

# **2023-2024 FWC AWARD REVIEW**

## **ARTS AND CULTURE SECTOR**

**5 DECEMBER 2023**

## **ABOUT BUSINESS NSW AND AUSTRALIAN BUSINESS INDUSTRIAL**

Business NSW (**BNSW**) is the state's peak business organisation with nearly 100,000 business members in NSW and Australia, spanning all industry sectors and sizes. Operating across **metropolitan and regional NSW, we field senior local leadership and teams throughout the state**, representing the needs of business to all levels of government.

For nearly 200 years Business NSW (formerly the NSW Business Chamber) has been advocating to create a better NSW and Australia by representing the needs of businesses to create the economic conditions that allow our members to grow and drive NSW and the nation forward. Our experience has proven that planning and delivering with Government increases prosperity, creates new jobs, and builds better communities for everyone.

We work closely with our members, partners, stakeholders, local, state and federal government to advocate for practical policy solutions to ensure Australian businesses of all sizes can prosper.

Australian Business Industrial (**ABI**) is the industrial relations affiliate of BNSW.

ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State and Federal tribunals.

## RELEVANT BACKGROUND

1. On 12 September 2023, the Hon. Tony Burke MO, Minister for Employment and Workplace Relations and Minister for the Arts, wrote to the President of the Fair Work Commission, the Hon. Justice Hatcher, expressing the Australian Government's interest in the Fair Work Commission (the **FWC**) initiating a "targeted review" of modern awards.
2. Relevantly for present purposes, one of the four areas of potential review canvassed in that letter was an investigation into "existing award coverage and minimum standards in the arts and culture sector, including potential coverage gaps".
3. The background to that request was that the Government had released its National Cultural Policy in January 2023 which was said to have included "an action to consider modern award coverage and minimum standards for the arts and culture sector".
4. The National Cultural Policy sets out the Australian Government's cultural policy and is described as "a five-year plan to revive the arts in Australia".<sup>1</sup> One of the actions set out in the policy is to "Include Award coverage of the arts sector and minimum standards as part of the upcoming Review of Modern Awards".<sup>2</sup>
5. By Statement dated 15 September 2023, the President of the FWC determined to initiate an award review on the Commission's own motion under s 576(2)(aa) of the *Fair Work Act 2009* (Cth) (the **FW Act**) to consider three of the four areas outlined in the Minister's letter. The Statement provided that the conduct of the review will involve the following steps:
  - (a) The release of discussion papers by the FWC addressing each of the particular issues;
  - (b) An invitation for interested parties to lodge submissions as well as an opportunity for reply submissions;
  - (c) Conferences convened by the FWC to discuss the issues raised in the discussion papers and submissions; and

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<sup>1</sup> See <https://www.arts.gov.au/sites/default/files/documents/national-culturalpolicy-8february2023.pdf>

<sup>2</sup> Page 101.

- (d) The issuing of a final report by the FWC which might “provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards”.
6. On 4 October 2023, the FWC outlined the timetable that would apply for the review process, pursuant to which it is anticipated that the review process will be completed by late June 2024.
  7. On 6 November 2023, the FWC published a Discussion Paper (the **Discussion Paper**) to “support the Full Bench’s consideration of the sector in the Review”.<sup>3</sup> The Discussion Paper sets out a detailed analysis of the modern awards system insofar as it may relate to the arts and culture sector, including a “preliminary analysis as to which modern awards could cover employees in particular occupations” in the arts and culture sector.<sup>4</sup>
  8. By a Statement issued on the same date, the Commission invited parties to file submissions in response to the Discussion Paper. The Discussion Paper also poses a series of questions which parties have been invited to respond to.
  9. These submissions have been prepared in accordance with that invitation. BNSW and ABI thank the Commission for the opportunity to participate in this review process.

## THE ARCHITECTURE OF THE MODERN AWARDS SYSTEM

10. One of the fundamental features of the current modern awards system is that modern awards should operate primarily along industry lines.
11. During the 2008-2010 award modernisation process, the Australian Industrial Relations Commission was tasked with modernising the awards system. The process was conducted pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth). In conducting its functions, the AIRC was also required to have regard to the “desirability of reducing the number of awards operating in the workplace relations system”.<sup>5</sup>
12. The award modernisation process was required to be carried out in accordance with the ‘award modernisation request’ made by the relevant Minister at that time.<sup>6</sup> That award modernisation request (the **Revised Request**) relevantly provided that:

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<sup>3</sup> See [2023] FWC 2899 at [4].

<sup>4</sup> Discussion Paper at [66].

<sup>5</sup> Section 576B(2)(d) of the *Workplace Relations Act 1996* (Cth).

<sup>6</sup> See section 576C(1) of the *Workplace Relations Act 1996* (Cth).

When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate.<sup>7</sup>

13. In the first decision regarding the award modernisation process, a Full Bench of the AIRC observed that:
 

...In a general sense we consider that these considerations require the Commission to make awards primarily on broad industry lines and, as far as practical, to make those awards applicable to all award-covered employees in the relevant industry.<sup>8</sup>
14. The reference to modern awards being made “primarily along industry lines” is a reference to modern awards being made “based on the industry of employers”.<sup>9</sup>
15. That approach reflected an important and well-established principle of modern award coverage: that award coverage is determined by the “substantial character” of the employer.<sup>10</sup>
16. There were sound reasons for the creation of modern awards along industry lines. Some of those reasons were alluded to in the modernisation request itself, including that the modern awards system “must be simple to understand and easy to apply, and must reduce the regulatory burden on business”.<sup>11</sup>
17. In the context of the award modernisation objective to reduce the regulatory burden on business, an outcome whereby an employer is more likely to find itself covered by a single modern award rather than multiple separate awards was desirable.
18. Indeed, this was an issue that was picked up by the FWC during the 4 yearly review of modern awards. In 2015, the FWC acknowledged that “Multiple award coverage has the potential to create complexity for businesses”.<sup>12</sup> To this end, the Commission engaged an external research provider to conduct research into the issues faced by

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<sup>7</sup> See variation to award modernisation request, 16 June 2008.

<sup>8</sup> See [2008] AIRCFB 550 at [12].

<sup>9</sup> See [2008] AIRCFB 550 at [11].

<sup>10</sup> See *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* [1948] HCA 9; (1948) 77 CLR 123 at 135; *Re Federated Liquor and Allied Industries Employees’ Union of Australia; Ex parte Australian Workers’ Union* [1985] HCA 80; (1976) 51 ALJR 266 at 268; *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* [1978] HCA 51; (1978) 140 CLR 470 at 484-5; *Dyno Nobel Asia Pacific Limited v Construction, Forestry, Mining and Energy Union* (AIRCFCB, PR956868, 14 July 2005) at [51].

<sup>11</sup> See [1a] of the *Request Under Section 57C(1) - Award Modernisation - Consolidated Version* issued 26 August 2009.

<sup>12</sup> [2015] FWC 6958.

employers who are subject to coverage by multiple modern awards and the utility of majority clauses.<sup>13</sup> In its Background Paper, the FWC observed that:

Multiple award coverage may mean that a business is required to apply different sets of conditions to different groups of employees within the one enterprise. This has the potential to create a significant administrative burden for businesses and may lead to confusion and issues of non-compliance...<sup>14</sup>

19. Although the external research project found negligible support for the adoption of 'majority clauses', the prevailing view remained that it was desirable to minimise the number of awards applicable to a particular employer, as far as practicable.<sup>15</sup>
20. While the current modern awards system includes occupation-based awards, the vast majority of awards are industry-based, and of the small number of occupational awards in existence, they tend to only apply to occupations in which large numbers of employees work (for example, clerks, professional employees, health professionals, etc.).
21. In the context of the current review process, we consider that the following objectives should guide the review:
  - (a) First, it is desirable that the existing architecture of the modern awards system (modern awards operating primarily along industry lines) be maintained;
  - (b) Second, it is desirable that modern award coverage continue to be determined primarily by the substantial character of an employee's employer; and
  - (c) Third, it is desirable that the number of modern awards applying to a particular employer are minimised wherever practicable (to reduce the regulatory burden on employers).

#### **THE APPLICATION OF THE MISCELLANEOUS AWARD**

22. Similarly with the award modernisation request requiring modern awards to be made primarily along industry lines, the Revised Request also required the AIRC to:

... create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards... This modern award is not to cover those

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<sup>13</sup> [2015] FWC 6958.

<sup>14</sup> [2015] FWC 6958, see Background Paper at [3].

<sup>15</sup> See 'Multiple modern award coverage and the utility of majority clauses', EY Sweeney Ref No. 25732 – May 2016.

classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards.

23. In accordance with that requirement, the AIRC created the Miscellaneous Award.
24. The scope and operation of the Miscellaneous Award has been examined in a number of decisions since 2010, including in *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort* [2018] FWCFB 128. In that decision, a Full Bench of the FWC effectively found that the Miscellaneous Award applied to employers throughout Australia and their employees not covered by another modern award, so long as:
  - (a) The employee falls within the classifications listed in the award; and
  - (b) The employee does not belong to a class of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards.
25. The coverage clause of the Miscellaneous Award was then expanded in 2020.<sup>16</sup>
26. As a result of the changes to the coverage clause in 2020, the Miscellaneous Award now operates to effectively 'catch' any employees who are not governed by another industry-based or occupational-based award, and who do not belong to a class that should appropriately be award-free (e.g., managerial employees or employees with specialist roles that have traditionally not been covered by awards).
27. That being the case, we consider it most unlikely that there would be employees working in the arts and culture sector who would 'fall through the cracks of award coverage'. Rather, we expect that, if they do not fall into one of the existing industry awards (or occupation-based awards), their employment would likely be regulated by the Miscellaneous Award.
28. On that basis, we would resist any suggestions that employees working in the arts and culture sector fall outside the modern awards system or do not have the protection of the modern awards system.
29. Although the Miscellaneous Award is by its nature a generic instrument that is not specifically designed for any one industry or occupation, it does contain a range of provisions regulating (amongst other things):
  - (a) Hours of work (including maximum daily hours, rest breaks, rostering protections, protections around working patterns for part-time employees);

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<sup>16</sup> See [2020] FWCFB 754.

- (b) Casual employment (including a casual loading and rights to conversion to permanency);
  - (c) Wages, allowances and higher duties; and
  - (d) Overtime and penalty rates.
30. While the Miscellaneous Award might not contain a comprehensive suite of provisions specific to a particular industry or sector, it provides the same or similar provisions as most other modern awards (including the common clauses such as consultation, flexibility, leave, dispute resolution, etc.).
31. In our view, this Review should commence from the proposition that the Miscellaneous Award, when viewed alongside the National Employment Standards, provides a fair and reasonable (albeit generic) minimum safety net of terms and conditions for employees who fall outside the scope of another modern award.

#### **RESPONSES TO QUESTIONS POSED IN THE BACKGROUND PAPER**

32. Our responses to some of the questions posed in the Background Paper are set out in the **Attachment** to this submission.

#### **SUMMARY OF OUR CLIENTS' POSITION**

33. In summary, we consider that the following objectives should guide the Review:
- (a) First, it is desirable that the existing architecture of the modern awards system (i.e., modern awards operating primarily along industry lines) be maintained;
  - (b) Second, it is desirable that modern award coverage continue to be determined primarily by the substantial character of an employee's employer;
  - (c) Third, it is desirable that the number of modern awards applying to a particular employer are minimised wherever practicable (to reduce the regulatory burden on employers); and
  - (d) Fourth, where a class (or classes) of employees are identified as falling outside the scope of the existing industry and occupational awards, that cohort of employees should be considered in the context of the Miscellaneous Award most likely regulating their employment prior to any consideration of expanding the scope of other awards or creating further modern awards.



**ATTACHMENT A- RESPONSES TO QUESTIONS IN THE DISCUSSION PAPER**

***Question 1: Are there any industries or occupations that should form the focus of the Commission's consideration of the arts and culture sector in this Review? If so, why?***

We endorse the comments at paragraph [7] of the Discussion Paper in relation to the need to properly identify and define the scope of the "arts and culture sector". In our view, that phrase is imprecise, particularly when one has regard to the expansive view of 'culture' in the National Cultural Policy. Accordingly, we support the FWC seeking to define the sector with a greater level of precision.

We refer to paragraphs [10]-[16] above in relation to our submission that modern awards should continue to operate predominantly along "industry lines". In this context, although the phrase "industry" is not defined in the FW Act, there is a long body of jurisprudence that has developed over the years, and which has considered the scope of the phrase "industry".<sup>17</sup>

We note the attempt to identify industries and occupations by reference to the ANZSIC codes at [11]-[12] of the Background Paper.

In our view, some of the "industries" listed at [11] of the Background Paper are not of themselves "industries" in the usually accepted sense. For example, we do not consider "newspaper publishing" and "magazine and other periodical publishing" to each be separate and standalone industries. Rather, we would suggest that those fields form part of, and are encompassed within the notion of, the "published media industry". Equally, we do not consider "design services" to be an industry of itself.

We also consider that "motion picture and video activities" and "sound recording and music publishing" would form part of the broader broadcasting, recorded entertainment and cinema industry.

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<sup>17</sup> See, for example, *R v Coldham; Ex Parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313; *Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 11 ALR 449; *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470; *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57 at 60.

In our respectful submission, the phrase “industry” has been used very liberally at paragraphs [11]-[12] of the Background Paper. This is not a criticism of the authors of the Background Paper. However, given our submissions above regarding the primacy of awards being made along industry lines, we considered it necessary appropriate to point out at an early stage of the Review.

***Question 2: Are there any industries or occupations that should be added to or removed from our consideration of the arts and culture sector for the purpose of the Review more broadly?***

On a preliminary basis, we do not consider that the Professional Employees Award would likely have any relevance to the review of the arts and culture sector. We consider it unlikely that the Professional Employees Award would apply to any employee working in the arts and culture sector.

***Question 7: Are there any other occupations in the arts and culture sector not covered by a modern award?***

Our preliminary view is that it is unlikely that there would be any occupations in the arts and culture sector (however defined) that are not covered by a modern award. We consider that the Miscellaneous Award would likely operate to cover employees not otherwise covered by modern award.

***Question 9: Do parties agree that the Miscellaneous Award may not cover certain workers, such as artistic directors or media producers?***

It is possible that certain employees in the arts and culture sector may fall outside the scope of the Miscellaneous Award, by reason of either clauses 4.2 or 4.3 of the Miscellaneous Award. Those provisions have the effect of preventing the Miscellaneous Award from applying to:

- managerial or “professional employees”; or
- employees who, because of the nature or seniority of their role, have traditionally not been covered by awards; or
- employees who perform work that is not of a similar nature to work that has traditionally been regulated by awards.

The question of whether or not a particular employee is covered by a modern award is a mixed question of fact and law. It requires an assessment of a range of factors including: the character of the employer (and the industry or industries in which the employer operates), the nature of work performed, the mix of duties undertaken, the qualifications held by the employee, the employee's seniority, and the history of industrial regulation relevant to that work. This assessment cannot be made by looking at an employee's job title alone. Nor can it be done by considering the employee in isolation; the issue of modern award regulation will in many cases be influenced by the nature of the employer's business.

***Question 10: To what extent are workers in the sector who are not currently covered by an award likely to be employees capable of being covered by modern awards?***

We expect that the vast majority (if not all) employees in the arts and culture sector (however defined) would be covered by the Miscellaneous Award if they are not covered by another award.

***Question 11: Do the parties have a view about the potential impact of the Closing Loopholes Bill on the arts and culture sector?***

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the **Bill**) is currently before Parliament and is still the subject of parliamentary debate. The Bill has also been subject to various amendments as it has progressed through Parliament. At this stage, the final form of the Bill is unknown and, as such, it is difficult to comment in any detail. However, in broad terms we would consider that the terms of the Bill may have an impact on the arts and culture sector. For example, the proposed reforms around 'employee-like work' and 'digital platform work' could potentially have implications for some workers in the sector.



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