DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards – *Miscellaneous Award 2010*
(AM2014/237)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER LEE

SYDNEY, 25 MARCH 2020

4 yearly review of modern awards – Miscellaneous Award 2010 – coverage clause.

Introduction

[1] On 12 February 2020 we issued a decision (February decision) in which we expressed the provisional views that clauses 4.2 and 4.3 of the *Miscellaneous Award 2010* did not meet the modern awards objective, and that clause 4 should be varied to provide as follows in order to rectify that deficiency:

> **4. Coverage**
>
> **4.1** Subject to clauses 4.2, 4.3, 4.4, and 4.5 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.
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> **4.2** The award does not cover managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.
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> **4.3** The award does not cover employees excluded from award coverage by the Act.
>
> **4.4** The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
>
> **4.5** The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

> **4.6** This award covers any employer which supplies on-hire employees in classifications set out in Schedule B and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.
>
> **4.7** This award covers employers which provide group training services for apprentices and trainees under this award and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

[2] We then invited submissions from interested parties in response to these provisional views in the following terms:

> "[60] We will allow interested parties a period of 21 days to provide any evidence or submissions they wish to make in response to the provisional conclusions expressed in this decision. In particular, we invite parties which consider that the deletion of clause 4.3 would result in any particular class of employees being inappropriately covered by the *Miscellaneous Award* to make submissions, supported by evidence if necessary, seeking a specific exclusion of such a class from the coverage of the award. Such evidence and submissions will need to:
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> (1) identify with precision the class of employees in question;
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> (2) demonstrate that the class of employees are *not* excluded from modern award coverage by s 143(7) of the FW Act (and are thus not already excluded by the existing clause 4.4); and
>
> (3) demonstrate that the minimum wage rates and conditions of employment provided for by the *Miscellaneous Award* are not appropriate for that class."

[3] A number of submissions were received, which are summarised below.

Submissions

Australian Industry Group

[4] The Australian Industry Group (Ai Group) submitted that it did not support the proposed new coverage clause because it did not comply with the requirement in s 143(7) of the *Fair Work Act 2009* (FW Act) that it must not be expressed to cover the classes of employees referred to in paragraphs (a) or (b) of that provision, and because it was inconsistent with the element of the modern awards objective in s 134(1)(g) that awards should be simple and easy to understand.

[5] In respect of the first of these matters, the Ai Group submitted in respect of the proposed new coverage provision that clause 4.1 is expressed to cover employees not covered by another modern award, which was an extremely wide coverage "*which would obviously offend*" s 143(7)

unless other exclusions adequately addressed the requirements of s 143(7). Clause 4.2 only partially addresses the requirements of s 143(7) in that it deals with classes of employees excluded from award coverage due to the seniority of their role, but not those excluded from coverage because of the nature of their role if they are not managerial or professional employees. Clause 4.3, it was submitted, does not identify any class of employees included or excluded from coverage and therefore does not express that the class of employees referred to in s 143(7) are not covered by the award. For s 143(7) to be complied with, clause 4.3 would need to be interpreted with reference to ss 136(1)(b), 137 and 143(7), which is a "*very complicated, unclear and indirect way of meeting the requirements of s.143(7)*". The Ai Group proposed that a new clause 4.4 be added stating: "*The award does not cover the classes of employees specified in s.143(7) of the Act.*"

[6] As to the second matter, the Ai Group said that because the terms of clause 4.3 appear in every modern award, its significance to the coverage of the *Miscellaneous Award* would be lost by the vast majority of users and would need to be read with reference to ss 136(1)(b), 137 and 143(7) of the Act, and was therefore not simple or easy to understand. It would for this reason most likely lead employers to apply the *Miscellaneous Award* to employees who are excluded from award coverage. It submitted, as an alternative to its proposed new clause 4.4, that a note be appended to clause 4.3 drawing the reader's attention to s 143(7) of the Act.

Australian Chamber of Commerce and Industry

[7] The Australian Chamber of Commerce and Industry (ACCI), which had not participated at any earlier stage of this proceeding, submitted that:

- the current coverage clause (including clause 4.3) served the purpose of maintaining and not interfering with the prevailing history of award coverage while providing a general award to cover emerging industries which have not yet been award-covered;

- the removal of clause 4.3 would have the effect of increasing the coverage of the *Miscellaneous Award* such that it may now intersect with industries covered by industry modern awards, contrary to the award's purpose;

- the need for a simple, easy to understand, sustainable modern awards system that avoids unnecessary overlap of modern awards (s 134(1)(g)) would be affected, since employers operating in an industry covered by an industry modern award take that award as their focal point for ensuring safety net compliance, whereas now they would have to assess whether there was any classification not covered by that award and then undertake the complex exercise of determining whether such employees were excluded from coverage by s 143(7);

- the current clause 4.3 was easier to apply than the task required by its deletion;

- the removal of clause 4.3 would add to the regulatory burden for employers (s 134(1)(f)) because of the difficulties already identified in ensuring award compliance, which are not offset by any productivity gain, in circumstances where no specific cases had been identified of employees being excluded from the award safety net when they should be award covered;

- the proposed variation would also not promote flexible modern work practices and the efficient and productive performance of work (s 134(1)(d)) because it will lead to employers currently being bound by one award possibly being covered by two awards, giving rise to difference regulatory obligations which will likely impede efficiency and lead to differing treatment of employees; and

- the proposed clause 4.3 (current clause 4.4) should be varied to add a note which reproduces the terms of s 143(7).

Australian Business Industrial and the NSW Business Chambers

[8] Australian Business Industrial and the NSW Business Chamber (ABI) have a preference for the retention of clause 4.3 in its current form and supported the submissions made by ACCI.

Australian Meat Industry Council

[9] The Australian Meat Industry Council (AMIC) contended that the occupation of Meat Inspector was excluded from coverage by s 143(7)(a) of the FW Act, and would continue to be excluded if the *Miscellaneous Award* was varied in accordance with our provisional view. The AMIC took issue with some observations made about Meat Inspectors in paragraph [57] of the February decision and provided further information about the duties, obligations and remuneration of Meat Inspectors and the regulatory framework in which they were employed.

United Workers Union

[10] The United Workers Union (UWU) supported the proposed new clause 4, but suggested that a note be added to clause 4.3 to read: "*Note: Subsection 143(7) of the Act sets out employees not traditionally covered by awards*".

Recruitment, Consulting and Staffing Association

[11] The Recruitment, Consulting and Staffing Association (RCSA) expressed concern in relation to recruitment and staffing consultants. It contended that such consultants are excluded from award coverage under the FW Act, and would therefore be excluded from coverage under the *Miscellaneous Award* by the current clause 4.4 (or the proposed clause 4.3). While it contended that recruitment consultants are professional employees and are thus excluded by the proposed clause 4.2, it preferred the existing drafting of clause 4.2 to avoid any debate about the issue.

Community and Public Sector Union

[12] The Community and Public Sector Union (CPSU) did not oppose the proposed new clause 4, although it expressed a preference for the complete removal of clause 4.2. In respect of the occupation of web designer, the CPSU did not necessarily accept that a diploma-qualified person in this occupation would not fall with the Level 4 classification in the *Miscellaneous Award* and thus be covered by the award. Such a person could be classified as a sub-professional employee under Level 4.

Housing Industry Association

[13] The Housing Industry Association supported the submissions made by ACCI.

Consideration

[14] No party made a submission seeking the exclusion of any identified class of employee from the coverage of the *Miscellaneous Award* on the basis that it would become inappropriately covered by the award as a result of the deletion of the current clause 4.3. Nor did any party identify any class of employees or employers, or any industry, that would be adversely affected by the variation to clause 4 of the award proposed in the February decision. No party took any specific issue with the analysis in paragraphs [45] and [46] of our decision concerning the lack of any intelligible industrial rationale for the exclusion of cleaners and security guards not covered by the *Cleaning Services Award 2010* and the *Security Services Industry Award 2010* respectively from award coverage altogether by reason of the current clause 4.3 of the *Miscellaneous Award*. The AMIC, as earlier stated, took issue with some observations we made about the position of Meat Inspectors in the February decision but maintained its position that such employees were excluded from award coverage under s 143(7)(a), and that this position would be left unchanged if the proposed variation to clause 4 was made. The CPSU took issue with whether diploma-qualified web designers were covered by the Level 4 classification definition in Schedule B of the *Miscellaneous Award*, but its submissions did not address the more fundamental question of whether they are excluded from award coverage by s 143(7) – a question which is incapable of being affected by the proposed variation to clause 4. The RCSA's position was that recruitment consultants were excluded from award coverage by s 143(7); if so, the drafting of the coverage provisions could not affect that position.

[15] There are only three substantive issues arising from the submissions filed which need to be addressed. The first is the Ai Group's submission that the proposed variation to clause 4 would not comply with the requirement in s 143(7) that a modern award's coverage not be expressed as covering the classes of employees in paragraphs (a) and (b) of that provision. We reject this submission. In respect of the proposed clause 4.1, the proposition that clause 4.1 by itself "*would obviously offend*" s 143(7) is without substance. As we emphasised in the February decision, clause 4.1 (both as it is now and proposed) is expressed so that an employee must not be covered by another modern award *and* fall within one of the classifications in Schedule B to be covered by the *Miscellaneous Award*. The Ai Group has been unable to identify any class of employees who would meet those conditions and yet be excluded from award coverage by s 143(7). And, in any event, the proposed clause 4.1 is expressed to be subject to clause 4.3, which provides that the award does not cover employees excluded from award coverage by the FW Act (which necessarily includes those employees to whom s 143(7) applies). There cannot therefore be any question that the proposed clause 4 is not expressed to cover those excluded from coverage by s 143(7).

[16] The second issue is ACCI's submission that clause 4.3 should be retained in its current form. Insofar as this submission advanced propositions concerning the purpose for which the *Miscellaneous Award* was originally made, it largely repeats submissions already advanced by ABI at an earlier stage of the proceedings and rejected by us in the February decision. For the

reasons set out in paragraph [44]-[46] of that decision, it is clear that the Ministerial Request pursuant to which the *Miscellaneous Award* was made required that the award "…*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*…", and that the current clause 4.3 prevents that objective from being achieved. Nothing stated in ACCI's submission challenges that analysis or adds anything new. The other criticisms concerning the deletion of the current clause 4.3 that are advanced by ACCI by reference to various elements of the modern awards objective might have some substance if they were founded upon an identification of any classes of employers who might actually be affected by the asserted detriments. However absent such identification, the submission is entirely hypothetical. As earlier outlined, we invited parties in the February decision to seek an exclusion from the coverage of the award of any specific group of employees who would inappropriately be brought within the award's coverage by the deletion of the current clause 4.3. Neither ACCI nor any other party chose to take advantage of that opportunity. The most likely inference to be drawn from that fact is that no such group of employees was able to be identified. Accordingly ACCI's submission is rejected.

[17] The third issue is whether the proposed clause 4.3 should be modified, either by the addition of a new clause 4.4 which makes specific reference to s 143(7) as proposed by the Ai Group, or by the addition of a note which refers to s 143(7) as suggested by the Ai Group, ACCI and the UWU. The submissions to that effect are rejected. As stated in the February decision, the proposed clause 4.3 (which is the same as the current clause 4.4) is a standard exclusion which appears in all modern awards, and has the same meaning and effect in all such awards. There has been no prior suggestion since modern awards commenced operation in 2010, either in respect of this award or any other award, that the standard clause is difficult to understand. We see no reason to take a different approach with this award than with any other modern award in this respect.

[18] For the reasons stated in the February decision, we consider that the current clause 4 does not meet the modern awards objective in s 134(1) of the FW Act and that the clause should be varied in the terms set out in paragraph [59] of that decision to rectify this. The variation shall take effect on 1 July 2020. A final variation determination will be issued in conjunction with this decision.

VICE PRESIDENT

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