

ACCI Reply Submission

Modern Awards Review 2023-24

Arts and Culture Sector

19 January 2024



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Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

Media Enquiries

Telephone 02 6270 8020 | Email media@acci.com.au

Canberra Office

Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600
Kingston ACT 2604

Melbourne Office

Level 3, 150 Collins Street
Melbourne VIC 3000

Perth Office

Bishops See
Level 5, 235 St Georges Terrace
Perth WA 6000

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Introduction

1. This submission seeks to reply to the submissions made by other parties in relation to the arts and culture sector stream of the Modern Awards Review 2023-24 (**Review**) conducted by the Fair Work Commission (**Commission**). This submission should be read in conjunction with our initial submission made on 4 December 2023, and oral submission made in the Commission on 20 December 2023.
2. ACCI looks forward to further participating in this process but does not propose to participate in all upcoming conferences. As a peak employer body, ACCI sees its role in these proceedings as being to assist the Commission in its consideration of relevant general principles, and their application, only. ACCI does not propose to weigh in on detailed discussions about specific occupations. Here, the Commission will be better assisted by the relevant industry association. In particular, ACCI refers to and supports the submissions of Live Performance Australia (**LPA**)¹.

Closing Loopholes Bill

3. As a preliminary matter, due to the extensive submissions made by other parties in relation to this matter, we wish to reiterate and expand upon our submissions made regarding the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) (**Closing Loopholes Bill**) at paragraphs [65]-[68].
4. The Closing Loopholes Bill should have no bearing on the Commission's final report in this stream of the Review. This is primarily because there is no certainty as to matters such as:
 - whether the proposed legislation will pass the Federal Parliament and become law;
 - if at all, *when* the proposed legislation will pass the Federal Parliament and become law;
 - whether the proposed legislation will remain in its current form unamended; or
 - what the recommendations of the Senate Education and Employment Legislation Committee conducting an inquiry into the proposed legislation will be.
5. Further, some submissions argue that the Closing Loopholes Bill should be amended to capture more workers in the arts and culture sector. It would not be appropriate for the Commission to recommend or discuss the desirability of any such amendments in its final report. The extent and scope of the Commission's jurisdiction is a matter for the Federal Parliament.
6. The Closing Loopholes Bill should not be considered during the consultations in this stream of the Review. This would be both inappropriate and a poor use of the limited timeframe afforded to conduct the Review.

¹ Live Performance Australia (LPA) Submission, Modern Awards Review, Arts and Culture Sector 4 December 2023, and Submission in Reply 19 January 2024.

Combined Union Submission

7. This section seeks to respond to the combined submissions made by the Australian Council of Trade Unions, the Media, Entertainment & Arts Alliance and Professionals Australia (collectively, the **Unions**).
8. ACCI understands from the conference on 20 December 2023, that the Unions were to provide additional detail to support their submissions prior to the next conference date of 22 January 2024. At the time this submission was lodged this further detail has not been provided.

Fragmented Coverage

9. On page 2, the Unions submit that “the review, in relation to the arts and culture sector should focus on” specified categories of workers, a “pertinent example” of which is as follows:

... 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.
10. With respect to workers who perform “the same work for a different employer” with differing award coverage, ACCI agrees with the Unions that these workers should be a focus of the Review. These situations may present opportunities to potentially simplify modern award coverage.
11. In relation to workers who are “covered by an award for some working engagements but may not be covered when performing different work for the same employer”, ACCI would respond and add to our initial submissions made in response to question (4) of the Discussion Paper with the following comments.
12. There is no doubt that some employees in the arts and culture sector may perform different types of work for the same employer. However, the extent to which this would result in award coverage “for some working arrangements” but a lack of award coverage “when performing different work for the same employer”.
13. As described by Judge Kelly in *Thompson v Arbias Ltd* [2020] FCCA 2829 [266], a “well-settled” principle applies where an employee is covered by one award when performing certain work and the covered by another award when performing different work for the same employer. In such circumstances, O’Mara J held in *Arbitration in Federated Engine Drivers and Firemen’s Association of Australasia v Maffra Co-operative Milk Products Co Ltd* (1940) 42 CAR 836 at 837 that the employee “is deemed to be covered by the award which applies to the major and substantial part of his employment”. This approach was confirmed more recently by Logan J in *Construction, Forestry, Mining and Energy Union v Anglo Coal (Callide Management) Pty Ltd* [2015] FCA 696 [35].

14. Additionally, as noted by Judge Kelly in *Thompson v Arbias Ltd* [2020] FCCA 2829 [268], the principle of major and substantial employment is not applied “merely by quantifying the time spent on particular duties”. In other words, if an employee who performs mixed duties covered by different awards, their award coverage is not determined by the work for which the employee dedicates the most time: see also *Choppair Helicopters Pty Ltd v Bobridge* [2018] FCA 325 [68] (Bromberg J).
15. Accordingly, we are unsure about the extent to which the proposition advanced by the Unions corresponds to proper treatment of the employees in relation to award coverage. Rather, it is more likely that these employees are in fact only covered by one award, despite “performing different work for the same employer”.
16. Nevertheless, any further clarification as to the specifics of these concerns would be welcomed and the law outlined above should supplement the content in chapter 3 of the Discussion Paper.

Dance Teachers

17. On page 4, the Unions submit that the existing coverage of dance teachers by the *Fitness Industry Award 2020*:

... does not appropriately capture the kind of work that educators in the field of dance perform, and that [their award coverage] would more appropriately be dealt with via the *Live Performance Award*.
18. ACCI refers to and supports the submissions made in reply by LPA on 19 January 2024.

Visual Arts, Craft and Design Roles

19. On page 4, the Unions identify fifteen roles in the visual arts, craft and design sector that “are not clearly covered by a modern award” but in their view should be.
20. ACCI has concerns about the Review focussing on many of these roles.
21. First, many of the roles identified by the Unions are clearly managerial occupations. For example, the Unions identify “Membership Managers” and “Studio ... Managers” as being “not clearly covered by a modern award”. These occupations may not be so because of the statutory exclusion in s 143(7) and therefore should be disregarded for the purposes of the Review.
22. Second, many of the roles identified by the Unions are not directly involved in artistic or creative work. Although this may not necessarily exclude them from the scope of the Review, we reiterate our initial submissions made at paragraphs [50]-[53]. In summary, the Review should focus on artists and other creative practitioners rather than ancillary occupations because of the limited timeframe in the Review and the policy basis for this stream.

Screen and Broadcasting Production Roles

23. On page 5, the Unions identify several roles in the screen and broadcasting production sector that “are not covered by a modern award” but in their view should be. Notably, in contrast to the roles in the visual arts, craft and design roles discussed above, the Unions appear to submit that these occupations are “*not covered*” by a modern award, as opposed to “*not clearly covered*” (emphasis added).
24. With respect to choreographers, we repeat our initial submissions made at paragraphs [75]-[77] which suggest that choreographers may be excluded from award coverage by s 143(7).
25. It is possible that other roles identified by the Unions are similarly excluded from award coverage by s 143(7). It is not clear that, for example, intimacy coordinators or cultural and safety consultants have been traditionally covered by modern awards and these occupations appear to be professional and/or managerial in nature.

Live Performance Roles

26. On page 5, the Unions similarly identify several roles working in live performance that “*are not covered by a modern award*” but in their view should be (emphasis added).
27. ACCI refers to and supports the submissions made in reply by LPA on 19 January 2024.

Video Game Development Roles

28. On page 5, the Unions similarly identify several roles working in video game development that “*are not covered by a modern award*” but in their view should be (emphasis added).
29. It is not clear that all of these roles are “not covered by a modern award”. The *Professional Employees Award 2020* is likely to cover several of these occupations. This is because, pursuant to clause 4.1(b), the award covers employers “throughout Australia principally engaged in the information technology industry ... and their employees who are” covered by classifications in Schedule A, which broadly covers non-managerial employees “performing ... professional information technology duties”.
30. Clause 2.3 of the award defines “information technology industry” as inclusive of “the design and manufacture of computer software”, “computer programming”, “the design, development and maintenance of online internet architecture and the facilitation of online content management”, and “activities which are incidental, ancillary or complementary” to such activities.
31. In our submission, most, if not all, of the roles identified by the Unions are likely to therefore be covered by the *Professional Employees Award 2020*.
32. In any case, it is uncertain whether employees in these roles are truly engaged in work in the arts and culture sector. It may be more appropriate to treat these employees as part of the information technology sector and therefore beyond the scope of this stream of the Review.

Miscellaneous Award

33. On page 9, the Unions submit that “extending the coverage of the Miscellaneous Award would not be an appropriate or enduring solution” for the award coverage of occupations identified as falling within a coverage gap.
34. It is not clear that any “extending” of the coverage of the *Miscellaneous Award 2020* would be necessary. It is likely that many of the identified occupations are already covered by the *Miscellaneous Award 2020*. Where they are not, they are likely to be excluded by s 143(7).
35. As noted in our initial submissions at [16], it is *possible* that some occupations are neither covered by the *Miscellaneous Award 2020* nor excluded by s 143(7) because the catch-all nature of the award may not be comprehensive. Clause 4.2 of the award excludes coverage of all managerial and professional employees, whereas s 143(7) only excludes employees who “because of the nature or seniority of their role, have traditionally not been covered by awards” or “who perform work that is not of a similar nature to work that has traditionally been regulated by such awards”. Accordingly, there could feasibly be employees who are entirely award-free because they are:
 - managerial or professional employees who have been traditionally covered by awards but are not covered by any modern award; or
 - managerial or professional employees whose lack of traditional coverage by awards “is not attributable to the nature or seniority of the employees’ role” (*United Voice v Gold Coast Kennels Discretionary Trust* [2018] FWCFB 128 [38]) but instead some other factors.
36. However, the number of employees who lack any award coverage is likely to be extremely low, if existent at all. No party has specifically identified any such class of employees. Moreover, in *Re 4 yearly review of modern awards* [2020] FWCFB 754 [43], the Full Bench declined to remedy this issue “in an undirected and non-specific way”.
37. Where the relevant occupations are already covered by the *Miscellaneous Award 2020*, we reiterate our initial submissions made at paragraphs [19]-[28] in respect of this award and the threshold questions that must be satisfied before considering whether an extension of coverage of another award to these occupations would be justifiable.

Other Submissions

38. This section seeks to respond to submissions made by other parties.

Arts Law Centre of Australia

39. There are some aspects of the submissions made by the Arts Law Centre of Australia (**Arts Law**) to which we seek to respond.

Independent Contractors

40. On page 3 in response to question (1), Arts Law submit that (emphasis added):

The Visual Arts, Craft and Design and Music industries should form the focus of the Commission's consideration of the arts and culture sector. This is because **existing awards lack meaningful coverage** for the visual arts and for musicians working in the music industry **who are not employees**.

41. Modern awards only cover workers who are employees (s 48). Workers "who are not employees" are therefore excluded from coverage by modern awards. Contrary to the submissions of Arts Law, they must be disregarded for the purposes of the Review.

42. That aside, we broadly support the submission by Arts Law that the visual arts, craft, design, and music industries should be a focus of the Commission's consideration of the arts and culture sector.

Examples of Missing Occupations

43. On page 3 in response to question (2), Arts Law submit a series of "examples of occupations missing from the occupations list".

44. As above at [20]-[22], many of these occupations are either managerial in nature (and thereby potentially excluded by s 143(7)) or ancillary to artistic and creative work. In our submission, occupations that fall within this category should be disregarded for the purposes of the Review.

Miscellaneous Award

45. On page 4 in response to question (9), Arts Law submit that:

The Miscellaneous Award does not align with the types of work in the Visual Arts, Craft and Design industry in the way an award should. For example, ordinary hours or meal breaks don't apply, roles do not match, inappropriate salary rates, specialised expertise not considered.

46. Contrary to these submissions, the *Miscellaneous Award 2020* does in fact specify ordinary hours (clause 13) and meal breaks (clause 14) terms.

47. Otherwise, we reiterate our initial submissions made at paragraphs [19]-[28] in respect of this award and the threshold questions that must be satisfied before considering whether an extension of coverage of another award to these occupations would be justifiable.

Mandated Minimum Pay and Conditions

48. On page 5, Arts Law submits under the heading of “proposals”:

Arts Law supports the introduction of mandated minimum pay and working conditions for creators working in the Visual Arts, Craft and Design industry and those in the Music industry who are not engaged as employees.

49. As above at [41], the Commission does not have the power to introduce “mandated minimum pay and working conditions for creators working in the Visual Arts, Craft and Design industry and those in the Music industry *who are not engaged as employees*” (emphasis added). This proposal must, therefore, be rejected on this basis alone.

Creative Australia

50. In their submission, Creative Australia advance three proposals in relation to the award coverage and minimum standards in the arts and culture sector.

Proposal 1

51. The first proposal argues that “alternative methods for measuring the scale and constitution of the arts and cultural sector” to ANZSCO should be adopted by the Commission. We support the adoption by the Commission of additional methods of obtaining data pertaining to the employment characteristics of employees in the arts and culture sector.

Proposal 2

52. The second proposal recommends that the Commission:

Consider the ways in which the lack of a dedicated Modern Award for creative workers can inhibit small-to-medium organisations from providing appropriate minimum standards commensurate with the skills and education required for roles in the creative sector.

53. For the reasons previously outlined, we oppose the creation of a new modern award, unless it involved the amalgamation of existing awards.
54. On pages 5-6, Creative Australia proceed to propose some “ways to better cover creative employees through existing Modern Award coverage”. These proposals are useful.
55. In particular, we see merit in Creative Australia’s proposal at [2.6.2.] that:

The classification system in the Amusement Award could be varied to describe general responsibilities (and level of duties) without referencing a specific job title or employer context (for example, include dynamic descriptions such as ‘visitor experience staff’ rather than ‘admissions/entrance attendants’).

56. This approach could be adopted to coverage gaps which are deemed inconsistent with the modern awards objective more broadly. The adoption of less specific job titles or employer contexts in modern awards would usefully extend coverage of existing modern awards without further complicating the coverage terms. It would extend coverage without necessarily expanding or lengthening coverage and classification terms. Additionally, this approach would allow for new and emerging occupations to continue to be caught by an award where they have strong similarity to existing occupations.

57. At [2.6.4] on page 6, Creative Australia submit that:

The Amusement Award does not allow for dual employment with the same employer. Many creative employees perform multiple roles, for example working as both artists and gallery attendants as well as being project managers or food and beverage attendants. For an employer to employ them in both capacities, they need to be issued with multiple employment contracts and be paid different rates of pay. An updated Modern Award could reference this possibility and either allow for a blended pay rate or another mechanism.

58. Due to the law described above at paragraphs [11]-[15] that applies to employees performing differing roles for the same employer with variable award coverage, this submission is likely incorrect. An employer can engage such workers under one employment contract. The employer must pay the employee the rate of pay that is specified in the award which applies to the major and substantial part of their employment.

Proposal 3

59. The third proposal, as noted by Creative Australia, relates to matters beyond the scope of the Review. Accordingly, we do not intend to respond to the proposal in this forum.

National Association for the Visual Arts

60. There are some aspects of the submissions made by the National Association for the Visual Arts (**NAVA**) to which we seek to respond.

New Award

61. At [1.1], NAVA also submit that a new award should be created “to address the lack of meaningful and consistent award coverage for the visual arts, craft and design sector, providing workers with a sufficient safety net.” We refer to our initial submissions at paragraphs [29]-[48].

62. That aside, we generally agree with the concerns expressed by NAVA with respect to the “lack of clarity” ([1.2]), “complexity” ([1.2]) and “inconsistency” ([1.3]) in modern award coverage.

63. However, these problems would only be amplified, rather than remedied, by adoption of NAVA's submission at [1.5.] that "[e]xisting awards lack the specificity required for [the] multifaceted activities" undertaken by employees in the sector. Rather, the coverage and classification terms in modern awards should be expressed at a level of generality that does not require rigorous examination to identify whether they apply to particular employees. If at all, such terms in existing awards are too specific, which adds to the complexity of the award system. As discussed above at [55]-[56], Creative Australia identified and advanced a proposal to remedy this issue.

Excluded Employees

64. At [7.1], NAVA lists a series of occupations which are purportedly "covered by a modern award". This list appears to replicate that which was submitted by the Unions on page 4. We reiterate our submissions made above at [19]-[22] in respect of this list.

65. Additionally, it is worth noting that NAVA submits at [7.1] these occupations are "not covered by a modern award" whereas the Unions submit on page 4 that these occupations are "not *clearly* covered by a modern award" (emphasis added). This is an important distinction. The submission by NAVA is plainly incorrect because several of the specified occupations are undoubtedly covered by a modern award: the *Miscellaneous Award 2020*. As discussed in our initial submissions at paragraphs [19]-[28], this also does not mean that the employees lack the "fair and relevant minimum safety net of terms and conditions" required by the modern awards objective in s 134.

Miscellaneous Award

66. At [9.1], NAVA submits that "[t]he *Miscellaneous Award* fails to align with sector expectations for an award".

67. Respectfully, the adequacy of coverage of employees by the *Miscellaneous Award 2020* is not determined by "sector expectations". The relevant question is whether it "fair and relevant minimum safety net of terms and conditions" pursuant to the modern awards objective in s 134.



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