



Friday 13 March 2015

Workplace Relations Inquiry  
Productivity Commission  
[Workplace.relations@pc.gov.au](mailto:Workplace.relations@pc.gov.au)

Dear Commissioner,

## **SYDNEY SYMPHONY ORCHESTRA SUBMISSION**

### **INTRODUCTION**

The Sydney Symphony Orchestra welcomes the Productivity Commission Inquiry into the Workplace Relations Framework.

*We acknowledge the scope of the Inquiry being to assess the performance of the workplace relations framework, including the Fair Work Act 2009, focusing on the key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people. A key consideration will be the capacity for the workplace relations framework to adapt over the long term to issues arising due to structural adjustments and changes in the global economy.*

*We are aware that the Productivity Commission shall make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.*

The Sydney Symphony Orchestra appreciates the Productivity Commission's release of 5 Issues Papers:

1. The Inquiry in Context
2. Safety Nets
3. The Bargaining Framework
4. Employer Protections
5. Other Workplace Relations Issues

## **SYDNEY SYMPHONY ORCHESTRA**

The Sydney Symphony Orchestra is Australia's flagship and busiest symphony orchestra. The orchestra is lead by David Robertson in his opening season as Chief Conductor and Artistic Director.

### **Our Performances**

In 2014 the Sydney Symphony Orchestra presented 131 concerts of 87 programs to 233,852 paid audience members. This includes 22 performances of 9 programs of commercial works. A further 9 performances were dedicated to Chamber Music (2) and Regional touring (7). The Sydney Symphony Fellows also performed a program to a paid attendance of 2,257 patrons.

### **Our Education Activities**

In addition to its main stage performance work, in 2014 the Sydney Symphony Orchestra undertook the following education activities:

- 26,101 teachers and students attended 47 schools concerts in Sydney venues, and 2074 attended schools concerts in Dubbo, Cobar and Broken Hill.
- 11 Education programs were delivered in regional areas in conjunction with the Sydney Symphony's other touring activities in Canberra, Dubbo, Cobar and Broken Hill.
- 4,791 patrons attended 19 performances by the Fellows in 2014 at venues including St James' Church King St, Verbrugghen Hall, Blacktown Arts Centre, the Moorambilla Festival in Central NSW, the Manning Entertainment Centre, Taree; Goulburn Regional Conservatorium and the South Coast Correctional Centre.
- 5 open rehearsals and 7 master classes were held at the Sydney Opera House for 183 tertiary students and their lecturers.
- Outreach events were held in 3 Chinese conservatories during the SSO's International Tour and was attended by 238 people.
- 16 professional learning workshops were held in Sydney and other capital cities and 2 regionally in Dubbo and Broken Hill, attracting 710 teachers and students.
- 7 Playerlink activities were held in Bathurst, regional NSW, in 2014, connecting with 155 local musicians of all ages and their teachers.
- Overall more than 34,974 people connected with the Sydney Symphony Orchestra through its Education and Developing Artist programs.

### **Our Touring & Community Outreach Activities**

In 2014 the Sydney Symphony Orchestra undertook an International Tour to China; performing in 7 cities and throughout the year participated in the following regional touring and community outreach programs:

- 2 free outdoor symphony concerts in the Domain and Parramatta Park.

- Concerts in Wollongong, Newcastle, Pokolbin and Orange.
- Concerts in Dubbo, Cobar and Broken Hill to a total audience of 790.
- Continued our award-winning *Music4health* Program with performances at: Montefiore Home Hunters Hill, the Autism Advisory and Support Service at Mount Pritchard, Westmead Children's Hospital and Randwick Children's Hospital. One of the SSO musicians regularly visits the Intensive Care Unit at Westmead Children's Hospital to play soothing tunes to sick neonates, parents and staff.
- Our musicians also continued to contribute to the wider community in their capacity as teachers and members of community music groups.

### **Our Broadcast & Streaming**

In 2014 the Sydney Symphony Orchestra extended its audience reach through the following broadcasts, recordings and social media:

- 59 performances were broadcast on ABC Classic FM in 2014, and 9 concerts to the European Broadcasting Union.
- 3 concerts with American pianist Emanuel Ax were live-streamed on the Sydney Opera House YouTube channel on 13, 18 and 21 June. The video-on-demand of these streams accumulated 28,656 views.
- SSO Live released one disc in 2014 – *Igor Stravinsky: The Firebird* with the SSO's Chief Conductor and Artistic Director David Robertson.
- The Sydney Symphony's mobile app attracted a total of 52,624 views and was downloaded 3,206 times.

### **SYDNEY SYMPHONY ORCHESTRA'S WORKFORCE**

Sydney Symphony Orchestra Holdings Pty Ltd is a not- for-profit, charitable Corporation. The Company employs 100 permanent orchestra musicians and 46 casual musicians. 55 staff administer the orchestra, 43 permanent, 12 part time and 20 casual staff members are engaged seasonally in our Box Office to sell our programs and raise funds for the Orchestra. The Company also engages the services of visiting artists, conductors and musicians each year to work with our orchestra on specific programs.

The terms and conditions of employment for the permanent and casual musicians of the orchestra are set out in a registered a collective agreement, currently the *Sydney Symphony Orchestra Musician's Agreement 2012-2015*.

The terms and conditions of employment for non- executive staff are set out in a registered collective agreement, currently the *Sydney Symphony Administrative Staff Agreement 2013-2015*.

Executive Staff, Concert Masters and visiting artists are individually contracted to the Company.

All employees are required to comply with Company Policies.

In 2015 the Company offered Fellowships to 14 emerging artists and a further 23 emerging artists are mentored by members of the Orchestra in our Sinfonia Orchestra.

In 2014 the Company's payroll expenses for employees (salaries + superannuation) were \$20,222,104, being 51.4% of our total operating costs for the year of \$39,327,409.

## **SYDNEY SYMPHONY ORCHETRA'S WORKPLACE RELATIONS**

Symphony orchestra musicians work collaboratively and throughout the world are highly unionised. This is also the case with the Sydney Symphony Orchestra musicians. Musicians of the orchestra are members of the SOMA Division of the Media Entertainment & Arts Alliance *SOMA*. Musicians of the Orchestra elect musician representatives who form 3 key workplace Committees, the Artistic Committee, the Management Committee and the Work Health & Safety Committee. These Committees work closely with the Company to ensure high artistic standards of performance are maintained and to address any issues pertaining to work and safety with the Company. Elected representatives of the Orchestra meet with Company representatives each 3 years to negotiate and create a new collective agreement.

The administrative staff of the Company are not highly unionised however some are members of the Community and Public Sector Union *CPSU*. Administrative staff elect their union representatives to negotiate a new collective agreement each 3 years.

Relations between the Company and its musicians and staff are good and the Company is committed to effective and regular communication between management, our musicians and administrative staff. The Company meets monthly (or more often as required) with 2 of its Musician Committees and quarterly for Health and safety matters.

There is very little contact between the Company and paid union officials from either the CPSU or SOMA. There may be some contact during EBA negotiations and/ or in relation to a dispute or issue relating to an individual employee/ member. The Company has good relations with paid union officials from both unions who interact with our musician and staff employees. But generally employee representatives work with the Company to address most matters at the workplace.

Visiting artists are represented by agents or managers who negotiate contracts on behalf their clients for their client's services with the Sydney Symphony Orchestra.

The Company's approach to workplace relations is one of continuous improvement and we strive to a reputation as a global *employer of choice* in our industry. We are determined to build our *employer brand* to match the success of the commercial brand of the Sydney Symphony Orchestra.

## SYDNEY SYMPHONY ORCHESTRA SUBMISSION

Our submission concentrates on your questions and requests for information, in order of your Issues Papers, rather than any order of importance to the Company. The Company's submission focuses on workplace relations issues of importance to it and our industry.

### 1. Safety Nets

#### ***How do minimum wages ripple throughout the wage system and over what time frame?***

The minimum wage and annual increases to the minimum wage have little impact on the Company's wages costs. Our workforce is highly educated and highly skilled and able to negotiate significantly higher wages than the Australian minimum wage. Nevertheless the Company supports the continuation of a minimum wage in Australia as an appropriate safety net for those with lesser skills, work opportunities and marketability.

#### ***What if any, particular features of the NES should be changed?***

The Company supports the 10 minimum workplace entitlements in the NES. The Company does not recommend any changes to the current National Employment Standards.

#### ***The Commission seeks feedback on the award system and flexibility and the implementation and transitional challenges of any significant changes.***

There are 2 underpinning awards for the Company as set out in our 2 collective agreements: *The Live Performance Award 2010* and the *Clerks – Private Sector Award 2010*. As we have collective agreements in place, the awards by and large are irrelevant to us, except for the *better off overall test*.

In 2013 we named the Clerks- Private Sector Award 2010 the underpinning award for the collective agreement with our administrative staff and we encountered difficulties in registering the agreement. The difficulties arose because the Classification Structure in that award bore no relevance to the salary or classification structure as set out in the proposed EBA, (arising from previous agreements) which did not reference the said award.

In registering our newly negotiated EBA in 2013 the Commissioner was concerned that any persons we engaged on our Level 1 Classification (as permanent employees) may not be *better off overall* under the proposed agreement when considered in light of the said award. This issue caused the Company delays in the commencement of the agreement and required our assurance not to engage a permanent employee on Classification 1. Of course we provided the assurance.

At no time have we or did we intend to use this Level Classification for our permanent staff. Rather the Company looks to market rates when engaging staff not an entry level classification. The Company uses the Level 1 Classification to engage casual staff, which was not a concern to the Commissioner. However in making a reference to what we considered a more appropriate underpinning award, we created a difficulty for ourselves which was otherwise not there.

This difficulty caused us to reflect on the fact that the Classification Structures in some awards, such as the Clerks- Private Sector Award 2010, are really irrelevant to the engagement and

employment of our staff. The various classifications are not easily reconciled with the roles or positions we offer our current or prospective administrative employees. Nor does the pay scale relate in any way to the salaries offered to our administrative employees.

In negotiating our next agreement, to avoid delays in registration, we could adopt the Live Performance Award 2010 as the underpinning award for this agreement. However the Classification Structure in that award does not adequately address the work classification or the pay structures of our administrative staff.

Given the changing nature of the way we work, new technologies and the changing workforce demographics, the Company does question whether the classification structures in the modern awards are of any value, usefulness or relevance to current employment practices? The Company recommends that the Productivity Commission explore alternatives for the current Classification Structures in Awards.

Finally in relation to the Clerks- Private Sector Award 2010 we note that award does not recognise commissions as a variable component of a salary. Whilst some industry awards recognise such concepts i.e. piece work rates for outworkers, this award covers call centre employees and yet does not recognise that a significant number of employees work for a base rate and a commission on sales and/or donations.

Each year the Company engages a number of casual sales staff to sell our season subscriptions and tickets and undertake fund raising work. Casual Sales staff are offered a minimum hourly rate as well as a percentage commission on sales and donations. The Company questions whether the award should acknowledge this variable component of salary for persons engaged in sales work. Furthermore should such commissions be also considered in relation to the *better off overall test*?

***What changes if any, should be made to the modern awards objective in relation to remuneration for non standard hours of working?***

Being in the entertainment industry most of our employees work non- standard hours. The Live Performance Award 2010 recognises our industry hours, offers the necessary flexibility in rostering and payment arrangements, therefore the Company does not recommend any change to modern award objectives in relation to remuneration for non standard hours of working.



## 2. The Bargaining Framework

***An overarching concern will be the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them.***

The Company is of the opinion that the FWA should have little influence over what issues are considered by parties appropriate to be included in bargaining arrangements, other than ensuring the content of such agreements does not breach existing criminal or civil laws. Employers and employees should be free to bargain on any issues they consider relevant to their employment relationship.

***To what extent is the BOOT clear and appropriate in its current form, and how, if at all, should it be improved?***

BOOT is relatively clear and its application straight forward. However the Company suggests that the test be reviewed in the course of this inquiry. See above for Company comments on BOOT.

***The Australian Government is proposing to introduce rules that require discussion of productivity improvements as part of the bargaining process. The Commission requests view about the effectiveness of existing productivity clauses, and whether there are any features of the industries, unions and firms that explain why some forge such agreements and others do not.***

The proposed introduction of productivity improvements as part of the bargaining process is consistent with the Australian Government and NSW Government Wages Policies for government employees. To that end the rule would provide the legislative force for governments (and non - government employers) to ensure the issue of productivity improvements were addressed, during the course of enterprise bargaining negotiations. In proposing this rule is the Australian Government introducing a form of pattern bargaining by another name?

It is the Company's experience that in each bargaining round, productivity improvements are identified and raised at the negotiating table with its employee representatives. Our successes in reaching agreement on the said improvements depend on a number of issues. Those issues include: available financial compensation; the nature of the improvements proposed; whether the changes are of the type that the employees and union representatives consider appropriate and or necessary, or in their own interests; and the number of productivity improvements raised. Sometimes an issue proposed for change has a long and turbulent history which adds to the difficulty of introducing a change or persuading employee negotiators to recommend such a change. In this situation a rejection is often based on irrational but very real and heart felled justifications for the status quo.

It is the experience of the Company that at the introduction of enterprise bargaining (1980-90s) it was seen as appropriate only for employees to present claims at the bargaining table. This is no longer the case, employee representatives expect company representatives to bring a series of productivity improvements to the table.

As the Company already focuses on productivity improvements in its bargaining with employee representatives the introduction of this rule would have little effect on our current state.

***To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified?***

Our Company relations with employees, employee representatives and their union officials are good. Negotiators for the Company and the employees are experienced, sophisticated and all are committed to an outcome in the interest of the Company, employees, and above all our Orchestra. In our experience to date, it is true to say that in commencing a bargaining period, all sides bargain in good faith.

***To what extent are IFA's standardised across employees, rather than tailored to individual circumstances?***

Flexible work arrangements for our musicians and staff are tailored to responses to individual circumstances. The Company phased out the standardised use of IFA's during the past 2 years as the previous practice offered little if any benefit to the Company.

***Given the clarification provided by the Toyota decision, what if any concerns persist about no extra claims provisions and what should be done about this?***

The decision of the Full Court of the Federal Court on 18 July 2014, which confirmed that *no further claims* in an enterprise agreement does not prevent an employer from using the provisions in the Fair Work Act 2009 to vary an agreement, means that the Company has less concerns about this issue.

***To what extent should there be any changes to the FWC's conciliation and arbitration powers?***

In the experience of the Company, disputes are best resolved at first instance at the workplace. The powers of the FWA to conciliate and arbitrate a dispute are beneficial as last resort or as incentive to the parties to resolve a dispute without recourse to the FWC.

***The Commission is interested in understanding whether employees and employers can effectively and efficiently resolve disputes over employment terms and conditions under the existing framework?***

The Company and its employee representatives are experienced at dispute resolution and committed to resolving any dispute at the workplace where possible. The existing framework supports our joint commitments. However it is our experience that disputes pertaining to *poor performance* or *behavioural issues* relating to an *individual* employee often cannot be resolved satisfactorily at the workplace. In these instances the existing framework provides the expertise to break a *deadlock* situation.



The one area where the Company is disinclined to seek resolution of a dispute through the FWC is a dispute which centres on *artistic or performance standards of our musicians*. Whilst the Company has negotiated detailed processes to address such issues and these are included in our collective agreement with our musicians, we are not confident that Commissioners are well placed to assess the artistic requirements and standards of our musicians.

### **3. Employee Protections**

***Do Australia's unfair dismissal processes achieve their purpose, and if not what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions?***

The current unfair dismissal provisions provide a clear and equitable process for parties to address a dispute as a consequence of the termination or possible termination of an employee's employment. It is our experience that the compulsory conciliation requirement is essential to the timely resolution of many disputes of this nature.

***In cases where employers are required to pay compensation in lieu of reinstatement, are the current arrangements for a cap on these payments suitable?***

Yes the Company considers the cap important, not only in cases where we might be required to pay compensation in lieu of reinstatement, (none in recent years) but more importantly the cap allows the Company to determine its strategy in addressing each and every unfair dismissal claim, at the outset. Whilst the Company has had few unfair dismissal claims against it (merit or otherwise) during the past few years, the cap provides us with some certainty and is an indicator from which we can decide whether to vigorously defend a claim or whether we should opt to settle a matter in conciliation.

***What are the effects of unfair arrangements on firm costs, productivity, recruitment processes, employment, and employment structures?***

Whilst the Company acknowledges that costs associated with the broader Workplace Relations Framework are understandably the costs of doing business in Australia, for a small organisation with great artistic ambitions, we expend not insignificant costs, ensuring we are up to date and engaged in good governance in all matters employment. This investment by the Company assists us in our aspirations to be an employer of choice and reflects our commitment to our employees.

Nevertheless as a not-for-profit corporation receiving 1/3 of our income from Government and 2/3rds from box office, philanthropy and corporate sponsorship, every direct and indirect cost expended on unfair dismissal cases and severance packages, is at the expense of our work and is money which cannot be spent on our existing musicians and staff.

Each and every claim of this type means at least 2 of our Senior Executive Team are required to redirect their time and energies away from their necessary work to spend significant work time in dealing with a dispute or a claim and this does come at the detriment of their other work. This is an enormous cost to a medium size business such as ours.

Costs to the Company in addressing unfair arrangements include: employee salaries, fees for service of lawyers to defend or represent the Company, any costs associated with severance; as well as insurance premium costs. The costs, for one case only in any given year, can mean the difference between making a small profit and posting a deficit for the year.

***What are the main sources of costs (including indirect costs), and how could these be reduced without undermining the fundamental goals of unfair dismissal legislation?***

As stated above the Company expends both direct and indirect costs in relation to unfair dismissal legislation. When the Company weighs up between the costs of effective legal representation for a significant period, during conciliation and arbitration, it is often in our interest to reach cash settlement with an ex- employee, whether or not their claim has any merit whatsoever.

As the framework has become more legalistic, the necessity to engage lawyers to assist the Company is more prevalent. Unfortunately employee representatives/ lawyers are aware of this, which leads to more cases or claims for compensation when a person's employment is terminated fairly or otherwise. Despite the fact that the legislation and our agreements clearly define notice periods and associated payments for employees whose employment is terminated, there is a growing expectation that an ex or soon to be ex- employee is entitled to additional compensation to *go away*, under any circumstances. This is a major concern to the Company.

Finally costs to the Company in defending an unfair dismissal case increase significantly where an employee is represented by a lawyer or non lawyer who is not familiar with the jurisdiction, lacks competence, or is unaware of the possible outcomes of such claims. It is our experience that in these circumstances an employee can develop unrealistic expectations, the case drags on and we expend more time and energy in defending our position or trying to reach resolution of the disputed claim.

***What if any changes should occur to the anti-bullying provisions of the FWA or in the processes used to address claims and to communicate with businesses and employees about measures?***

The Company supports the anti-bullying provisions of the FWA and make no recommendation for change.

***Do the general protections within the Fair Work Act 2009, and particularly the 'adverse action' provision, afford adequate protections while also providing certainty and clarity to all parties?***

The Company supports the general protection provisions in the FWA as appropriate measures to prevent adverse actions against employee(s) based on illegal and inappropriate purposes. The Company is committed to its Equity and Diversity Policy and works hard to ensure the culture of the organisation is one to be proud of, from top-down and bottom-up.

***What economic impacts do these protections have?***

The major concern for the Company in the past 2 years about the Workplace Framework relates to the quantum of penalties and compensatory payments, in orders against Companies in adverse action cases. This is not to say we condone adverse action practices of such companies. But the economic uncertainty of the financial outcomes in such cases unnerves us. Where this Company struggles with costs associated with only one unfair dismissal settlement we are concerned that one successful action against the Company would lead us into dire straits.

Since the introduction of the General Protection provisions in the legislation, lawyers and unions representing claims against the Company on behalf of employee or ex employee clients/ members are couching the terms of their claims with reference to the General Protections provisions, rather than unfair dismissals. The reasoning behind this strategy is obvious; the uncapped nature of compensation in these cases verses the capped payments in unfair dismissal matters.

Whilst recent decisions in adverse action cases are pleasing, the Company still remains somewhat concerned about the potential consequences of a successful action against us, from a risk and monetary perspective.

We recommend the Commission explore whether the introduction of a cap in adverse action cases similar to that of unfair dismissals would be more appropriate and whether it would reduce the level of forum shopping, unrealistic expectations and level of risk to medium size firms.

#### **4. Other Workplace Relations Issues**

##### ***How are the FWC and FWO performing?***

In the course of the past 3 years the Company has only attended the FWC to register collective agreements and to deal with 3 disputes regarding individual employees or ex -employees. On each occasion the Company was impressed with the skills and knowledge of the Conciliators and Commissioners and satisfied with their ability to address our issues and assist us to resolve matters in dispute.

The Company and a number of our employees participated in the FWC Australian Workplace Relations Study in 2014. We were pleased to contribute to this study, were very appreciative of the FWC findings, at a national and industry level and would support further studies of this type. The Company is using the FWC findings to better focus on effective attraction and retention strategies as well as shaping our ideas for our up and coming bargaining negotiations.

During the same period the Company interacted with the FWO on one occasion and the matter was dealt with effectively and in a timely manner. The only complaint the Company has with the FWO is in respect of its website. We find the website user unfriendly, too simplistic in the nature of advice and inadequate in being a go to tool for employment matters.

##### ***What are the main compliance costs faced by parties in the WR system (management time, costs of paying for expertise, delays in making decisions)? How big are they?***

The Company addresses these issues above.

##### ***How could compliance costs be reduced?***

The Company looks forward to the Commission identifying ways to reduce compliance costs. However from the Company perspective we identify the constant (real or proposed) changes to the Workplace Framework as adding significant costs to our governance and compliance activities.

## CONCLUSION

Thank you for the opportunity to make a submission to the Productivity Commission Review into the Workplace Relations Framework.

Please contact me at [michel.hryce@sydneyssymphony.com](mailto:michel.hryce@sydneyssymphony.com) or by phone on 02 8215 4628 for any further information or clarification in relation to our submission.

Yours Sincerely



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