

Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF: 4 Yearly Review of Modern Awards – Group 4 Awards
Casual employment and part-time employment
Broadcasting, Recorded Entertainment and Cinemas Award 2010
AM2014/196 and AM2014/197

Submission of Birch Carroll and Coyle Limited and other cinema industry employers

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Introduction

- 1 This submission is made on behalf of:
 - (1) Birch Carroll and Coyle Limited
 - (2) The Hoyts Corporation Pty Limited
 - (3) The Greater Union Organisation Pty Ltd
 - (4) Village Cinemas Limitedand Independent Cinemas Association of Australia and its employer members.
- 2 The employers named at paragraph 1 (the **Employers**) together comprise the overwhelming majority of employers in the cinema exhibition industry and employ virtually all the employees in the cinema exhibition industry.
- 3 This submission is made to the Full Bench in respect of the *Broadcasting, Recorded Entertainment and Cinemas Award 2010 (BREC Award)*. The Commission's review of the BREC Award is matter AM 2014/259 and that matter is in sub-group 4D. The Employers have made submissions in that proceeding in relation to a number of issues affecting cinemas covered by the BREC Award.
- 4 This submission is made in response to the Full Bench Decision dated 9 August 2018 which requests the filing of submissions by Friday 7 September 2018 in response to the following at paragraph 33:

Interested parties may make submissions raising any award-specific drafting issues within 7 days after the draft determinations are published.
- 5 Vice President Hatcher has granted an extension for the filing of this submission until 5.00pm on Friday 14 September 2018.

Summary

- 6 The cinema exhibition industry is most unusual in that its labour requirements can fluctuate significantly depending on a range of factors of which there can be little or no warning or regularity, such as the popularity of a particular product, competing public events, school holidays, weather and so on.
- 7 For many years the relevant award part-time provisions, which have usually been made by consent, have accommodated the operationally necessary part-time hours flexibility.

- 8 ***The Entertainment and Broadcasting Industry – Cinema Award – 1998*** (the **Cinema Award 1998**) and *The Broadcasting and Recorded Entertainment Award 2010* both contain necessary part-time hours flexibility.
- 9 In 4 Yearly Review proceedings the industry award, now known as the *Broadcasting Recorded Entertainment and Cinemas Award 2010* (**BREC Award**), was subject to detailed consideration of the provisions relevant to employees in cinemas. Following agreement between employers and the Media Entertainment and Arts Alliance (**MEAA**) in conferences before Senior Deputy President Hamberger, the flexibility of award part-time employment provisions was clarified and reinforced by appropriate amendments.
- 10 The draft determination to insert a casual conversion provision at clause 10.2 of the BREC Award, which was published on 30 August 2018, has the potential to create a situation which is unclear. It appears it could create inconsistency in conditions between eligible casuals who convert to part-time employment (proposed clause 10.2) and persons who are otherwise employed as part-time employees (current award clauses 54.3 and 55.2 and the Exposure Draft republished 23 March 2018 – clauses 57.3 and 59).
- 11 It would be unwise to create two classes of part-time employees who would be working alongside one another.
- 12 It could seriously disadvantage the cinema exhibition industry if the longstanding and necessary flexibility in respect of part-time employees' hours, a flexibility confirmed recently by employers and MEAA in conference before Senior Deputy President Hamberger were to be removed.

Entertainment and Broadcasting Industry – Cinema Award – 1998

- 13 This award was made with effect from 1 July 1998. It replaced the *Entertainment and Broadcasting Industry – Cinema Award – 1997*. The Cinema Award 1998 provided at clause 21.3:

Part-time employees, will be required to work an agreed number of ordinary hours in a 14 day cycle. The agreement about ordinary hours to be worked will be in writing and may be changed at any time by agreement between the employer and employee which will also be in writing. Ordinary hours will be the same as for a full-time employee. During school holidays in the State of employment, part-time employees may by agreement be employed as full-time employees in accordance with clause 21.2 above.

- 14 And at clause 24:

The employer will post the roster at least 7 days before the start of the week to be worked. The start of the week is a Thursday. Rostered ordinary hours may be changed by agreement between the employee and the employer. The employer can change the roster at short notice due to unforeseen operational requirements. However, if the employer changes the roster for other reasons, employees will be paid double the ordinary rate for hours worked outside the original roster.

Broadcasting and Recorded Entertainment Award 2010 (now Broadcasting, Recorded Entertainment and Cinemas Award 2010)

15 This award commenced on 1 January 2010. In respect of part-time employees' hours, it provides:

54.3 Part time employment

- (a) *A part-time employee is an employee who works less than 76 ordinary hours in a 14 day cycle (or less than 152 hours in a 28 day cycle by written agreement between the employer and the employee, which may be terminated as provided in clause 55.1(d)); has regular, reasonably predictable and continuous employment; and receives, on a pro rata basis at the rate of 1/38th of the weekly rate, equivalent pay and conditions to those of full-time employees who do the same kind of work.*
- (b) *An employer is required to roster a part-time employee for a minimum of 4 consecutive hours on any day or shift. An employer will offer to roster a part-time employee for a minimum of 8 hours in any consecutive 7 day period commencing on a Thursday.*
- (c) *All hours worked in excess of full-time hours will be overtime and will be paid as such.*

55.2 Rosters

- (a) *The employer will post a draft roster on the Friday and will post a final roster on the Monday afternoon before the start of the week to be worked. The start of the week is a Thursday.*
- (b) *Where a change to the final roster is required to be made, an agreement between the employer and the employee is required.*
- (c) *The employer can change the roster at short notice without agreement due to unforeseen operational requirements. However if the employer changes the roster for other reasons, employees will be paid double the ordinary rate for hours worked outside the original roster.*
- (d) *To the extent practicable, the rostering process shall be undertaken in consultation with individual employees affected.*

Four yearly review of modern awards

16 As required by the *Fair Work Act 2009*, the Fair Work Commission is undertaking a review of the BREC Award. That review has involved Fair Work Commission proceedings as well as a number of conferences before Senior Deputy President Hamberger and also separately with MEAA.

Report to the President

17 On 21 July 2016, Senior Deputy President Hamberger reported to Justice Ross on the outcome of conferences before him. Senior Deputy President Hamberger stated:

It does not appear that a separate Full Bench will be necessary to deal with the disputed issues.

- 18 Annexure A to the Report of Senior Deputy President Hamberger set out the agreed position on part time employment as follows:

- 54.3(a) *A part-time employee is an employee who works less than 76 ordinary hours in a 14 day cycle (or less than 152 hours in a 28 day cycle by written agreement between the employer and the employee, which may be terminated as provided in clause 55.1(d)); has regular, reasonably predictable and continuous employment within the terms of this clause and clause 55.1(c); and receives, on a pro rata basis at the rate of 1/38th of the weekly rate, equivalent pay and conditions to those of full-time employees who do the same kind of work.*
- 55.1(c) *Part-time employees will be required to work an agreed number of ordinary hours in a 14 day cycle (or 28 day cycle by written agreement). The agreement about the number of ordinary hours to be worked will be in writing and may be changed at any time by agreement between the employer and employee which will also be in writing. Part-time employees may by agreement be employed as full-time employees during school holidays.*
- 52.2(d) *To the extent practicable, the rostering process shall be undertaken in consultation with individual employees affected and, in respect of part time employees, the employer will endeavour to provide a reasonably regular pattern of work which accommodates the fluctuating operational requirements of the employer.*

The underlining highlights suggested amendments from the current Award provisions as advised by Senior Deputy President Hamberger in his Report to the President.

Current award provisions and suggested amendments

- 19 That the operational needs of the cinema exhibition industry have for many years been recognised by the Commission, MEAA and employers is confirmed by award clauses including:
- 54.3 *Part-time employees can be rostered for different hours and days over the roster period.*
- 55.2 *The roster can be changed without agreement due to unforeseen operational requirements.*
- 20 This operational need has recently been confirmed by the position agreed between MEAA and the Employers and conveyed by Senior Deputy President Hamberger in his Report of 21 July 2016 to the President:
- 54.3(a) *Part-time employment will be regular, reasonably predictable and continuous in accordance with the award rostering provision.*
- 55.2(d) *In respect of part-time employees, the employer will endeavour to provide a reasonably regular pattern of work which accommodates the fluctuating operational requirements of the employer.*

Effect of proposed wording of clause 10.2(j) (ii)

- 21 If a variation is made in the form of clause 10.2(j) (ii) in the draft determination then this will most likely create two classes of part-time employees, namely those who have elected to convert from casual employment to part-time employment and those who commence employment as part-time employees. If this occurs, these two classes of

part-time employees could easily be working alongside one another on quite different conditions.

- 22 If this variation is made, it will also make administration of the two classes of part-time employees more burdensome operationally.

Part Time Employment in the Cinema Industry

- 23 As can be seen from the Cinema Award 1998 and its predecessor the 1997 Award, the specific requirements in respect of part time employment in the cinema industry have long been recognised. These requirements continue to be addressed in the current BREC Award. Then, in the current award review proceedings, these specific requirements were again acknowledged by both employers and MEAA and recognise that part time employees:

- (1) have a minimum number of ordinary hours per day and for each seven day period;
- (2) may be placed on different rosters from week to week (rosters may be changed on notice).

- 24 These proposed provisions were settled in discussions between the employers and MEAA, chaired by Senior Deputy President Hamberger, i.e. recent discussions between parties representing both employers and employees who are familiar with the specific flexibilities required by the cinema exhibition industry.

Exposure drafts

- 25 Subsequent to the Report of Senior Deputy President Hamberger, the exposure drafts of the BREC Award of 10 May 2017 and 23 March 2017 have included these suggested amendments.

Award variations-employees in cinemas

- 26 To preserve the effect of the award variations proposed before Senior Deputy President Hamberger and included in the exposure drafts, and to address the specific and necessary requirement of the cinema exhibition industry, it is suggested that clause 10.2 (j) (ii) in the draft determination be amended to read:

if it is agreed that the employee will become a part-time employee, the matters referred to in clauses 54.3(a), 55.1(c) and 55.2(d)


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