



# DECISION

*Fair Work Act 2009*

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

## **The Australian Industry Group**

(AM2011/55)

## **MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2012**

(ODN AM2008/5) [MA000010]

Manufacturing and associated industries

SENIOR DEPUTY PRESIDENT ACTON

MELBOURNE, 27 MARCH 2012

*Application to vary clauses 4.9(a)(iii) and 4.10.*

### **Introduction**

[1] The Australian Industry Group (AIG) seeks to vary the coverage and associated definitions clauses of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award 2010).<sup>1</sup> Their application to vary has been made under s.160 of the *Fair Work Act 2009* (Cth) (FW Act) and is said by the AIG to also be consistent with s.157 of the FW Act.

[2] Clause 4 of the Manufacturing Award 2010 sets out the coverage of the award. Clause 4.1 states that the “award covers employers throughout Australia of employees in the Manufacturing and Associated Industries and Occupations who are covered by the classifications in this award and those employees.” Clauses 4.2 to 4.5 then set out who the award does not cover. Clause 4.9 sets out what is meant by the term “Manufacturing and Associated Industries and Occupations”. Clause 4.10 gives further definition to clause 4.9. Clause 4.11 of the Manufacturing Award 2010 sets out what the term does not mean.

[3] Clauses 4.9 to 4.10 of the Manufacturing Award 2010 with the variations sought by the AIG underlined would, relevantly, be as follows:

**“4.9 Manufacturing and Associated Industries and Occupations means:**

**(a)** the following industries and parts of industries:

**(i)** the manufacture, making, assembly, processing, treatment, fabrication and preparation of:

- the products, structures, articles, parts or components set out in clause 4.10; or
  - the materials or substances set out in clause 4.10; or
  - any products, structures, articles, parts or components made from, or containing, the materials or substances set out in clause 4.10.
- (ii)** the coating, painting, colouring, varnishing, japanning, lacquering, enamelling, porcelain enamelling, oxidising, glazing, galvanising, electroplating, gilding, bronzing, engraving, cleaning, polishing, tanning, dyeing, treatment and finishing of any of the items referred to in clause 4.9(a)(i).
- (iii)** the repair, refurbishment, reconditioning, recycling, maintenance, installation, testing and fault finding of:
- any of the items referred to in clause 4.9(a)(i); or
  - floor covering; or
  - plant, equipment and buildings (including power supply) in the industries and parts of industries referred to in clauses 4.9(a)(i) and (ii); or
  - plant, equipment and buildings (including power supply) in any other industry.
- (iv)** mechanical and electrical engineering.
- (v)** space tracking.
- (vi)** farriery (other than in the racing industry).
- (vii)** bottle merchants.
- (viii)** the printing and processing of photographs from film.
- (ix)** every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the foregoing industries, parts of industries or occupations.
- (x)** handling, sorting, packing, despatching, distribution and transport in connection with any of the foregoing industries or parts of industries.

- (b) the provision of any of the operations or services set out in clause 4.9(a) on a contract basis by one business to another business, where the first business is independent of the second business.
- (c) the following occupations:
  - (i) maintenance employees in the engineering streams.
  - (ii) technical workers.
  - (iii) draughtspersons.
  - (iv) production planners.
  - (v) trainee engineers.
  - (vi) trainee scientists.
  - (vii) engine drivers.

**4.10** For the purposes of clause 4.9(a)(i), the products, structures, articles, parts, components, materials and substances include: ...

- (oo) Products and components manufactured from composite materials, carbon fibre, carbon graphite, graphite, titanium, magnesium, alloys or similar materials.”

[4] As a corollary of these variations, the AIG seeks to insert the following definitions into clause 3 - Definitions and interpretation of the Manufacturing Award 2010:

“**Composite materials** means composites of materials which are covered by the Award, including metals, carbon fibre, plastics, fibreglass, polymer, vinyl, resin and ceramics.”

**Recycling** means the recycling of products and materials covered by the Award.”

### **Submissions regarding “recycling”**

[5] The impetus for the AIG’s application seeking the inclusion of the word “recycling” in clause 4.9 of the Manufacturing Award 2010 has been the Fair Work Ombudsman’s view that while he does not disagree that the Manufacturing Award 2010 and the *Business Equipment Award 2010*<sup>2</sup> could cover the E-Waste sector, he believes it is also arguable that the *Waste Management Award 2010*<sup>3</sup> could cover the sector. The Ombudsman’s view has been expressed in the course of his dealing with a complaint made to him.

[6] Before me the AIG maintained the Manufacturing Award 2010 currently covers “recycling”. In this regard they pointed to the fact that under its clause 4.9(a)(iii) the Manufacturing Award 2010 covers the “repair, refurbishment, reconditioning, maintenance, installation, testing and fault finding” of various products and materials. Further, under its clause 4.9(a)(ix) the Manufacturing Award 2010 covers “every operation, process, duty and

function carried on or performed in or in connection with or incidental” to any of the industries, parts of industries or occupations covered by the award.

[7] The AIG went on to submit that the Ombudsman’s view shows some uncertainty exists about the Manufacturing Award 2010’s current coverage of “recycling” and their proposed variation to insert the word “recycling” in clause 4.9 would remove any ambiguity and/or uncertainty in that regard.

[8] The “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) (AMWU) supported the AIG’s application. The AMWU submitted that “recycling” is embraced within the term “treatment” and/or “preparation” in clause 4.9(a)(i) of the Manufacturing Award 2010. The AMWU also submitted that the coverage, classification and, where relevant, “overlap” clauses in modern awards should be used to resolve any competing coverage issues between modern awards.

[9] The Construction, Forestry, Mining and Energy Union (CFMEU), The Australian Workers’ Union (AWU), the Transport Workers’ Union of Australia (TWU), Australian Business Industrial (ABI) and an individual opposed the AIG’s application to insert the word “recycling” in clause 4.9 of the Manufacturing Award 2010.

[10] Their opposition was largely based on the fact that other modern awards cover recycling. Hence, they submitted, inserting the word “recycling” into clause 4.9 of the Manufacturing Award 2010 will or could create overlap in coverage between the Manufacturing Award 2010 and these other modern awards, contrary to the modern awards objective. However, some of those opposing the application accepted that the current coverage of the Manufacturing Award 2010 embraces “recycling”, and the others opposing the application refrained from analysing the existing coverage of the Manufacturing Award 2010. The CFMEU also pointed out that the AIG had not identified any specific provision in the Manufacturing Award 2010 creating the ambiguity or uncertainty that their proposed variation concerning “recycling” seeks to remove.

#### **Submissions regarding “composite materials” etc**

[11] The AIG also submitted that many products traditionally manufactured from metal are now manufactured from modern materials but the coverage of the Manufacturing Award 2010 of the modern materials is not clearly expressed. In particular, the AIG said that the lack of an express reference to “composite materials, carbon fibre, carbon graphite, graphite, titanium, magnesium, alloys or similar materials” in the Manufacturing Award 2010 appears to be an error or oversight and the inclusion of such an express reference is necessary to remove ambiguity or uncertainty in that award.

[12] In this regard the AIG pointed out that “Schedule A - Industries covered by award” to the *Metal, Engineering and Associated Industries Award 1998* (Metals Award),<sup>4</sup> a forerunner award to the Manufacturing Award 2010, provided that subject to certain exemptions the industries and callings covered by the Metals Award were the “engineering, metal working and fabricating industries in all their branches, and all industries allied thereto”.

[13] Further, the AIG pointed out that clause “1.4 - Definitions” of the Metals Award provided that:

“**1.4.3 ‘Engineering Streams’** are the three broad engineering streams recognised within the classification definitions set out in Schedule D, namely: Electrical/electronic; fabrication; and mechanical. Additionally, there are five vocational fields (as defined). Entry to training in any engineering stream is not conditional on union membership. The streams are defined as:

**1.4.3(a)** ‘**Electrical/electronic stream**’ includes the design, assembly, manufacture, installation, modification, testing, fault finding, commissioning, maintenance and service of all electrical and electronic devices systems, equipment and controls, eg, electrical wiring, motors, generators, PLC's and other electronic controls, instruments, refrigeration, telecommunications, radio and television, communication and information processing.

**1.4.3(b)** ‘**Mechanical stream**’ includes the design, assembly, manufacture, installation, modification, testing, fault finding, commissioning, maintenance and service of all mechanical equipment, machinery, fluid power systems, automotive mechanics, instruments, refrigeration, and the use of related computer controlled equipment, eg, Computer Numeric Controlled machine tools.

**1.4.3(c)** ‘**Fabrication stream**’ includes fabrication, forging, carpentry, plumbing, founding, structural steel erection, electroplating, metal spinning, metal polishing, sheet metal work and the use of related computer controlled equipment. This includes fabrication in all metals, plastics, carbon fibre, composite materials, ceramics and other materials.” (Underlining added)

[14] Schedule D to the Metals Award set out classification definitions and clause 1.2 of Schedule D provided that the classification definitions in the schedule should be read in conjunction with the stream definitions in clause 1.4.3 of the Metals Award.

[15] The AMWU supported the AIG’s application and submissions in respect of the proposed clause 4.10(oo).

[16] The CFMEU, AWU and ABI opposed the AIG’s proposed variation to add “composite materials” and, to some extent, also opposed the proposed variation to add “similar materials” to the coverage clause of the Manufacturing Award 2010. They maintained that some other modern awards already cover many products and components made from composite materials and the AIG’s variations will or could create overlap in the coverage of the Manufacturing Award 2010 and those other modern awards. The resultant uncertainty, it was said, would be contrary to the modern awards objective.

[17] The modern awards cited by those opposing the variations and the products or components manufactured from composite materials that they were said to cover were:

- *Timber Industry Award 2010*<sup>5</sup> - products made from wood, engineered wood and laminated paper and, due to clause 4.3 of the *Timber Industry Award 2010*, artificial, laminated or manufactured material used in the place of wood or timber or worked in a similar manner as wood or timber.
- *Joinery and Building Trades Award 2010*<sup>6</sup> - products made from wood or similar material, engineered wood, fibreglass, insulated and safety glass, and synthetic granite.
- *Concrete Products Award 2010*<sup>7</sup> - products made from concrete, re-constituted granite and terrazzo.
- *Asphalt Industry Award 2010*<sup>8</sup> - products made from mastic asphalt.
- *Premixed Concrete Award 2010*<sup>9</sup> - concrete.

[18] The CFMEU also maintained that clause 1.4.3(c) of the Metals Award was not concerned with that award's coverage. The definition of "fabrication stream" in the clause was relevant to the training required for the classifications contained in the Metals Award.

### **Conclusion**

[19] As I earlier indicated, the AIG made their application to vary the Manufacturing Award 2010 under s.160 of the FW Act. The AIG also maintains its application is consistent with s.157 of the FW Act in that the variation is necessary to achieve the modern awards objective.

[20] Section 160 of the FW Act is as follows:

**"160 Variation of modern award to remove ambiguity or uncertainty or correct error**

- (1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) FWA may make the determination:
  - (a) on its own initiative; or
  - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award."

[21] The AIG is not covered by the Manufacturing Award 2010 and so does not have standing to make an application pursuant to s.160 of the FW Act.

[22] Section 157 of the FW Act is, relevantly, as follows:

**“157 FWA may vary etc. modern awards if necessary to achieve modern awards objective**

- (1) FWA may:
  - (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
  - (b) make a modern award; or
  - (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective...

- (3) FWA may make a determination or modern award under this section:
  - (a) on its own initiative; or
  - (b) on application under section 158.”

[23] Section 158 of the FW Act relevantly provides that a s.157 application:

- to vary or include terms, other than coverage terms, in a modern award may be made by an organisation covered by the award or an organisation entitled to represent the industrial interests of an employer covered by the award; and
- to vary or include coverage terms in a modern award to increase the range of employers covered by the award may be made by an organisation that would become covered by the award or an organisation entitled to represent the industrial interests of an employer that would become covered by the modern award.

[24] The AIG’s application seeks to vary or include coverage terms in the Manufacturing Award 2010, but the AIG does not itself seek to become covered by that modern award. The AIG, therefore, only has standing to make their application under s.157 to the extent their application would result in an employer they are entitled to represent becoming covered by the Manufacturing Award 2010.

[25] Notwithstanding these limitations in respect of the AIG’s standing to make their application, for the following reasons I am not persuaded I should make the variations or include the terms sought by the AIG in their application.

[26] In respect of the AIG’s application to insert the word “recycling” in clause 4.9 of the Manufacturing Award 2010, I am not persuaded there is a relevant ambiguity, uncertainty or error in the Manufacturing Award 2010.

[27] The only party claiming an ambiguity, uncertainty or error relevant to this matter is the AIG. Their claim is based on what they perceive to be the views of others. However, the Ombudsman does not maintain that the Manufacturing Award 2010 does not currently cover recycling. The Ombudsman is concerned about which one of three awards in the area applies in the particular factual circumstances confronting him. Further, some of those opposing the AIG's application to insert the word "recycling" into clause 4.9 of the Manufacturing Award 2010 in fact accept that the Manufacturing Award 2010 currently covers recycling. The remaining parties opposing the AIG's application do not even consider the terms of the current Manufacturing Award 2010, rather they simply point out that many other modern awards cover recycling.

[28] It is apparent that there is no sound basis before me for concluding there is an ambiguity, uncertainty or error in the Manufacturing Award 2010 which the inclusion of the word "recycling" in clause 4.9 would remove or correct.

[29] The AIG did not elaborate beyond their submissions about ambiguity, uncertainty or error as to why the inclusion of the word "recycling" is necessary to achieve the modern awards objective. Accordingly, on what is before me I am also not satisfied that varying the Manufacturing Award 2010 to include the word "recycling" in its clause 4.9 is necessary to achieve the modern awards objective.

[30] Nor am I persuaded the inclusion of the phrase "products and components manufactured from composite materials, carbon fibre, carbon graphite, graphite, titanium, magnesium, alloys or similar materials" as a clause 4.10(oo) in the Manufacturing Award 2010 is necessary to remove ambiguity or uncertainty or correct error in the Manufacturing Award 2010.

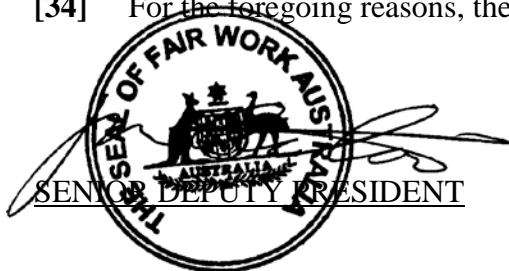
[31] In support of such a contention, the AIG pointed to the industries and callings covered by the Metals Award, an award which was influential in the making of the Manufacturing Award 2010. The AIG also pointed to the "fabrication stream" definition in the Metals Award. I am prepared to assume that the coverage of the Metals Award extended to products and components manufactured from composite materials, carbon fibre, carbon graphite, graphite, titanium, magnesium, alloys or similar materials. However, a difference in the coverage of the Manufacturing Award 2010 compared to that of the Metals Award is not sufficient for me to conclude there is ambiguity or uncertainty or an error within the meaning of s.160 of the FW Act in the coverage clause of the Manufacturing Award 2010.

[32] The AIG did not make out a case beyond their submissions about ambiguity, uncertainty or error as to why the inclusion of their proposed clause 4.10(oo) is necessary to achieve the modern awards objective. As a result, I am also not satisfied on what is before me that varying the Manufacturing Award 2010 to include the AIG's proposed clause 4.10(oo) is necessary to achieve the modern awards objective.

[33] I have come to this view notwithstanding the absence of opposition to part of the AIG's application concerning their proposed clause 4.10(oo). In the circumstances, a modern awards review may be a better forum for dealing with the coverage of the Manufacturing Award 2010 of products and components manufactured from composite materials, etc.



[34] For the foregoing reasons, the AIG's application in this matter is dismissed.



*Appearances:*

*S Smith* for The Australian Industry Group.

*S Haynes* and *G Starr* for Australian Business Industrial.

*S Taylor* for the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU).

*S Maxwell* for the Construction, Forestry, Mining and Energy Union.

*M De Carne* for The Australian Workers’ Union.

*T Walton* for the Transport Workers’ Union of Australia.

*Hearing details:*

2012.

Melbourne:

February 22.

Sydney:

March 14.

**Endnotes:**

<sup>1</sup> MA000010.

<sup>2</sup> MA000021.

<sup>3</sup> MA000043.

<sup>4</sup> AP789529.

<sup>5</sup> MA000071.

<sup>6</sup> MA000029.

<sup>7</sup> MA000056.

<sup>8</sup> MA000054.

<sup>9</sup> MA000057.

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