



Fair Work
Commission

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

(Please provide the name of the person lodging the submission)

Madeleine Thornton-Smith

Organisation

(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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Usability of awards:

How to prepare a submission

Submissions should be emailed to awards@fwc.gov.au. Directions set out the due dates for submissions. Directions are issued by a Member of the Commission and will be published on the [Commission website](#).

Make sure you use numbered paragraphs and sign and date your submission.

Your submission. Provide a summary of your experience and any relevant issues. You may wish to refer to one or more of the issues outlined in the relevant discussion paper.

Issues

1. [Using numbered paragraphs, outline the main issues you want the Fair Work Commission to consider as part of the Modern Award Review 2023-34 including your responses to any questions set out in Commission discussion papers. Include, if possible, references to any relevant sections of the *Fair Work Act 2009*, or other legislation or specific clauses in modern awards that apply].

I would like the Fair Work Commission to consider including in the award the craft, and more specifically ceramics industry – which includes the production of pottery but also the teaching of ceramics classes and studio technicians' work. I have done research and advocacy into the problem of sham contracting in the ceramics industry over the last few years, and many studios do not employ their staff properly but rather force them to invoice for their hours, without the ability to negotiate their pay rate, and often without receiving superannuation. This happens because there is no specific ceramics or craftworkers' award or minimum standards. This has happened to me in local council and teaching at Northcote Pottery Supplies in Melbourne, that openly sham contracts its ceramic tutoring staff and does not allow them to negotiate their rate of pay. Those who ask for a pay rise are often fired, as I was. An award would mean that businesses have to adhere to minimum standards and ceramics workers would have more workplace rights. I will attach an article I wrote on this issue.

Proposals

2. [Tell us your proposals to the address the issues you have raised in the submission. If you are proposing that the Commission should consider varying an award, you should include draft wording for the proposed variation]

Signature:



Name:

Madeleine Thornton-Smith

Date:

4/12/2023

SHAM CONTRACTING IN THE CERAMICS SECTOR

by Madeleine Thornton-Smith; @madeleinethorntonsmith

Sham contracting is when workers are hired to ongoing positions but are required by their employer to invoice using an ABN and to get their own insurance, with little possibility of negotiating their pay rate. Employers often do this to avoid legal obligations such as leave entitlements, insurance, payroll tax, superannuation, and sometimes minimum award rates. This practice is increasingly common in local government, commercial and not-for-profit ceramics studios. In some cases, contractors are paid at a high rate to incorporate insurance costs and the lack of superannuation, and their rate can be negotiated. Sham contracting is illegal when it is done knowingly or recklessly by an employer to avoid providing an employee's legal entitlements. The Fair Work Ombudsman can investigate and take offenders to court where there are harsh penalties in the tens of thousands of dollars.

What does sham contracting look like? Here are some examples:

- 1 I was asked by my employer if I had an ABN and public liability insurance. I found this puzzling because I thought I was applying for a job. After a couple of years tutoring as a contractor on \$40/hour, I took on a payroll position as a studio technician. I noticed that some employee tutors were being paid around \$20/hour *more* than me for the same work, plus superannuation. This local government employer was contracting out all new tutors, avoiding yearly pay increases, award rates, unfair dismissal legislation and risk, by making them get insurance.
- 2 I approached my boss about the difference in pay [between tutors], hoping to re-negotiate my rate. They came up with a variety of excuses, including that my pay was 'benchmarked' against other employers (that were also sham contracting). My employer didn't seem to understand the difference between an independent contractor and an employee.
- 3 I've had to fight to get paid many times. I was once asked to work for a three-day workshop, where being a participant was the payment. That's 18 hours unpaid. When I emailed saying it was unfair, [they] said that many people would be grateful to be able to attend the workshop 'for free'. I once worked all weekend representing [the studio] at [a pottery festival], then later when I asked what rate to put on my invoice, I was told that it was a volunteer role. I was paid \$20/hr as a studio hand and \$35/hr to teach. I feel so silly now looking back that I ever accepted those rates but my lack of knowledge about the industry was taken advantage of.

I did an online callout to ceramics and visual arts workers who had experienced sham contracting. To my horror, messages flooded in. Rates varied wildly. Many studios offer very low pay for studio technicians/assistants (for e.g. \$18/hour), but most pay \$25 to \$35/hour. Teaching rates varied from \$25 to \$85/hour, averaging \$50 to \$60/hour. Production pottery was also poorly paid, mostly around \$25/hour. Piece rates for making decals paid as low as \$1 a piece or \$10 per turned pot. Many workers had approached their bosses about a raise, sometimes just to get minimum wage, or what they thought was fair. Wage theft appears to be common, such as not being

able to invoice for all hours worked (like set-up and clean-up), unpaid internships or voluntary shifts for 'experience'. Some workers sent invoices that were never paid; others were paid in cash or required to sign contracts with illegal non-compete clauses or 'exit fees'. For contracted workers, superannuation was rarely paid, with insurance obtained by the worker. Many workers experienced mistreatment for bringing up workplace concerns thus breaking the Fair Work Act 2009 protections for independent contractors against adverse action. The vast majority of respondents were young women.

Ceramics is booming at the moment in Australia with small private ceramics studios replacing dwindling TAFE and university programs. These are often run by ceramicists with little formal training in industrial relations or basic OH&S. Lots of money is being made running profitable workshops with little passed on to those who have generated the revenue. Some employers in ceramics studios contract out their labour because they know little about which awards may apply to their staff. The good news is workers in private studios teaching adults fall under the Educational Services (Post-Secondary Education) Award 2020, and tutors of children are covered by the Miscellaneous Award 2020. Employers can consult these awards for fair rates to pay their staff. The Independent Education Union represents workers in private studios, and the Australian Services Union represents local council workers.

Our culture has a problem with valuing the arts. I have previously written about how artmaking in Australia isn't considered 'work' or a 'real job'. However sham contracting is more clear-cut. When employers contract out ongoing work to disguise an employment relationship as an independent contracting relationship, they could be breaking the law. Some employers in our industry want it both ways – to avoid the responsibilities of hiring staff but maintain control over their contractors' working conditions, rates of pay and hours. Many arts studios advertise themselves as 'community' spaces, but employers need to remember their workers are an integral part of that community too and treat them accordingly.

ADVICE FOR EMPLOYEES

Fair Work Ombudsman: fairwork.gov.au/find-help-for/independent-contractors; T: 13 13 94

Australian Taxation Office: ato.gov.au/business/employee-or-contractor/how-to-work-it-out-employee-or-contractor; Tip-off hotline, T: 1800 060 062

Local government workers: Australian Services Union; asu.asn.au/contact

Private studio workers: Independent Education Union: ieuvictas.org.au/post-secondary-education-elicos-rtos; T: 1800 622 889

Young Workers Centre: youngworkers.org.au/about; T: 1800 714 754

The National Association for the Visual Arts: visualarts.net.au/contact-us/; T: 1800 046 282

ADVICE FOR EMPLOYERS

Fair Work – Small Business Showcase: smallbusiness.fairwork.gov.au

Educational Services (Post-Secondary Education) Award 2020: fwc.gov.au/documents/documents/modern_awards/award/ma000075/default.htm

Miscellaneous Award 2020: awardviewer.fwo.gov.au/award/show/MA000104

Australian Taxation Office: ato.gov.au/Business/Employee-or-contractor/

WorkSafe: worksafe.vic.gov.au/contractors-and-workers-guideline