might not be entirely excited about my proposed response though. I have also reflected upon the nature of the timetable. It's lent the outcomes that we're seeking to understand. And it is a really important issue that the parties here today and the Commission understand the nature of the specific concerns that you're proposing to raise.

PN457

So, what I would be proposing is subject to anything else that Ms Benton would like to raise orally this afternoon and hearing from Mr Lowe as I alluded to before and seeing if there's anything else that anybody would like to raise, and I note that Creative Australia is observing but may like to make a short submission, what I would propose is that perhaps we conclude early today so that parties can do some preparatory work.

PN458

Subject to Mr Kemppi being able to entice Professionals Australia to attend tomorrow, we would spend the morning doing video games and considering the issues that arise there. And tomorrow afternoon I would anticipate that Ms Vincent, you would be in a position to start at least providing your oral submissions in response to the matters that Ms Benton raises in relation to the identity of the employers that she foreshadows for engaging employees or otherwise to do the work contemplated by her supplementary submission.

PN459

Now, I don't anticipate that we might conclude that work by tomorrow afternoon but I'd like to start it.

PN460

MS VINCENT: Look, I very much do appreciate that and as I'm sure you appreciate, that probably isn't my preference. Naturally I do need to obtain instructions from our members and it's hard to say – I'm highly doubting I'm going to be in a position to do that before tomorrow afternoon. Similar to, I believe, the position of Ms (Indistinct) from the Australian – well, it's imperative having regard to the nature of our organisation that we do have that capacity to consult with our members.

PN461

Obviously we're in the hands of the Commission and we will do our best to comply with that. And to the extent that that is your preference then we will do our best. I just don't want to commit to that and then ultimately waste the Commission or the parties' time by not being in a position to fulsomely or meaningfully respond tomorrow afternoon.

PN462

THE DEPUTY PRESIDENT: The process that I'm identifying certainly doesn't curtail your organisation from canvassing the views of your membership. And you're always open to making supplementary submissions as the consultation process continues. But I anticipate that much of what you're initially going to say might relate to matters of law more generally, as oppose to matters of specific substance that your membership might address.

PN463

And so to that end I do think that there is an opportunity for us to have those discussions tomorrow afternoon by reference to the supplementary list that Ms Benton is going to provide, so that we can start to continue to have ideas sharing, information sharing and perhaps also elicit where there is a need for further work to be done on an ongoing basis, bearing in mind the rather limited time that we have before the conclusion of consultation in relation to this aspect of the review.

PN464

MS VINCENT: Thank you, Deputy President, and we take that on – we appreciate and ultimately are in your hands.

PN465

THE DEPUTY PRESIDENT: Thank you. Ms Benton, is there anything that you would like to say in response to the proposal that I've just made?

PN466

MS BENTON: Thank you. I really appreciate you deliberating over that and it makes sense to me.

PN467

THE DEPUTY PRESIDENT: Is there anything else anyone else would like to add in relation to that proposal? All right. Ms Benton, are there any matters that you would like to supplement orally this afternoon? Or is it going to be now a matter for further discussion tomorrow with the benefit of some of the issues Ms Vincent proposes to raise?

PN468

MS BENTON: Yes, I think it can wait till tomorrow.

PN469

THE DEPUTY PRESIDENT: All right.

PN470

MS BENTON: Yes.

PN471

THE DEPUTY PRESIDENT: All right. Well, today then, Mr Lowe, what would you like to say? Are there matters that you would like to address arising from the supplementary submissions that you've filed and Ms Vincent's response to them?

PN472

MR LOWE: Sure. So, our second submission was really not about award coverage or any gaps that are in the – it was mostly about making it more easy for people to access and interpret. I do notice that there is a different review taking place.

PN473

THE DEPUTY PRESIDENT: Yes, a different steams.

PN474

MR LOWE: A different stream.

PN475

THE DEPUTY PRESIDENT: Yes.

PN476

MR LOWE: And while our award is not included in that, as I discussed with Ms Vincent in the break, that might have some flow on effects for the Live Performance Award. So the recommendations we made in our second submission are quite simple, I think. But I don't – before I advance those recommendations I just do want to clarify, is it the view of the Commission that the awards should be used and correctly interpreted by employers without the assistance of a third party service provider? Or do we accept that they're complex legal documents that need a user pays service to use and interpret them?

PN477

THE DEPUTY PRESIDENT: I think that can be a difficult question to answer. They're intended to be in plain English and easy to understand. But I would probably be selling the roles of industrial advocates and the Fair Work Ombudsman short if I didn't acknowledge that there is an absolute basis for organisations to call upon expertise in order to interpret the application on some of these instruments.

PN478

Does that mean that that necessarily drives a requirement to change the award, or is this a specific area of law where some knowledge about interpretation and provisions is otherwise required and that's the information that can be shared with organisations. It's probably the latter in my view. But that's a very general, non-committal response to the question that you posed.

PN479

MR LOWE: Yes. Yes. I mean, I guess I just asked that to gauge how I pursue these recommendations, whether they are worth pursuing or whether we just acknowledge that there will always be a level of ambiguity within the awards that requires professional assistance to interpret.

PN480

THE DEPUTY PRESIDENT: And so if that's where your submission has started to navigate now, and I think that's a theme that became apparent from what you put in writing, that you had done a substantial body of work in order to come to the conclusions that you've seen been able to reach.

PN481

MR LOWE: Correct. Yes. And so from that submission you will have read that we agreed with LPA that the Live Performance Award in terms of coverage does what it needs to do in making those submissions around change of coverage. But it's our view for representing our part of the sector that there are some elements, particularly within the indicative positions that are not very helpful that make it really opaque. And the difficulty is the – well, without the intense level of scrutiny, and to that effect why we've made these submissions.

PN482

I do appreciate that we don't represent the whole sector and that there are other parts of this sector that may differ in how they title these positions or what those positions mean to them, and to that effect we seek LPA's input into that. So, I do appreciate in the LPA's submission that while our recommendations might work for our part of the sector, they might cause confusion in other parts of the sector. So, you know, it would be great to have a conversation around how that might fit.

PN483

I think by – sorry, I'll refresh from my notes – so, we agreed with LPA in section 72 of the January submission that listing job titles in the awards has the potential to leave to misclassification for employees. But I think what that statement does acknowledge is that the status quo is already doing that, and that by maintaining it without any effort to find solutions that work with the industry is a bit unhelpful. And I recognise that, you know, in (indistinct) submissions it's assessed that the sector is fast and diverse as I've already mentioned.

PN484

And that in section 65 of their submission they say, 'Indicative position and classification descriptions must be applicable and relevant to the whole live performance sector.' We represent a very large part of that sector and they are currently not all applicable and relevant. Therefore they are not applicable and relevant to the whole live performance sector. So, I think by LPA's own definition there needs to be some (indistinct) management.

PN485

But I think that if we utilise our combined knowledge and representation of the broad sector I think that we can yield some outcomes that we are both happy to agree to. I would really rather not leave it to the status quo and ask the industry to continue to guess or have to seek professional advice. I think there are some really modest changes that we can make that we can all agree to that will actually benefit the sector.

PN486

THE DEPUTY PRESIDENT: And so, are they changes that arise because of gaps, or are they changes that arise because of making clearer in 88.1 (indistinct)?

PN487

MR LOWE: The former, Yes.

PN488



THE DEPUTY PRESIDENT: Yes. Ms Vincent, what do you have to say about that?

PN489

MS VINCENT: I do understand obviously that it makes it hard for some people to interpret awards but that's why people call us every day and ask us to do it.

PN490

THE DEPUTY PRESIDENT: Yes.

PN491

MS VINCENT: Or (indistinct) to do it. So, I mean, the way obviously Modern Awards are structured, it's like an Industry Award. It's very hard to cover every single occupation or every kind of task that's undertaken in quite a very broad sector that consists of very small not-for-profits, to massive stadium and ticketing companies.

PN492

So, we did have a chat in the break and I think that we can sit down and just talk about how this operates and what kind of confusion there is out there. And at the moment I'm not sure what that resolution might be.

PN493

THE DEPUTY PRESIDENT: No.

PN494

MS VINCENT: But I think we can find a way, whether it's like amending some things in the classifications or just talking about how we communicate these things to our sector.

PN495

THE DEPUTY PRESIDENT: Yes.

PN496

MS VINCENT: Because I do recognise and I think, you know, there's a lot of people and if they don't – you know, some members engage more.

PN497

THE DEPUTY PRESIDENT: Yes.

PN498

MS VINCENT: Some don't. And some ask certain questions. Some are willing to rely on how it's always been done and, you know, maybe that's not the way. So, maybe it highlights something like that for the industry rather than some kind of amendment to the award.

PN499

THE DEPUTY PRESIDENT: Yes.

PN500

MS VINCENT: But I think since we've agreed to have that conversation that in this forum that maybe in one of the break offerings we could sit down and talk about that a little bit more.

PN501

THE DEPUTY PRESIDENT: I think that's terrific.

PN502

MR LOWE: I agree.

PN503

THE DEPUTY PRESIDENT: I think that the extent that this process has provided the facility to further that information sharing and the possibility of ideas sharing, and I think that's really a win insofar as this stream is concerned already. So, I encourage you both to have those discussions and thanks for sharing that.

PN504

I don't then understand, Mr Lowe, that there are any residual components or roles that you have identified specifically within your submissions that you would now classify as falling through the cracks, to use the term that's been used by - - -

PN505

MR LOWE: Correct.

PN506

THE DEPUTY PRESIDENT: All right. Is there anybody else that wanted to contribute to anything that was just raised?

PN507

All right.

PN508

MR LOWE: If I may?

PN509

THE DEPUTY PRESIDENT: Yes.

PN510

MR LOWE: Just on another point while I've been speaking - - -

PN511

THE DEPUTY PRESIDENT: Yes.

PN512

MR LOWE: I just want to, coming back to MEAA's submission, particularly around the role of choreographer, it's perhaps helpful that I am a choreographer by occupation.

PN513

THE DEPUTY PRESIDENT: Well, look at what we have here.

PN514

MR LOWE: I just want to support the LPA's submission in that. From our perspective when a choreographer in the industry at an industry level is employed by an organisation they are nearly always employed in conjunction with being an artistic director or within senior management.

PN515

THE DEPUTY PRESIDENT: Right.

PN516

MR LOWE: And in most other cases they'd be employed as a contractor and are therefore not eligible to be covered by awards. I think there would be very, very few instances in our sector where someone would be employed as a choreographer as an employee, and to not be within senior management.

PN517

THE DEPUTY PRESIDENT: Right. Well, that's really interesting. And two things fall from that. I'd be interested, Mr Borgeest, if there's anything that you wanted to say in response to that proposition, or perhaps even ask Mr Lowe about in relation to your status as a choreographer. But also to loop back in relation to something you said, Ms Benton, which was about the capacity to bring to the Commission some individuals who might, like Mr Lowe has just done, bring some direct information to bear.

PN518

And so, in terms of doing that I might be interested in understanding what it is that you would propose and how you would seek to do that, and to what purpose you see that it might result. But I think, you know, that this example just raised by Mr Lowe now demonstrates that when you're able to talk to somebody directly it at least provides some first-hand knowledge about how the roles are engaged.

PN519

MS BENTON: A hundred per cent. Look, to be honest, when we had that meeting in December and discussed setting an agenda today, I reached out to others and colleagues who had either made submissions or had wanted to.

PN520

THE DEPUTY PRESIDENT: Yes.

PN521

MS BENTON: And didn't end up doing it in writing, to see if they'd be available to come if I could give them clarity as to what we would be discussing and when it would be relevant for them to be in attendance and make an appearance.

PN522

THE DEPUTY PRESIDENT: Yes.

PN523

MS BENTON: I'm not sure I have that clarity today. I wonder if it would be useful for me to gauge what their availability is in the next couple of weeks and –

or this week and next, and probably liaise with the department or the team on what would be suitable.

PN524

THE DEPUTY PRESIDENT: Yes. Well, just thinking about next steps from here and appreciating that there's now a little bit of work that's going to be done ahead of tomorrow's consultation, I wonder if we could – perhaps we've taken things as far as we can today and I'm open to views on that. We've got a general plan for tomorrow and then it appears to me that there might be a window of time on Wednesday where there might be some capacity for attendances such as those to come along and speak about a lived experience, to give that sense.

PN525

MS BENTON: Great.

PN526

THE DEPUTY PRESIDENT: With a view to then picking up on Thursday with Ms Vincent's ongoing ability to perhaps continue to address some of the other issues that she might have progressed in that other period. So, I think probably the short answer is I think we've got time on Wednesday. I appreciate the timing is quite tight but that's probably consistent with this whole aspect of the review.

PN527

MS BENTON: Yes.

PN528

THE DEPUTY PRESIDENT: And then it appears to me that we're really identifying our agenda, sort of in a progressive way depending on what comes out of the consultation session. So, it's difficult to imagine what next week looks like. There's a little bit of unavailability but there would also be potential capacity to attend on a day or days next week.

PN529

So, I encourage you to make those inquiries and you can note that with us tomorrow morning if that suits.

PN530

MS BENTON: Okay.

PN531

THE DEPUTY PRESIDENT: All right. Now, is there anything else that anybody at the Bar table wanted to add?

PN532

MR KEMPPI: Deputy President, one thing just arising from what was just discussed, as I understand the proceedings in the stream of the review it's going to result in the production of a report in the scope of what was described in the your remarks that are mentioned and from the President's statement.

PN533

THE DEPUTY PRESIDENT: Yes.

PN534

MR KEMPPI: It's not clear to me how bringing in lay witnesses would provide material that would be drawn upon, or how that could be drawn upon in the Commission's - - -

PN535

THE DEPUTY PRESIDENT: Is it not that this process is an invitation to interested parties to provide their views?

PN536

MR KEMPPI: Of course. And I guess my question is, with respect, is how can our contribution over the time that's been set aside most assist in the task of creating a report. I imagine in the various interested parties making choices about the resources they apply either to picking out documents at the request of another interested party, or making arrangements to bring practitioners to speak, it would assist in the making of judgments about those resources to have some further understanding of how the report will be framed and how the Commission would be most assisted by the parties in this process.

PN537

So, if the Commission has a view about how the report will be framed and what issues will be confronted and how the parties can most assist then for myself, I'd certainly be grateful for that indication. And I suspect it might be useful for other parties in making judgments about the application of resources at that time.

PN538

THE DEPUTY PRESIDENT: Sure. Well, this is an opportunity for interested parties to address the matters that are raised in the Commission's discussion paper and provide an opportunity for other interested parties to address or provide responsive views to those issues. So, it is an information gathering exercise with a particular focus on identifying potential coverage gaps in the existing Modern Award system.

PN539

To the extent of what does the report look like, I think much depends on what information is gathered as part of this exercise. And I've got a really open mind to what information might be provided to the Commission. Am I to understand that you have some preliminary opposition to the attendance of other parties who have not otherwise been in attendance today joining a session later in the week or next week? Or is it more so a general inquiry about how the report might look and feel at the conclusion of this process?

PN540

MR KEMPPI: Yes, absolutely. No opposition. No. It was a – it's not for me to concern myself about other people by their resources but I just had a concern that there be some guidance about what would be of most assistance to the Commission in confronting the issues that are faced in preparing the report.

PN541

THE DEPUTY PRESIDENT: Yes. So, to that end you assisted in understanding from Ms Benton tomorrow perhaps the identification of who, if any, other parties

might attend and what information it's proposed that they might be able to share, so that we can understand - - -

PN542

MR KEMPPI: No, not at all. I don't need anything, with respect.

PN543

THE DEPUTY PRESIDENT: All right. Is there anything else that you need further from the Commission then in order to address the issue that you've raised?

PN544

MR KEMPPI: No, thank you.

PN545

THE DEPUTY PRESIDENT: All right.

PN546

MS BENTON: If I can pick up on what – I've understood from what you've said is maybe offering some clarity to me or anyone to – and anyone who would be encouraged to attend as to what information in addition to what's been provided already would be useful to - - -

PN547

THE DEPUTY PRESIDENT: Valuable.

PN548

MS BENTON: We don't know yet what your questions are out of the submissions that have been received, and so maybe some of that would be useful in also bringing people in who could respond to those queries. I don't know. Is that - - -

PN549

THE DEPUTY PRESIDENT: Well, I suppose the focus is upon if we're talking about organisations. It's really upon, how do you engage? What types of employees within the list of potential classifications you've identified are you engaging, how are you engaging them and why do you say there's a problem? Those are probably – at a high level they're sort of the parameters that I have in mind in order to understand what issues, if any, arise. Are they issues that realistically arise from gaps in award coverage? Or are they issue that arise from confusion about the application of the local government award, or a position that perhaps a Miscellaneous Workers Award could apply but it's not the right fit? Does that equal a coverage gap.

PN550

So, to the extent that some interested parties might be able to develop the Commission's understanding about why they consider there to be a particular problem then that might be useful. I would probably assume that the questions that I might have would be relatively narrow of the kind that I've just indicated. I wouldn't anticipate that it would be an opportunity to provide lengthy and ongoing submissions, but certainly, as you say, in order to supplement or add to the submissions that have already been advanced.

PN551

MS BENTON: Thank you.

PN552

THE DEPUTY PRESIDENT: All right. Anything else arising from that? Creative Australia. I know that you've said that you're observing today. I think that you've also indicated that you probably don't anticipate attending future consultation sessions of this kind. Having heard the discussion today, is there anything that you wanted to contribute?

PN553

MS SCHAFFNER: Deputy President, no, not at this stage. Whether given interest in the proceedings there are (indistinct) Creative Australia will be connecting with other organisations (indistinct). So, our interest is really (indistinct) positions that it might (indistinct) us.

PN554

THE DEPUTY PRESIDENT: All right, thank you.

PN555

MS SCHAFFNER: (Indistinct) at our – if we do have availability to attend (indistinct) in person. We would like to hear the rest of what's happening if at all possible.

PN556

THE DEPUTY PRESIDENT: Of course that's possible. That's the purpose of the process.

PN557

MS SCHAFFNER: Yes. (Indistinct).

PN558

THE DEPUTY PRESIDENT: That's great. And otherwise rely upon the written submissions that have been provided.

PN559

MS SCHAFFNER: And (indistinct), Deputy President.

PN560

THE DEPUTY PRESIDENT: Yes. Thank you. All right. I am loathe to cut today's session short but I do feel like we might have progressed some of the discussion perhaps as far as we can today, pending some of that additional work that you're going to do this afternoon, Ms Benton. And I would propose that we would return tomorrow morning at 10 am. Mr Kemppe has indicated to my chambers that he's still awaiting confirmation that a representative of Professional Australia might be in a position to attend.

PN561

I'm hopeful that that can occur and we can use the morning to progress those video related matters that have been foreshadowed, including understanding the extent to which that's forward in the scope of the review, with the afternoon and

following returning to some of the issues that you've raised, Ms Benton. All right. Thank you, very much for all your attendance today. Is there any - - -

PN562

MS SCHAFFNER: If we're doing things like video games - - -

PN563

THE DEPUTY PRESIDENT: Yes.

PN564

MS SCHAFFNER: And perhaps we're not needed, so there's, I guess, other things we can do. We can come and observe.

PN565

THE DEPUTY PRESIDENT: And use the conference room if you'd like to.

PN566

MS SCHAFFNER: Yes, use the conference room to talk to – for example, we could sort out our matter that we talked about today.

PN567

THE DEPUTY PRESIDENT: Yes.

PN568

MS SCHAFFNER: Or we could talk to MEAA, as well.

PN569

THE DEPUTY PRESIDENT: About your fixed term contract issue - - -

PN570

MS SCHAFFNER: Yes, or any - - -

PN571

THE DEPUTY PRESIDENT: Or any issues.

PN572

MS SCHAFFNER: That's a good idea.

PN573

THE DEPUTY PRESIDENT: Yes.

PN574

MS SCHAFFNER: And so, if we do that would you like us to inform you when we're going to be here, when we're going to attend and when we're going to be on the premises? Like, how would you like us to manage that?

PN575

THE DEPUTY PRESIDENT: Well, if you're not proposing to appear then it's not necessary that we're here at 10 o'clock. But there might be an opportunity for you to just make it known to my associate that you are in the premises. That way, if there are issues that we anticipate might be of interest to you it's easy for us to call



you in. And otherwise it just helps us to know that you're continuing to make yourself present for further discussions. Because issues might come up as we go.

PN576

MS SCHAFFNER: Yes.

PN577

THE DEPUTY PRESIDENT: If you're also not present then you don't necessarily have to advise us in advance that you're not intending to appear. But if you think that that might be helpful by sending an email to my chambers then I encourage that just to keep the lines of communication open and I know what to expect in terms of attendances.

PN578

The other thing that might become an issue, perhaps not tomorrow but as the consultation process continues, is an evolution back towards Microsoft TEAMS. If you start to think that you have taken the opportunities that present themselves to engage with other stakeholders in person. That's really my focus in terms of having you all present in person. I think it provides a great opportunity to step into the hall and – to a conference room and pick up on these issues in a really organic way with those.

PN579

But to the extent that that that might evolve then I'm open to the idea of reverting back to TEAMS sessions if that's desirable or upon request. Otherwise I'll continue to be here and conduct the sessions in person and via a hybrid method where that's required. Any other admin related issues?

PN580

MR BORGEEEST: I suppose that just for clarification, in terms of my role and participation at this stage I understand that essentially there's a process which needs to be followed through MEAA and SPA.

PN581

THE DEPUTY PRESIDENT: Yes.

PN582

MR BORGEEEST: And then subject to that then that will determine my next level of involvement in proceedings. Is that correct?

PN583

THE DEPUTY PRESIDENT: Yes.

PN584

MR BORGEEEST: Yes.

PN585

THE DEPUTY PRESIDENT: Yes, that's right.

PN586

MR BORGEEEST: Yes.

PN587

THE DEPUTY PRESIDENT: That's right. So, there may be some significant issues that you think are necessary for you to address, or they might fall away.

PN588

MR BORGEEEST: Yes.

PN589

THE DEPUTY PRESIDENT: And I think that will become apparent as some of those discussions progress offline this week.

PN590

MR BORGEEEST: Yes. Great. Thank you.

PN591

THE DEPUTY PRESIDENT: All right. Anything else then before we adjourn? Okay. Thanks, everyone.

PN592

MS VINCENT: Thank you.

PN593

THE DEPUTY PRESIDENT: Lovely to have you all here today.

PN594

MR BORGEEEST: Thank you.

PN595

THE DEPUTY PRESIDENT: We're adjourned.

**ADJOURNED UNTIL TUESDAY, 23 JANUARY 2024**

**[2.47 PM]**