

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

**Submission in response to the  
Commission's provisional view**

Miscellaneous Award 2010 -  
Coverage  
(AM2014/237)

**3 March 2020**

**Ai**  
GROUP

# 4 YEARLY REVIEW OF MODERN AWARDS

## AM2014/237 – MISCELLANEOUS AWARD 2010 – COVERAGE

### 1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to paragraphs [59] and [60] of the decision published by the Fair Work Commission (**Commission**) on 12 February 2020 (**Decision**) concerning coverage of the *Miscellaneous Award 2010* (**Miscellaneous Award**).<sup>1</sup>
2. In the Decision, the Full Bench expressed the *provisional view* that clause 4 of the Miscellaneous Award should be amended as follows:<sup>2</sup>

#### 4. Coverage

- 4.1 Subject to clauses 4.2, 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 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.~~
- ~~4.34.4~~ The award does not cover employees excluded from award coverage by the Act.
- ~~4.44.5~~ 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.
- ~~4.54.6~~ The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional

<sup>1</sup> [2020] FWCFB 754.

<sup>2</sup> [2020] FWCFB 754 at [59].

award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.

~~4.64.7~~ 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.

~~4.74.8~~ 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.

3. Ai Group does not support the re-drafted coverage clause, as presently proposed by the Commission.
4. In our submission:
  - a. The proposed coverage clause does not comply with the duty that the Commission has under Part 2-3 of the *Fair Work Act 2009 (FW Act)* to ensure that the coverage terms of a modern award comply with s.143(7). This provision of the Act requires that a modern award must not be expressed to cover the classes of employees referred to in s.143(7)(a) and (b).
  - b. The proposed coverage clause is inconsistent with the element of the modern awards objective that emphasises that awards should be “simple” and “easy to understand” (s.134(1)(g)).

### **The duty of the Commission to comply with s.143(7)**

5. The FW Act confers on the Commission the power to make and vary awards and in doing so the Commission of course has a duty to comply with the requirements of Part 2-3 and other relevant provisions of the FW Act.
6. Section 136 states that a modern award must only include terms that are permitted or required by Subdivision B, Subdivision C, section 55 and Part 2-2.

7. Subsection 143(7) falls within Subdivision B of the Act. It states that a modern award must not be expressed to cover certain classes of employees.
8. We submit that the re-drafted coverage clause proposed by the Commission in the *provisional view*, does not comply with s.143(7) of the FW Act, for the following reasons:
  - a. Clause 4.1 of the Miscellaneous Award is expressed to cover employees not covered by another modern award. Such extremely wide coverage would obviously offend s.143(7), unless other exclusions adequately address the requirements of s.143(7).
  - b. Clause 4.2 only partially addresses the requirements of s.143(7). The clause deals with two classes of employees that are excluded from coverage under the Award due to the “*seniority*” of their role (i.e. managerial employees and professional employees) but it does not exclude employees from coverage due to the “*nature*” of their role if they are not managerial or professional employees.
  - c. Clause 4.3 does not identify any class of employees that is included or excluded from the coverage of the Award, so this provision does not adequately narrow the extremely wide coverage expressed in clause 4.1. Subsection 143(7) imposes a duty on the Commission to ensure that coverage terms are not ‘expressed’ in a particular manner. Clause 4.1 includes classes of employees referred to in s.143(7) and this is not adequately remedied by the wording in clause 4.3. Clause 4.3 does not ‘express’ that the classes of employees referred to in s.143(7) are not covered by the Award.

The Macquarie Online Dictionary defines ‘express’ in the following manner:

*verb (t)* 1. to put (thought) into words: *to express an idea clearly.*

For the requirements of s.143(7) to be met, clause 4.3 would need to be interpreted with reference to ss.136(1)(b), 137 and 143(7) of the FW Act, which is a very complicated, unclear and indirect way of meeting the requirements of s.143(7).

- d. For completeness we note that clauses 4.4 and 4.5 only cover a very limited number of employers and employees and, therefore, these exclusions do not adequately narrow the extremely wide coverage expressed in clause 4.1.
  - e. Clauses 4.6 and 4.7 are inclusions, rather than exclusions and, therefore, these provisions do not narrow the extremely wide coverage expressed in clause 4.1.
9. As mentioned above, s.136(1)(b) requires that a modern award must only include terms that are permitted or required by Subdivision C of Part 2-3 of the FW Act (which includes s.143). Section 137 provides that a term of a modern award has no effect to the extent that it contravenes s.136. It would appear that if clause 4 of the Miscellaneous Award does not conform with s.143(7) of the FW Act, then to that extent, clause 4 is of no effect.
10. Notwithstanding any inability to precisely identify all classes of employees who will be excluded from award coverage by virtue of s.143(7), the language of the legislative provision is clear. The FW Act *mandates* that the coverage of awards be expressed in accordance with s.143. The FW Act does not afford the Commission any discretion to deviate from s.143(7), irrespective of the implications this might have for certain groups of employees and their employers. The Commission must comply with the duty that the Legislature has given it under Part 2-3 of the Act.

11. Consistent with s.143(7), we propose that clause 4.3 be retained and a new clause 4.4 added (with consequent renumbering of the other subclauses in clause 4) as follows:
  - 4.3 The award does not cover employees excluded from award coverage by the Act.
  - 4.4 The award does not cover the classes of employees specified in s.143(7) of the Act.
12. For the reasons outlined above, clause 4.3 is not an adequate means of addressing the requirements of s.143(7) of the Act, given the extremely wide coverage expressed in clause 4.1. However, it is important that clause 4.3 is retained because certain employees may be excluded from award coverage by a provision of the Act or by an FWC order made under a provision of the Act (see s.48(3)).

### **The need for the coverage of the Award to be simple and easy to understand**

13. Subsection 143(7) of the FW Act is of critical relevance to the boundaries of coverage of the Miscellaneous Award. However, in the Commission's proposed re-drafted coverage clause, the important requirements of s.143(7) are not brought to the attention of readers of the Award.
14. We acknowledge that proposed clause 4.3 addresses this issue in a general way through the words: "*The award does not cover employees excluded from award coverage by the Act*". However, these words appear in every modern award and, as such, the significance of these words to the coverage of the Miscellaneous Award will undoubtedly be lost on the vast majority of readers of the Award.
15. Also, as discussed above, the wording proposed by the Commission for clause 4.3, would need to be interpreted with reference to ss.136(1)(b), 137 and 143(7) of the FW Act, in order to properly identify the scope of the award. Far from being "simple" and "easy to understand" for the purposes of s.134(1)(g) of the Act, the coverage clause would be extremely difficult to understand.

16. The Commission's proposed clause would most likely lead to employers applying the Miscellaneous Award to employees who are excluded from award coverage by s.143(7) of the Act (when read with ss.136(1)(b) and 137). The Commission's proposed clause would also most likely lead to many employees misunderstanding their award entitlements.
17. In the interests of making the Miscellaneous Award simple and easy to understand, the coverage clause should be amended in the manner set out above.
18. If, despite Ai Group's submissions, the Full Bench is of the view that Ai Group's proposed additional subclause should not be included in the Award, a note should be included in clause 4.3, drawing the reader's attention to section 143(7) of the Act.
19. The versions of modern awards that reflect the outcome of the 4 Yearly Review, include numerous notes that refer to relevant legislative provisions, including:
  - a. The standard note explaining the parameters governing termination of Individual Flexibility Arrangements in the standard 'Individual Flexibility Arrangements' clause;
  - b. The standard clause dealing with requests for flexible working arrangements, which contains notes referring to s.65 of the FW Act;
  - c. The standard 'payment of wages' clause, which contains notes that refer to Regulations 3.33(3) and 3.46(1)(g) of the *Fair Work Regulations 2009* and ss.113, 117(2) and 120 of the FW Act.
  - d. The standard 'time off instead of payment for overtime' clause, which contains references to ss.65, 65(5) and 345(1) of the FW Act;
  - e. The award provisions relating to 'excessive leave accruals', which refers to Part 2.2, Division 6 of the FW Act;
  - f. The standard clause dealing with directions by an employer that annual leave be taken, which refers to s. 88(2) of the FW Act;

- g. The standard 'cashing out of annual leave' clause, which refers to ss.344 and 345(1) of the FW Act;
  - h. The standard clauses dealing with 'termination of employment', which refer to ss.117, 123, 123(1) and 123(3) of the FW Act; and
  - i. The standard redundancy clause, which includes a reference to ss.119 to 123 of the FW Act.
20. The inclusion of relevant notes in modern awards referring to important provisions in the FW Act that are related to particular award provisions, is practical and sensible and consistent with s.134(1)(g) of the FW Act.