

MODERN AWARDS REVIEW 2023-24 (AM2023/21)
SUBMISSION COVER SHEET

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A Introduction

1. The Community and Public Sector Union (CPSU) has industrial coverage of arts and cultural institutions owned and operated by Federal, State and Territory Governments. The union comprises two autonomous Groups;

- PSU Group – Commonwealth and Territory Governments
- SPSF Group – State Governments

2. On 6 November 2023 the Commission published a Discussion Paper about the Arts and Culture Sector¹. The discussion paper poses a series of questions at the end of each chapter. This submission by the CPSU/SPSF Group is in relation to Part 4 of the Discussion Paper which deals with possible modern award coverage of the sector.

3. CPSU notes that at paragraph 55 of the Discussion Paper there is reference to application of other awards applying to the public sector that may cover certain classes of employees.

[55] It is also possible that these roles in other public galleries and museums may be covered by other awards applying to the public sector, such as the *Australian Government Industry Award 2016* or the *State Government Agencies Award 2020*.

4. Question 5 is set out as follows:

Are there employees working in the arts and culture sector that may be covered by an award that has not been included in this chapter?

5. CPSU will submit that the *State Government Agencies Award 2020* and *Victorian State Government Agencies Award 2015* cover employees and employers in the public sector part of the arts and culture sector.

B State Government owned and operated cultural, heritage, and arts agencies

6. Major cultural, heritage, and arts agencies are owned and operated by State Governments. Generally, these institutions are covered by relevant state based public service/sector industrial arrangements. They are not constitutional corporations and therefore are not covered by modern awards. Statutes in each State set out whether the entity is in the public sector or not.

7. Further, s14(2) of the *Fair Work Act 2009* provides 'opt out' provisions for particular

¹ <https://www.fwc.gov.au/hearings-decisions/major-cases/modern-awards-review-2023-24>

employers who might otherwise be constitutional corporations. Relevantly, s14(2)(a) provides that a body established for a public purpose by a or under a law of a State or Territory is not a national system employer if declared not to be by the Minister.²

8. Victoria is different. It is the only State to refer its public sector, with exclusions, to the Commonwealth.

C Victorian Government Arts Agencies

9. The following Victorian arts agencies are national system employers because they are constitutional corporations or due to the Victorian state referral³.

Table 1: Victorian Government Arts Agencies: CPSU Coverage

Agency	Employer	Purpose <i>(See www.publicboards.vic.gov.au/)</i>	Enterprise Agreement
Arts Centre Melbourne	Victorian Arts Centre Trust	The Victorian Arts Centre Trust is established under the Victorian Arts Centre Act 1979. It is responsible for the management and operation of Arts Centre Melbourne, and for the presentation, production and promotion of performances and entertainment of all kinds.	Arts Centre Melbourne Enterprise Agreement 2022
Australian Centre for the Moving Image	Australian Centre for the Moving Image	The Australian Centre for the Moving Image (ACMI) came into operation on 1 January 2002, and is constituted under the Film Act 2001 . ACMI is responsible for featuring and exhibiting film, television and multimedia programs, and promoting public education in relation to screen content and culture. Membership of the board of ACMI is currently on an honorary (unpaid) basis.	Australian Centre for the Moving Image (ACMI) Enterprise Agreement 2020 - 2024
Museums Victoria	Museums Board of Victoria	Museums Victoria was established under the Museums Act 1983, which provided for the amalgamation of the National Museum of Victoria and Science Museum of Victoria. The Museums Board of Victoria is responsible for managing Museums Victoria, and for the development and maintenance of the State collection of natural sciences, Indigenous culture, social history and science and technology.	Museums Victoria Staff Enterprise Agreement 2020
National Gallery of Victoria	Council of Trustees of the National Gallery of Victoria	The National Gallery of Victoria was established in 1861. The Council of Trustees of the National Gallery of Victoria is constituted under the National Gallery of Victoria Act 1966 to manage the National Gallery and to maintain, develop and exhibit the State collection of works of art. Membership of the Council of Trustees of the National Gallery of Victoria is currently	The Council of Trustees of the National Gallery of Victoria Enterprise Agreement 2020

² Declarations made to date are listed on the FWC website at <https://www.fwc.gov.au/about-us/legislation-and-regulations>

³ See Part 1-3 Division 2A

Agency	Employer	Purpose <i>(See www.publicboards.vic.gov.au/)</i>	Enterprise Agreement
		on an honorary (unpaid) basis.	
Shrine of Remembrance	Shrine of Remembrance Trustees	Provides for the Shrine Trustees who are responsible for the care, management, maintenance and preservation of the Shrine of Remembrance, and for the care, management, maintenance and improvement of the reserved land.	Shrine of Remembrance Enterprise Agreement 2021

Note: State Library Victoria not included as Discussion Paper footnote 8 says libraries and library staff not in scope

10. As noted in Table 1 above there are enterprise agreements in place for all the arts agencies where CPSU has coverage. Enterprise agreements covering the following agencies; Australian Centre for the Moving Image, Museums Victoria, National Gallery of Victoria, and Shrine of Remembrance also include the Victorian public service classification structure and pay. There are no award reliant employees.

D State Government Agencies Award 2020 ('SGA')

11. The SGA covers constitutional corporations created by state law for a public purpose. These employers are *national system employers* under s14 (1)(a). If the employers are not national system employers the *Victorian State Government Agencies Award 2015* applies. Arts agencies are either within the footprint of the *Fair Work Act 2009* as constitutional corporations or through the Victorian referral.

12. When first made in 2010, the SGA was named the *State Government Agencies Administration Award 2010*. The rationale for its creation was to ensure a safety net for State agencies within the constitutional footprint of the Workchoices legislation⁴. In 2015 the award was renamed the *State Government Agencies Award 2010*. One of the reasons for the change was to clarify that the award did not only cover administrative work⁵. The 4 yearly review of modern awards, among other matters, changed its title to State Government Agencies Award 2020 effective 4 February 2020⁶.

13. The SGA has the following coverage clause:

4. Coverage

[Varied by [PR743468](#)]

4.1 This award covers State public sector employers that are incorporated bodies established for a public purpose by or under a law of a State, by the Governor of a State or by a Minister of the State or a body corporate in which the State has an equal or controlling interest, and their employees in the classifications listed in clause 15 — Minimum rates, to the exclusion of any other modern award.

4.2 This award does not cover State public service bodies.

4.3 The award does not apply to employers covered by the following awards:

- (a) Aged Care Award 2010 ;
- (b) Ambulance and Patient Transport Industry Award 2020 ;
- (c) Building and Construction General On-site Award 2020 ;
- (d) Children's Services Award 2010 ;
- (e) Coal Export Terminals Award 2020 ;

⁴ Award Modernisation decision of the Full Bench dated 9 November 2009 in [2009] AIRCFB 917

⁵ [2015] FWCFB 4960.

⁶ PR714195

- (f) Educational Services (Post-Secondary Education) Award 2020 ;*
- (g) Educational Services (Schools) General Staff Award 2020 ;*
- (h) Educational Services (Teachers) Award 2020 ;*
- (i) Electrical Power Industry Award 2020 ;*
- (j) Fire Fighting Industry Award 2020 ;*
- (k) Fitness Industry Award 2020 ;*
- (l) Health Professionals and Support Services Award 2020 ;*
- (m) Higher Education Industry—Academic Staff—Award 2020 ;*
- (n) Higher Education Industry—General Staff—Award 2020 ;*
- (o) Joinery and Building Trades Award 2020 ;*
- (p) Labour Market Assistance Industry Award 2020 ;*
- (q) Local Government Industry Award 2020 ;*
- (r) Manufacturing and Associated Industries and Occupations Award 2020 ;*
- (s) Marine Towing Award 2020 ;*
- (t) Medical Practitioners Award 2020 ;*
- (u) Nurses Award 2020 ;*
- (v) Port Authorities Award 2020 ;*
- (w) Ports, Harbours and Enclosed Water Vessels Award 2020 ;*
- (x) Rail Industry Award 2020 ;*
- (y) Social, Community, Home Care and Disability Services Industry Award 2010 ;*
- (z) Stevedoring Industry Award 2020 ;*
- (aa) Supported Employment Services Award 2020 ; and*
- (bb) Water Industry Award 2020 .*

- 4.4** *This award covers any employer which supplies labour on an on-hire basis to State public sector employers in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. Clause 4.4 operates subject to the exclusions from coverage in this award.*
- 4.5** *This award covers employers which provide group training services for trainees to State public sector employers and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. Clause 4.5 operates subject to the exclusions from coverage in this award.*
- 4.6** *This award does not cover:*
- (a) employees excluded from award coverage by the Act ;*
 - (b) employees who are covered by a modern enterprise award or an enterprise instrument (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees; or*
 - (c) employees who are covered by a State reference public sector modern award or a State reference public sector transitional award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.*
- 4.7** *Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.*

NOTE: Where there is no classification for a particular employee in this award it is

possible that the employer and that employee are covered by an award with occupational coverage.

E Victorian State Government Agencies Award 2015 ('VSGA')

14. The *Victorian State Government Agencies Award 2015* is a State reference public sector modern award⁷. The award is almost in identical terms to the SGA. All modern awards include an exclusion in the same terms as clause 4.5 of the SGA. This clause means that if an employer is a state reference public sector employer no other modern award can cover them.

15. Section 168E(4) defines a State reference public sector employer:

(4) A *State reference public sector employer* is an employer:

(a) that is a national system employer only because of section 30D or 30N; and

(b) that is a State public sector employer as defined in section 30A or 30K.

16. Relevantly Victoria's referral occurred before 1 July 2009, therefore s30A applies. *State public sector employer* is defined as:

State public sector employer, of a State, means an employer that is:

(a) the State, the Governor of the State or a Minister of the State; or

(b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(c) a body corporate in which the State has a controlling interest; or

(d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(e) any other employer in the State of a kind specified in the regulations; and includes a holder of an office to whom subsection 30E(2) applies.

17. If a Victorian arts agency employer is a state reference public sector employer the *Victorian State Government Agencies Award 2015* applies to the exclusion of all other modern awards. The *Victorian State Government Agencies Award 2015* has the following coverage clause:

5. Coverage

5.1 *This State reference public sector modern award covers an employer in relation to its employees and any of its employees as defined.*

5.2 *This award does not cover:*

(a) *employees who are covered by any other State reference public sector modern award or any employer in relation to those employees;*

(b) *employees excluded from award coverage by the Act; or*

(c) *an employer who, on 1 January 2014, was covered by an award listed in Schedule A—Excluded Awards.*

5.3 *This award completely replaces each State reference public sector transitional award, with the exception of the Excluded Awards, applying in Victoria from*

⁷ [2015] FWCFB 5194

the commencement date.

F Relevant Award for Public Sector Arts Agencies

18. Awards apply to employers and employees depending on the industry they work in and the type of job worked. Every award has information about who it covers. If an enterprise agreement applies to a particular employee, then any modern award that covers the same employee no longer applies to them. If more than one award may cover the same employer, the FWC must determine which is a relevant award for the purpose of the Better Off Overall Test (BOOT).
19. Modern awards provide the means of resolving how award coverage is resolved where an employer may be covered by more than one award. This is normally one of the sub clauses in clause 4. The relevant provision in the SGA is;

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

Classification

20. The VGSA can only cover a State reference public sector employer.
21. For an award to cover an employee, the employee must be covered by the award classification that is most appropriate to the work performed and to the environment in which the employee normally performs the work. Even if it is arguable that a public sector arts agency is covered by awards in addition to the SGA, the environment in which the employee works in each of the arts agencies is the public sector.
22. At 4.9 the Discussion Paper sets out the coverage of the Local Government Industry Award 2020. The commentary notes that it is an industry award covering all the activities of local government entities. Its classification structure is broad:

[53] The classification structure in the award is broad and includes levels 1 to 11. Level 1 covers entry level employees with minimal experience and qualifications and Level 11 positions are those with a management focus such as senior executive officers (but not a chief executive officer) with overall responsibility and accountability for a number of significant functions. The classifications include a variety of tasks including management work, clerical and administrative work, professional positions including project management and technical work.

[54] Curators, managers and directors employed in galleries or museums controlled by local government entities may be covered by this award.

[55] It is also possible that these roles in other public galleries and museums may be covered by other awards applying to the public sector, such as the *Australian Government Industry Award 2016* or the *State Government Agencies Award 2020*.

23. In our view this applies equally to the SGA. The SGA is an award with a classification structure capable of covering all the roles undertaken by public sector Arts Agencies. The award contains streams with generic descriptors for the work performed under the award. The streams are:

- Administrative Stream

- Technical Stream,
- Professional Stream, and
- General/Field work stream⁸.

24. Unlike occupationally specific awards the descriptors used are generic and broad. Given the number of agencies and occupations potentially covered by the SGA it is not possible to refer to specific job titles. The mere fact the SGA does not describe particular roles nor contain indicative duties does not mean that its classification structure does not cover the work performed by all employees of the arts agencies.

Environment

25. The relevance of environment in which work is performed was considered by the Full Bench of the Fair Work Commission in *Construction, Forestry, Mining and Energy Union v B J Jarrad Pty Ltd* [2013] FWCFB 8740:

[37] Although the On-site Award may have more specific descriptors than the Plumbing Award for some of the tasks performed by the Company's employees, this does not mean that it should be concluded that the relevant employees do not fall within the more general classification definitions in the Plumbing Award. It may be that the work performed by plant operators and general labourers employed by the Company may be covered by both awards. This is not an uncommon position in relation to civil construction works and, in this regard, we note that clause 4.2 of the On-site Award makes specific provision to avoid overlapping coverage (see also clause 4.8)

[38] Clause 4.2 of the On-site Award provides that "[w]ithout limiting the generality of the exclusion, this award does not cover employers covered by: ... the *Plumbing and Fire Sprinklers Award 2010*". Given the finding that the Company is covered by the Plumbing Award, it follows that the On-site Award does not cover the Company. In these circumstances, it is not necessary to consider the operation of clause 4.6 of the Plumbing Award and clause 4.8 of the On-site Award and, in particular, which award contains the classifications "most appropriate to the work

performed by the employee[s] and the environment in which the employee[s] normally [perform] the work". However, we note that on the evidence in the present matter the plant operators and general labourers are employed by a plumbing contractor and that their work is generally performed in teams under the direction and control of a qualified plumber and as part of plumbing works or works associated with plumbing works. These considerations would tend to support a conclusion that the Plumbing Award is the most appropriate award to cover the relevant workers employed by the Company.

26. *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 (28 February 2014) is another case where the "substantial character" of the business was considered⁹.

G Do other awards cover the public sector Arts Agencies?

27. CPSU submits that either the *State Government Agencies Award 2020* [MA000121] ["SGA"] or in limited circumstances the *Victorian State Government Agencies Award*

⁸ SGA clause 12

⁹ At para 158

2015 are the only modern award for public sector arts agencies. Arts agencies are State public sector employers, they are incorporated bodies established for a public purpose by or under a law of a State within the coverage of the SGA. The classification structure within the SGA can accommodate all relevant employees and the environment of the employees employed “for the purposes of” the constitutive Acts is a unique and separate from other similar types of employment in the public sector. This argument is set out below.

28. In our view the SGA, and VGSA, cover all activities of the public sector employer. It has the same status in the state public sector as the Local Government Industry Award 2020 does in relation to all activities of a local government and associated corporations. The Discussion paper at 4.9 sets out this view in relation to that award.
29. A number of awards have been identified as covering the arts and culture sector including Amusement, Events and Recreation Award 2020 [MA000080] (AER Award)
30. The coverage of the Amusement, Events and Recreation Award 2020 [MA000080] (AER Award) is in clause 4:

4. Coverage

[Varied by PR743444]

4.1 *This industry award covers employers throughout Australia in the amusement, events and recreation industry and their employees in the classifications set out in this award to the exclusion of any other modern award.*

4.2 *Definition of amusement, events and recreation industry*

(a) *Amusement, events and recreation industry means the operation of:*

(i) *leisure and recreation facilities and centres;*

(ii) *sporting, exhibition, convention and amusement complexes;*

(iii) *theme parks;*

(iv) *heritage, tourism and cultural centres;*

(v) *museums and galleries;*

(vi) *zoos, animal parks and aquariums;*

(vii) *agricultural and horticultural shows;*

(viii) *carnivals and amusement parks;*

(ix) *ten pin bowling venues;*

(x) *go-kart racing venues;*

(xi) *amusement arcades, including video game and pinball parlours; and*

(xii) *golf facilities including but not limited to golf clubs, on-course and off-course golf shops and driving ranges.*

(b) *For the purpose of clause 4.2(a) , theme parks means locations or enterprises operating attractions or amusements (whether indoor or outdoor) open to the public through either paid or free admission.*

(c) *For the purpose of clause 4 , the amusement, events and recreation industry also includes:*

(i) *employers engaged in the supply, preparation, marking out, fabrication, installation, erection or dismantling of exhibition stands or associated componentry for the trades and public promotions industry;*

(ii) *the provision of services within the primary venue such as photographic services, the sale of food, beverages and merchandising;*

(iii) *activities undertaken by an employer covered by this award which are ancillary to the conduct of the primary venue, such as road or water*

transport at, to or from, or away from, the primary venue, sightseeing tours, travel arrangements, and wildlife research, conservation and collection conducted away from the primary venue; and

- (iv) golf facilities including but not limited to golf clubs, on-course and off-course golf shops and driving ranges.

[4.3 - 4.6 omitted].

4.7 This award does not cover:

- (a) an employee excluded from award coverage by the Act ;
- (b) employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees; or
- (c) employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

31. The AER award is primarily derived from the former *AWU Theme Park and Amusement Award 2001*. Its industry comprises for profit business. Inclusion of the words “museums and galleries” or “exhibition, convention and amusement complexes” does not in our view establish coverage for public institutions such as the arts agencies who operate under a statutory framework for public purposes.

32. In its decision to make the AER award on 4 September 2009 the Australian Industrial Relations Commission included the following commentary (footnotes omitted).¹⁰

Entertainment and broadcasting industry (other than racing)

Amusement, Events and Recreation Award 2010

[91] We have not included any provisions concerning the interaction of this award with local government or State bodies. These are matters that will be dealt with at a later stage.

[92] A number of employers raised concerns about the penalty rates applicable under the exposure draft. These have been altered to a degree to better reflect the provisions of the *AWU Theme Park and Amusement Award 2001*¹⁶ upon which the modern award is largely based. A number of the employers who raised concerns about the penalty rates are currently party to enterprise awards. These issues can be revisited at the time those awards are modernised.

[93] We have decided not to include the coverage of the *Theatrical Employees (Showmen’s Guild) Award 2002*¹⁷ in the modern award. The current conditions under that award are sufficiently different to warrant a separate award. A modern award, which we shall tentatively title the Travelling Shows Award 2010, will be considered as part of Stage 4.

¹⁰ [2009] AIRCFB 826

H Conclusion

33. All the Arts Agencies are State public sector employers, that are incorporated bodies established for a public purpose by or under a law of a State and are therefore within the coverage of the SGA.
34. All employees within the Arts Agencies are employed for the public purposes of the legislation under which those agencies are constituted.
35. All employees who will be the subject of the agreements are capable of being classified under the SGA.
36. The SGA should be the only “relevant modern award” for the purposes of assessing the BOOT at the test time under s193.
37. The employees work in a State Government Agency not in the Amusement, Events and Recreation Industry.
38. No award classification outside the SGA is appropriate to the work performed by the employees of the Arts Agencies as the public sector environment where the employees normally perform work including the public purposes for which they are employed is unique.