

**MODERN AWARDS REVIEW 2023-24  
(AM2023/21)**

**SUBMISSION COVER SHEET**



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**Modern Award Review Stream:**

Arts and Culture:     x

Job Security:           

Work and Care:         

Usability of awards:   

**How to prepare a submission**

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

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LIVE  
PERFORMANCE  
AUSTRALIA

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Modern Awards Review 2023-24  
Arts and Culture Sector  
(AM2023/21)

**Live Performance Australia Submission**

## Modern Awards Review 2023-24

### Arts and Culture Sector

(AM2023/21)

### FAIR WORK COMMISSION

#### Live Performance Australia Submission

##### A. Introduction

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1. The Australian Entertainment Industry Association trading as Live Performance Australia (**LPA**) welcomes the opportunity to make submissions on the Modern Awards Review 2023-24: Arts and Culture Sector (**Review**) conducted by the Fair Work Commission (**Commission**).
2. This submission outlines some key issues that LPA considers should be addressed as part of the review and responds to the relevant questions posed in the Discussion Paper.<sup>1</sup>
3. As LPA is the peak employer body for Australia's live performance industry, this submission focusses on the live performance industry and *Live Performance Award 2020*.
4. LPA does not propose any changes to modern award coverage at this stage of the Review. However, we intend to respond to any specific submissions or proposals that arise throughout the consultation process in respect of the live performance industry and make submissions in reply as required.

##### B. Issues

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5. The Commission has set the key issues to be considered by the Review including existing modern award coverage and minimum standards for the arts and culture sector, including potential coverage gaps, in line with the Government's National Cultural Policy (**Revive**).<sup>2</sup>

##### Live Performance Award Coverage

6. From the outset the Discussion Paper frames its examination of the arts and culture sector around Pillar 3 of *Revive*, *Centrality of the Artist*, noting that its strategic objective is to support artists as workers and celebrate them as creators.<sup>3</sup>
7. *Revive* emphasises the need for "cultural and creative practitioners" to receive fair pay and conditions.<sup>4</sup>

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<sup>1</sup> Fair Work Commission, Modern Awards Review 2023-24 – Arts and Culture Sector (Discussion Paper, 6 November (**Discussion Paper**)).

<sup>2</sup> Justice Hatcher, *Fair Work Commission*, President's Statement, Modern Awards Review 2023-24 (14 September 2023 [3](4); Modern Awards Review 2023-24 (AM2023/21) [\[2023\] FWC 2899](#) at [2] .

<sup>3</sup> Discussion Paper at [8], p. 7.

<sup>4</sup> Commonwealth of Australia, [Revive: a place for every story, a story for every place](#) (30 January 2023) at p.53.

8. Therefore, LPA submits that in the Review any consideration of the coverage of the live performance industry and the *Live Performance Award 2020*:
  - a) be restricted to occupations that can be defined or can be categorised as “creative practitioner” or “artist”; and
  - b) this excludes examination of production and support staff as defined by the *Live Performance Award 2020*,<sup>5</sup> or any other occupation that is ancillary to the actual artistic creation of an artwork or live performance itself.
9. LPA submits that occupations which satisfy the criteria of “creative practitioner” or “artist” are covered by the *Live Performance Award 2020* under the following parts:
  - a) Part 5: Performers and Company Dancers
  - b) Part 6: Musicians
10. Therefore, the identification, if any, of coverage gaps, should be limited to an examination of those Parts.

#### **Minimum Standards**

11. The *Live Performance Award 2020* sets appropriate minimum standards for the live performance industry.
12. The Discussion Paper does not present any evidence that any variation is needed to minimum standards.

### **C. Discussion Paper Questions**

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#### **Chapter 2 – The Arts and Culture Sector**

**(1) Are there particular 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?**

13. LPA’s submission focusses on the live performance industry, identified at paragraph [11] of the Review as *Performing Arts Activities*.
14. LPA submits that the current award coverage in the live performance industry is sufficient, and minimum standards in the *Live Performance Award 2020* meet the modern awards objective.<sup>6</sup>
15. Therefore, while it is appropriate that the live performance industry should be included in the review it does not require a significant investigation.

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<sup>5</sup> *Live Performance Award 2020*, cl 2; Part 8; and Schedule A.

<sup>6</sup> *Fair Work Act 2009* (Cth) s 134.

**(2) Are there particular industries or occupations that should be added or removed from our consideration of the arts and culture sector for the purpose of the Review more broadly?**

16. Occupations listed in the Discussion Paper at paragraph [11] that should be removed include:
- a) Artistic Directors – it is clear that they are excluded from award coverage (see paragraphs 25, 26, 39 and 40 below).
  - b) Choreographers – it is clear that they are excluded from award coverage (see paragraphs 41-43 below).
  - c) Composers – are covered by the *Live Performance Award 2020* (see paragraphs 44-47 below).
  - d) Music Director – is covered by the *Live Performance Award 2020* (see paragraphs 48-52 below).
  - e) Arts Administrators – do not satisfy the criteria of “creative practitioner” or “artist”.
  - f) Performing Arts Technicians – do not satisfy the criteria of “creative practitioner” or “artist”.

**Chapter 3 – What is modern award coverage?**

**(3) If advocating for a new award to address coverage gaps in the arts and culture sector, how is it proposed that such an award defines its coverage? For example, would the award be expressed to cover employers or employees in an industry or employees in particular occupations and their employers, or both?**

17. LPA submits that the *Live Performance Award 2020* provides appropriate and extensive coverage for employees in the live performance industry.
18. It is LPA’s view that the Commission should not recommend the creation of a new modern award that covers employers or employees that perform work in the live performance industry.

**(4) Are there any responsive views addressing the content in Chapter 3?**

19. No. Chapter 3 sufficiently sets out the key principles concerning modern award coverage, application and interpretation.

**Chapter 4 – Modern Awards with possible coverage in the arts and culture sector**

**(5) Are there employees in the arts and culture sector that may be covered by an award that has not been included in this Chapter?**

20. LPA has not identified any relevant employees in the live performance industry that may be covered by an award, that have not been included in Chapter 4 of the Discussion Paper.

**(6) Are there employees performing work of a similar nature to the work performed in the arts and culture sector that are not currently covered by an award but should be?**

21. This question seems to consider employees performing work outside the arts and culture sector.
22. The scope of this Review should not extend beyond the employees who work in the arts and culture sector.

**Chapter 5 – Potential gaps in award coverage of the arts and culture sector**

**(7) Are there any occupations in the arts and culture sector not covered by a modern award?**

23. LPA is not aware of any relevant occupations in the live performance industry that are not covered by a modern award in addition to those already covered by the *Live Performance Award 2020* or identified in the Discussion Paper.

**(8) Are there any industrial contexts in which occupations, such as painter, are engaged that fall outside current award coverage?**

24. LPA is not aware of any other industrial contexts in which relevant occupations fall outside coverage of the *Live Performance Award 2020*.

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

25. Yes. LPA agrees with this view in respect of artistic directors in the live performance industry.
26. Artistic Directors are excluded from award coverage and the *Miscellaneous Award 2020* due to s 143(7) of the FW Act.

**(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?**

27. As set out in the Discussion Paper,<sup>7</sup> modern award coverage is limited to national system employees and any employees who are not exempt from coverage by s 143(7) of the FW Act.

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

28. LPA submits that the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) (**Closing Loopholes Bill**) is outside the scope of this review.

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<sup>7</sup> Discussion Paper at [77], [78] at p.31.

29. The Closing Loopholes Bill is still being debated in the Federal Parliament. It is not certain that it will either pass at all or pass with amendments.
30. If the Closing Loopholes Bill is passed, the sections identified as relevant in the Discussion paper will not commence in their final form until 1 July 2024,<sup>8</sup> which is after the Review is scheduled to be completed.<sup>9</sup>
31. Therefore, LPA submits that it is not appropriate for the Review to consider legislation that is still being debated in the Federal Parliament.

**(12) Is digital platform work common within the arts and culture sector?**

32. Digital platform work is not common in the live performance industry.
33. LPA notes the Discussion Paper references the Closing Loopholes Bill's proposal that the Commission has power to set minimum standards for digital platform work. As set out paragraphs 28 to 31 above, LPA submits that it is not appropriate for the Review to consider legislation that is still being debated in the Federal Parliament.

**Chapter 6 – Changing modern award coverage**

**(13) Are there any relevant occupations that were covered by pre-reform awards that are not currently covered by a modern award?**

34. LPA has not identified any relevant occupations.

**(14) Are any of the occupations identified as possible gaps in award coverage in this paper, or by the parties, occupations that could not be covered by awards because of section 143(7)?**

37. Under s 143(7) of the FW Act a modern award cannot cover an employee:
  - a) who, because of the nature or seniority of their role, have traditionally not been covered by awards;<sup>10</sup> or
  - b) performed work that is not of a similar nature to work that has traditionally been regulated by such awards.<sup>11</sup>
38. Relevant to the live performance industry the Discussion Paper identifies four occupations that may not be covered by a modern award, or may be covered by the *Miscellaneous Award 2020*:
  - a) artistic director;
  - b) choreographer;
  - c) composer; and
  - d) music director.

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<sup>8</sup> [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#).

<sup>9</sup> Modern Awards Review 2023-24 (AM2023/21) [\[2023\] FWC 2481](#) at [3].

<sup>10</sup> *Fair Work Act 2009* (Cth), s 143(7)(a).

<sup>11</sup> *Fair Work Act 2009* (Cth), s 143(7)(b).

### **Artistic Director**

39. As set out above at paragraph 16 above. LPA agrees that an Artistic Director in the live performance industry has a high level of managerial responsibility.
40. Therefore, Artistic Directors are excluded from award coverage and the *Miscellaneous Award 2020* due to s 143(7)(a) of the FW Act because of the nature and seniority of their role, they have traditionally not been covered by awards.

### **Choreographer**

41. LPA agrees that choreographers are not covered by a modern award and have not been historically covered by awards.
42. Similar to an Artistic Director a choreographer has a high level of skill and managerial responsibility.
43. Therefore, choreographers are excluded from award coverage and the *Miscellaneous Award 2020* by s 143(7)(a) and 147(b) of the FW Act because of the nature and seniority of their role, they have traditionally not been covered by awards, and the nature of the work they perform has not been traditionally covered by awards.

### **Composer**

44. LPA submits that a composer as defined by its historical award coverage, is covered by the *Live Performance Award 2020*.
45. The *Musicians Award* created by the Tasmanian Industrial Relations Commission applied to any person who receives remuneration for “musical services”, including “composers of music”.<sup>12</sup>
46. *Live Performance Award 2020*, defines “musician” to include “any other person employed to provide musical services.”<sup>13</sup>”
47. Therefore, a composer is not excluded from award coverage by s 143(7) and is currently covered by the *Live Performance Award 2020*.

### **Music Director**

48. LPA submits that a music director as defined by its historical award coverage, is covered by the *Live Performance Award 2020*.
49. Historically, the occupation or job-title conductor-leader or conductor has been interchangeable with musical director. For example:
  - a) cl 5 of the *Musicians' General (State) Award 1985*, defines "Musical Director" to mean a musician required to perform the duties of a musical director,<sup>14</sup> and

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<sup>12</sup> [Musicians Award](#), cl 2(b).

<sup>13</sup> [Live Performance Award 2020](#), cl 2.

<sup>14</sup> [Musicians' General \(State\) Award 1985](#).



- b) cl 6 of the *Musicians General Award 1998*, defines “Conductor-leader” to mean an employee who plays, supervises and directs the orchestra in its duties.<sup>15</sup>
50. However, a different definition is set out in the *Musicians State Award 2002 (Qld)* at cl 1.6.6:
- a) “Conductor” or “Musical Director” means a person who conducts only and does not play an instrument in the Orchestra.<sup>16</sup>
51. The *Live Performance Award 2020* covers “conductors” and “conductor-leaders” as follows
- a) Clause 2 – Definitions of the *Live Performance Award 2020* defines musician to include conductors; and
- b) Schedule A of the *Live Performance Award 2020* classifies a conductor-leader at the highest classification, Live performance employee level 15.<sup>17</sup>
52. Therefore, a Music Director is not excluded from award coverage by s 143(7) and is currently covered by the *Live Performance Award 2020*.

**(15) For the occupations identified as gaps in award coverage in this paper, or by the parties, which awards could be varied to close the gap?**

53. LPA has not identified any coverage gaps in the live performance industry.
54. Therefore, LPA submits that no variations to any modern award are required.

**(16) Are there legislative provisions or significant decisions pertinent to the Commission’s consideration of the arts and culture sector in the Review?**

55. LPA is not aware of any legislative provision or significant decisions pertinent to the Commission’s consideration of the arts and culture sector in this Review.

**Chapter 7 – Minimum entitlements in awards**

**(17) Are there any responsive views addressing the content in chapter 7?**

56. LPA submits that no variations are necessary to address minimum entitlements in the live performance industry.

***Minimum wages***

57. LPA submits that adequate minimum wages are provided under the *Live Performance Award 2020*, when considering *work value reasons* at s 157(2A) of the FW Act.

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<sup>15</sup> [Musicians General Award 1998](#).

<sup>16</sup> [Musicians State Award 2002 \(Qld\)](#).

<sup>17</sup> [Live Performance Award 2020](#).

58. The lowest classification under the *Live Performance Award 2020* for a “cultural or creative practitioner” is, Live Performance Employee level 7 which is, Company Dancer Level 1 and Performer Category 1 Grade 1. The minimum weekly rate for level 7 is \$1,085.60.<sup>18</sup>

***Minimum engagement periods***

59. The minimum engagement periods under the *Live Performance Award 2020*,<sup>19</sup> are appropriate.
60. Often musicians, performers and company dancers are not required to perform work for the full 3 or 4-hour minimum engagement period or call. This is because a particular production or performance (including time for warming up or dressing up and down) may be less than 3 or 4 hours.
61. In addition, the minimum engagement period is consistent with other awards.<sup>20</sup>

***Ordinary hours of work***

62. The ordinary hours of work under the *Live Performance Award 2020*,<sup>21</sup> are appropriate given the nature of the work performed in the live performance industry.



**Shay Minster**

**Director, Workplace Relations**

**Live Performance Australia**

**4 December 2023**

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<sup>18</sup> [Live Performance Award 2020](#), cl 11 and Schedule A.

<sup>19</sup> Discussion Paper at [139], p.61 Table 3.

<sup>20</sup> See for example: [Clerks Private Sector Award 2020](#), cls 10.5, 11.4 (3 hours); [Hospitality Industry \(General\) Award](#) cl 11.3 (2 hours).

<sup>21</sup> Discussion Paper [146], Table 4, p. 65.