



# DECISION

*Fair Work Act 2009*

s 158—Application to vary or revoke a modern award

## **Sugar Research Australia Limited**

(AM2023/4)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 11 JULY 2023

*Application to vary clause 4.2(a) of Sugar Industry Award 2010 to replace the name of the industry services body covered by the award.*

[1] Sugar Research Australia Limited (SRA) has applied for the Commission to vary the coverage provisions in clause 4 of the *Sugar Industry Award 2020* (Award) pursuant to s 157 of the *Fair Work Act 2009* (Act).

[2] Clause 4.1 of the Award provides that employers throughout Australia in the sugar industry are covered by the Award. The sugar industry is defined in clause 4.2, relevantly, as follows:

**4.2** In this award **sugar industry** means the following:

(a) **field sector:** all sugar cane farming operations including the operations of contractors performing general farm work, cane harvesting and haul out work and farm management; cane testing; and pest, disease control, advisory and research operations of Cane Protection and Productivity Boards and the Bureau of Sugar Experiment Stations;

[3] SRA seeks to vary clause 4.2(a) of the Award by replacing the reference to “the Bureau of Sugar Experiment Stations” with a reference to “Sugar Research Australia Limited”. SRA seeks this variation on the basis the Bureau of Sugar Experiment Stations (BSES) amalgamated with the Sugar Research and Development Corporation in 2013 to establish SRA as the declared industry services body for the Australian sugarcane industry, and the BSES ceased to exist.

[4] SRA initially made this application under s 159 of the Act. Section 159 of the Act allows the Commission, relevantly, to make a determination varying a modern award “to reflect a change in the name of an employer, organisation or outworker entity” (s 159(1)(a)) or “to omit the name of an organisation, employer or outworker entity” that has ceased to exist (s 159(1)(b)) on application by that employer, organisation or outworker entity (s 159(2)(b)) or on its own initiative (s 159(2)(a)). The variation sought by SRA, however, does not concern updating or omitting the name of an employer. Instead, it seeks to replace the name of an employer, the BSES, with the name of a different employer, the SRA, in the coverage provisions of the Award.

As such, s 159 of the Act is not the appropriate section under which to make the variation sought by SRA.

[5] At a conference before me on 7 June 2023 I raised this issue, and SRA sought to amend their application so that it is an application made under s 158 of the Act. As the amendment does not change the nature of the variation sought but rather it seeks to engage with the appropriate head of power under the Act, I allowed the amendment pursuant to s 586 of the Act.

[6] On 15 March 2023, I issued directions asking any interested parties wishing to be heard in relation to the application to send an email to my Chambers by 5 April 2023. No communication in response was received. On 5 May 2023, I issued further directions requiring the SRA to file submissions in support of its application by 19 May 2023 and directed that the application would then be determined on the papers. SRA filed submissions on 23 May 2023.

[7] Following the conference on 7 June 2023, I invited SRA to file amended submissions addressing considerations relevant to an application to vary the coverage of an award made under s 158 of the Act. SRA filed amended submissions on 27 June 2023 and further amended submissions on 28 June 2023.

[8] Section 157(1) of the Act allows the Commission to make a determination varying a modern award if it is satisfied that making the determination is necessary to achieve the modern awards objective.

[9] The modern awards objective is set out in s 134(1) of the Act as follows:

*What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours; or
  - (iii) employees working on weekends or public holidays; or
  - (iv) employees working shifts; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

**[10]** Under s 157(3), the Commission may make a determination under s 157 on its own initiative, or on application under s 158. Section 158(1) sets out who may apply for the Commission to make a determination under s 157. Relevantly, it provides that an application to vary coverage terms in a modern award to increase the range of employers or employees that are covered by the award can be made by an employer that would become covered by the award.

**[11]** Section 163 contains special criteria relating to changing the coverage of modern awards. Section 163(1) provides the following:

(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

**[12]** The BSES was established as a statutory corporation under s 3A(1) of the *Sugar Experiment Stations Act of 1900* and operated under the supervision of the Queensland Minister for Agriculture and Stock. In 2003, the *Sugar Industry and Other Legislation Amendment Act 2003* amended the *Sugar Industry Act 1999* transferring the functions of the BSES to a private industry-owned company limited by guarantee.

**[13]** 1 September 2003 was fixed as the transfer day for the transfer of the assets and liabilities of the BSES to 'BSES Limited' pursuant to s 351 of the *Sugar Industry Act 1999*. In 2013 a new legislative framework was established for the delivery of research and development to the sugar industry. SRA was declared the industry services body for the Australian sugar industry on 5 August 2013 after passage of the new legislation<sup>1</sup> on 28 June 2013. As part of the reforms, BSES Limited amalgamated with the Sugar Research and Development Corporation (SRDC) to establish the SRA.

**[14]** The SRDC and BSES Limited were wound-up and their assets and research and development functions, along with the research coordination activities of Sugar Research Limited, were transferred to SRA. BSES Limited was declared by the relevant Minister to no longer be the industry services body and thereafter ceased to exist.

**[15]** As the declared industry services body, SRA is entitled to receive levies paid by grower and milling businesses, and matching funds from the Commonwealth Government, and as a Rural Research and Development Corporation, SRA operates under an accountability framework overseen by the Federal Government.

**[16]** SRA submits that as the BSES and BSES Limited have ceased to exist and it is SRA and not BSES that now undertakes research operations under the 'field sector' component of

the definition of the sugar industry in clause 4.2(a), it is the legal entity that ought to be covered by the Award.

[17] SRA submits that as the BSES ceased to exist as an employing entity in or about June 2013, the proposed variation will not stop any employees or employers from being covered by the Award and therefore s 163(1) of the Act is not relevant.

[18] SRA submits the variation sought is not intended to substantially change the coverage of the Award, but rather to ensure the employees of SRA who are engaged in the research operations formerly undertaken by BSES are not excluded from coverage simply because of the legislative changes resulting in SRA becoming the sugar industry services body.

[19] SRA also submits that the proposed variation will increase certainty of the Award coverage and reduce regulatory burden as a consequence (s 134(1)(f)) thereby achieving the modern awards objective.

[20] For the reasons that follow, I am satisfied the variation proposed by the SRA is necessary to achieve the modern awards objective and that the amendments should be made.

[21] As the SRA has replaced the BSES as the industry services body for the Australian sugarcane industry and has taken over its research and development functions, the reference to the research operations of the BSES in the Award's coverage provisions is outdated. Replacing the reference to the BSES in clause 4.2(a) with a reference to SRA will ensure that employment in the research operations previously covered by the Award, that is, the research operations undertaken by the industry services body for the Australian sugar industry, will clearly be covered by the Award.

[22] I consider the variation necessary to ensure a stable modern awards system in accordance with the consideration at s 134(1)(g) of the Act. I also accept the SRA's submission that the variation will increase certainty of the Award's coverage and therefore reduce regulatory burden, relevant to s 134(1)(f) of the Act.

[23] As the BSES has ceased to exist as an employing entity, the special criteria relating to changing coverage of modern awards in s 163(1) of the Act does not arise. Any determination to vary the Award in the circumstances will not be to the effect that certain employers and employees stop being covered by the Award. To the contrary, the variation will give clarity to the coverage of the Award as extending to employers and employees who might have been thought as not covered because of the reference to the long ago ceased to exist "Bureau of Sugar Experiment Stations" referenced in the definition of "field sector". That definition is an important component in identifying the "sugar industry" which frames the Award's coverage.

[24] The special rules in ss 163(2), (3) and (4) do not arise. A determination varying the Award in the manner proposed by the SRA will be issued concurrently with this decision.



DEPUTY PRESIDENT

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<sup>1</sup> Encompassing the *Sugar Research and Development Services Act 2013*, *Sugar Research and Development Services Consequential Amendments and Transitional Provisions) Act 2013* and the *Sugar Research and Development Services (Consequential Amendments – Excise) Act 2013*.