

*Fair Work Act 2009*

FAIR WORK COMMISSION

**IN THE MATTER OF: 4 Yearly Review of Modern Awards – Group 4 Awards**  
**Broadcasting, Recorded Entertainment and Cinemas Award 2010**  
**AM2014/259**

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

April 2018

Norton Rose Fulbright Australia  
ABN 32 720 868 049  
Level 15, RACV Tower  
485 Bourke Street  
MELBOURNE VIC 3000  
AUSTRALIA  
Tel +61 3 8686 6000  
Fax +61 3 8686 6505  
GPO Box 4592, Melbourne VIC 3001  
DX 445 Melbourne  
nortonrosefulbright.com  
**Contact:** Michael Serong  
**Direct line:** +61 8686 6978  
**Email:** [michael.serong@nortonrosefulbright.com](mailto:michael.serong@nortonrosefulbright.com)

Live Performance Australia  
David Hamilton – Director, Workplace Relations  
Level 1, 15-17 Queen Street  
Melbourne Victoria 3000  
Phone: (03) 8614 4200  
Fax: (03) 9614 1166  
Email: [dhamilton@liveperformance.com.au](mailto:dhamilton@liveperformance.com.au)

## 4 Yearly Review of Modern Awards – Group 4 Awards

### Broadcasting, Recorded Entertainment and Cinemas Award 2010

#### Submissions of Birch Carroll Coyle Limited and other cinema industry employers and Live Performance Australia

##### 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 Limited

and Independent Cinemas Association of Australia and its employer members and Live Performance Australia.

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 21 March 2018 which requests the filing of submissions by Thursday 19 April 2018 in response to the following:

*... we think there is merit in seeking further clarification about how the 8% loading is calculated.*

5 This is a reference to clause 13.4 of the Exposure Draft of the BREC Award republished on 23 March 2018 (the **Exposure Draft**) where it is stated:

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

##### Summary

6 The Exposure Draft, at clause 13.4, restates the effect of current clause 14.12 of the BREC Award 2010.

7 An 8% penalty averaging provision has been in the predecessor award, the Entertainment and Broadcasting Industry – Cinema Award – 1998 (**Cinema Award 1998**) since the award simplification proceedings which resulted in the making of that Award.

8 It is understood that the amount of 8% was arrived at by consent and has not been contested in Commission proceedings since and was reinstated by consent into the

BREC Award by Order of a Full Bench Decision of the Commission on 30 December 2009, i.e. before the modern award took effect and should be retained.

### Submission – The current BREC Award

9 The current BREC Award at clause 14.12 states:

*All cinema workers will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.*

10 The current BREC Award at clause 26.3 states:

#### ***Special provision for employees in cinemas***

(a) *Clause 26.2 will not apply to employees in cinemas.*

(b) *If a weekly employee is required to work on a day to be observed as a public holiday, then, in addition to receiving the normal rate of pay for working ordinary hours, employees will be paid at the rate of single time additional for the hours worked.*

(c) *Casual employees will be entitled to receive double the full-time permanent hourly rate for work on a public holiday.*

(d) *A weekly employee whose rostered time off falls on a public holiday will be allowed an additional day off at a time to be agreed upon by the employer and the employee or the employee will be paid an additional day's pay instead within seven days of the holiday.*

11 When the current award was first made on 4 September 2009 [PR 988989] it did not repeat the provision for an 8% penalty averaging provision which was specifically provided for at clause 16.1 of the predecessor award, the Cinema Award 1998.

12 In 2009, a Full Bench of the Australian Industrial Relations Commission considered an application by the Australian Entertainment Industry Association (**AEIA**) to vary the BREC Award, inter alia, to restore the 8% penalty averaging provision which had not been carried over from the Cinema Award 1998 to the BREC Award. In the Decision of 30 December 2009 ([2009] AIRCFB 998), the Full Bench noted that the Media Entertainment and Arts Alliance (MEAA):

[3] *did not object to the concept of a penalty averaging clause but claimed that it is "incumbent on the AEIA to show how many Sunday and public holiday shifts are compensated for by the 8% penalty."*

13 The Full Bench Decision of 30 December 2009 also noted:

[5] *In response to the MEAA position the AEIA reiterated that the current penalty averaging provision was negotiated between the parties during the minimum rates adjustment process, was included in the award as part of the minimum rate rather than an all-purpose allowance, and was approved as part of the properly fixed minimum rate when the current award was simplified. It also submitted that the penalty averaging component, which is set as a percentage of the base rate, retains the minimum rates relativities.*

14 The Full Bench Decision then stated:

[6] *As the variation is sought to restore a provision of the current award which, if not reinstated could have the effect of disadvantaging some employees and is not opposed by the MEAA, we have decided to grant the application.*

#### **Submission – Entertainment and Broadcasting Industry – Cinema Award - 1998**

15 A penalty averaging component was originally inserted into the Theatrical Employees (Cinema and Drive-in Industry) Award 1983 by Order of Commissioner McDonald on 11 April 1997 (Print N9936). It is understood that the amount of 8% was arrived at by consent of the parties and there is no formal decision other than the variation to this award noted in Print N9936.

16 The Cinema Award 1998, at clause 16.1, under Wage rates, includes *penalty averaging per week* which, for each classification, provides an additional 8% calculated on the “base rate” for the relevant classification.

17 Section 89A of the *Workplace Relations Act 1996* (Cth) confined new Awards to twenty “allowable matters” and limited the Australian Industrial Relations Commission’s power to make new awards dealing with those allowable matters to the making, inter alia, of “minimum rates” awards.

18 Items 49-51 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth)(**WROLA Act**) contained provisions which set out the process by which awards were to be stripped back.

19 In matter C No. 20261 of 1998, by section 33 - action of the Commission’s own motion, the Commission dealt with the Entertainment and Broadcasting Industry – Cinema Award – 1997 under schedule 5 to WROLA Act and made the Entertainment and Broadcasting Industry – Cinema Award – 1998. Representatives of the Media Entertainment and Arts Alliance and employers participated. The Commission will have had regard to allowable award matters including:

*(c). rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage systems.*

The Commission will also have had regard to section 89A(6)

*The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.*

20 The result of the award simplification proceeding C No. 34203 of 1998 was the Order by Commissioner Larkin making the Entertainment and Broadcasting Industry – Cinema award – 1998. The Cinema Award 1998 contained properly fixed minimum rates including, at clause 16.1, a penalty averaging provision of 8% of each award base rate.

21 The appropriateness of the 8% penalty averaging provision has not been contested in the Commission by either the union or employers and so has been accepted as fair and reasonable compensation “*instead of Sunday penalty payments and as compensation for reduced public holiday penalties.*”

22 Based on research and on assistance provided by Fair Work Commission library staff, it appears that there is no available record of the relevant Commission proceedings or the Commission decision which resulted in the 8% penalty averaging provision being included in the Cinema Award 1998.

- 23 Based on the best information available, it seems that no precise formula was developed and used to determine the percentage to be applied to base rates instead of Sunday penalty payments and as compensation for reduced public holiday penalties. Rather, the percentage appears to have been arrived at by mutual agreement between union and employer representatives during the Commission proceedings which resulted in the making of the Cinema Award 1998 and the insertion of the reference, at clause 16.1 of that Award of a “penalty averaging” provision of 8%.
- 24 Based on the parties’ agreed position in 1998, which was accepted by the Commission and incorporated into the Cinema Award 1998, and as standard federal award Sunday penalty rates have remained relatively unchanged and the standard for federal award public holidays rates has remained at 250% since before 1998, it is submitted that the 8% penalty averaging provision at clause 12.14 of the BREC Award continues to be an appropriate percentage of the relevant award base rate to compensate for Sunday penalties and reduced public holiday penalties.

**No change required**

- 25 The Employers submit that the 8% penalty averaging provision is part of properly made minimum rates, has been a provision of the BREC Award and its predecessor the Cinema Award 1998 for more than 20 years, has not been challenged in the Commission by any party as inappropriate and should remain in the BREC Award.

Michael Serong  
Consultant  
Norton Rose Fulbright Australia

David Hamilton  
Director, Workplace Relations  
Live Performance Australia

17 April 2018