



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

United Voice

v

Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort
(C2017/4888)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BINET
COMMISSIONER CAMBRIDGE

SYDNEY, 12 JANUARY 2018

Appeal against decision [2017] FWCA 4283 of Commissioner Wilson at Melbourne on 16 August 2017 in matter number AG2017/1963.

Introduction

[1] United Voice has applied for permission to appeal and has appealed, pursuant to s 604 of the *Fair Work Act 2009* (FW Act), a decision of Commissioner Wilson issued on 16 August 2017¹ (Decision) in which he approved the *AAA Pet Resort Enterprise Agreement 2017* (Agreement). The Decision in its entirety was as follows:

“[1] An application has been made for approval of an enterprise agreement known as *The AAA Pet Resort Enterprise Agreement 2017* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by Gold Coast Kennels Discretionary Trust T/A AAA Pet Resort. The Agreement is a single enterprise agreement.

[2] The Agreement covers employees engaged in the pet grooming and boarding industry in Queensland.

[3] Although not bargaining a representative for the Agreement, United Voice provided submissions on the question of whether employees to be covered by the Agreement would otherwise not be covered by an award. I have taken these submissions into consideration however, I am satisfied that in keeping with the Fair Work Commission’s previous decisions that these employees are not covered by an Award.¹

[4] I am satisfied that each of the requirements of ss.186, 187 and 188 as are relevant to this application for approval have been met.

¹ [2017] FWCA 4283

[5] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 23 August 2017. The nominal expiry date of the Agreement is 16 August 2021.”

[2] The footnote in paragraph [3] cited two decisions: *Samboot Pty Ltd T/A Samford Pet Resort and Northshore Pet Resort*² and *GL Elin and CM Elin T/A Animal World Pet Resorts*³.

[3] United Voice contends in its appeal that the Commissioner erred in concluding that the employees to whom the Agreement would apply if approved (Employees) were not covered by a modern award and that the Agreement satisfied the approval requirements in ss 186, 187 and 188 of the FW Act, and he should not have followed the previous decisions referred to in the footnote. The basis of United Voice’s contentions in this regard was that the Employees were in fact covered by the *Miscellaneous Award 2010*, and the result of the identified errors that there was no proper assessment as to whether the better off overall test (BOOT) approval requirement contained in s 186(2)(d) and explicated in s 193 was satisfied by reference to that award.

Statutory framework

[4] Section 186 of the FW Act relevantly provides:

186 When the FWC must approve an enterprise agreement--general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(d) the agreement passes the better off overall test.

...

[5] Section 193(1) sets out the BOOT in respect of non-greenfields agreements as follows:

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the

² [2016] FWCA 4382

³ [2017] FWCA 2375

agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

[6] The expressions “*award covered employee*”, “*prospective award covered employee*” and “*test time*” are defined in s 193(4), (5) and (6) as follows:

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:

- (a) is covered by the agreement; and
- (b) at the test time, is covered by a modern award (the ***relevant modern award***) that:
 - (i) is in operation; and
 - (ii) covers the employee in relation to the work that he or she is to perform under the agreement; and
 - (iii) covers his or her employer.

Prospective award covered employee

(5) A ***prospective award covered employee*** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

- (a) would be covered by the agreement; and
- (b) would be covered by a modern award (the ***relevant modern award***) that:
 - (i) is in operation; and
 - (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
 - (iii) covers the employer.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

[7] Where the Commission has concerns that an agreement for which approval is sought does not meet the statutory approval requirements (including the BOOT), it may nonetheless approve the agreement under s 190 if those concerns are addressed by acceptable undertakings which are not likely cause financial detriment to any employees covered by the agreement or result in substantial changes to the agreement. The Commission may also approve an agreement that does not satisfy the BOOT if it is satisfied that, because of

exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

Relevant provisions of the Agreement

[8] Clause 1.2 of the Agreement provides that it applies to the “*Gold Coast Discretionary Trust ABN 82114105406*” and its employees. It is unclear how a discretionary trust can constitute a “*national system employer*” capable of making an enterprise agreement under Pt 2-4 of the FW Act, although we note that the ABN is held by the trustee of the discretionary trust identified. This issue was not the subject of any appeal ground, but it will require further attention as discussed at the end of this decision.

[9] Clause 1.4, *Company Profile*, states:

“AAA Pet Resort operates a Luxury Pet Holiday destination where we care about our clients’ pets using the best modern facilities.”

[10] The Agreement provides in clauses 1.3 and 5.1 for the following classification structure:

- Level 1 – Animal Attendant (Introductory)
- Level 2 – Assistant Animal Attendant
- Level 3 – Animal Attendant
- Level 4 – Supervisor
- Level 5 – Senior Supervisor

[11] The classification definitions are set out in clause 5.1 of the Agreement as follows:

“Level 1 Animal Attendant (Introductory) ”

An Employee engaged without prior skills and experience in the pet boarding and grooming industry in Queensland and who is required to complete the Employer’s internal training program.

Progression - An Animal Attendant (Introductory) employee will progress to Level 2 following the completion of 494 hours of work. The Employer may decide to sign an Employee off as competent at an earlier time than 494 hours, and allow the Employee to progress to Level 2.

Level 2 Assistant Animal Attendant

In addition to the duties of a Level 1 Employee, an Employee at Level 2 must focus on excellent client service. Additional duties will be trained at this level to ensure the employee is competent in all duties.

Qualifications -A Level 2 will have completed the Employer’s internal training course and up to 494 hours of training at Level 1.

Progression -An Assistant Animal Attendant will progress to the next level when a vacancy exists and the Employer assesses the Employee to be suitably qualified to carry out the indicative duties of an Animal Attendant.

Level 3 Animal Attendant

In addition to the indicative duties of a Level 2 and training at that Level, an Employee at Level 3 may possess a Certificate 3, Certificate 4 or Diploma in Animal Care and Management or similar studies or equivalent industry experience.

An Employee appointed to this level will have no less than 12 month's prior experience with AAA Pet Resort or equivalent with another industry employer that is recognised by the Employer.

An Employee at this level must provide daily demonstration to lower level employees about best practice and upholding the Employer's operational and good conduct standards.

Progression - An Animal Attendant will progress to the next level when a vacancy exists and the Employer assesses the Employee to be suitably qualified to carry out the indicative duties of a Supervisor.

Level 4 Supervisor

An Employee employed to perform the role of Supervisor must always undertake Animal Attendant duties as a priority in addition to the duties described below under the Duties for a Supervisor.

In addition to the qualifications of an Animal Attendant, the Supervisor may possess a Bachelor Degree and/or prior experience in a managerial role.

Level 5 Senior Supervisor

An Employee employed to perform the role of Senior Supervisor must always undertake Animal Attendant duties as a priority in addition to the duties described below under the Duties for a Senior Supervisor.

A Senior Supervisor must take on the responsibility of overall supervision of the facility.

The duties of Senior Supervisor are detailed below.

There are no additional qualifications that would be relevant other than those described as recognised at Animal Attendant and Supervisor level.”

[12] According to clause 5.1 of the Agreement, Level 1 – Animal Attendants, Level 2 – Assistant Animal Attendants and Level 3 – Animal Attendants perform the following duties:

“A love of animals and the ability to anticipate their needs is necessary for this job.

Kennel attendants work in animal boarding houses. They most often work with dogs and cats, but may also occasionally find themselves in contact with other domestic or companion animals.

They are in charge of the general upkeep of animals in their care and must provide individualized attention to them so they stay healthy and happy.

General duties include keeping rooms clean and sanitized; walking, feeding and picking up after the animals; reporting on the animal's condition to its owner, scheduling boarding appointments, cleaning rooms runs, non-trade maintenance, bathing, grooming, administering medication, and monitoring the behavior of animals. They also interact with clients as they pick up and drop off their dogs.

They also must be prepared to handle companion animals that may be stressed due to their being in an unfamiliar environment.”

[13] Clause 5.1 further provides that Level 4 – Supervisors perform the following duties:

“Supervisors must oversee the boarding animals to ensure that they are cared for properly.

Supervisors are required to assist the duties of animal attendants wherever necessary.

Supervisors must also be great with leading their team. Supervisors must know their team well enough to know who works better where and how to structure their team’s work program.

Supervisors must also have excellent public relations skills so that they can interact with owners as they drop off and pick up their pets. They also are responsible for creating work schedules/budgets and supervising staff members. Ensuring that all of the daily/weekly tasks (yard rotations, individual services, daily cleaning, weekly cleaning, etc...) are complete.

Supervisors must be able to multi-task, have excellent communication skill and have strong Customer Service Skills.

Supervisors may be required to work “on call” during emergency situations and to fill in when employees call in sick or must miss work.

Supervisors have the ultimate responsibility for making sure all duties are completed each day.

The Supervisor will report directly to the Managing Director of the Company or the Senior Kennel supervisor.”

[14] Clause 5.1 also provides that Level 5 – Senior Supervisors perform the following duties:

“The Senior Supervisor must oversee the whole facility to ensure that it is running correctly and that animal care is being maintained to AAA Pet Resort standards.

The Senior Supervisor may be involved with all duties of Animal Attendant and Supervisors.

Senior Supervisors have the ultimate responsibility of the facility; it does fall on this level to make sure everything is running smoothly.

The Senior Supervisor is expected to demonstrate good leadership skills to train new employees and manage existing employees.

The Senior Supervisor must multitask to a high standard; have excellent communication skills and strong Customer Service Skills.

Senior Kennel supervisors are also responsible for ensuring that the electronic media plan is implemented consistently (Electronic media includes social media; website updates; and online scheduler).

The Senior Supervisor is responsible for assuring the Preparation of various flyers/premiums for event days (print and electronic); ensuring adequate staffing levels during events.

The Senior Supervisor must oversee/monitor documentation of health check/medication administration for facility dogs.

Senior Kennel supervisors also have to maintain appropriate levels of kennel supplies as well as maintaining inventory for retail.

Where AAA Pet Resort offers dog training services while dogs are being boarded, the Senior Supervisor may be involved with performing or supervising training activities.

The Senior Supervisor must also be available to work “on call” for emergency situations and to fill in when employees call in sick or must miss work.

The Senior Supervisor has the ultimate responsibility for making sure all duties are completed each day.”

[15] The permanent base hourly rates of pay provided for in the Agreement are: Level 1 - \$17.70; Level 2 - \$17.90; Level 3 - \$18.40; Level 4 - \$21.10; Level 5 - \$23.00. The Level 1 rate aligns with the National Minimum Wage as it was at the date the application for approval of the Agreement was lodged.

Coverage of the Miscellaneous Award 2010

[16] Clause 4, Coverage of the *Miscellaneous Award* relevantly provides as follows:

“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.
...”

[17] There was no dispute that the further exclusions from coverage in clauses 4.3-4.6 were not applicable.

[18] The classifications contained in the *Miscellaneous Award* are set out in Schedule B as follows:

“Schedule B—Classification Structure and Definitions

Level 1

An employee at this level has been employed for a period of less than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 2

An employee at this level has been employed for more than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 3

An employee at this level has a trade qualification or equivalent and is carrying out duties requiring such qualifications.

Level 4

An employee at this level has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.”

[19] The wage rates currently prescribed for the above classifications range from \$18.29 per hour for Level 1 (an amount equal to the National Minimum Wage) to \$23.23 per hour for Level 4.

Previous award coverage of pet boarding

[20] The terms of clause 4.2 of the *Miscellaneous Award* make relevant the extent to which there was award coverage of pet boarding functions and other functions of an analogous nature at the time of the award modernisation process conducted under Pt 10A of the *Workplace Relations Act 1996* (WR Act) which led to the making of the *Miscellaneous Award* and other modern awards. In the course of the appeal proceedings, United Voice and

the Commission identified a number of pre-modern awards which had apparent application to such functions.

[21] Firstly, in Victoria, there was an award of the Australian Industrial Relations Commission (AIRC), the *Veterinary Assistants & Animal Attendants (Victoria) Interim Award 2000* (Victorian Award).⁴ Clause 4, *Incidence* of the Victorian Award provided (underlining added):

“This award applies to persons other than veterinary surgeons employed in connection with:

- veterinary hospitals or surgeries (however described); or
- any establishment which accommodates, handles or treats animals and household pets; or
- any establishment which otherwise caters for the welfare of animals or pets.”

[22] Clause 5, *Locality*, provided that the Victorian Award only applied to the State of Victoria, and Clause 6, *Parties Bound*, provided that it was binding on the Australian Liquor, Hospitality and Miscellaneous Workers Union, its officers and its members, and on all the employers listed in Schedule A - *Respondents* in respect of their employees, whether or not they are members of the Union. The employers listed in Schedule A were generally of the nature of animal welfare organisations, and did not appear to include any for-profit pet accommodation businesses. However the declaration appended to the Victorian Award shows that it was declared a common rule award in Victoria pursuant to ss 141 and 493A of the WR Act effective from 1 January 2005.⁵ The adult classifications set out clause 16.1.2 include “*Certified Animal Nurse*”, “*Trainee Nurse*” and “*Animal Attendant*”. Clause 8, *Definitions* contains the following definitions of relevance:

“8.4 Animal Attendant means an adult employee, or an employee who has completed at least three years' service as a Trainee Animal Attendant.

8.5 Trainee Animal Attendant means a junior employee who feeds animals (including the preparation of foods) and cleans animal enclosures or kennels, but who does not maintain clinical records or assist with the treatment of animals.”

[23] Secondly, in New South Wales there were two awards of the Industrial Relations Commission of New South Wales of relevance: the *Animal Welfare General (State) Award* (NSW) (NSW Award) and the *Animal Welfare Institutional (State) Award* (NSW) (NSW Institutional Award).⁶ Clause 31, *Area, Incidence and Duration* of the NSW Award provided that it applied “*to all persons employed in the classifications set out in clause 5, Wages, within the jurisdiction of the Animal Welfare, Non-Institutional (State) Industrial Committee*”. The jurisdiction of the Industrial Committee referred to encompassed the industries and callings of “*All employees, other than tradespersons and veterinary surgeons, employed in or*

⁴ This award had replaced the earlier *Veterinary Assistants and Animal Attendants (Victoria) Interim Award 1996*.

⁵ PR953973

⁶ The *Area, Incidence and Duration* provisions of both awards show that there were equivalent predecessor awards dating back to at least 1994.

in connection with veterinary hospitals and any establishment or business which accommodates, handles, treats, or otherwise caters for the welfare of animals and household pets in the State, excluding the County of Yancowinna” (underlining added), subject to certain exceptions which are not presently relevant. Clause 5 of the NSW Award provides for minimum rates of pay as set out in Table 1, *Wages* of Part B of the award. Table 1 of Part B includes minimum pay rates for the classifications of “*Animal Nurse, as defined*”, “*General Nurse, in transition*”, “*Animal Attendant, as defined*” and “*Food Preparer or Kennel Cleaner*”. Animal attendant is defined in clause 4 of the NSW Award to mean:

“... an employee with three years' experience in the industry and who is employed in connection with animal welfare, or with less service if, in the opinion of the employer, the employee is sufficiently experienced to be so classified and who may be able to give injections and to take temperatures of animals.”

[24] Clause 33, *Area, Incidence and Duration* of the NSW Institutional Award provided that it applied to “*all persons employed in the classifications set out in clause 5, Wages, within the jurisdiction of the Animal Welfare, Institutional (State) Industrial Committee*”. The jurisdiction of this Industrial Committee encompassed the industries and callings of “*All employees other than tradespersons and veterinary surgeons employed in or in connection with animal welfare institutions in the State, excluding the County of Yancowinna*”. As with the NSW Award, the NSW Institutional Award included a classification of Animal Attendant, which was defined in the same terms as in the NSW Award.

[25] Thirdly, in Western Australia there was (and, in respect to non-national system employers, remains) the *Animal Welfare Industry Award* (WA Award), an award of the Western Australian Industrial Relations Commission.⁷ Prior to the award modernisation process, clause 3, *Area and Scope* of the WA Award provided that it applied throughout Western Australia to “*all employees employed in any classification referred to in clause 18 – Rates of Pay in the veterinary industries of animal welfare, animal care, animal breeding or animal homes and to all employers employing such employees*.” Schedule B lists as respondents to the WA Award a number of veterinary hospitals and the RSPCA. The classification structure contained in clause 18 of the WA Award provides for six different classification levels progressing from an Introductory Classification up to a Level 5 Classification. The specified typical duties of a Level 1 employee may include “*basic animal care*” and “*grooming, feeding, cleaning and restraint*”; the typical duties of a Level 2 employee may include “*basic animal care*” and “*animal handling*” but also “*tasks relating to the clinic and surgery including maintaining patient records and compiling patient and client histories*” and “*ability to undertake basic animal health procedures*”; and the duties of a Level 3 employee under the WA Award may include “*assisting with animal care*” but also “*undertaking daily clinic routines and routine monitoring of patient care*”. A Level 3 employee is required to have competencies of Certificate III in Companion in Animal Services or another equivalent qualification.

[26] Finally, the *Miscellaneous Workers (Northern Territory) Award 2001* (NT Award)⁸, an award of the AIRC, was a common rule award applicable in the Northern Territory which was described by clause 3.4.1 as applying to the “*industry and/or industrial pursuits of*”, among other things, “*animal welfare establishment*”. Its classification skill level definitions,

⁷ The award variation history for this award indicates that it has been operational since November 1968.

⁸ A predecessor version of this award was made in 1985.

set out in Schedule B, are expressed in fairly generic terms (reflective of the diverse range of industries and occupations covered by the NT Award), but clause 11.2.5 does, in relation to the minimum engagement period for casual employees, make specific reference to “*veterinary assistants and kennelhands*”, as does clause 14.4.1 in relation to junior rates. Schedule A contains a list of employer respondents, and it includes “*Tammaki Kennels*” and “*Yarrawonga Boarding Kennels*”.

[27] It is not in contest that there has never been an award applicable in the State of Queensland to employees involved in animal care outside of veterinary practices. The *Veterinary Practice Employees’ Award - State* (Queensland Award), an award of the Queensland Industrial Relations Commission, covers employees performing unskilled animal care functions but only when employed in veterinary practices. Specifically, the Level 1 classification defined in Appendix 1, *Classification structure* includes “*basic animal care*” and “*grooming, feeding, cleaning and restraint as instructed*” in its “*Roles and Expectations*”.

Submissions and evidence

[28] United Voice submitted that:

- it had standing to bring the appeal because it had coverage of relevant employees in the animal care services industry, had made submissions to the Commissioner concerning the coverage of the *Miscellaneous Award* and whether the Agreement passed the BOOT, was a bargaining representative for a member employed by another enterprise in the industry, and had a critical interest in the determination of whether the employees in the industry were award-free or covered by the *Miscellaneous Award*;
- the two decisions relied on by the Commissioner did not deal with or even mention the issue of award coverage;
- to the extent that the Commissioner may have intended to rely upon the May 2010 decision in *GL Elin & CM Elin t/a Animal World Pet Motel*⁹ (instead of the 2017 *Elin* decision which he cited), that decision was not determinative of the current matter because the employer was held not to be covered by the *Miscellaneous Award* only because it was a Division 2B employer and did not fall within the definition of “*employer*” then appearing in clause 3 of the award;
- the definition was changed by a determination issued on 4 June 2010¹⁰ so that it referred to an employer for the purpose of the *Miscellaneous Award* being a “*national system employer within the meaning of the Act*”;
- the classes of employees excluded from coverage by clause 4.2 of the *Miscellaneous Award* were employees of the type in the examples given in the clause, namely managerial, professional and other specialist white collar employees;
- this approach was confirmed by the relevant Ministerial requests in the award modernisation process;

⁹ [2010] FWAA 2851

¹⁰ PR997772

- the duties and wage rates prescribed by the Agreement show that the Employees perform work at a basic and supervisory level in the areas of animal care, grooming and accommodation, and their wage rates are modest;
- the work performed is of a similar nature to work which has historically been regulated by awards such as the Victorian Award, the NSW Award, the NSW Institutional Award, the WA Award, the NT Award and the Queensland Award;
- the type of employees to whom the Agreement would apply are the very type of employees who were meant to be caught by the *Miscellaneous Award*;
- the Commissioner therefore erred in concluding that the Employees were not covered by the *Miscellaneous Award*, with the result that the Commissioner gave no proper consideration to the BOOT;
- the application of the BOOT by reference to the *Miscellaneous Award* would raise issues about the lack of overtime rates and penalty rates for work on nights, Sundays and public holidays, and the inferiority of the ordinary wage rates at least for the animal attendant classifications when compared to the *Miscellaneous Award*;
- permission to appeal should be granted because the appeal raised issues of general importance concerning whether the pet boarding and grooming industry was covered by the *Miscellaneous Award* and the proper construction of clause 4.2 of that award, and because the Decision was attended by sufficient doubt to warrant its reconsideration and substantial injustice would result for employees of AAA Pet Resort if permission was refused;
- the appeal should be upheld and the application for approval of the Agreement remitted for re-determination by another member of the Commission.

[29] United Voice read two affidavits of John Barrie Spreckley, its Industrial Coordinator, affirmed on 21 September 2017 and 11 October 2017 in the appeal. In the first affidavit Mr Spreckley described United Voice's constitutional coverage of animal care service employees, its interest in the question of the coverage of the *Miscellaneous Award* by reference to its role as bargaining representative at another pet accommodation establishment, and the submission United Voice had made to the Commission in relation to the application for approval of the Agreement concerning whether the Agreement passed the BOOT if the *Miscellaneous Award* covered the Employees. In the second affidavit, Mr Spreckley said that a United Voice member (whom he identified) had been advised by the Fair Work Ombudsman on 28 June 2017 that the *Miscellaneous Award* covered an animal attendant at a private boarding kennel, but then received further advice on 22 August 2017 that there had not yet been a definitive answer to the issue of award coverage in the pet boarding industry.

[30] AAA Pet Resorts submitted that:

- United Voice was not a "person aggrieved" with standing to appeal the Decision, in that because it was not a bargaining representative for the Agreement, did not contend it had any members covered by the Agreement, did not seek to be covered by the Agreement, and there was no evidence that it was likely that it would in future have

members covered by the Agreement, it did not have any grievance beyond that of an ordinary member of the public;

- any interest which United Voice had in resolution of the question of whether the *Miscellaneous Award* covered pet boarding for the purpose of enterprise bargaining at any other establishment was a collateral purpose which was not sufficient to make it a person aggrieved;
- there was no issue of general importance in the appeal that justified the grant of permission to appeal, and no evidence that the refusal of permission would cause any injustice;
- the view that pet boarding employees in Queensland were award free had been adopted by the Commission for several years in relation to enterprise agreement approvals in the pet accommodation industry, including in the decision in *Young Family Trust t/a Castalan Boarding Kennels and Cattery*¹¹, and that status quo should not be disturbed now;
- the *Miscellaneous Award* did not cover employees at pet boarding establishments because the exclusion in clause 4.2 applied, and the award classifications did not cover the functions of employees at those establishments;
- the exclusion in clause 4.2 applied because the roles of animal attendants, their assistants and supervisors in pet boarding establishments had not traditionally been covered by awards, State or federal, in Queensland;
- awards which dealt with veterinary practices were not relevant, because veterinary practices were vastly different to pet boarding establishments, in that the former involved caring for sick and injured pets while the latter merely provided accommodation for pets while their owners were away;
- the Queensland Award only applied to veterinary practices and had no coverage of pet boarding establishments;
- the Victorian Award's classifications required work in the environment of ill, injured, homeless and maltreated animals of all types and not just companion pets, and its list of respondents included only veterinary and animal welfare establishments;
- the NSW Award, by reference to its inclusion of an Animal Nurse classification, and the requirements that an animal attendant must have three years' experience in the welfare industry and might have to give injections and take temperatures, was to be read as applying to the higher-level performance necessary for animals requiring welfare level care;
- the NSW Institutional Award's classifications covered Veterinary Assistants, Animal Attendants required to give injections and take temperatures, and Lethalists who clinically destroyed animals;

¹¹ [2011] FWAA 1997

- the WA Award was concerned with clinical care of animals and animal breeding and welfare, not pet accommodation;
- the NT Award was concerned with animal welfare establishments;
- while the award modernisation process which gave rise to the *Miscellaneous Award* contemplated that the award to be made might be extended to cover new industries or occupations where the work was similar in nature to work historically regulated by awards, it did not contemplate extending award coverage to old industries and occupations that were traditionally award-free;
- alternatively, even if the exclusion in clause 4.2 did not apply, the classifications did not capture employees in pet boarding establishments, so there was no coverage under clause 4.1.

[31] AAA Pet Resort read two affidavits in the appeal. The first was affirmed by Carolyn Maree Tate, sole Director of SME Assistance Group Pty Ltd, on 9 October 2017. Ms Tate's business provided industrial relations services to the Association of Pet Boarding and Grooming (APBG). She described submissions she had made in relation to applications for the approval of the *Animal World Pet Motel Enterprise Agreement 2010* and the *Pet Chalet and Park Ridge Cat Resort Enterprise Agreement 2010*, and written advice she had received from the Fair Work Ombudsman dated 8 September 2010 that the *Miscellaneous Award* did not apply to an animal attendant or pet groomer engaged in a boarding kennel facility in Queensland. That letter, annexed to Ms Tate's affidavit, relevantly stated:

“Historically these occupations have not been regulated by an award in the state of Queensland.

The modern award applies to national system employers and their employees who are not covered by any other modern award. However there are a number of exclusions to these coverage provisions.

Clause 4.2 states that the modern award will not apply to employees who due to the nature of their work have traditionally not been covered by awards. We are of the view that an animal attendant or dog groomer engaged in a boarding kennel facility in Queensland will not be covered by the modern award due to this exclusion.

These employees will continue to be considered award free and entitled to the provisions of the National Employment Standards and the *Fair Work Act 2009*.¹⁴

[32] Ms Tate also described the subsequent approval of a number of enterprise agreements applying to pet boarding and grooming establishments in Queensland which had been assessed for approval by the Commission on the basis that they were not covered by any modern award.

[33] The second affidavit was affirmed by Glenn Lewis Elim, the President of the APBG, on 9 October 2017. He said that the APBG was peak representative body in Queensland for the kennel and grooming industry, that the industry in Queensland originated in the late 1960s, and Queensland industrial relations authorities had advised in 2003 that the industry

was award-free. He also described activity which Ms Tate had conducted as a consultant to the APBG in relation to obtaining advice from the Fair Work Ombudsman and the approval of enterprise agreements for the industry in Queensland.

Consideration

Standing to appeal

[34] We consider that United Voice has an interest in the decision beyond that of an ordinary member of the public and is consequently a person aggrieved by the Decision and has standing to appeal against the Decision pursuant to s 604 of the FW Act.¹² Although it was not a bargaining agent for the Agreement, it was not in dispute that its rules permitted it to enrol as members the Employees. Furthermore, its broader interest in the question of whether the *Miscellaneous Award* covered employees in the pet accommodation industry, which arose at least in relation to its role as a bargaining agent at another pet accommodation establishment, caused it to make submissions concerning this question in the proceedings below which were rejected by the Commission. Those circumstances are sufficient to confer standing to appeal: see *CEPU v Main People Pty Ltd*¹³; *MUA v Toll Energy Logistics Pty Ltd*¹⁴; *CFMEU v MGI Piling (NSW) Pty Ltd*¹⁵; *TWU v ALDI Foods Pty Limited*¹⁶; *CFMEU v CSRP Pty Ltd*¹⁷; *CFMEU v Concrete Constructions (WA) Pty Ltd*¹⁸.

Permission to appeal

[35] We consider that permission to appeal should be granted. For the reasons which follow, the Decision is attended by sufficient doubt to warrant its reconsideration on an issue which affected the Commission's power to approve the Agreement. Further, the question of the coverage of the *Miscellaneous Award* is novel and, as the submissions of both parties made clear, has broader consequences for enterprise bargaining in pet boarding businesses generally.

Coverage of the Miscellaneous Award

[36] We have earlier set out clause 4.2 of the *Miscellaneous Award*, which establishes the exception from the general coverage provision in clause 4.1 which AAA Pet Resort relies upon to avoid the proposition that the award covers the Employees. It is necessary at the outset therefore to construe clause 4.2 having regard to its context and purpose. Before we turn directly to the text of clause 4.2, two observations may be made about the apparent purpose of the *Miscellaneous Award* based on the context of the award's terms as a whole. First, the title of the award, the terms of clause 4.1, and the broad and generic nature of the classifications descriptors in Schedule B suggest that the purpose of the award is to provide minimum (and minimalistic) conditions of employment for a miscellaneous range of employers and employees, not identified by reference to any industry, business function or

¹² *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 65 IR 393

¹³ [2014] FWCFB 8429 at [5]- [7]

¹⁴ [2015] FWCFB 7272; 254 IR 353 at [95]- [98]

¹⁵ [2016] FWCFB 2654; 260 IR 244 at [4]

¹⁶ [2016] FWCFB 91; 255 IR 248 at [22]- [23]

¹⁷ [2017] FWCFB 2101 at [8]- [13]

¹⁸ [2017] FWCFB 3912 at [4]

occupation, who are not covered by any other modern award. Second, the classifications descriptors make it clear that no classification applies to persons with a professional qualification or managerial responsibilities¹⁹, 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. In respect of low-skilled employees, the low minimum rates of pay prescribed also tend to suggest that the award was intended to capture low paid workers not covered by another award.

[37] We consider that clause 4.2 has a plain meaning based on the ordinary meaning of the words used. The exclusion in clause 4.2 has two requisite elements. Stated in reverse order, they are:

- (1) the classes of employees must not have been traditionally covered by awards; *and*
- (2) this must have been because of the nature or seniority of their role.

[38] That is, it is not sufficient for the exclusion to apply that a particular class of employees has not traditionally been covered by awards where this is not attributable to the nature or seniority of the employees' role.

[39] It may be accepted, as submitted by AAA Pet Resort, that the remainder of clause 4.2, “*...including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists*”, cannot be read as exhaustively stating the scope of the exclusion. Nonetheless it is plain that the identified classes of employees are intended both to serve as examples to guide the interpretation and application of the clause and to constitute the principal classes of employees excluded. Thus “*managerial employees*” are a class of employees traditionally excluded from award coverage because of the “*seniority of their role*”, and the other identified classes are specialist white collar professionals traditionally not covered because of the “*nature ... of their role*”. To read the clause this way is consistent with the overall context of the award to which we have referred, including the lack of any classifications applicable to managerial or professional employees.

[40] This interpretation of clause 4.2 is consistent with the statutory and historical context. Section 143(7) of the FW Act 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.

¹⁹ That the *Miscellaneous Award* may however cover persons with supervisory duties may be inferred from the fact that clause 15.3 provides for a leading hand/in-charge allowance.

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

[41] 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), which contains the same double requirement that the class of employees must traditionally not have been covered by awards *and* that this is because of the nature or seniority of their role. Although this provision did not come into operation until 1 January 2010 (the same date as the *Miscellaneous Award* took effect), it was expressly adverted to in the Full Bench decision of the Australian Industrial Relations Commission of 4 December 2009 which finalised the terms of the *Miscellaneous Award* as part of the award modernisation process.²⁰ The Full Bench in that decision also referred to the Ministerial request made pursuant to s 576A of the WR Act which required it to make the *Miscellaneous Award*.²¹ That request stated:

“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.”

[42] It is notable that the first sentence of the above passage requires the award to be made to cover employees performing work *of a similar nature* to work historically regulated by awards – that is, the employees to be covered do not actually have to be performing work which was itself historically regulated by awards. The exclusion required by the third sentence (from which clause 4.2 clearly originates) 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 Full Bench having referred to the request and s 143(7) then said (footnote omitted):

“[149] Although s.143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the *Miscellaneous Award* in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature or seniority of their roles have traditionally not been covered by awards. Many different approaches and drafting techniques were proposed to encapsulate that requirement. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards.

²⁰ [2009] AIRCFB 945 at [148]-[149]

²¹ Ibid at [146]

[150] A number of submissions canvassed the purpose or function of the award. The ACTU, for example, submitted that the functions of the award should be twofold. The first is to fill gaps in modern award coverage which became apparent during the process of setting aside award-based transitional instruments as required by the Transitional Act. The second function is to provide interim coverage for emerging industries pending the making of a new modern industry award or an appropriate extension to the coverage of an existing modern award. The Australian Government took a very similar approach, while stressing the importance to the economy of ensuring that employees who have not traditionally been covered by awards remain free from modern award coverage as well. In an earlier stage in the consultations ACCI proposed that the coverage of the award should not be settled until after an audit of modern award coverage to ascertain what if any gaps there are by comparison with the existing pattern of federal and state award coverage. AiGroup and ACCI both suggested that the award be limited to employees covered by a federal or state award or a Notional Agreement Preserving a State Award (NAPSA). AiGroup proposed in addition that industries and employers could be specified in a list attached to the award to permit new industries and employers to be added as necessary.

[151] Almost without exception employer representatives criticised the breadth of coverage in the exposure draft. They suggested that employees who have traditionally been excluded from award coverage, particularly professional and managerial employees, would be covered, including those deliberately excluded from modern award coverage in earlier stages of the modernisation process.

[152] We have considered all of the submissions and decided to include an additional paragraph in the coverage clause which more closely reflects the terms of the consolidated request and the Fair Work Act. The paragraph also contains some greater definition of the types of employees excluded. It reads:

‘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.’’

[43] The above passage confirms that the addition to the draft clause 4.2 of the reference to the exclusion including managerial employees and professional employees was intended to assist in defining the class of employees intended to be excluded.

[44] In its submissions AAA Pet Resort referred to the paragraph in the Full Bench’s decision which immediately followed the passage quoted above (emphasis added):

“[153] We deal now with conditions of employment. Our approach to conditions of employment is influenced by the nature of the award’s coverage. *We agree with those who have suggested that the coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned or where the expansion of coverage of a modern award is involved.* Accordingly we do not think the award should contain a comprehensive safety net designed for any particular occupation or industry. Rather it should contain basic conditions only, leaving room for the application of an appropriate safety net in another modern award in due course. That

said, there is still room for the exercise of considerable discretion in formulating appropriate wages and conditions.”

[45] We do not consider that the emphasised sentence assists much in interpreting or applying clause 4.2 of the *Miscellaneous Award*. To say that the coverage is narrow provides little guidance as to its application in a particular case, and this observation probably only reflects the fact that most employees are covered by other modern awards. The further observation that the coverage is limited in time with respect to emerging industries does not mean that the award was only meant to cover emerging industries but that it was envisaged that such industries would eventually be accommodated by the making of a new modern award or the extension in coverage of an existing one. It may also be noted, consistent with our earlier observations, that the Full Bench made the conditions in the award without any specific industry or occupation in mind, thus explaining their generic nature.

[46] The nature of the work required to be performed by the Employees to whom the Agreement is intended to apply may be ascertained from the terms of the Agreement, the relevant provisions of which we have earlier set out. Employees at Levels 1, 2 and 3 perform basic animal care functions including feeding, cleaning, grooming, individualised attention, and administering medication, and employees at Level 4 and Level 5 perform supervisory duties in relation to these work functions. This work is performed at a pet boarding establishment, in which animals can usually be expected to be in good health and to be retrieved by their owners after their agreed stay has completed. There is no external training qualification requirement at any level, although employees at Level 3 and above may possess a Certificate 3, Certificate 4 or a Diploma in Animal Care and Management. The rates of pay at all levels can fairly be described as modest, and for at least Levels 1-3 the rates of pay in the Agreement would permit employees to whom they applied to be characterised as low-paid workers.²²

[47] Having regard to these fundamental characteristics of the Employees and their work, we do not consider that either of the two conditions for the operation of the exclusion in clause 4.2 is satisfied. First, it cannot be said that work of the class of employees to which the Employees may be characterised as belonging has traditionally not been covered by awards. If that class is characterised in the way proposed by AAA Pet Resorts, namely “animal attendants, their assistants and supervisors in pet boarding establishments”, it is clear that the Victorian Award, the NSW Award and the NT Award all covered the class. The Victorian Award applied, relevantly, to establishments which accommodated pets, and contained classifications for Animal Attendants whose primary functions were feeding animals and cleaning their enclosures or kennels. This award operated on a common rule basis from 2005. The common rule NSW Award applied, relevantly, to establishments or businesses which accommodated animals and household pets, and included classifications of “*Food Preparer or Kennel Cleaner*” and Animal Attendant. The former classification is not distinguishable from the work of the lower level classifications in the Agreement. As earlier set out, the Animal Attendant under the NSW Award might be required to give injections and take the temperature of animals, but as earlier set out the duties of Level 1-3 employees under the Agreement include the administration of medication. The NT Award, somewhat ambiguously, had coverage of animal welfare establishments, but the specific reference in the award to kennelhands and the respondency of two identified kennels makes it reasonably clear that the NT Award covered pet boarding businesses.

²² See *Annual Wage Review 2016-17* [2017] FWCFB 3500 at [369]-[370]

[48] If the relevant class of employees is more widely characterised as that of animal attendants performing basic animal care functions, then the NSW Institutional Award, the WA Award and the Queensland Award also provided relevant coverage in veterinary practices and/or animal welfare institutions. We note that there is comity in the qualification requirements for a Level 3 employee under the WA Award and a Level 3 employee under the Agreement.

[49] Second, however the class of employees is characterised, there is no discernible reason based on the *nature or seniority of their role* why such employees should not traditionally have been covered by the relevant awards. It is plain that the latter consideration of seniority has no relevance, and AAA Pet Resort was unable to identify anything about the *nature* of their roles which would cause them to be excluded from award coverage. Animal attendants of the type to which the Agreement would apply are, as earlier discussed, lower skilled and modestly or low-paid employees of the type which ordinarily would be most suited to award coverage. There is nothing otherwise unusual about their employment which would render them unsuited to award coverage.

[50] We note the apparent reliance by AAA Pet Resort (and other Queensland pet boarding businesses) upon the correspondence from the Fair Work Ombudsman dated 8 September 2010 to which we have earlier referred. One reading of the passage from that correspondence which we have quoted is that the exclusion in clause 4.2 of the *Miscellaneous Award* operated specifically in relation to pet boarding businesses *in Queensland* because such businesses had traditionally been award-free *in Queensland*. We reject the proposition that clause 4.2 could be interpreted or applied on the basis that it had a differential operation as between the various States dependent on the history of award coverage in each State. Nothing in the language of clause 4.2 suggests that it could be read as capable of operation in this fashion. The purpose of the establishment of modern awards was to set a nationally consistent minimum safety net for terms and conditions of employment throughout Australia. Section 154(1), which prohibits State-based differences in modern awards (subject to a transitional period provided for in s 154(2) which expired on 31 December 2014), militates against clause 4.2 being read in a way which would provide for State-based differences in the coverage of the *Miscellaneous Award*.

[51] The reliance by AAA Pet Resort on earlier decisions of the Commission approving enterprise agreements made by pet boarding businesses does not assist in determining whether the exclusion in clause 4.2 of the *Miscellaneous Award* applies here. As submitted by United Voice, the decision in *GL Elin & CM Elin t/a Animal World Pet Motel*²³ found that the *Miscellaneous Award* did not apply to the employer in that case on an entirely different basis than clause 4.2 which has no present relevance. AAA Pet Resort referred to the decision in *Young Family Trust t/a Castelan Boarding Kennels and Cattery*²⁴, in which the *Castelan Boarding Kennels and Cattery Enterprise Agreement 2010* was approved. In that decision, the Commissioner who determined the matter said:

“[2] In applying the BOOT I have had regard to the fact that there is no industry or occupational modern award that covers the employer. Nor is there any applicable award based transitional instrument.”

²³ [2010] FWAA 2851

²⁴ [2011] FWAA 1997

[52] The above passage does not disclose that any consideration was given to the possible coverage of the *Miscellaneous Award* (as distinct from an “industry or occupational modern award”) or clause 4.2 of that award specifically. No other decision to which we were taken by AAA Pet Resort in its submissions contains any specific consideration or conclusion with respect to the coverage of the *Miscellaneous Award*, nor do the two decisions referred to in the footnote to the Decision under appeal. To the extent that any earlier decision of a single member of the Commission can be read as implicitly concluding that the *Miscellaneous Award* did not cover animal attendants, their assistants and supervisors employed by pet boarding businesses, we consider for the reasons stated that it was wrongly decided.

[53] We reject the alternative submission advanced by AAA Pet Resort that the Employees were not captured by clause 4.1 of the *Miscellaneous Award* because they did not fall within any of the classifications. As earlier discussed, those classifications were drawn in a broad and generic way in order to capture a miscellaneous range of employees not covered by any other modern awards. They do not refer in terms to any specific industry, occupation or work function, but that does not mean they were not intended to cover anybody. We consider that, on their ordinary meaning, the classification descriptors cover the Employees.

Conclusion and orders

[54] We consider that the Commissioner erred in finding that the *Miscellaneous Award* did not cover the Employees and in not assessing satisfaction of the BOOT approval requirement by reference to the *Miscellaneous Award*. It is therefore necessary to quash the Decision and remit for re-determination the application for approval of the Agreement. We see no difficulty in the matter being returned to the Commissioner for this purpose. The Commissioner will also need to consider the difficulty with the identification of the employer in the Agreement to which we have earlier referred.

[55] We order as follows:

- (1) Permission to appeal is granted.
- (2) The appeal is upheld.
- (3) The Decision ([2017] FWCA 4238) is quashed.
- (4) The application for approval of the *AAA Pet Resort Enterprise Agreement 2017* (AG2017/1963) is remitted to Commissioner Wilson for re-determination in accordance with the above reasons for decision.



VICE PRESIDENT

Appearances:

R. Reed of counsel with *S. Ong* on behalf of United Voice.

J. Murdoch QC with *E. Furlong* on behalf of Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort.

Hearing details:

2017.

Brisbane:

17 October.

Printed by authority of the Commonwealth Government Printer

<PR599331>