

Modern Award Review – Arts and Culture Sector (AM2023-21)

Submission of the ACTU, MEAA and PA

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Introduction

The Fair Work Commission (**FWC**) is currently reviewing modern awards, pursuant to a request from the Minister for Employment and Workplace Relations.

On 6 November, the FWC released a discussion paper (**Discussion Paper**), as part of the review, relating to the arts and culture sector.

This submission is the combined submission of the Australian Council of Trade Unions (**ACTU**), Media, Entertainment & Arts Alliance (**MEAA**) and Professionals Australia (**PA**) in response to the Discussion Paper and the questions therein.

Response to Discussion Paper Questions

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?

We are of the view that the review, in relation to the arts and culture sector should focus on the following categories of workers generally:

- Workers who are not covered by modern awards, but should be;
- Workers for whom award coverage is unclear, ambiguous or inconsistent, for example:
 - workers who are covered by modern awards for part of the work they do, but not covered at other times;
 - workers who may be covered by a modern award, but might be better covered by a different award (or where there is doubt as to which award covers the worker)

A pertinent example of this are visual arts workers who due to that sub-sector’s unclear and/or fragmented modern award coverage may find themselves covered by an award for some working engagements but may not be covered when performing different work for the same employer, or the same work for a different employer.

There are a number of discreet roles (listed below) in the arts and culture sector more broadly which currently lack modern award coverage, or where such coverage is unclear or inadequate, which should attract the Commission’s attention as part of this Review.

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?

See other answers provided.

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?

The diverse nature of the arts and culture sector is such that adopting one of these approaches over another would inevitably lead to coverage gaps and inconsistencies. For example, coverage defined by reference to the employer would create a regulated and an unregulated sphere. Likewise, the diverse and changing nature of the sector could mean that if coverage is defined only according to occupations, the safety net will fail to catch some workers entirely and may only partially capture some workers.

So as to ensure the broadest possible coverage, and ensure the current gaps are minimised, our view is that award coverage should be expressed both as covering employers in an industry and particular occupations.

We would suggest a coverage that is defined to include:

- Certain employers, described by attribute, industry, sub-industry etc.;
- Specified occupations;
- Cohorts of workers defined by the skills and qualifications they possess and/or the tasks they perform.

4. Are there any responsive views addressing the content in chapter 3?

We note that regardless of award coverage, underpayment of wages or other entitlements is not uncommon in the arts and culture sector. For example, in a recent survey of MEAA's orchestra musician members, 40% of respondents reported they received less than the *Live Performance Award* call rates at least some of the time they worked.

Chapter 4 - Modern awards with possible coverage in the arts and culture sector

5. 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?

Dance teachers are generally engaged – where they are engaged as employees – under the *Fitness Industry Award*, that award covering the fitness industry (including the “operation or provision of” – at 4.2(i) “dance centres”).

We are of the view that this award does not appropriately capture the kind of work that educators in the field of dance perform, and that it would more appropriately be dealt with via the *Live Performance Award*.

In addition, the *Fitness Industry Award* does not account for these workers’ training or professional skill (we note they are paid the same as aerobics instructors with very limited training).

Various roles working in the visual arts, craft and design are not clearly covered by a modern award but in our view should be:

- Access Coordinator
- Advisory
- Artists
- Exhibitions and Collections staff
- Conservators and Registrars
- Curators
- Educators and Public Programs
- First Nations (identified roles)
- Front of House and Visitor Services
- Gallery Assistants
- Gallery Production and Installation
- Marketing and Communications
- Membership Managers
- Studio Assistants, Coordinator and Managers
- Volunteer Coordinators

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?

Various roles working in screen and broadcasting production are not covered by a modern award but in our view should be:

- Audio book recording;
- Choreographer;
- Intimacy Coordinator;
- Cultural and Cultural safety consultant;
- Safety Coordinator; and
- Chaperones.

Various roles working in live performance are not covered by a modern award but in our view should be:

- Music teachers/educators;
- Clowns and Birthday Party entertainment;
- Automation, rigging, and fly systems technician;
- Broadcast specialists;
- Drone operators (usually lighting, also camera/streaming);
- Intimacy Coordinator;
- Choreographer;
- Cultural and Cultural Safety Consultant;
- Chaperones; and
- Festival and events staff.

Various roles working in video game development are not covered by a modern award but in our view should be:

- Designers;
- Artists;
- Animators;
- Writers;
- Audio workers;
- Producers

In relation to Audio book recording (above) it does not appear to be covered by the *Broadcasting, Recorded Entertainment and Cinemas Award*, while commercial voiceover work has historically been considered covered.

Moreover, it seems doubtful that gaming or other voice-over work would be covered by the award either.

Ideally, a clear classification title would be inserted into the award, covering all voiceover work.

While some festival and events staff (see above) may be currently covered by the *Amusements, Events and Recreation Award*, festival staff at live performance festivals e.g. music festivals, would be more clearly covered by the *Live Performance Award*. At the moment, their coverage is unclear.

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

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

See answer to Question 6.

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

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

We agree that certain workers such as an artistic director or a media producer would not be covered by the Miscellaneous Award. We note:

- Clause 4.2 states that managerial and professional employees are not covered. An artistic director is a highly skilled and professional occupation that sometimes has managerial responsibilities and media producers are professional employees.
- Clause 4.1 provides that this award covers employers and their employees in classifications listed in Clause 15.
- Clause 15 does not provide specific descriptions that relate to the above classifications.

- Artistic Directors are normally employed by live theatre companies who would be possibly covered by the *Live Performance Award*.
- Media Producers can be employed by various types of organisations in their communications departments. They could be covered by the *Journalists Published Media Award* or *Broadcasting, Recorded Entertainment and Cinemas Award*, or the *Live Performance Award*, as the case may be.

We note that on occasion employees working in the live performance area (including music teachers/educators not engaged at a school) are seen by employers as being covered by the *Miscellaneous Award*, and engaged as such. We note that the *Miscellaneous Award* provides for different penalties, including a 2 hour minimum shift for casual employees, compared to the *Live Performance Award*'s 3 hour minimum.

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?

In MEAA's experience a considerable number of workers in the arts and culture sector are engaged indirectly (i.e. not as employees). For example, around 25% of MEAA's media section members are engaged as freelancers and the majority of MEAA's musician members are engaged as "gigging" (non-employee) musicians.

Voice over artists in the commercial sector also tend to be engaged as independent contractors, and are often paid under MEAA's Commercial Voiceover Industry Rate, a set of recommended rates for the industry.

On this basis, some of the groups of workers MEAA has identified – including music and dance educators, may often not be capable of having an award apply to them (as opposed to being covered) due to them often being engaged as independent contractors. The same is true of some types of work in the visual arts sub-sector.

However, we also note that many workers in the arts and culture sector may work across various roles and engagements such that they would, or should, be covered by modern awards for some of the work that they perform.

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

While we support the proposed minimum standard setting powers for the Fair Work Commission (“FWC”) regarding “employee-like” workers in the Bill, we believe the Bill should extend its application of “employee like” provisions to all “employee like” workers regardless of whether they are engaged by a digital platform or not.

MEAA’s membership includes people working in television, radio, theatre, film, entertainment venues, sporting stadia, and as journalists, actors, dancers, cartoonists, photographers, and musicians.

These creative and media industry workers include some of the economy’s original gig workers. For example, musicians who perform live commonly ply their craft at an assortment of live music venues across wide geographic areas. There are considerable gaps as to when (if at all) many of these musicians are paid for bumping-in, bumping out and rehearsals and they are rarely engaged as employees. Similarly, freelance journalists are engaged by news media companies on a piece-work basis and voice over artists are generally engaged as contractors.

These workers invariably have low bargaining power and lack employment security and are often subject to commercial or financial risk and a significant degree of control by the hirer over their work.

While the Bill provides welcome acknowledgment of some gig workers it unfortunately limits its scope to those who are engaged via a digital platform – e.g. uber and Deliveroo type arrangements. This leaves non-digital platform workers – who do not have a high degree of bargaining power, are not comparatively well remunerated and do not have a significant degree of authority over their work – without any guaranteed minima. This group of non-digital platform workers includes many in the arts and culture sector.

While the Bill provides a number of other significant reforms – particularly around labour hire and sham contracting, in our experience these are not as prominent as other features of the sector as far as methods of indirect engagement of workers are concerned (notwithstanding that sham contracting does occur in the sector, for example in the visual arts). We also note, for completeness, that the FWC’s new unfair contracts jurisdiction may assist some workers in the sector to a limited extent.

Therefore, we see the Bill as having limited impact in the arts and culture sector.

12. Is digital platform work common within the arts and culture sector?

While engagement of arts workers – loosely defined – on digital platforms such as freelancer.com and Star Now - is not uncommon, our initial assessment is that there is very little, if any work performed through digital platforms in the arts and culture sector that would enliven the employee-like provisions of the Closing Loopholes Bill.

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?

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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)?

No

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?

Generally, we are of the view that extending the coverage of the Miscellaneous Award would not be an appropriate or enduring solution.

Some of the gaps identified in the paper that MEAA has identified could be addressed through the varying of the *Live Performance Award* (in the case of gaps with live visual and audio roles) and the *Broadcasting, Recorded Entertainment and Cinemas Award* (regarding broadcasting, screen and recorded roles).

For visual artists, we are of the view that while some awards may appropriately be extended in relation to some occupations, a preferable solution is the creation of a new award.

16. Are there any other legislative provisions 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?

See other answers provided.

