

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

4 Yearly Review of Modern Awards
Miscellaneous Award - Coverage
(AM2014/237)

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/237 – MISCELLANEOUS AWARD 2010 - COVERAGE

1. INTRODUCTION

1. This submission is made by Australian Industry Group (**Ai Group**) in response to the Statement issued by President Ross on 6 June 2019¹ (**the Statement**) and the Directions issued by the Fair Work Commission (**Commission**) on 3 July 2019 (**Directions**).
2. The Statement relates to issues concerning the exclusions in the coverage clause of the *Miscellaneous Award 2010* (**Miscellaneous Award**). The correct interpretation of clause 4 of the Miscellaneous Award and the boundaries of the coverage of the Award have been the subject of debate due to the decision of a Full Bench of the Commission in *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* (**Gold Coast Kennels**).²
3. The Statement refers, at paragraph [7], to a number of issues relating to the coverage provisions of the Miscellaneous Award, namely:
 - a. 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;
 - b. Whether the coverage of the Award is drawn in terms consistent with paragraph 4A of the Award Modernisation Request;
 - c. 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.

¹ [2019] FWC 3934.

² *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* [2018] FWCFB 128.

4. This matter was subsequently referred to a Full Bench to review the coverage provisions of the Miscellaneous Award and to give consideration to the above issues, and any related issues that may be raised by interested parties.³
5. Directions have been issued by the Full Bench requesting parties to provide submissions and any evidence addressing:
 - a. the issues identified in paragraph [7] of the Statement;
 - 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; and
 - d. any other relevant issues relating to the coverage provisions of the Miscellaneous Award.

2. THE COVERAGE PROVISIONS OF THE MISCELLANEOUS AWARD

6. The key coverage provisions of the Miscellaneous Award are contained in clause 4 and are as follows:
 - 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.

³ [2019] FWC 3934, [11].

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.

7. Clause 4.1 clarifies that the Miscellaneous Award only includes employees in the classifications listed in clause 14 – Minimum Wages. Those classifications and the associated definitions in Schedule B of the Award are:

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.

3. AWARD MODERNISATION DEVELOPMENTS

8. The Award Modernisation Request did not, in its original form, mandate the creation of a Miscellaneous Award. On 17 June 2008, the [Request was varied](#) to include the following paragraphs 4A and 8A:

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 the award as such. This 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.

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8A. In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.

9. Paragraph 1(c) of the Award Modernisation Request, as referred to in paragraph 8A above, referred to the need for modern awards to be “economically sustainable and promote flexible modern work practices and the efficient and productive performance of work”.

10. In [Ai Group’s Stage 4 Pre-exposure draft submission of 24 July 2009](#), we submitted:

4. General Award

12. In addition to the creation of modern awards along industry and occupational lines, the Modernisation Request requires that the Commission create an award of residual application. The coverage and purpose of this award is articulated in paragraph 4A of the Modernisation Request in the following terms:

“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 the award as such. This 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.”

(Emphasis Added)

13. Ai Group submits that the Commission must be highly cautious in its approach to drafting this modern award as, although its coverage may appear very limited, its application could potentially affect every industry or occupation for which there is a modern award. We contend that such a notion was clearly in the contemplations of the Government in advancing this requirement, as the Modernisation Request also states:

“8A In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.”

(Emphasis Added)

14. Ai Group has considered this issue, other requirements of Part 10A of the *Workplace Relations Act 1996* (“the Act”) and the Modernisation Request, and has developed a proposed award to meet the requirements of paragraph 4A of the Modernisation Request. This draft award is set out in the **Annexure**.

Title of the Award

15. Ai Group notes that the terms of the Modernisation Request provide no indication as to the appropriate title for the award required by paragraph 4A. At various times during the process of Award Modernisation the award has been referred to in a variety of ways by parties and the Full Bench including the ‘general award’ and the ‘catch all award’, however these identifiers have not been assigned to the award due to any specific legislative direction.
16. Whilst it may seem trite, we contend that assigning an appropriate name to the award contemplated by paragraph 4A of the Modernisation Request is important as this will provide both employers and employees with an initial indication of coverage of the award.
17. With this in mind, Ai Group does not support identifying the award as either the General Award 2010 or the Catch-all Award 2010 as both titles we submit imply a far broader coverage than that which is intended by the Modernisation Request.
18. Ai Group instead supports the naming of the paragraph 4A award the *Residual Safety Net Award 2010* (“the Residual Award”). We submit that this title most closely aligns with the intent which unpins the terms of the Modernisation Request.

Scope of the *Residual Safety Net Award 2010*

19. When drafting the scope of the modern awards, the Commission and various parties have been mindful of, not only the coverage of existing federal awards, but additionally the coverage derived from any NAPSAs relevant to the industry or occupation. On this basis, we contend that there should be no readily identifiable class or classes of employee which would be covered by the Residual Award.
20. Indeed, we submit that if such a group can be identified it is more appropriate to identify another modern award which has synergies with either the industry or occupation identified and amend the coverage provision of that award to include the group of employees.
21. With this notion in mind, it is Ai Group’s submission that the coverage of the award cannot be drafted with any specific occupations or classifications in mind, instead, the Commission should adopt the language in paragraph 4A of the Modernisation Request to express the scope of the award.
22. In this regard, there are a number of critical limitations which we submit are expressed in paragraph 4A relating to the coverage of the award. The following emphasised sections of 4A, we contend, are relevant in this regard:

“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 the award as such. This 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.”

(Emphasis Added)

23. Ai Group submits that there are three specific requirements which must be included within the coverage provision of the Residual Award. The first is somewhat self-evident from the first emphasised section and that is that the award cannot cover employees who are covered by another modern award. Ai Group’s proposed award expresses this as its first proposition when articulating the award’s coverage and we submit that such a notion is fundamental to the expression of the scope of the award.
24. As a corollary to this concept, Ai Group has also omitted the Commission’s model rule to resolve overlap between modern awards which was determined in the priority stage of award modernisation. We contend that its inclusion is unnecessary and is only likely to create confusion in regards to the application of the award.
25. The second critical principle regarding coverage, we submit, is that the award should only apply in circumstances where there has been coverage of similar work in multiple pre-modernised awards and/or NAPSAs. We contend that such a proposition accords with a correct reading of the language of the Modernisation Request, in particular the fact that the second emphasised section of paragraph 4A refers to “*awards (including state awards)*” plural, as opposed to adopting singular phraseology and referring to ‘an award (including a state award).’
26. The final issue relating to coverage is that the award, in addition to expressing coverage in positive terms, should identify through expressed exclusion that it does not apply to employees who because of the nature or seniority of their role have not traditionally been covered by awards. This is a notion that is reflected in the third emphasised section of paragraph 4A.
27. In addition to these matters derived from the expressed terms of the Modernisation Request, Ai Group submits that whilst it has been the Commission’s approach to limit the coverage of the award by reference to the classifications within the award, such an approach is unnecessary in relation to the Residual Award. We contend that there should only be one classification within the award and that the minimum wage rate specified should be the Federal Minimum Wage (“the FMW”).
28. Ai Group submits that a minimalist approach of this nature is necessary as the range of employees and types of work that the award may apply to is incapable of precise identification. In such circumstances it is impossible to undertake any legitimate work value analysis to ascertain appropriate minimum rates of pay for multiple classifications under the award. It is also

impossible to develop appropriate classification descriptors when the work carried out by persons covered by the award is unknown. On this basis we would submit that the only appropriate minimum rate which should be specified within the award is the FMW.

Content of the Residual Award

29. As Ai Group has already outlined, it is imperative that the Commission, when drafting the Residual Award, proceed cautiously, both in terms of the manner in which coverage is expressed, and in determining the terms and conditions of the award.
 30. The Modernisation Request identifies a range of mandatory matters which the Residual Award must contain including “*minimum wages, meal breaks and any necessary ancillary or incidental provisions about the NES entitlements.*” We submit that with the exception of these mandatory matters, the Residual Award should be highly limited in its content.
 31. Given the nature of the award’s coverage and the possibility of it applying to a variety of occupations and industries, we submit that it is impractical to make an award which is highly prescriptive as the conditions which may be suitable for one group of employees may be completely inappropriate for another group of employees. Such an observation is particularly relevant when one considers that this award by its very nature could potentially cover blue collar, white collar, para-professional, professional and supervisory employees in disparate industries.
 32. Throughout the process of award modernisation the Commission has developed a range of model clauses which have been inserted within the majority of modern awards created. Ai Group has identified those model clauses which it contends are appropriate for inclusion within the Residual Award and has inserted them accordingly.
11. Attached to [Ai Group’s Stage 4 Pre-exposure draft submission of 24 July 2009](#), was a draft *Residual Safety Net Award 2010* which contained the following coverage clause:
4. **Coverage**
 - 4.1 This award covers employers and employees of employers throughout Australia who:
 - (a) are not covered by another award; and
 - (b) who perform similar work to that which is covered by pre-modernised awards and/or NAPSAs.
 - 4.2 **Exclusions**

This award does not cover:

 - (a) an employee excluded from award coverage by the Act;

- (b) an employer bound by an enterprise award or enterprise NAPSA in respect to an employee who is covered by the enterprise award or NAPSA;
- (c) employees who because of the nature or seniority of their role, have not traditionally been covered by pre-modernised awards or NAPSAs, including, but not limited to:
 - (i) managerial employees; and
 - (ii) professional employees

12. In the *Stage 4 Award Modernisation Statement*,⁴ the Australian Industrial Relations Commission's (AIRC) said: (emphasis added)

Miscellaneous award

[81] We publish a draft Miscellaneous Award 2010. (We have renamed the General Award as the Miscellaneous Award to reflect the language of the Transitional Act.) While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it. There are also provisions ensuring that the general award does not overlap with modern enterprise awards or state reference public sector awards. Proposals for a transitional clause applying to some employees in Catholic Church related employment have not been adopted at this stage but will be considered further during the consultations.

[82] The classification structure is very general with only four levels. The first level is set at the minimum wage and applies to employees with less than three months service. The second level covers an employee with more than three months service. The third level requires trade or trade equivalent qualifications. The fourth level is for a graduate employee.

[83] The draft provides for full-time, part-time and casual employees and has flexible working hours provisions. The minimum wage levels have been set having regard to minimum wages for lower skill, trades and graduate employees in other relevant modern awards. A range of generally applicable allowances is also included.

[84] It is unclear which employees will be covered by this award. It may be that it will have application in some areas of the workforce which have not been covered by awards before. Section 576L of the WR Act provides that the Commission may only include terms in modern awards to the extent that they constitute a fair minimum safety net. Because there is doubt about the existing conditions of employees who might be covered we have taken a cautious approach. We have included some provisions found in modern awards of wide application but not included others so as to reduce the risk of significant cost and employment effects.

⁴ [2009] AIRCFB 865, 25 September 2009.

13. The Transitional Act referred to in paragraph [81] above was the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which referred to the “miscellaneous modern award” in various sections. For example, Paragraph 29(c) in Part 5 of Schedule 3 of the Act stated:

The miscellaneous modern award

- (2) While an award-based transitional instrument that covers an employee, or an employer or other person in relation to the employee, is in operation, the miscellaneous modern award does not cover the employee, or the employer or other person in relation to the employee.

14. In conjunction with the Stage 4 Award Modernisation Statement, on 25 September 2009 the AIRC published an exposure draft of the Miscellaneous Award. The coverage clause in the exposure draft stated:

4. Coverage

- 4.1** Subject to clauses 4.1, 4.3, 4.4 and 4.5, this award covers employers throughout Australia and their employees in the classifications listed in clause **Error! Reference source not found.** – Minimum wages who are not covered by any other modern award.
- 4.2** 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 from the operation of a modern award,
- or employers in relation to those employees.
- 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*), 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*), or employers in relation to those employees.

15. On 16 October 2009, Ai Group filed three submissions which addressed the coverage of the exposure draft of the Miscellaneous Award:
 - a. A [Stage 4 Post-exposure draft submission](#) which addressed numerous Stage 4 awards, including the Miscellaneous Award (see pages 7-23 and Annexure A).
 - b. A [joint submission of Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants](#) which strongly opposed accounting professionals being included in the Miscellaneous Award, or any other modern award.
 - c. A [joint submission of Ai Group and the Recruitment and Consulting Services Association of Australia](#) which strongly opposed managerial and professional employees in the recruitment, contracting, on-hire, employment services and workforce management consulting industries losing their award-free status through coverage under the Miscellaneous Award.
16. The following content in Ai Group's [Stage 4 Post-exposure draft submission](#) of 16 October 2009 is relevant:

4. The Miscellaneous Award

Overview

12. Ai Group is very concerned about the coverage and conditions in the *Exposure Draft – Miscellaneous Award 2010*.
13. It is vital that the Miscellaneous Modern Award not impose award coverage on staff who are currently award free, such as professional and managerial staff.
14. The application of overtime penalties or shift loadings to professional or managerial staff who are currently award-free would be very harmful to both employers and employees. Such remuneration methods are completely inconsistent with the nature of professional and managerial employment in most private sector workplaces.
15. Ai Group submits that the *Exposure Draft – Miscellaneous Award 2010*:
 - Is inconsistent with the intended purpose of the Miscellaneous Modern Award;

- Does not adhere to various mandatory requirements of the *Fair Work Act 2010*;
- Does not conform with the Award Modernisation Request;
- Would create huge problems for industry.

The intended purpose of the Miscellaneous Modern Award

16. In a media release dated 26 September 2009, the Deputy Prime Minister, the Hon Julia Gillard MP, stated:

“As part of the Rudd Government's agenda to reduce the number and complexity of awards, it was always intended that a new general modern award be drafted to apply to employees who perform work of a type that has traditionally been covered by awards but who are not covered by a new modern award.

The Transition to Forward with Fairness legislation, the Fair Work Act and the Minister's award modernisation request make it clear that the award modernisation process is not intended to extend awards to groups such as senior managers who have never been covered by awards.”

17. Ai Group concurs with the Deputy Prime Minister's view that the intent of the Miscellaneous Modern Award is that it cover “*employees who perform work of a type that has traditionally been covered by awards but who are not covered by a new modern award*”.
18. We submit that the intended purpose of the Miscellaneous Modern Award is that it cover the very small number of employees who were bound by a pre-modern award or NAPSA, and who have been omitted from coverage under a modern industry or occupational award.
19. It is not appropriate that the Miscellaneous Modern Award cover any industries which can be readily identified or any common occupations. If an industry or occupation can be identified then either:
- the industry or occupation is award free, and should remain so; or
 - the industry or occupation was covered by pre-modern awards / NAPSAs and a new modern industry or occupational award should be made; or
 - the industry or occupation was covered by pre-modern awards / NAPSAs and the most relevant existing modern award should be varied.
20. During the Senate Inquiry into the *Fair Work Bill*, senior officials of the Department of Education, Employment and Workplace Relations (DEEWR) were asked a series of questions on notice by various Senators. One relevant written question and DEEWR's written answer is set out below:

“Senator Abetz asked in writing:

Question

Non-award industries

11. How will non-award industries such as aquaculture be dealt with under the new regime?

Answer

In an award modernisation request to the Australian Industrial Relations Commission on 28 March 2008, the Hon Julia Gillard MP, made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). The Government has asked the Australian Industrial Relations Commission to create a modern award to provide minimum entitlements for employees who are not covered by another (industry or occupation based) modern award and who are performing work of a similar nature to that which has historically been regulated by awards.

There will be a national minimum wage for employees not covered by a modern award.

The 10 National Employment Standards (NES) will apply to all employees - whether they are covered by an award or not.

Simple and flexible ‘default rules’ will apply consistently to all employees not covered by a modern award or enterprise agreement to ensure the NES are effective.”

21. As set out by DEEWR, the Act does not “*preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards).*”
22. However, as demonstrated by the *Exposure Draft - Aquaculture Industry Award 2010* (which was the industry example used by Senator Abetz), where a new industry or occupation is identified and the work performed is of a similar nature to work that has historically been regulated by awards, the appropriate course of action is to make a new modern award or vary an existing one, not cover the work under the Miscellaneous Modern Award.

Requirements of the Fair Work Act

General requirements

23. The *Fair Work Act* requires that modern awards:
 - be “fair, relevant and enforceable” (s.3(b));
 - “promote flexible modern work practices and the efficient and productive performance of work” (s.134(1)(d));
 - be “simple” and “easy to understand” (s.134(1)(g).

24. The Act also states that FWA must take into account “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden” (s.134(1)(f)).
25. Ai Group submits that the *Exposure Draft – Miscellaneous Award 2010*:
- Has coverage provisions which are so vague that the proposed award would not be “fair” upon employers or employees, and would not be readily “enforceable”;
 - Would not promote “flexible modern work practices” but rather would apply rigid and inappropriate award conditions to many thousands of professional and managerial employees who are currently award-free, and would disturb the flexible and modern methods by which professional and managerial employees are currently employed;
 - Would not promote “the efficient and productive performance of work” but rather would hamper efficiency and productivity; and
 - Is not “simple” or “easy to understand” but rather is complex and hard to understand.

Mandatory provisions relating to coverage terms

26. Chapter 2, Part 2-3, Division 3, Subdivision C of the Act sets out the “Terms that **must** be included in modern awards”. Subdivision C includes s.143 – Coverage Terms.
27. Subsection 143(1) states:
- “Coverage terms must be included
- (1) A modern award **must** include terms (coverage terms) setting out the employers, employees, organisations and outworker entities that are covered by the award, **in accordance with this section**”. (Emphasis added).
28. Accordingly, in determining the coverage provisions of a modern award, the Commission **must** comply with the provisions of s.143.
29. The Explanatory Memorandum for the *Fair Work Bill* (para 565) explains that:
- “FWA is required to include in a modern award terms that clearly identify the persons and bodies that are covered by the award (subclause 143(1))”.
30. Subsection 143(2) states:
- “Employers and employees
- (2) A modern award **must** be expressed to cover:
- (a) **specified** employers; and
- (b) **specified** employees of employers covered by the modern award.” (Emphasis added).

31. There is no discretion with regard to the requirements of paragraph 143(2). The Commission must ensure that the employers and employees covered by the award are “specified”.
32. Subsection 143(5) goes on to state that for the purposes of subsections (2) to (4), “*employers may be specified by name or by inclusion in a specified class or specified classes*” and that “*employees must be specified by inclusion in a specified class or specified classes*”.
33. The term Macquarie Dictionary defines the terms “specify” and “specified” in the following way:
- “specify** / v., **-fied, -fying**. –v.t. **1.** to mention or name specifically or definitely; state in detail. **2.** to give a specific character to. **3.** to name or state as a condition. – v.i. **4.** to make a specific mention or statement. [ME, from ML: *specific*, from L: *sort kind*]”
34. The term “specify” is defined in the Concise Oxford Dictionary as to “*name expressly, mention definitely*”.
35. Accordingly, we submit that the Act requires that the employers and employees covered by the Miscellaneous Modern Award must be set out in a manner which is specific, definite and detailed. Such requirements include the manner in which the class or classes are defined, as referred to in subsection 143(5). We submit that the coverage provisions in the *Exposure Draft – Miscellaneous Award 2010* offend these requirements.
36. Subsection 143(7) of the *Fair Work Act* states:
- “Employees not traditionally covered by awards etc
- (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.”
37. Again, this is a mandatory requirement.
38. However, while subsection 143(7) must be complied with by the Commission, it is not drafted in a manner which would exempt the classes of employees who fall outside those mentioned in paragraphs (a) and (b), should the Commission fail to adhere to the requirements of the Act.
39. The wording of subsection 143(7) can be contrasted with the wording of subsection 47(2). Clearly the term “*a modern award must not be drafted to cover*” (subsection 143(7)) does not have the same meaning as “*a modern award does not apply to an employees...at the time when the employee is a high income employee*” (subsection 47(2)). Subsection 47(2) operates to

exclude a particular class of employee from the application (but not the coverage) of a modern award, whereas subsection 47(2) requires the Commission to draft coverage provisions in a particular manner.

40. A special rule relating to varying modern awards is articulated in subsection 163(1) of the Act in the following terms:

“Special rule about reducing coverage

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

41. It can be seen that FWA is not permitted to reduce the coverage of a modern award that has already been made, if it results in an employee being covered under the Miscellaneous Modern Award. This clearly reinforces the argument that the Miscellaneous Modern Award is not designed to have a major role in the modern award system. It is there to simply to cover the very small number of employees who were covered under a pre-modern award or NAPSA, and who have been omitted from coverage under a modern industry or occupational award.

42. A further special rule relating to modern awards is set out in subsection 163(2) of the Act as follows:

Special rule about making a modern award

- (2) FWA must not make a modern award covering certain employers or employees unless FWA has considered whether it should, instead, make a determination varying an existing modern award to cover them.”

43. Ai Group submits that this provision indicates that the appropriate course of action for the Commission would be to, firstly, determine the “certain employers and employees” who would potentially be covered under the Miscellaneous Modern Award, and, secondly, determine whether an existing modern award should be varied to cover such employees.

Award Modernisation Request

44. The Award Modernisation Request requires that the Commission create a Miscellaneous Modern Award. The coverage and purpose of this award is articulated in paragraph 4A of the Request in the following terms:

“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 the award as such. This 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.”

45. The requirements upon the Commission arising from Paragraph 4A of the Award Modernisation Request are clear. These include:
- The Miscellaneous Modern Award must only “*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 must “*identify the award*” as only covering “*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 award must not 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.*”
46. Paragraph 8A of the Award Modernisation Request states that:
- “8A In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to **paragraph 1(c)** and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.”
(Emphasis Added)
47. Paragraph 1(c) of the Award Modernisation Request, which the Commission is required to have “particular regard” to when developing the Miscellaneous Modern Award, states that modern awards “*must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work*”.
48. This provision includes similar concepts to s.134(1)(d) of the *Fair Work Act* which requires that modern awards “promote flexible modern work practices and the efficient and productive performance of work”.
49. As stated earlier, the *Exposure Draft – Miscellaneous Award 2010* would not promote “flexible modern work practices” but rather would apply rigid and inappropriate award conditions to many thousands of professional and managerial employees who are currently award-free, and would disturb the flexible and modern methods by which professional and managerial employees are currently employed. Further, the *Exposure Draft – Miscellaneous Award 2010* would not promote “the efficient and productive performance of work” but rather would hamper efficiency and productivity.

“Covers” versus “applies”

50. It is evident to Ai Group that there is widespread misunderstanding amongst employers and employees about the implications of a modern award “covering” particular employers and employees versus a modern award “applying” to particular employers and employees.
51. The wider implications of award “coverage”, as opposed to award “application”, are particularly relevant in respect of the Miscellaneous Modern Award.

52. Section 47 of the *Fair Work Act* states that a modern award “applies” to an employer, employee, organisation or outworker entity if:
- The modern award covers the employee, employer, organisation or outworker entity;
 - The modern award is in operation; and
 - No other provision of the Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.
53. Subsection 47(2) states that “a modern award does not **apply** to an employee.....at the time when the employee is a high income employee”.
54. A “high income employee” is defined in s.329 of the Act as an employee who has a Guarantee of Annual Earnings and the annual rate in the Guarantee exceeds the “high income threshold” (currently \$108,300).
55. It is extremely important that the Commission remain very conscious of the fact that:
- Modern awards “cover” employees who are within the class of employees specified in the award, regardless of whether they are “high income employees”;
 - Modern awards “apply” to employees with earnings which exceed the high income threshold, unless they have a Guarantee of Annual Earnings which exceeds the high income threshold;
 - Very few high income employees currently have a Guarantee of Annual earnings. Subclause 328(3) of the Act requires that before or at the time of giving the Guarantee “the employer must notify the employee in writing that a modern award will not apply to the employee”.
56. The effect of drafting the Miscellaneous Modern Award to “cover” a specified class or classes of employee will be to extend the unfair dismissal laws to all employees within such class or classes, regardless of whether they are “high income employees”.
57. Section 382 states that a person is protected from unfair dismissal if the person has completed the minimum employment period and
- “(b) one or more of the following apply:
- (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income

threshold”.

58. With regard to the above provision, the Explanatory Memorandum states:

“1513 Paragraph 382(b) provides that a person will be protected from unfair dismissal if they are covered by a modern award or if an enterprise agreement applies to their employment. If neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their remuneration is less than the high income threshold”.

59. It would be highly inappropriate for the Miscellaneous Modern Award to have the effect of massively expanding the number of professional and managerial employees who are covered by the unfair dismissal laws.

60. A further effect of drafting the Miscellaneous Modern Award to “cover” employees who are currently award-free, such as most professional and managerial employees, will be to exclude the application of the “*simple and flexible ‘default rules’*” for the NES.

A large proportion of professional and managerial employees earn less than \$108,300

61. As pointed out above, almost all employees earning more than the high income threshold do not currently have a Guarantee of Annual Earnings, which meets the requirements of the Act. This means that the Miscellaneous Modern Award will “apply” to a very high proportion of the employees “covered” by the award, including those earning salaries which are far in excess of \$108,300.

62. Also, a large proportion of professional and managerial employees earn less than \$108,300. Indeed, recent graduates and professionals in the early stages of their career typically earn much less than this amount. The award will “apply” to all such employees who fall within the class of employees “covered” by the award.

Accounting practices

63. A joint submission has been filed by Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants.

64. The submission strongly opposes award-coverage for accounting professionals, including opposing coverage under the *Miscellaneous Award 2010*.

Recruitment and consulting services

65. A joint submission has been filed by Ai Group and the Recruitment and Consulting Services Association.

66. The submission strongly opposes award-coverage for professional and managerial employees in the recruitment and consulting services industry – including opposing coverage under the *Miscellaneous Award 2010*.

67. Typical award-free roles in the recruitment and consulting services industry include:

- On-Hire Recruitment Consultants
- Recruitment Placement Consultants
- Branch Managers
- Operations Managers
- Regional Managers
- Financial Controllers
- Accountants (in-house)
- Account Managers
- Business Development Officers or Managers
- Candidate Resourcers
- Human Resource Coordinators / Manager / Consultants
- Workplace Relations Managers / Consultants
- Industrial Relations Managers / Consultants
- Employee Relations Managers / Consultants
- OHS Managers / Coordinators / Consultants
- Outsourcing Consultants
- Environment Managers
- Environmental Services Consultants
- EEO Managers
- EEO Consultants
- Training Coordinators / Managers

APESMA's apparent proposal to expand the coverage of Professional Employees Award

68. Ai Group understands that APESMA proposes that the coverage of the *Professional Employees Award 2010* be expanded to cover additional professional employees, rather than such employees being covered under the *Miscellaneous Modern Award*.
69. Ai Group opposes this proposal. Whilst the terms of the *Professional Employees Award 2010* are far more appropriate for professional employees than the *Exposure Draft – Miscellaneous Award 2010*, professional and managerial employees who are currently award-free need to remain so, as

required by the Act and the Award Modernisation Request.

70. Despite the expansive title (which Ai Group opposed) the *Professional Employees Award 2010* only covers a few award-covered professions (eg. engineers and scientists). Most professionals are award-free.

Ai Group's proposed changes to the Exposure Draft – Miscellaneous Award 2010

71. An amended version of the *Miscellaneous Award 2010* is included as **Annexure A**.

72. The most important amendments are:

- To amend the coverage provisions to ensure that the award clearly specifies who the award covers and to limit the award's coverage to those employees who Ai Group submits the award was intended to cover;
- To prevent the award applying to any employee who earns more than the high income threshold (ie. \$108,300) regardless of whether the employee has a Guarantee of Annual Earnings which meets the requirements of the Act;
- To remove the professional classification for the reasons explained above.

73. It would highly inappropriate and damaging to industry for the award to contain any classification above the base trade level.

74. In the event that the professional classification is retained despite Ai Group's strong objections, the following clauses should not apply to any employee engaged at this level and provisions reflecting Clause 18 (Ordinary Hours of Work and Rostering) in the *Professional Employees Award 2010* should apply to professional employees covered by the *Miscellaneous Award 2010*:

- Clause 15 – Allowances;
- Clause 16 – District allowance;
- Clause 20 – Hours of work;
- Clause 22 – Overtime and penalty rates;
- Subclause 23.2 – Additional week of annual Leave for shiftworkers
- Subclause 23.3 – Annual leave loading;

17. On 16 October 2009, the Australian Government made the following [submission](#) to the AIRC which highlighted the Government's intent in respect of the relevant provisions of the Award Modernisation Request and the provisions of the FW Act: (emphasis added)

Miscellaneous Award 2010

Scope of the award

32. Paragraph 4A of the Minister's request requires the Commission to make a modern award to cover employees who are not covered by another modern award and who perform work of a similar to that which has historically been regulated by pre-reform awards or Notional Agreements Preserving State Awards. The Miscellaneous Award 2010 will meet this requirement.
33. The Government's intention is that the making of this modern award will provide an effective minimum award based safety net for employees who should have the benefit of an award safety net – but who are not employed in an industry or occupation covered by an existing industry or occupation based award.
34. Specifically, where the Commission has purposely excluded certain employees from the classification structure of another industry or occupational modern award, the Government's intention is not that those employees would then been covered by the Miscellaneous Award 2010. This is to ensure that the Miscellaneous Award 2010 promotes flexible modern work practices and the efficient and productive performance of work (paragraphs 8A and 1(c) of the request).
35. The Government is aware that there are parties who claim that some small classes of employees working in an industry or occupation with a designated a modern award are not covered by the classification descriptions within that relevant modern award when they should be. The Government believes the correct approach for parties in this situation is to make an application to vary the award to apply to that class of employee. From 1 January 2010, this could be at the time Fair Work Australia terminates a current award or NAPSA (see Schedule 5, Item 3 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009).
36. The primary purpose of the requirement to create the Miscellaneous Award 2010 is to provide award coverage for those employees in new and emerging industries who perform work of a similar kind to that which has historically been regulated, until such time as a new modern award is created to cover employees engaged in that work or the coverage of an existing modern award is varied to cover those performing this work.
37. The Government's election policy, Forward with Fairness, contained a clear undertaking that award coverage would not be extended to cover those who are historically award free, such as many managerial employees. Consistent with this, the Minister's request provides that 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, should remain free from award coverage.
38. By ensuring that these kinds of employees remain free from award coverage, the Commission will ensure the objective of flexible modern work practices through the modern award system is realised.

39. The Government is encouraged that the Commission is carefully considering this issue, guided by the participation of stakeholders in the award modernisation process.

18. In the *Stage 4 Award Modernisation Decision*⁵ of 4 December 2009, the Full Bench said: (emphasis added)

Miscellaneous Award 2010

[146] The principal issue in relation to the *Miscellaneous Award 2010* (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

“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.”

[147] Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

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

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

... ..”

[148] Several parties also drew our attention to s.143(7) of the Fair Work Act:

“143 Coverage terms

Employees not traditionally covered by awards etc.

... ..

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

⁵ [2009] AIRCFB 945.

(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.”

[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.

[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.”

[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.

[154] We have decided not to make any alteration in the part-time provisions or casual loadings, despite suggestions from employers we should do so. The part-time provision permits alteration in agreed hours by consent or by the employer on notice while maintaining the essential characteristics of part-time employment. We do not think it is appropriate to exempt casual employees from weekend and other penalties applicable to full-time employees.

[155] We have made some alterations to the classification structure. Consistent with the intent of alterations in the coverage clause we have deleted the graduate level and replaced it with an advanced trades/sub-professional classification at a lower minimum wage level. We have decided not to delete the leading hand allowance. It is appropriate that leading hands, who have traditionally been covered by awards, should receive an appropriate allowance. We have included a new reimbursement allowance. The model superannuation provision has been cut down significantly in recognition of the nature of the award.

[156] There were suggestions by representatives of employees and employers that we should alter the hours of work provisions in the exposure draft in a variety of ways. In the end we have decided not to make any change. The hours of work in the exposure draft properly balance the need for some basic protections for employees with a great deal of flexibility for employers.

[157] In relation to the annual leave loading, we have decided to include provision for an employee to receive the pay they would have received for the period of leave if that amount is greater than the loading. We have not accepted various other proposals in relation to annual leave.

[158] The Australian Government submitted that the award should include the model part-time apprentice clause resulting from the Full Bench decision in 2000. We have examined the model clause. Its substantive provisions do not significantly alter the part-time provisions in the award or the model school-based apprentices provisions in Schedule D to the award. Since any other matter dealt with in the clause will be regulated by the relevant training contract, we do not think it is necessary to include the model part-time apprentice clause. Should some unforeseen issues arise the matter can be revisited by application.

19. In another part of the *Stage 4 Award Modernisation Decision*,⁶ the Full Bench made the following comments about the coverage clause of the Miscellaneous Award and the importance of the exclusions that had been incorporated in the final award, to ensure that various award-free fishing and aquaculture operations remained award-free:

[19] We also note that the alterations to the coverage of the *Miscellaneous Award 2010* should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the *Aquaculture Award 2010*.

20. The above paragraph relates to submissions made by the National Aquacultural Council that the Miscellaneous Award, as originally drafted, would cover workers employed in fin fish and shellfish farming in Tasmania and those in oyster farming in New South Wales.
21. The changes made to the coverage clause in the exposure draft to arrive at the final coverage clause in the Miscellaneous Award are marked up below:

4. Coverage

4.1 Subject to clauses 4.1, 4.3, 4.4 ~~and 4.5 and 4.6~~, this award covers employers throughout Australia and their employees in the classifications listed in clause **Error! Reference source not found.** – 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.

4.2 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 ~~from the operation of~~ by a modern award from its operation,

or employers in relation to those employees.

4.3 4.4 The award does not cover employees excluded from award coverage by the Act.

⁶ [2009] AIRCFB 945.

4.4 4.5 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 4.6 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.

4.7 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.

4.8 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.

22. The changes made to the classification structure in the exposure draft to arrive at the final classification structure in the Miscellaneous Award are marked up below:

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 ~~completed at least a three or four year tertiary degree or equivalent~~ advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.

23. The changes made to the adult minimum wage rates in the exposure draft to arrive at the final minimum wage rates in the Miscellaneous Award are marked up below:

14.1 Adult minimum wages

Classification	Minimum wage per week	Minimum wage per hour
	\$	\$
Level 1	543.90	14.31
Level 2	583.00	15.34
Level 3	637.60	16.78
Level 4	733.70 <u>698.20</u>	19.31 <u>18.37</u>

24. The award modernisation developments highlight that the AIRC was persuaded by the arguments of Ai Group and others that:
- The Miscellaneous Award needs to expressly exclude those employees in an industry covered by a modern award, who are not within a classification in that modern award or who are in a class exempted by a modern award from its operation.
 - The Miscellaneous Award needs to contain an express exclusion which clarifies that 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*”.
 - It is not appropriate for the Miscellaneous Award to include a classification for professional employees.

- d. The coverage of the Miscellaneous Award is intended to be “very narrow”.⁷

4. SUBSECTION 143(7) OF THE FW ACT

25. The coverage provisions in the Miscellaneous Award operate subject to s.143(7) of the *Fair Work Act 2009* (**FW Act**), 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.

26. The expression “traditionally not been covered by awards” is important in correctly interpreting the effect of s.143(7).

27. The Explanatory Memorandum for the *Fair Work Bill 2008* simply states:

569.....A modern award must not be expressed to cover classes of employees 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 who perform work that is not of a similar nature to work that has traditionally been regulated by such awards (subclause 143(7)).

28. In paragraph 32 of the Australian Government’s [submission](#) of 16 October 2009 to the AIRC on the scope of the Miscellaneous Award, the Government said: (emphasis added)

32. Paragraph 4A of the Minister’s request requires the Commission to make a modern award to cover employees who are not covered by another modern award and who perform work of a similar to that which has historically been regulated by pre-reform awards or Notional Agreements Preserving State Awards. The Miscellaneous Award 2010 will meet this requirement.

⁷ [2009] AIRCFB 945, [153]; Australian Government [submission](#), 16 October 2009, 33-36.

29. Further, during the Senate Committee inquiry into the *Fair Work Bill 2008*, the Australian Government provided the following written answer to a question on notice: (emphasis added)

Question

Non-award industries

11. How will non-award industries such as aquaculture be dealt with under the new regime?

Answer

In an award modernisation request to the Australian Industrial Relations Commission on 28 March 2008, the Hon Julia Gillard MP, made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). The Government has asked the Australian Industrial Relations Commission to create a modern award to provide minimum entitlements for employees who are not covered by another (industry or occupation based) modern award and who are performing work of a similar nature to that which has historically been regulated by awards.

30. Ai Group does not have any difficulty with the word “traditionally” in s.143(7)(a) being equated with the word “historically”. However, it is necessary to take into account the degree to which a particular class of employees has historically been covered by awards, to avoid absurd outcomes. For example, the fact that a class of employee was only covered by one or a small number of pre-modern enterprise awards, or a NAPSA in only one State, would not logically result in the class of employees being held to be “traditionally covered by awards”.
31. For example, in *Serco Traffic Camera Services (Vic) Pty Ltd*,⁸ Commissioner McKinnon was satisfied that traffic camera operators in Victoria were not covered by the Miscellaneous Award as they were not traditionally award covered. Commissioner McKinnon found only one brief example of a pre-modern award covering traffic camera operators for a period of less than one year.

⁸ *Serco Traffic Camera Services (Vic) Pty. Ltd* [2017] FWCA 5873, [11].

32. In any event, as submitted to the AIRC in the following extract from [Ai Group's Stage 4 Pre-exposure draft submission of 24 July 2009](#), the reference to "awards" (plural) in s.143(7)(a) is relevant:

25. The second critical principle regarding coverage, we submit, is that the award should only apply in circumstances where there has been coverage of similar work in multiple pre-modernised awards and/or NAPSAs. We contend that such a proposition accords with a correct reading of the language of the Modernisation Request, in particular the fact that the second emphasised section of paragraph 4A refers to "*awards (including state awards)*" plural, as opposed to adopting singular phraseology and referring to 'an award (including a state award).'

33. In *Gold Coast Kennels* the Full Bench held:

[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.

34. Ai Group accepts that clause 4.2 of the Miscellaneous Award (and s.143(7)(a) of the FW Act) have two required elements:

(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.

35. However, clause 4.2 cannot be interpreted in a manner that results in a narrowing of the proscription on award coverage in s.143(7).
36. Section 143(7) serves as an insurmountable limitation on the scope of the Miscellaneous Award's coverage. That is, the Award cannot validly contain a coverage provision that would purport to provide coverage to classes of employees described in s.143(7). To the extent that a term contravened the requirements of s.143(7) it would contravene s.136(1) and be of no effect pursuant to s.137.
37. It is very clear from the award modernisation developments in 2009 that the AIRC did not intend that only award-free employees in professional and managerial roles would be excluded from the Miscellaneous Award.
38. In the *Stage 4 Award Modernisation Decision*,⁹ the Full Bench made the following comments about the coverage clause of the Miscellaneous Award and the importance of the exclusions that had been incorporated in the final award, to ensure that various award-free fishing and aquaculture operations remained award-free:

[19] We also note that the alterations to the coverage of the *Miscellaneous Award 2010* should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the *Aquaculture Award 2010*.

39. The above paragraph related to concerns expressed by the National Aquacultural Council that the Miscellaneous Award, as originally drafted, would cover workers employed in fin fish and shellfish farming in Tasmania and those employed in oyster farming in New South Wales.¹⁰ The relevant employees were not managerial or professional employees and, therefore, it is clear that the Miscellaneous Award was intended to exclude award-free employees of different types – not just senior employees.

⁹ [2009] AIRCFB 945.

¹⁰ 18 October 2009 submission of the National Aquacultural Council; Transcript of AIRC Proceedings, 26 October 2009, PN271.

40. In *Gold Coast Kennels*, the Full Bench said in respect of clause 4.2 in the Miscellaneous Award 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”*.¹¹
41. The extract above refers to the interpretation and application of the award clause. The examples in clause 4.2 cannot legitimately be used as a guide to the interpretation of s.143(7)(a) of the FW Act.
42. Paragraph 143(7) prohibits awards covering *“classes of employee...who, because of the nature or seniority of their role, have traditionally not been covered by awards”*. The word “or” is important and must be given effect in interpreting the provision.
43. No “principal classes” of employees are referred to in s.143(7)(a). Classes of employees are excluded if they have not traditionally been covered by awards because of the “nature” of their role (e.g. the fishing and aquaculture employees referred to above), or because of the “seniority” of their role (e.g. most managers and professionals). Paragraph 143(7)(a) gives equal weight to the “nature” of a role and the “seniority” of a role.

5. THE ISSUES RAISED BY THE FULL BENCH IN THE DIRECTIONS

44. Ai Group’s views on the issues raised by the Full Bench in the Directions are set out below.

¹¹ *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* [2018] FWCFB 128.

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.

45. In Ai Group’s view, the current coverage provisions are sufficiently clear. The provisions were carefully drafted by a seven-Member Full Bench of the AIRC after careful consideration and extensive written and oral submissions from peak councils, industrial parties, other interested parties and the Australian Government.
46. The Full Bench as currently constituted should follow the decision of the Award Modernisation Full Bench. As stated by the Full Bench in the *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues Decision*:¹²

[25] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq.*”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:

“Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

¹² [2014] FWCFB 1788.

Whether the coverage of the Award is drawn in terms consistent with paragraph 4A of the Award Modernisation Request.

47. In Ai Group's view, the coverage of the Award does not conflict with paragraph 4A of the Award Modernisation Request. As set out above, the Australian Government at the time that the coverage provisions of the Award were being developed made submissions to the AIRC on the intention of the Award Modernisation Request. The outcome was consistent with the Government's submissions and the Award Modernisation Request.
48. In any event, the more relevant question at this time is whether the coverage of the Award offends s.143(7) of the Act which it does not. The AIRC has already determined, in effect, that the coverage of the Award is consistent with the modern awards objective. In the *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues Decision*,¹³ the Full Bench said: (emphasis added)

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

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.

49. Ai Group's supports the current exclusions in the Miscellaneous Award. They do not offend s.143(7) of the Act.

¹³ [2014] FWCFB 1788.

50. The provisions were carefully drafted by a seven-Member Full Bench of the AIRC after careful consideration and extensive written and oral submissions from peak councils, industrial parties, other interested parties and the Australian Government.
51. There is nothing in the FW Act which states that modern awards must cover all employees other than those excluded from award coverage by s.143(7) of the Act.
52. As the Australian Government stated in its [submission](#) to the AIRC of 16 October 2009: (emphasis added)
34. Specifically, where the Commission has purposely excluded certain employees from the classification structure of another industry or occupational modern award, the Government's intention is not that those employees would then been covered by the Miscellaneous Award 2010. This is to ensure that the Miscellaneous Award 2010 promotes flexible modern work practices and the efficient and productive performance of work (paragraphs 8A and 1(c) of the request).
- - -
36. The primary purpose of the requirement to create the Miscellaneous Award 2010 is to provide award coverage for those employees in new and emerging industries who perform work of a similar kind to that which has historically been regulated, until such time as a new modern award is created to cover employees engaged in that work or the coverage of an existing modern award is varied to cover those performing this work.
53. In the *Stage 4 Award Modernisation Statement*,¹⁴ the AIRC relevantly said:
- [81]** While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it.
54. As submitted by the Australian Government in 2009 and as determined by the AIRC, it is not appropriate for employees who have been excluded from coverage under the classification structure in an industry award, or who are specifically exempted from an industry award, to be included within the coverage of the Miscellaneous Award.

¹⁴ [2009] AIRCFB 865, 25 September 2009.

55. Website designers provide a suitable example of this. The issue of whether the *Graphic Arts, Printing and Publishing Award 2010* should cover website designers was vigorously contested between Ai Group and the AMWU during the award modernisation process in 2008-09. The pre-modern awards did not cover this type of work. Ultimately the Award Modernisation Full Bench rejected the AMWU's arguments that the award should cover these employees:

[142] We publish a *Graphic Arts, Printing and Publishing Award 2010*. We have made only minor alterations to the coverage provision in the exposure draft. Some concerns were expressed about the potential for overlap between this award and other awards in relation to publishing and despatching. We have made a minor alteration to make it clear that the award only applies to despatching which is incidental to the industries or parts of industries covered by the award. Otherwise we do not think any greater clarification is warranted. We have not made any changes to the draft relating to coverage of web design, design generally, or metropolitan newspapers or plastics manufacturing. The provisions largely reflect the coverage of awards to be subsumed into the modern award.¹⁵

56. Other examples are the various award-free classes of fishing and aquaculture employees discussed earlier in this submission. The AIRC decided that it is not appropriate for these employees to be covered under the *Aquaculture Industry Award 2010* or the Miscellaneous Award. The Award Modernisation Full Bench noted that the exclusions in the Miscellaneous Award are necessary to achieve this.

[19] We also note that the alterations to the coverage of the *Miscellaneous Award 2010* should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the *Aquaculture Award 2010*.¹⁶

57. The *Aluminium Industry Award 2010* provides a further example. Senior supervisors (i.e. not leading hands) were expressly excluded from coverage under the Award (see clause 4.3(d)) and it would not be appropriate for these employees to be covered under the Miscellaneous Award. In the *Stage 3 Award Modernisation Decision*,¹⁷ the Full Bench said: (emphasis added)

¹⁵ *Stage 2 Award Modernisation Decision* [2009] AIRCFB 345.

¹⁶ [2009] AIRCFB 945.

¹⁷ [2009] AIRCFB 826

[25] We have accepted the proposal of the employer group (with some minor modification) in relation to a separate subclause for exclusions, now cl.4.3. We note that that proposal was supported or not actively opposed by the relevant unions. We also note that some employees excluded by cl.4.3(d) and (e) will be covered by the occupational operation of the Manufacturing Modern Award. We note also that we modified the exclusion in what is now cl.4.3(d) to exclude only “senior” supervisors on the basis that some employees who could be described as “supervisors”, for example, leading hands, will be covered by the *Aluminium Industry Award 2010*.

58. In a further relevant development, in 2010 the MEAA applied to the Commission for the making of a *Public Relations Industry Award*.¹⁸ Public relations employees were covered under pre-modern awards in Victoria and the ACT but not in other States and Territories. The Full Bench took into account that public relations professionals were excluded from coverage under the Miscellaneous Award but decided not to make a Public Relations Industry Award. The Full Bench relevantly said that *“it appears to us to be anomalous to establish an award for employers who operate in the public relations industry. We are not satisfied that the making of the award is necessary to give effect to the modern awards objective”*.¹⁹

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.

59. Ai Group’s supports the current exclusions in the Miscellaneous Award. There is no need for additional classes of employees to be identified.

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.

60. Ai Group’s supports the current exclusions in the Miscellaneous Award. There is no need for additional classes of employees to be identified.

¹⁸ [2010] FWAFB 3795.

¹⁹ [2010] FWAFB 3795, [16].

Any other relevant issues relating to the coverage provisions of the Miscellaneous Award.

61. Ai Group has raised numerous relevant issues in this submission which highlight the merits of the current carefully crafted coverage provisions of the Miscellaneous Award, and the importance of the coverage provisions not being disturbed.
62. Since 1 January 2010, the coverage provisions of the Miscellaneous Award have been mostly applied in a sensible and practical manner by employers, employees, industrial parties and the Fair Work Ombudsman. Very few issues had arisen prior to the Commission's decision in *Gold Coast Kennels*.
63. In Ai Group's view, the decision in *Gold Coast Kennels* is being misinterpreted by some parties. As Ai Group stated in its reply submission in the *Annual Wage Review 2018-19*, in response to the submission of the Australian Catholics Bishops Conference (**ACBC**):

The ACBC also incorrectly contends that the *Miscellaneous Award 2010* applies widely to low paid employees. In support of this, it refers to the Full Bench decision in *United Voice v Gold Coast Kennels Discretionary Trust Pty Ltd* (Gold Coast Kennels). The ACBC's contention is not correct. The *Miscellaneous Award 2010* has very limited coverage.

The ACBC Submission is based on a misreading of the Decision of the Full Bench in *Gold Coast Kennels*. The ACBC makes the following comments concerning the decision at paragraph [451] of its submission:

This decision, which was delivered on January 2018 was unknown to ACCER and, we presume, at least some of other parties. An online search of the case name will show that it was barely reported, and commented upon during 2018. Yet it is an important decision in regard to the operation of the NMW and the Australian award system. It means that all low paid workers in unskilled jobs who are not otherwise covered by an award are covered by the Miscellaneous Award. It also means that these workers should progress to the C12 wage rate after 3 months employment.

The above description of the decision is not correct. *Gold Coast Kennels* is not authority for the contention that the coverage of the *Miscellaneous Award 2010* extends to all low paid workers in unskilled jobs who are not otherwise covered by an award. Such a contention ignores the exclusions in the *Miscellaneous Award 2010*.

In *Gold Coast Kennels*, a Full Bench of the Commission was required to decide whether employers engaged in performing basic animal care functions were covered by the *Miscellaneous Award 2010*. The Full Bench decided that they were, but the decision is not directly relevant to any other types of employees.

Ai Group was not involved in the *Gold Coast Kennels* proceedings and we do not interpret the decision as having widespread relevance to the award coverage of employees other than those performing animal care functions. If the proceedings were intended to have broader relevance in determining the extent of the coverage of the *Miscellaneous Award 2010*, fairness would dictate that the proceedings be communicated to peak councils and other parties with a significant interest in the outcome so that these parties could make submissions. The fact that this did not occur lends weight to Ai Group's view that the decision is not intended to have wide relevance.

Clauses 4.1 to 4.4 of the *Miscellaneous Award 2010* state:

- 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.

The above exclusions were intended to very substantially limit the coverage of the *Miscellaneous Award 2010*. Ai Group was heavily involved in the proceedings that led to the making of the *Miscellaneous Award 2010* and we made detailed submissions about all of the above exclusions. Indeed some of the exclusions are based on those proposed by Ai Group.

ACBC's argument that the *Miscellaneous Award 2010* has wide coverage to unskilled employees is not sustainable.