



4 yearly review of modern awards - Miscellaneous Award 2010

SUBMISSIONS IN RESPONSE TO DIRECTIONS OF 3 JULY 2019

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

4 OCTOBER 2019

1. BACKGROUND

- 1.1 These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 The submissions are made in response to Directions issued by the Full Bench on 3 July 2019 with respect to the *Miscellaneous Award 2010* (**the Award**).
- 1.3 The Directions sought responses to questions identified in a Statement issued by his Honour President Ross on 6 June 2019 as well as further questions identified in the Directions themselves. The relevant questions are as follows:
- (a) Are the coverage provisions of the Award, and in particular, the exclusionary provisions in clause 4.2, expressed in terms which provide sufficient clarity to employers and employees as to the scope of coverage?
 - (b) Is the coverage of the Award drawn in terms consistent with paragraph 4A of the Ministerial Request?
 - (c) Does the Award currently cover, or should it cover, all employees who are not covered by another modern award and who are not excluded from award coverage by s143(7) of the *Fair Work Act 2009* (Cth) (**FW Act**)?
 - (d) Does clause 4.2, or should it, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1?
 - (e) Does clause 4.3, or should it, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1?
 - (f) Are there any other relevant issues relating to the coverage provisions of the Award?
- 1.4 Each question is addressed separately below.

2. ARE THE COVERAGE PROVISIONS OF THE AWARD, AND IN PARTICULAR, THE EXCLUSIONARY PROVISIONS IN CLAUSE 4.2, EXPRESSED IN TERMS WHICH PROVIDE SUFFICIENT CLARITY TO EMPLOYERS AND EMPLOYEES AS TO THE SCOPE OF COVERAGE?

2.1 The summary response to this query is that the coverage provisions of the Award are sufficiently clear.

2.2 The following matters support this contention:

- (a) Clauses 4.4 to 4.8 of the coverage clause adopt relatively standard language consistent with other modern awards. There appears to be no need to consider these specific clauses, which align with the uniform drafting across the modern award system.
- (b) With respect to clauses 4.1 to 4.3, the clauses operate in a sequential manner to outline the threshold requirements applicable to trigger the Award's coverage. Specifically:
 - (i) Clause 4.1 makes it clear that the Award is generally intended to cover all employers in respect of those employees who are not covered by another award and who are covered by the classifications listed in the Award.
 - (ii) Clauses 4.2 and 4.3 then identify particular sub-categories of employees who are exempted from the coverage of clause 4.1.
- (c) In relation to clause 4.2:
 - (i) The first two lines¹ of the clause exempt certain employees from the Award's coverage in order to ensure compliance with s143(7) of the FW Act. These first two lines of clause 4.2 mirror the

¹ As appears in the pdf version of the Award: "*The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards*"

provisions of s143(7)(a) precisely and ensures that the exemption from the Award's coverage complies with the FW Act's requirements. These first two lines go no further than is necessary to comply with s143(7)(a) of the FW Act.

(ii) The remainder of clause 4.2 provides examples of the types of employees who have not traditionally been covered by awards. These examples are uncontroversial and provide helpful guidance to the parties regarding the scope of the exemption contained in clause 4.2.

(d) In relation to clause 4.3, the clause identifies two further categories of employees excluded from the Award's coverage. Clause 4.3 specifies that employees will be excluded from the Award's coverage if they:

(i) are engaged in an industry covered by a modern award, but the award does not contain classifications applicable to the relevant employee; or

(ii) form part of a class of employees excluded from the coverage of a modern award.

These categories of exemptions are concisely defined and are identifiable by reference to objective criteria (namely, the coverage provisions of other Awards of the Fair Work Commission which are publicly published and widely available).

3. IS THE COVERAGE OF THE AWARD DRAWN IN TERMS CONSISTENT WITH PARAGRAPH 4A OF THE MINISTERIAL REQUEST?

3.1 The summary response to this query is that the Award operates consistently with the Consolidated Ministerial Award Modernisation Request made pursuant to Part 10A of the then *Workplace Relations Act 1996* (**Ministerial Request**).

3.2 ABI/NSWBC acknowledge that the drafting of the specific terminology in the Award is somewhat different to the Ministerial Request. However, no inconsistency between the Award and Ministerial Request arises once one has considered the effect of the Award and once paragraph 4A of the Ministerial Request is read in combination with the Ministerial Request as a whole.

The Ministerial Request

3.3 The Ministerial Request relevantly provided as follows:

“This award modernisation request is to be read in conjunction with Part 10A of the Act.

Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 567A of the Act, modern awards:

(a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and

(b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and

(c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements;

(e) must result in a certain, stable and sustainable modern award system for Australia.

2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally

been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia...

4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

3.4 The relevant features of the Ministerial Request that are addressed by the Award are as follows:

Ministerial Request	Award clause addressing Request
<p>Clauses 2 & 4A: Modern awards should not extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free.</p>	<p>Clause 4.2:</p> <p><i>“The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees...”</i></p>
<p>Clause 4A: Create a modern award to cover employees:</p> <p>a) who are not covered by another modern award; and</p> <p>b) who perform work of a similar nature to that which has historically been regulated by awards.</p>	<p>Clauses 4.1, 4.2 and 4.3 address this requirement as follows:</p> <ul style="list-style-type: none"> - Clause 4.1 ensures that the Award covers all employees not covered by other awards, dealing with the part a) of the adjacent column - Clause 4.2 identifies certain carve outs

	<p>from the Award coverage to ensure those who have not historically been covered by Awards remain excluded from the Award's coverage.</p> <p>- Clause 4.3 seeks to exempt from the Award's coverage persons excluded from industry award coverage on the basis that such persons were not historically covered by awards in the relevant industry and were therefore award free.²</p>
<p>Clauses 1(e): Awards must result in a "<i>certain, stable and sustainable modern award system for Australia.</i>"</p>	<p>Clause 4.3 addresses this obligation by ensuring that employees who historically were excluded by industry awards continue to be excluded from award coverage.</p> <p>This appears to have been a deliberate decision by the AIRC focused on ensuring stability and consistency of treatment of the relevant employees.³</p>

The operation of the Award

- 3.5 ABI and NSWBC are not aware of any instances since 1 January 2010 where classes of employees have been identified who should have been award-covered pursuant to the Ministerial Request, but have not been covered because of any deficiencies in the drafting of the Award.
- 3.6 This supports a view that the Award is operating consistently with the provisions of the Ministerial Request.

Case for change required

- 3.7 Notwithstanding the above submissions, should the Commission conclude that the Award is not drafted consistently with the provisions of the Ministerial Request,

² See paragraphs 6.5 to 6.9 further below

³ The deliberateness of this decision is addressed at paragraph 6.19 of these submissions below.

this alone does not provide an automatic basis to vary the Award pursuant to the provisions of the FW Act.

3.8 Given that the FW Act now governs the exercise of the Commission's modern award powers, any variation to modern award coverage clauses (including this Award) would require the Commission to be satisfied that:

- (a) the variation is supported by the relevant legislative provisions, such as sections 134 and 138 of the FW Act;
- (b) the variation is consistent with the specific FW Act provisions pertaining to varying coverage terms (section 163 of the FW Act); and
- (c) cogent reasons exist to depart from previous Full Bench decisions which have made the relevant modern award provisions (see *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 at [19]-[24] and the *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [254]). This is particularly the case here where the drafting of clauses 4.2 and 4.3 of the Award were the subject of considered focus by an Australian Industrial Relations Commission (**AIRC**) Full Bench during award modernisation.⁴

3.9 Having regard to the above, mere inconsistency with the Ministerial Request (noting ABI/NSWBC's position that no inconsistency presently arises) is not a sufficient basis under the existing provisions of the FW Act to vary an award's coverage.

⁴ See paragraphs 6.7 to 6.9 and 6.19 below

4. DOES THE AWARD CURRENTLY COVER, OR SHOULD IT COVER, ALL EMPLOYEES WHO ARE NOT COVERED BY ANOTHER MODERN AWARD AND WHO ARE NOT EXCLUDED FROM AWARD COVERAGE BY S143(7) OF THE FW ACT?

4.1 The Award's drafting does not precisely mirror the provisions of section 143(7) of the FW Act.

4.2 This is because the Award has coverage exclusions that are not contained in section 143(7) of the FW Act. Namely, the Award excludes from coverage:

(a) employees who are in an industry covered by a modern award who are not within a classification in that industry modern award; or

(b) employees in a class exempted by a modern award from its operation.

4.3 It might theoretically be argued that some employees referred to in paragraph 4.2 above (who are excluded from the Award's coverage) are not explicitly excluded from award-coverage at large by section 143(7).

4.4 Importantly, however, the Commission should bear in mind that it is likely that the types of employees referred to in paragraph 4.2 above have been excluded from industry award coverage by the AIRC for the very reason that they do not perform work of a similar nature to that which has traditionally be regulated by awards (see s143(7)(b)).⁵

4.5 As indicated earlier, ABI and NSWBC are not aware of any instances arising since 1 January 2010 whereby classes of employees have been identified who:

(a) might not be subject to the exclusion from award coverage in s143(7)(b);
but

(b) are excluded from the Award's coverage pursuant to clause 4.3.

⁵ This is addressed further at paragraphs 6.7 to 6.9 and 6.19 below

4.6 For the above reasons, the Commission should not be concerned that a class of employees exists who have been excluded from the Award's coverage but are not automatically excluded from award coverage by the FW Act.

5. DOES CLAUSE 4.2, OR SHOULD IT, OPERATE TO EXCLUDE FROM COVERAGE ANY IDENTIFIABLE CLASS OF EMPLOYEES FALLING WITHIN THE SCOPE OF COVERAGE DELINEATED BY CLAUSE 4.1?

5.1 Clause 4.2 is a clause which must be retained in the Award because it is required to ensure compliance with section 143(7) of the FW Act.

5.2 Section 143(7) of the FW Act excludes two classes of employees from award coverage. Namely:

(a) **s143(7)(a)**: Employees who, because of the nature or seniority of their role, have traditionally not been covered by awards; and

(b) **s143(7)(b)**: Employees who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

5.3 These requirements are addressed as follows:

(a) The first two lines of clause 4.2⁶ mirror the provisions of s143(7)(a) precisely and ensure that the exemption from the Award's coverage and go no further than is necessary to comply with s143(7)(a) of the FW Act.

(b) The remainder of clause 4.2 provides examples of the types of employees who have not traditionally been covered by awards. These examples are uncontroversial and provide helpful guidance to the parties regarding the scope of the exemption contained in clause 4.2.

⁶ As appears in the pdf version of the Award: "*The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards*"

(c) Section 143(7)(b) is not expressly addressed by clause 4.2. However, this subsection is addressed by clause 4.4, which provides that the Award does not cover employees excluded from award coverage by the Act.

5.4 The Full Bench of the Fair Work Commission confirmed the operation of clause 4.2 in *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort* [2018] FWCFB 128 (**Gold Coast Kennels**).

5.5 In *Gold Cost Kennels*, the Full Bench relevantly stated that:

“The exclusion in clause 4.2 has clearly been drawn consistently with the terms of that part of the prohibition in s 143(7)(a)....

The exclusion required by the third sentence [of clause 4A of the Ministerial Request] (from which clause 4.2 clearly emanates) again encompasses employees who have not traditionally been covered by awards only where this is because of the nature or seniority of their role...

... the addition to the draft clause 4.2 of the reference to the exclusion including managerial and professional employees was intended to assist in defining the class of employees intended to be excluded.”

5.6 ABI and NSWBC accordingly submit that clause 4.2 excludes operates in an appropriate manner.

5.7 The only change to clause 4.2 that might have merit would be to include an additional sentence at the end of clause 4.2 which expressly addresses section 143(7)(b) of the FW Act. By way of example, the sentence could provide as follows:

“This Award does not cover employees who perform work that is not of a similar nature to work that has traditionally been regulated by awards.”

6. DOES CLAUSE 4.3, OR SHOULD IT, OPERATE TO EXCLUDE FROM COVERAGE ANY IDENTIFIABLE CLASS OF EMPLOYEES FALLING WITHIN THE SCOPE OF COVERAGE DELINEATED BY CLAUSE 4.1?

6.1 Clause 4.3 operates to ensure classes of employees that have traditionally not been covered by awards are not residually covered by the Award.

6.2 The clause limits the coverage of the Award, by preventing the Award from covering an employee on two bases:

1. The existence of an industry based modern award that does not contain a classification for the employee; and
2. Classes of employees that have been exempt from coverage of a modern award.

6.3 As previously discussed at paragraph 3.4 above, clause 4.3 of the Award operates to give effect to both:

- (a) clause 4A of the Ministerial Request (by limiting the Award's coverage to those who have historically been award-covered); and
- (b) clause 1(e) of the Ministerial Request (which seeks to ensure a certain, stable and sustainable modern awards system for Australia).

Development of clause 4.3

6.4 Conveniently, the development of clause 4.3 has been expressly addressed in AIRC decisions and conference transcripts.

Customary pre-modern award coverage

6.5 During the 7 August 2009 AIRC award modernisation hearing, his Honour Justice Giudice raised concerns about the scope of the coverage of the Award.

6.6 The discussion on this point commenced with Justice Giudice identifying that industry based modern awards:

*“... will all have a classification structure and one could assume that there will be some people employed by an employer covered by the award who aren't within the classification structure and that that's, deliberate probably isn't the right word, but **that's the customary coverage in that industry.**”⁷ [emphasis added]*

6.7 This assumption gave rise to concerns to ensure that the Award did not alter customary lines of award coverage, with Justice Giudice going on to highlight the complexity in formulating the correct form of words to protect the “*customary coverage*” of industries. Specifically, his Honour stated:

“And the question is how do you preserve that position, what words do you use in this General Award if indeed it's appropriate to preserve [customary industrial coverage] ... But the options seem to be to try and devise some general words along the lines that a number of parties have tried to in the scope provision or, and perhaps additionally, to identify specifically the areas of exclusion that you know about or the parties bring to our attention.”

6.8 The need to address this concern of the AIRC (namely that employees traditionally exempted from industry award coverage should be exempted from the coverage of the Award) was conceded by the Australian Council of Trade Unions (**ACTU**) in exchanges with Justice Giudice.⁸ It appears that this concern of the AIRC was shared by both employer and union parties to proceedings.⁹

⁷ 7 August 2009 AIRC Conference at [PN80].

⁸ Ibid at [PN80] to [PN82].

⁹ The ACTU's acceptance of this concern is identified at [PN83]; ACCI expressed significant concerns about extending the Award's coverage (or creating the Award at all) in circumstances where ACCI held the view that the traditional areas of award covered employment had now been addressed by the modern awards - see PN [167]-[180]

6.9 It therefore becomes apparent that the underlying objective of clause 4.3(a) was to preserve customary industrial award coverage. This is a goal and outcome entirely consistent with the Ministerial Request.

Exempt classes of employees

6.10 Turning to the second limb of clause 4.3, this portion of the clause is designed to exclude from the Award's coverage those classes of employees that have been expressly left out of a modern award because this class of employees have been found not to be traditionally award covered.

6.11 The importance of ensuring that classes of employees that were traditionally not award covered should not be captured by the Award was expressly and repeatedly raised by the Australian Meat Industry Council (**AMIC**) throughout the award modernisation process.

6.12 In its written submissions to the AIRC dated 24 July 2019 and subsequently through its oral submissions during the 7 August 2009 conference, AMIC expressly raised the example of meat inspectors and their exclusion from the *Meat Industry Award 2010 (Meat Award)*.

6.13 AMIC commented that:

"...Specifically in 1996 the parties, the union and the employer body agreed to specifically exclude meat inspectors and managerial people specifically and, as I said, they were not covered for at least 50 or 60 years in this industry.

...

Now, there's an exclusion for those in the [Meat Award] exposure draft, therefore if they're not dealt with here then there's a possibility that any award that the Commission does make will cover those particular type of

people and that is why in paragraph 13 of our written submissions that there has to be an exclusion for those people.”¹⁰

- 6.14 AMIC’s concerns were that, although meat inspectors were traditionally not award covered, they might fall under the Award’s coverage as they were not “*managerial or professional employees*” that were automatically excluded by clause 4.2 of the Award.
- 6.15 Clause 4.3(b) was drafted directly in response to the concerns of AMIC.
- 6.16 It becomes apparent that clause 4.3(b) does not seek to exclude classes of employees that historically were covered by modern awards. It has been designed to ensure that classes of employees traditionally not covered by awards did not inadvertently become covered by the Award.
- 6.17 Any deletion of clause 4.3(b) presently could itself have the effect of rendering the Award inconsistent with the Ministerial Request and section 143(7)(b) - particularly with respect to meat inspectors as identified by AMIC (there may well be other examples).

Operation of clause 4.3

- 6.18 Having regard to the above, the AIRC included clause 4.3 in the Award to both:
- (a) ensure that the Award was being made in accordance with the Ministerial Request; and
 - (b) to preserve traditional award coverage exclusions.
- 6.19 The drafting was deliberate - as is apparent in the AIRC’s statement of 25 September 2009:

*“While the coverage clause has been drafted to include employees not covered by any other modern award a **number of qualifications are also***

¹⁰ 7 August 2009 AIRC Conference at [PN225]-[PN226].

required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempt from it.”¹¹

- 6.20 During the award modernisation hearing process, parties including the ACTU and ACCI both appear to have concurred that if there were employees that fell out of industry award coverage, the appropriate step to take would be to vary the coverage of the industry award, as opposed to relying upon the coverage of the Award.¹²
- 6.21 The approach suggested by the ACTU and ACCI in 2009 remains appropriate today. In the event that a class of employees emerges that once had award coverage pre-2009 but has since fallen outside the scope of the award system, there remains an ability to vary the industry awards at the relevant time, as opposed to varying the provisions of the Award presently.
- 6.22 For the above reasons, the Commission should be satisfied that clause 4.3 of the Award is operating as intended and in a manner consistent with the objects of the Ministerial Request and section 143(7) of the FW Act.
- 6.23 ABI and NSWBC submit that no changes should be made to clause 4.3 of the Award.

Filed on behalf of ABI and NSWBC by

Luis Izzo

Managing Director - Sydney Workplace

Australian Business Lawyers & Advisors

4 October 2019

¹¹ [2009] AIRCFB 865 at [81].

¹² PN [36]