

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2014/237)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions re: Miscellaneous Award Coverage

Introduction

1. On 6 June 2019 President Ross issued Statement [2019] FWC 3934 regarding the coverage of the *Miscellaneous Award 2010 (the Award)* and the recent decision in *United Voice v Gold Coast Kennels Discretionary Trust /tas AAA Pet Resort [2018] FWCFB 128 (The AAA Pet Resort Decision)*. Following that Statement, Directions were issued on 3 July 2019 requiring any interested party to file submissions and other evidence by 4 October 2019.
2. The CPSU files these submissions pursuant to those Directions. The Directions invited submissions to address the following issues:
 - a) the issues identified in paragraph [7] of the Statement of Justice Ross, President, issued on 6 June 2019 ([2019] FWC 3934)
 - b) the question of whether clause 4.2 of the Miscellaneous Award does, or should, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1;
 - c) the question of whether clause 4.3 of the Miscellaneous Award does, or should, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1;
 - d) any other relevant issues relating to the coverage provisions of the Miscellaneous Award.
3. These submissions only address the first of these issues as referred to in paragraph 3(a) of the Directions. However, the CPSU supports the submissions of United Voice in relation to the other issues.
4. The CPSU has an interest in the *Miscellaneous Award* and has members likely to fall within the coverage of that Award.

Background

5. The coverage clause of the Award currently provides:

4. Coverage

4.1 *Subject to clauses 4.2, 4.3, 4.4, 4.5 and 4.6 this award covers employers throughout Australia and their employees in the classifications listed in clause 14—Minimum wages who are not covered by any other modern award.*

4.2 *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 and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.*

4.3 *The award does not cover employees:*

- (a) in an industry covered by a modern award who are not within a classification in that modern award; or*
 - (b) in a class exempted by a modern award from its operation,*
- or employers in relation to those employees.*

4.4 *The award does not cover employees excluded from award coverage by the Act.*

...

6. The Award was made pursuant to a Ministerial Award Modernisation Request which relevantly provides:

'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.'

7. The coverage of the Award is also subject to section 143(7) of the Fair Work Act 2009 which provides:

'(7) A modern award must not be expressed to cover classes of employees:

- (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
- (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.'

The issues identified in paragraph [7] of the Statement of Justice Ross, President, issued on 6 June 2019 ([2019] FWC 3934)

Whether the coverage provisions of the award, and in particular the exclusionary provision in clause 4.2, are expressed in terms which provide sufficient clarity to employers and employees as to the scope of coverage.

8. The exclusions in clause 4.2 are not sufficiently clear. This is made clear by the circumstances surrounding the AAA Pet Resort Decision and expanded up in the submission of United Voice.
9. Clause 4.2 includes a list of examples of professional employees to be excluded from coverage on the basis that they are 'not traditionally covered' by Awards. This list is subjective and not necessarily based on actual award coverage for these professions. In many cases Award coverage for these professions is industry specific. For example, lawyers have been award covered in the public and community sectors but not in the private sector. Human Resources and Information Technology specialists have also been award covered in the public sector.
10. It is unclear if clause 4.2 only excludes these professions to the extent that they have not been traditionally award covered (which may be difficult to determine) or if the clause excludes all employees in these or similar professions despite the fact that they may have a history of Award coverage in some industries.
11. The CPSU believes that the Miscellaneous Award is intended to cover four classes of employees:
 - a) Employees formerly covered by pre-reform awards who are no-longer covered by those awards and are not covered by a modern award and who do not otherwise fall within an industry covered by a modern award. Examples of these included employees of the Central and Northern Land Councils after the termination of their award and prior to the making of the *Australian Government Industry Award 2016*.
 - b) Employees who were formerly covered by an enterprise award which either sunsetted in 2013, a modern enterprise award wasn't made, or the coverage of the modern enterprise award did not include this group of employees and they don't fall within an industry covered by a modern award.
 - c) Employees in industries that may not have previously been covered by an award, but who perform work of a similar nature to that which is traditionally award covered. Pet hostels is one example of this type of industry.
 - d) Employees in emerging or new industries which do not fall clearly within the scope of another modern industry award. These employees may only be temporarily covered by the Award until a new industry award is made or until the coverage of an existing award is extended.
12. Listing such examples in the Award of the circumstances in which the Award is intended to operate could provide additional clarity to employers and employees as to the intended scope of the award.

13. Over the life of the Award, new industries will emerge, and the Commission may make new Awards and vary existing Awards. Therefore, there needs to be some elasticity to the coverage of the Award to deal with certain groups of employees entering and leaving its coverage.

Whether the coverage of the award is drawn in terms consistent with paragraph 4A of the Ministerial Request set out above.

14. The Ministerial Request states that the 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’. While the coverage of the Award does exclude those employees required to be excluded by the Ministerial Request, it could be read to also exclude a broader range of employees than required by the Request.
15. Clause 4.2 lists examples of professional employees to be excluded from coverage which, as noted above, have been and still are, covered by awards in certain industries. This additional exclusion goes beyond, and is not consistent with, the Ministerial Request.
16. The coverage of the Award is additionally restricted by the classification structure in the Award. In the AAA Pet Resort Decision, the full bench noted at [36]:

“The classifications descriptors make it clear that no classification applies to persons with a professional qualification or managerial responsibilities, that Levels 3 and 4 were to apply to trade qualified employees, and that Levels 1 and 2 were to apply to low skilled employees with no particular work qualification at all. Thus, it may be inferred that the award was not intended to cover professional or managerial employees, and that it was intended to cover low skilled employees as well as trade-qualified employees not covered by any other award”

17. It is consistent with the Ministerial Request not to include classifications for managerial employees. However, there may be roles that, despite requiring professional qualifications, have traditionally been covered by Awards, at least in some industries. Therefore, the classification structure, as referred to by clause 4.1, may be inconsistent with the Ministerial Request.

Whether the award currently covers, or should cover, all employees who are not covered by another modern award and who are not excluded from award coverage by s.143(7) of the FW Act.

18. The Award should cover all employees who are not covered by another modern award and who are not excluded from award coverage by s.143(7) of the Act. As noted above, the exclusions in clause 4.2, may in fact exclude certain classes of employees who are not covered by another modern award and who are not excluded from award coverage by s.143(7) of the Act.

CPSU

4 October 2019