

2023-2024 FWC AWARD REVIEW

ARTS AND CULTURE SECTOR

31 January 2024

REPLY SUBMISSION

**BUSINESS
NSW**



**AUSTRALIAN
BUSINESS
INDUSTRIAL**

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.

INTRODUCTION

1. This submission seeks to reply to aspects of the various submissions made by other stakeholders as part of the Modern Awards Review 2023-24 insofar as it relates to the arts and culture sector (the **Review**).
2. This submission should be read in conjunction with our initial submission filed on 5 December 2023, and the oral submissions made throughout the Consultations.

RESPONSES TO VARIOUS ISSUES RAISED BY OTHER STAKEHOLDERS

3. At the outset, it is apparent that there is no uniform definition of the “arts and culture sector” or the types of work, businesses, or categories of employees that fall within the sector. Stakeholders will naturally have different interpretations and understandings of what might be considered to fall within the construct of the “arts and culture sector”.
4. To the extent that certain stakeholders are advocating for a new modern award to be created to apply to the “arts and culture” sector, there would need to be some precision around how the sector is defined and the types of employers and employees that might fall into the scope of such a modern award.
5. This is particularly so given there are a number of existing modern awards that pick up a range of employers and employees who might typically be considered to be in the arts and culture sector or employing “artists”. For example, we refer to (among others):
 - (a) The *Live Performance Award 2020* which covers employers and their employees in the live performance industry;
 - (b) The *Amusement, Events and Recreation Award 2020* which covers a range of businesses operating museums; galleries; heritage, tourism and cultural centres; exhibition, convention and amusement complexes; theme parks; carnivals and amusement parks (among others);
 - (c) The *Travelling Shows Award 2020* which covers employers operating travelling shows;
 - (d) The *Broadcasting, Recorded Entertainment and Cinemas Award 2020* which covers employers and employees working in television, film and radio (and other audio/visual content) broadcasting, production, distribution and sales;
 - (e) The *Book Industry Award 2020* which covers employers in the book industry and their employees (including editors, proof-readers, publicists, etc.); and

- (f) The *Journalists Published Media Award 2020* which covers the published media industry.
6. Given the existence and longstanding operation of the above modern awards (and others), any proposal to create a new modern award would need to carefully define the part/s of the “arts and culture” sector that it is attempting to regulate so as to avoid issues of dual coverage, interaction between instruments, inconsistency of entitlements and confusion.
 7. Having regard to the various submissions made by stakeholders in this review process, we are not presently convinced that:
 - (a) there is any significant gap/s in coverage in respect of workers in the arts and culture sector;
 - (b) the existing modern awards applying to various parts of the “arts and culture” sector are not fit for purpose or require any significant amendment; or
 - (c) there is any material need to create a new modern award to rectify any such perceived gaps in coverage.
 8. Our reasoning for this view is set out below.

PERCEIVED GAPS IN COVERAGE

9. A number of the submissions have sought to identify specific occupations for which it is contended “fall through the cracks” of modern award coverage. However, in most cases, upon closer examination of those occupations it has become apparent that:
 - (a) those occupations are typically undertaken by non-employees; or
 - (b) those occupations are covered by one of the existing modern awards; or
 - (c) there may be some confusion or misapplication in respect of the existing modern award system.
10. Without being critical of the participants in the Review, the reality is that many of the perceived “gaps” in coverage are not borne out when one considers the existing modern awards system.
11. Our assessment of this issue is set out as follows.
12. **Firstly**, many of the submissions made by stakeholders identify that a great many “arts workers” (to adopt a broad and loose phrase) are not employees but are rather

independent contractors, sole traders, freelancers or small business owners who produce artistic works for sale (or are commissioned by clients to do so).¹

13. Although we are not aware of any comprehensive data on this point, we anticipate that a very large number of “artists” would fall into this category of non-employees. For example, the submission of Creative Australia refers to a 2016 study of professional artists which found that 81% of practicing artists are non-employees.
14. It is uncontroversial that the modern awards system is not applicable to non-employees and so therefore any new modern award or extension to coverage of existing awards cannot address these individuals.
15. **Secondly**, in respect of “arts workers” who are employees, the various submissions tend to confirm that:
 - (a) Most major arts and culture centres are run by Federal, State or Territory governments and that employees of those establishments have their employment regulated by awards such as the State Government Agencies Award 2020, the Victorian State Government Agencies Award 2015, or potentially other awards or enterprise agreements.² Employees within the local government sector have their employment regulated by the *Local Government Industry Award 2020*.³ The effect of this is that it should be uncontroversial that public sector workers (both at the Federal, State/Territory, and local government levels) do not ‘fall through the cracks’ of award coverage.
 - (b) In respect of the private sector workforce, many arts workers are currently covered by the *Amusement, Events and Recreation Award 2020* (including, by way of example, employees of museums and galleries),⁴ the *Live Performance Award 2020*, or another modern award.
 - (c) Some “arts workers” are likely to be award-free by reference to the managerial nature of the role or their seniority.

¹ See for example the written submission of National Exhibitions Touring Support Victoria (NETS Victoria); written submission of Theatre Network Australia; written submission of the Australian Society of Authors at [2.1]; written submission of Creative Australia; written submission of Australian Writers’ Guild; written submission of MEAA at page 7; written submission of Diversity Arts Australia at page 4;

² See submission of the CPSU/SPSF Group dated 4 December 2023 at [5]-[23].

³ See submission of the CPSU/SPSF Group dated 4 December 2023 at [22].

⁴ See clause 4.2(a) of the Award.

- (d) Some “arts workers” are potentially regulated by the *Clerks - Private Sector Award 2020*, such as where the duties performed by the employee are of a clerical nature.
16. At this stage, despite the efforts of stakeholders throughout the consultation process to identify with precision which occupations they considered to fall through the cracks of award coverage, it remains unclear to us which specific cohort/s of private-sector employees fall outside the suite of existing industry and occupational awards. We have endeavoured to address this issue by reference to specific occupations in more detail below (see paragraphs 22-26 below).
17. Where a specific occupation can be properly identified as falling outside the suite of existing industry and occupational awards, there might be merit in more detailed consideration as to:
- (a) whether the role/s can or should be regulated by a modern award (as opposed to being award-free);
 - (b) whether the *Miscellaneous Award 2020* is an adequate safety net instrument for the role; or
 - (c) whether another existing award should be varied to cover the role.
18. This will require a more detailed consideration of the work performed by those employees, who their employers are (and the character/industry of their employer), the employee’s qualifications, the minimum terms and conditions appropriate to be set for those roles, and other factors such as the modern awards objective.

ADEQUACY OF EXISTING MODERN AWARDS

19. We note that a number of stakeholders have expressed the view that existing modern awards are operating appropriately and, in their view, do not require any substantial amendment. By way of example, we refer to (among others):
- (a) The written submission of Theatre Network Australia in respect of the operation of the *Live Performance Award*;
 - (b) The written submission of Live Performance Australia dated 4 December 2023 in respect of the operation of the *Live Performance Award*; and
 - (c) The written submission of Commercial Radio & Audio (CRA) in respect of the *Broadcasting, Recorded Entertainment and Cinemas Award*.

20. To the extent that the stakeholders identify that a modern award is unclear or ambiguous as to whether a particular cohort of workers fall within its coverage, we would be supportive of the relevant modern award being varied to make the position clear.
21. In some cases, there may also be merit in including certain occupational groupings into an existing modern award where such workers should be included in that award but are not. However, there should be a clear and compelling merit basis for such a change, and the implications should be carefully considered prior to any such change occurring.

SUBMISSIONS IN RESPECT OF SPECIFIC OCCUPATIONS

22. Much of the consultation process to date has focussed on certain occupations that one or more stakeholders have identified as potentially not being appropriately regulated by the modern awards system (or requiring some level of further examination).
23. To assist the Review process, we have considered the submissions of other stakeholders and have formed a preliminary view in respect of many of these occupations.
24. However, it is important to note that most of the discussion to date has been at a level of generality, with discussions being directed at broad occupations or job titles rather than real examples or specific employees. The effect of this is that:
 - (a) In most cases, for each of the relevant occupations canvassed, it continues to be unclear which businesses or organisations tend to employ those people (e.g. the character or industry of the employer is not known);
 - (b) It makes it difficult to properly consider the issue of award coverage given that an employee's modern award coverage will, to a large extent, be determined (or at least influenced) by the character of the employer; and
 - (c) Occupations or 'job titles' often do not accurately reflect the actual duties performed by employees (or there can be a significant variability in the use of role titles and the work actually done by people working in different establishments).
25. Notwithstanding the above caveats, we have considered many of the occupations under discussion in an effort to express a qualified view as to award coverage.

26. In our view, the occupations under consideration appear to fall into the following broad categories:

(a) ***Occupations which appear to be undertaken by non-employees***

- (i) Choreographer.⁵
- (ii) Artists / Public Artists.
- (iii) Curators.⁶
- (iv) Advisors.
- (v) Intimacy coordinator.

(b) ***Occupations which appear to be appropriately Award-free***

- (i) Cultural and Cultural Safety Consultant.
- (ii) Director.
- (iii) Arts Producer and Executive Producer.⁷
- (iv) Membership manager.
- (v) Studio manager.
- (vi) Business / Operations Manager.
- (vii) General Manager.
- (viii) Other managers (e.g. Development Manager, Fundraising Manager).

(c) ***Occupations which appear to be covered by existing awards***

- (i) Clowns and Birthday party entertainment (Live Performance Award or the Amusement, Events and Recreation Award).
- (ii) Automation, rigging and fly systems technician (Live Performance Award).
- (iii) Broadcast Specialists (Live Performance Award where employees are working in the live performance industry, or the Broadcasting, Recorded Entertainment and Cinemas Award).

⁵ There was also a view expressed that these employees would be award-free if they were to be employees by reason of the seniority and specialist nature of the role).

⁶ To the extent that curators are directly employed to work in independent galleries, the Amusement Award may apply to them.

⁷ In respect of employees working as producers / executive producers in the live performance industry.

- (iv) Drone operators (Live Performance Award where employees are working in the live performance industry).
- (v) Chaperones (Live Performance Award).
- (vi) Festivals and Events staff (for employees performing work in the live performance industry, the Live Performance Award).
- (vii) Dancers (Live Performance Award).
- (viii) Arts Administrators (for employees performing work in the live performance industry, the Live Performance Award).
- (ix) Arts Producer/Programmer and Associate Arts Producer / Programmer (for employees performing work in the live performance industry, the Live Performance Award).
- (x) Audio Book Recording (Broadcasting, Recorded Entertainment and Cinemas Award).
- (xi) Safety Coordinator in screen and production (Broadcasting, Recorded Entertainment and Cinemas Award).
- (xii) Education and Public Programs Officer / Manager (Amusement, Events and Recreation Award).
- (xiii) Conservators / Registrars (Amusement, Events and Recreation Award).
- (xiv) Exhibitions, Touring and Collections Manager / Coordinator (Amusement, Events and Recreation Award or the Miscellaneous Award).
- (xv) First Nations Art Centre Manager, Studio Coordinator / Studio Art Worker (Amusement, Events and Recreation Award).
- (xvi) Front of House / Visitor Services (Amusement, Events and Recreation Award).
- (xvii) Gallery Assistant / Attendant (Amusement, Events and Recreation Award).
- (xviii) Specialist Technician, Production and Installation (Amusement, Events and Recreation Award).
- (xix) Casual Gallery Installer (Amusement, Events and Recreation Award).

- (xx) Volunteer Coordinator (Amusement, Events and Recreation Award).
- (xxi) Executive Assistant / Administration Officer (Clerks - Private Sector Award).
- (xxii) Marketing and Communications Manager / Coordinator (Clerks - Private Sector Award, or award free depending on the nature of the role and duties being performed).

CONCLUSION

27. We trust that this submission assists the Fair Work Commission in its Review of the arts and culture sector.

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