

ACCI Submission

Modern Awards Review 2023-24

Arts and Culture Sector

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Introduction

1. ACCI welcomes the opportunity to make submissions in relation to the arts and culture sector stream of the Modern Awards Review 2023-24 (**Review**) conducted by the Fair Work Commission (**Commission**).
2. This submission includes two parts. First, the submission will address the key issues that are relevant to the stream and outline the matters which should be prioritised. Second, the submission will respond to the questions contained in the Discussion Paper.
3. As a peak employer body with national coverage, ACCI intends to engage more closely with specific proposals to resolve any issues that emerge from submissions of other parties through the consultation process and, if necessary, a submission in reply.

Issues

4. The objective of this stream of the Review is to investigate “existing *award coverage* and *minimum standards* for the arts and culture sector, including potential coverage gaps, in line with the Government’s National Cultural Policy.”¹
5. In response to this objective, ACCI submits that the Commission should be guided by the following priorities while conducting this stream of the Review:
 - (1) in relation to “award coverage”, the Commission should prioritise ensuring that, where necessary and permissible,² award-free employees in the arts and culture sector become covered by an existing modern award;
 - (2) in relation to “minimum standards”, the Commission should prioritise ensuring that the modern awards that cover employees in the arts and culture sector satisfy the modern awards objective.³
6. The bases for these priorities and their implications for the conduct of the Review are as follows.

Award Coverage

Approach

7. The aspect of this stream pertaining to the award coverage of the arts and culture sector is not *required* to be restricted to consideration of coverage gaps. The letter from the Minister for Employment and Workplace Relations to the President was clear in expressing that the Commission was being asked to “investigate existing award coverage ... *including* potential coverage gaps”.⁴ This language was then replicated in the President’s statement announcing the commencement of the Review.⁵
8. The Review could, therefore, feasibly involve broader consideration of the *adequacy* of existing award coverage of the sector. For example, it could investigate whether the coverage of a particular occupation by an award is appropriate and whether it would be more appropriate for the occupation to be covered by another award.⁶

¹ Justice Hatcher, Fair Work Commission, President’s Statement on Modern Awards Review 2023-24 (15 September 2023) [3(4)] (emphasis added).

² But see below at [72]-[100]. See also *Fair Work Act 2009* (Cth) s 143(7).

³ *Fair Work Act 2009* (Cth) s 134.

⁴ Minister for Employment and Workplace Relations, Letter to the Hon Justice Adam Hatcher (12 September 2023) 2 (emphasis added).

⁵ Justice Hatcher, Fair Work Commission, President’s Statement on Modern Awards Review 2023-24 (15 September 2023) [3(4)] (emphasis added).

⁶ See *Fair Work Act 2009* (Cth) s 163(1).

9. However, given the intended timeframe for the conduct of the Review, this broader investigation of award coverage of the sector would be, in our submission, inadvisable. The contribution of parties in this stream of the Review is timetabled to conclude by 2 February 2024. This timeframe does not seem to allow for extensive consideration of the adequacy of existing award coverage in addition to gaps in award coverage. The exception to this may be where employees are covered by the *Miscellaneous Award 2020*. For the sake of brevity, this coverage will be described as a “coverage gap” in this submission, despite it not technically being so.⁷
10. In our submission, the investigation of the award coverage of the arts and culture sector should therefore prioritise consideration of coverage gaps. This, in itself, is a complex process and will require two steps:
 - (1) identification of where coverage gaps exist; and
 - (2) evaluation of whether and how each coverage gap should be remedied.
11. Our submissions in respect of each of these steps are outlined below.

Identifying Coverage Gaps

12. As explored in the Discussion Paper,⁸ the award coverage of employees in the arts and culture sector varies across occupations. It is necessary to first consider the different ways in which employees in the arts and culture sector are covered by modern awards.
13. First, some employees are already fully covered by an industry or occupational award. For the reasons outlined above,⁹ these employees should be disregarded for the purposes of investigating award coverage of the sector.
14. Second, some employees are in occupations partially covered by an industry award where they work for an employer in a particular industry but may otherwise be covered by the *Miscellaneous Award 2020*. This type of award coverage is identified at paragraphs [72]-[73] in the Discussion Paper. There, the occupation of authors, who may only be covered by the *Journalists Published Media Award 2020* to the extent that they work for an employer in the published media industry, is provided as an example of this type of award coverage.
15. Third, some employees are not covered by any industry or occupational award and are instead covered by the *Miscellaneous Award 2020*. Importantly, as will be discussed below, this does not, by default, justify the extension of coverage of another modern award to these employees.

⁷ See below at [19]-[28].

⁸ Fair Work Commission, Modern Awards Review 2023-24 — Arts and Culture Sector (Discussion Paper, 6 November 2023) chapter 5 (**Discussion Paper**).

⁹ See above [7]-[10].

16. Fourth, some employees may be award-free because of limitations in the coverage of the *Miscellaneous Award 2020*. As has been previously recognised by the Commission,¹⁰ the coverage of the *Miscellaneous Award 2020* may not necessarily include all employees who are not covered by another award and are not excluded from award coverage by statute; the “catch-all”¹¹ nature of the *Miscellaneous Award 2020* may not be comprehensive. However, the Commission has previously declined to remedy this “in an undirected and non-specific way”.¹²
17. Fifth, some employees are award-free because they are excluded from award coverage by the *Fair Work Act 2009* (Cth).¹³ This includes employees “who, because of the nature or seniority of their role, have traditionally not been covered by awards” and employees “who perform work that is not of a similar nature to work that has traditionally been regulated by such awards”.¹⁴ These employees should, of course, also be disregarded for the purposes of the Review, given that these limitations on award coverage are imposed by statute.
18. In relation to award coverage of the sector, the Review should therefore focus on the following categories of employees:
 - (1) employees in occupations partially covered by an industry award where they work for an employer in a particular industry but are otherwise covered by the *Miscellaneous Award 2020*;
 - (2) employees in occupations that are covered by the *Miscellaneous Award 2020*; and
 - (3) employees who are award-free because of a gap in the coverage of the *Miscellaneous Award 2020*.

Remedying Coverage Gaps — Miscellaneous Award

19. From the outset, it is necessary to make some observations in respect of the coverage of employees in the arts and culture sector by the *Miscellaneous Award 2020*.
20. The coverage of employees by the *Miscellaneous Award 2020* does not, by itself, justify the extension of coverage by another modern award in its place. The application of the terms and conditions stipulated in the *Miscellaneous Award 2020* to a class of employees is not, by default, inconsistent with the modern awards objective.¹⁵ If either of these propositions were contested, then the entire purpose of the *Miscellaneous Award 2020* would be undermined.
21. The Commission has described the purpose of the *Miscellaneous Award 2020* as follows:

¹⁰ *Re 4 yearly review of modern awards* [2020] FWCFB 754 [43].

¹¹ *Re 4 yearly review of modern awards* [2019] FWCFB 4748 [62].

¹² *Re 4 yearly review of modern awards* [2020] FWCFB 754 [43].

¹³ *Fair Work Act 2009* (Cth) s 143(7).

¹⁴ See *ibid*.

¹⁵ *Fair Work Act 2009* (Cth) s 134.

... the *Miscellaneous Award* was never intended to provide a comprehensive safety net for any particular industry or occupation, but rather was meant to provide basic conditions only for employees not covered by other modern awards *until such time as a proper safety net could be established for identifiable groups of such employees in another modern award*.¹⁶

22. Importantly, the establishment of a “proper safety net” in substitution of that which is provided by the *Miscellaneous Award 2020* requires an “identifiable” group of employees.¹⁷ This should perform a central role in this stream of the Review.
23. Unless the employees who fall within a purported coverage cap can be actually *identified*, it is impossible to consider the constitution of a proper safety net. By “identifiable”,¹⁸ this cannot mean the mere identification of an occupation, in the abstract, that *could* apply to a class of employees. Rather, it is necessary to examine evidence pertaining to the real employment characteristics of the class of employees to determine what would constitute “a fair and relevant minimum safety net of terms and conditions”.¹⁹ For this reason, identification of, for example, “choreographers”²⁰ as an occupation that is potentially not covered by any modern award is insufficient by itself to make recommendations pertaining to how employees falling within this description should be covered and protected by the modern awards system.
24. Accordingly, although the Review is not a formal process involving an application to vary one or more modern awards, the Commission should be guided by evidence pertaining to the characteristics of the employees in any identified occupation. Otherwise, the Commission risks making recommendations in its final report that complicate any resulting applications for award variations.
25. Without identifying the relevant employees, it is also impossible to consider whether the coverage of the employees by the *Miscellaneous Award 2020* fails to meet the modern awards objective and thereby whether the Commission has jurisdiction to extend another award’s coverage to those employees.²¹
26. In the decision relating to a proposed award covering helicopter aircrew, the Commission noted that the first threshold question for altering coverage of employees presently covered by the *Miscellaneous Award 2010* was as follows:

First, we must be satisfied that the current coverage of helicopter aircrew under the *Miscellaneous Award* does not meet the modern awards objective such that an alteration to this position is necessary to meet the modern awards objective.²²

¹⁶ *Re 4 yearly review of modern awards* [2019] FWCFB 4748 [62] (emphasis added).

¹⁷ See *ibid*.

¹⁸ See *ibid*.

¹⁹ *Fair Work Act 2009* (Cth) s 134(1).

²⁰ Discussion Paper [70].

²¹ *Fair Work Act 2009* (Cth) s 157(1).

²² *Re 4 yearly review of modern awards* [2019] FWCFB 4748 [57].

27. Hence, although the Commission has held that coverage of employees by the *Miscellaneous Award 2020* was only ever intended to be temporary “until such time as a proper safety net could be established for identifiable groups of such employees in another modern award”,²³ this, of course, does not displace the jurisdictional requirement to only make award variations of the relevant kind upon satisfaction that it is “necessary to achieve the modern awards objective”.²⁴
28. The *Miscellaneous Award 2020* has been subject to extensive review by the Commission. The Commission cannot, therefore, assume that its terms are inconsistent with the modern awards objective. The Commission must consider whether the relevant jurisdictional fact exists in relation to a particular class of employees after examining evidence pertaining to their employment characteristics.

Remedying Coverage Gaps — New Awards

29. Although not explored in-depth, the Discussion Paper also notes the possibility of creating a new award to address coverage gaps that may be identified in the Review. Question (3) in the Discussion Paper asks:
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?²⁵
30. In anticipation that one or more parties in the Review may propose this solution, ACCI makes the following submissions in respect of the creation of new awards.
31. It is our strong contention that the Commission should not recommend the creation of any new modern awards covering the arts and culture sector. The reasons for this position are as follows.
32. First, the recommendations of the Review should accord with the architecture of the *Fair Work Act 2009* (Cth) of which it is a creature. The *Fair Work Act 2009* (Cth) expresses a clear statutory preference for, where possible, avoiding the creation of new modern awards. As the Discussion Paper notes, s 163(2) provides:
- (2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.²⁶
33. This is further supported by the explanatory materials accompanying the Fair Work Bill 2009 (Cth), which stated in reference to this provision:

²³ *Re 4 yearly review of modern awards* [2019] FWCFB 4748 [62].

²⁴ *Fair Work Act 2009* (Cth) s 157(1).

²⁵ Discussion Paper, 14.

²⁶ *Fair Work Act 2009* (Cth) s 163(2).

It is intended that FWA should vary an existing award to cover certain employers or employees, rather than make a new award, if it is appropriate to do so. This is designed to limit the proliferation of new awards, by ensuring that making a new award occurs only where variation of coverage of an existing award is not appropriate.²⁷

34. Second, the Review should not be at variance with the award modernisation process. Needless to say, that process was designed to reduce the number of awards. The legislative provisions guiding the Australian Industrial Relations Commission's conduct of that process contained in the *Workplace Relations Act 1996* (Cth) required consideration of:

(d) the desirability of reducing the number of awards operating in the workplace relations system²⁸

35. In our submission, the desirability of that objective has not changed since the conclusion of that process.

36. Third, the current number of modern awards in the workplace relation system already poses a substantial compliance problem for employers. This compromises “the need to ensure a simple, easy to understand, stable and sustainable modern award system”.²⁹

37. Although, at present, we do not have recent data to illustrate this point, as a peak employer body, the number of modern awards is consistently reported as a matter that adds to the complexity of the system. It is difficult enough, at times, for experienced industrial advocates to understand the correct coverage of employees in a particular occupation,³⁰ let alone a small business owner.

38. This is supported by the qualitative research report prepared by Sweeney Research for the Commission in 2014. The report noted that one of the “key reservations” of small business owners in relation to the modern award system was:

The number of modern awards... With so many modern awards some employers worried that they weren't referencing the correct documents.³¹

39. The more awards that exist, the greater difficulty employers will generally face in ascertaining the correct terms and conditions that apply to their employees. This exposes them to potential penalties for non-compliance.

40. For the above reasons, the Commission should avoid making recommendations involving the creation of any new modern awards that would apply to the arts and culture sector. The exception to this may be where the creation of the new award is accompanied by the revocation of one or more existing awards (thereby amalgamating them); however, it appears highly unlikely that the Commission would be in a position to sufficiently investigate such a significant proposal within the given timeframe.

²⁷ Explanatory Memorandum, Fair Work Bill 2009 (Cth), 100 [624].

²⁸ *Workplace Relations Act 1996* (Cth) s 576B(2)(d) (repealed).

²⁹ *Fair Work Act 2009* (Cth) s 134(1)(g).

³⁰ See, eg, *Re Menulog Pty Ltd* [2022] FWCFB 5 [18]-[40].

³¹ Sweeney Research, *A Qualitative Research Report on: Citizen Co-Design with Small Business Owners* (Report, 13 August 2014) 16.

41. In any case, a party advocating for the creation of a new award should be expected to adduce probative evidence pertaining to the nature of any affected industries and the impact of the new award on productivity and costs for employers. This is consistent with the Commission's reasoning for declining to create a new award to cover the public relations industry, where it was stated that:

In our view the case for a modern award covering the public relations industry has not been made out. There was little information put on the nature of the industry or on the impact of any modern award on productivity and employment costs in the industry.³²

Minimum Standards

42. This stream of the Review also involves investigation of “minimum standards for the arts and culture sector”.³³ At this stage, ACCI intends to only make a brief submission in respect of how this aspect of the stream should be approached.
43. As above, it is recognised that the Review is not a formal process involving an application to vary a modern award. As the recommendations in the final report of the Review will be non-binding, it is therefore likely that the Commission is not required to satisfy itself of any jurisdictional facts before advancing such recommendations.
44. Nevertheless, it is critical that the “minimum standards” that presently exist in modern awards applying to employees in the arts and culture sector are investigated with acute attention paid to whether they “provide a fair and relevant minimum safety net of terms and conditions” in accordance with the modern awards objective.³⁴ The relevant terms and conditions of employment should not be considered in the abstract, without probative evidence adduced as to their fairness and relevance as a minimum safety net.
45. This is particularly the case because, as noted in the President's statement:

The report might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.³⁵

46. Of course, it is expected that any variations following the publication of the Report, whether by an eligible party or by the Commission on its own motion, will be accompanied by the usual degree of consideration of evidence as occurs in these matters.

³² *Re Media, Entertainment and Arts Alliance* [2010] FWAFB 3795 [15].

³³ Justice Hatcher, Fair Work Commission, President's Statement on Modern Awards Review 2023-24 (15 September 2023) [3(4)].

³⁴ *Fair Work Act 2009* (Cth) s 134(1).

³⁵ Justice Hatcher, Fair Work Commission, President's Statement on Modern Awards Review 2023-24 (15 September 2023) [8].

47. However, there is a risk that, were recommendations to not be closely guided by the statutory prerequisite for the exercise of the award variation power (the modern awards objective),³⁶ the necessary state of satisfaction required of the decision-maker in a subsequent application could nonetheless be reached, or at least heavily influenced by, the contents and recommendations of the final report. In other words, the contents of the final report itself, despite not being formed based on the relevant statutory prerequisite for the exercise of the power, could heavily contribute to the “material before the [Commission] upon which [it] could reasonably be satisfied that a variation to [an] Award was necessary, at the time at which it was made, in order to achieve the statutory objective.”³⁷
48. This is not to suggest that the above result would be within the Commission’s jurisdiction; it may not. However, it is to illustrate the risks that would taint this aspect of the Review were it to embark, unbounded, on a broad investigation of the purported adequacy of “minimum standards” in the arts and culture sector.

³⁶ See *Fair Work Act 2009* (Cth) ss 157(1), 134(1).

³⁷ *Shop, Distributive and Allied Employees Association v National Retail Association and Another (No 2)* [2012] FCA 480 [37] (Tracey J).

Discussion Paper Questions

Chapter 2 Questions

(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?

49. The industries and occupations identified at paragraph [11] in the Discussion Paper seem appropriate. However, ACCI would not object to consideration of additional industries and/or occupations if they were identified by other parties and clearly form part of the arts and culture sector.

(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?

50. The consideration of the arts and culture sector within the Review should exclude consideration of occupations that are only ancillary to creative or artistic work. In other words, the Review should only examine the award coverage and minimum standards that apply to artists and other “creative practitioners”;³⁸ support, technical, and production staff should be excluded. This would exclude, for example, employees who are or could be covered by part 8 of the *Live Performance Award 2020*.

51. This approach should be adopted for two reasons.

52. First, this approach should be adopted because of the limited timeframe provided for the Review. Narrowing the scope of occupations under consideration will benefit the Commission and parties by allowing for a more thorough investigation of the relevant industrial circumstances. The more occupations under consideration, the more widely spread time and resources will be.

53. Second, these ancillary occupations are largely beyond the scope of the government policy which formed the basis of this stream of the Review. Pillar 3 of *Revive*, the Federal Government’s National Cultural Policy, which examined industrial conditions, was entitled: “Centrality of the Artist”.³⁹ The policy was avowedly “underpinned by a commitment to recognise the value of Australia’s cultural and creative practitioners”.⁴⁰ These practitioners should therefore be the focus of the Review.

³⁸ Commonwealth of Australia, *Revive: a place for every story, a story for every place* (30 January 2023) 11.

³⁹ *Ibid* 51.

⁴⁰ *Ibid* 53.

Chapter 3 Questions

(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?

54. For the reasons outlined above at [29]-[41], the creation of a new award should not be considered.

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

55. No. The chapter adequately describes the statutory requirements and principles of interpretation relating to modern award coverage.

Chapter 4 Questions

(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?

56. ACCI is not aware of any such employees.

(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?

57. Employees who perform “work of a similar nature to the work performed in the arts and culture sector” do not, by definition, perform work in the arts and culture sector. They are, therefore, beyond the scope of this stream of the Review.

58. This stream of the Review should solely focus on employees who work in the arts and culture sector.

Chapter 5 Questions

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

59. ACCI is not aware of any occupations in the arts and culture sector not covered by a modern award in addition to those identified in the Discussion Paper.

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

60. As the Discussion Paper notes,⁴¹ some occupations may be only covered by a modern award (other than the *Miscellaneous Award 2020*) to the extent that they work for an employer in a specific industry. However, in such circumstances, the occupation will generally be covered by the *Miscellaneous Award 2020*, unless it is excluded by virtue of s 143(7) (in which case, it is not necessary to consider in the Review).

61. Where the occupation is covered by the *Miscellaneous Award 2020*, this does not mean that employees in the occupation “fall outside current award coverage” per se. These employees are still covered by a modern award. As discussed above at [19]-[28], it is not necessarily the case that the coverage of these occupations by the *Miscellaneous Award 2020* is inconsistent with the modern awards objective; this must be demonstrated to enliven the Commission’s jurisdiction to vary another award to extend its coverage to the employees.

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

62. ACCI agrees with this view.

63. In particular, some workers may be excluded from the coverage of the *Miscellaneous Award 2020* because of s 143(7). This may include web designers for the reasons previously outlined by the Commission.⁴² Some of the other occupations identified in the Discussion Paper may also fall within this category. This issue is discussed in greater depth below at [72]-[100] in response to question (14).

(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?

64. To the extent that a worker is a national system employee and is not excluded by s 143(7), they are capable of being covered by a modern award.

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

65. ACCI submits that the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) should have no bearing on the Review.

⁴¹ Discussion Paper [72]-[73].

⁴² *Re 4 yearly review of modern awards* [2020] FWCFB 754 [56].

66. This legislation is highly contentious and remains before the Federal Parliament. There is no certainty as to whether the proposed laws will pass the Federal Parliament, nor whether it will remain in its current form unamended. Accordingly, it would be inappropriate for the Review to involve consideration of proposed laws for which the effect, if at all, on employees in the arts and culture sector is unknowable.
67. Moreover, the aspects of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) which have been noted in the Discussion Paper as potentially relevant to the award coverage and minimum standards in the arts and culture sector do not commence until 1 July 2024.⁴³ The timetable for the Review provides that the intended date of publication of the final report is 28 June 2024. Accordingly, even if the proposed laws contained in the legislation were passed by the Federal Parliament, they would not commence or take effect during the period of the Review.
68. The contents and effect of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) must, therefore, be disregarded.

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

69. ACCI is unaware of the precise prevalence of digital platform work within the arts and culture sector and will defer to the submissions of the relevant industry associations.
70. To the extent that the usage of digital platforms for the performance of work within the arts and culture sector is considered because of proposed laws before the Federal Parliament contained in the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), it should be disregarded for the above reasons.

Chapter 6 Questions

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

71. ACCI is not aware to any such 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)?

72. Section 143(7) excludes from award coverage:

⁴³ Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) cl 2 items 21-22.

- employees “who, because of the nature or seniority of their role, have traditionally not been covered by awards”;⁴⁴ and
- employees “who perform work that is not of a similar nature to work that has traditionally been regulated by such awards”.⁴⁵

73. Importantly, whether employees have been traditionally “covered by awards” or “regulated by such awards” includes awards made under the laws of the States.⁴⁶

74. At paragraph [70], the Discussion Paper identifies nine occupations that may not be *specifically* covered by modern award (but may be covered by the *Miscellaneous Award 2020* if not excluded by s 143(7)). Each of these occupations will be examined separately. Despite the below, ACCI is open to revisiting these submissions if another party provides compelling reasons to the contrary.

Choreographers

75. It does not appear that choreographers have been traditionally covered by awards.

76. The *Theatre Managers (State) Award* created by the Industrial Relations Commission of New South Wales does refer to choreographers. The award explicitly excluded coverage of certain employees within the jurisdiction of other industrial committees but stated that this was “not so as to exclude persons employed as ... choreographers”.⁴⁷ However, this does not mean that the award necessarily ever covered choreographers; this occupation was excluded from a class of exempted employees.

77. Generally speaking, choreographers are substantially similar to other types of artistic directors. They often perform a managerial role, or at minimum, are of a nature that is not traditionally covered by awards. Accordingly, it appears that choreographers may be excluded from award coverage by s 143(7).

Composers

78. Composers are not excluded from award coverage by s 143(7) because they are already covered by the *Live Performance Award 2020*.

79. The *Live Performance Award 2020* covers to “musicians”.⁴⁸ The award defines “musician” as:

musician means a person who plays a musical instrument *or any other person who is employed to provide musical services* including but not limited to any type of service which is directly concerned with live music or musicians or the production of musical sound, vocalists, repetiteurs and conductors and others employed as an integral part of a musical group, band or orchestra.⁴⁹

⁴⁴ *Fair Work Act 2009* (Cth) s 143(7)(a).

⁴⁵ *Ibid* s 143(7)(b).

⁴⁶ *Ibid* s 143(7)(a).

⁴⁷ *Theatre Managers (State) Award* cl 36.

⁴⁸ *Live Performance Award 2020* pt 6.

⁴⁹ *Ibid* cl 2 (emphasis added).

80. A composer is a person “employed to provide musical services”. Their music services are “directly concerned with ... the production of musical sound”.

Jewellery Designers

81. The *Watchmakers’ and Jewellers’ Award 1970* created by the Western Australian Industrial Relations Commission applied to “jewellers” in Western Australia.⁵⁰ The award defined “jeweller” as inclusive of workers employed “wholly or partly” in “designing jewellery”.⁵¹
82. Accordingly, having been previously covered by a State award, jewellery designers are not excluded from award coverage by s 143(7).

Music Director

83. In our submission, music directors, insofar as this occupation is the same or substantially similar to “conductors”, are not excluded from award coverage by s 143(7) because they are already covered by the *Live Performance Award 2020*.
84. Music directors are “employed to provide musical services” in accordance with the definition of “musicians” who are covered by the *Live Performance Award 2020*.
85. To the extent that any music directors do not “provide musical services” but instead “direct” the production of music in a managerial capacity, they are likely excluded from award coverage by s 143(7) because of the seniority of their role.

Potter or Ceramic Artist

86. It is unclear whether potters or ceramic artists have been previously covered by an award. Nevertheless, there is no “discernible reason” as to why these employees would have been traditionally excluded from award coverage based on the nature of their role.⁵² These occupations also do not involve inherent seniority.
87. Additionally, these occupations appear to generally be “of a character, kind or sort that has a likeness or resemblance” “to traditionally award-regulated work”.⁵³ There are numerous types of artists which have been traditionally regulated by awards for which analogies could be drawn in comparison with potters or ceramic artists.
88. It is, therefore, unlikely that potters or ceramic artists are excluded from award coverage by s 143(7).

Screenwriter

89. It is unclear whether screenwriters have been previously covered by an award.

⁵⁰ *Watchmakers’ and Jewellers’ Award 1970* cl 3.

⁵¹ *Ibid* cl 15.

⁵² *United Voice v Gold Coast Kennels Discretionary Trust* [2018] FWCFB 128 [49].

⁵³ *Re 4 yearly review of modern awards* [2020] FWCFB 754 [36].

90. However, their possible exclusion from traditional coverage does not appear to be based on the nature of seniority of the occupation. For example, analogously, other types of writers are covered by modern awards.

91. Accordingly, it appears initially unlikely that screenwriters are excluded from award coverage by s 143(7).

Script Editor

92. It is unclear whether script editors have been traditionally covered by awards. It appears that they have not.

93. However, their possible exclusion from traditional coverage does not appear to be based on the nature of seniority of the occupation. For example, analogously, book editors are covered by modern awards.⁵⁴

94. Accordingly, it appears initially unlikely that script editors are excluded from award coverage by s 143(7).

Sculptor

95. It appears that sculptors have not been traditionally covered by any awards.

96. Nevertheless, there are no obvious reasons as to why the nature of this occupation would have excluded it from award coverage. Analogies to the occupation could be easily drawn from other artist occupations covered by awards.

97. The occupation is also not inherently senior.

98. Accordingly, it appears initially unlikely that sculptors are excluded from award coverage by s 143(7).

Web Designer

99. As previously examined by the Commission, it is possible that web designers are excluded from award coverage by s 143(7).⁵⁵ This is because, as of 2009, there were likely no awards covering web designers due to the nature of the occupation. These employees were professional employees at the time (even if that may be less so now).

100. The Commission has noted that this position could be contradicted if “the work was not award-covered because it was ‘new or emerging’ as of 2009”.⁵⁶ In our submission, this was not the case and the occupation was sufficiently established at that time, even if it has subsequently undergone significant growth.

⁵⁴ *Book Industry Award 2020* cl A.1.

⁵⁵ *Re 4 yearly review of modern awards* [2020] FWCFB 754 [56].

⁵⁶ See *ibid.*

(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?

101. As discussed above at [19]-[28], it is necessary to first demonstrate that the coverage of any occupations by the *Miscellaneous Award 2020* is inconsistent with the modern awards objective before extending coverage of another award to those occupations in its place.
102. At this stage, ACCI does not have such evidence before us and will therefore respond to proposals advanced by other parties.

(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?

103. ACCI is not aware of any additional legislative provisions or significant decisions pertinent to the Commission’s consideration of the arts and culture sector in this Review other than those referred to in these submissions or the Discussion Paper.

Chapter 7 Questions

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

104. With respect to minimum wages,⁵⁷ the Review should only consider their adequacy to the extent that there might be “work value reasons” that would justify their variation.⁵⁸ Any discussion of minimum wages should be coloured by this statutory requirement as well as the minimum wages objective.⁵⁹
105. With respect to minimum engagement periods,⁶⁰ the awards covering employees in the arts and culture sector do not appear to stipulate particularly low periods of minimum engagement. The majority of the periods of minimum engagement are at least 3 hours. This is consistent with other commonly used awards such as the *Clerks – Private Sector Award 2020*⁶¹ and the *General Retail Industry Award 2020*,⁶² and exceeds those in the *Children’s Services Award 2010*⁶³ and the *Hospitality Industry (General) Award 2020*.⁶⁴
106. ACCI does not wish to make further submissions in respect of the Commission’s description of the minimum entitlements in the arts and culture sector. It is not evident from this description that variations are necessary; however, ACCI will respond to any specific proposals advanced by parties.

⁵⁷ Discussion Paper pt 7.2.2.

⁵⁸ *Fair Work Act 2009* (Cth) s 157(2A).

⁵⁹ *Ibid* s 284.

⁶⁰ Discussion Paper pt 7.2.3.

⁶¹ *Clerks – Private Sector Award 2020* cls 10.5, 11.4 (3 hours).

⁶² *General Retail Industry Award 2020* cls 10.9, 11.2 (3 hours).

⁶³ *Children’s Services Award 2010* cls 10.4(e), 10.5(c) (2 hours).

⁶⁴ *Hospitality Industry (General) Award 2020* cl 11.3 (2 hours).



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