



4 yearly review of modern awards - Miscellaneous Award 2010

REPLY SUBMISSIONS: MISCELLANEOUS AWARD

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

11 NOVEMBER 2019

1. BACKGROUND

- 1.1 These reply submissions are on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 These reply submissions are filed in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 3 July 2019. These reply submissions address submissions made with respect to the coverage provisions of the *Miscellaneous Award 2010* (**the Award**).
- 1.3 In particular, these reply submissions are made in response to the submissions put forward by:
- (a) the Community and Public Sector Union (**CPSU**) on 4 October 2019;
 - (b) the United Voice on 3 October 2019; and
 - (c) the Australian Council of Trade Unions (**ACTU**) on 5 November 2019,
- (collectively referred to as **the Unions**).

2. UNIONS POSITION REGARDING CLAUSE 4.2

- 2.1 The Unions have argued that:
- a) the listing of roles in clause 4.2 is of no utility and creates ambiguity; and
 - b) that because a number of listed roles are covered by specific industry modern awards they should not be included in the clause as currently worded.

No utility in listing roles

- 2.2 ABI and NSWBC do not agree that the listing of roles in clause 4.2 of the Award creates any ambiguity as has been put forward by the Unions.
- 2.3 If anything, the inclusion of a broad list in clause 4.2 of the Award clarifies what types of roles have not traditionally been award covered.

Roles present in other modern awards

- 2.4 Through their submissions, the CPSU have explained that various roles referenced in clause 4.2, such as human resources and lawyers, have been traditionally award covered in the community and public sectors.
- 2.5 We agree with this sentiment and note that in the current community and public sector industry awards these roles have maintained their award coverage.
- 2.6 However, it is also clear that the listed roles in clause 4.2, unless specifically mentioned in an industry award, have not been traditionally award covered in the broader industrial context. For example, lawyers and human resource

professionals do not have an occupational award that covers their employment. Nor does the *Legal Services Award 2010* cover qualified lawyers.

- 2.7 Clause 4.2 when read in conjunction with clause 4.1 clearly explains that the coverage of the Award extends to employers and their employees who are not covered by any other modern award and does not extend to roles such as “managerial employees and professional employees”.
- 2.8 The intention of clause 4.2 to assist in defining the classes of employee that are not captured by the Award’s coverage was confirmed in *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort* [2018] FWCFB 128.¹
- 2.9 If an employer and their employees are covered by a modern award, which the CPSU have confirmed is the case with community and public sector industry awards, then they are not captured by the Award in any event.
- 2.10 As the CPSU has made a general assertion that clause 4.2 of the Award is not clear, they do not provide any material examples of any ambiguity deriving from the clause. Additionally, the CPSU have not proffered any amendments to rectify the perceived ambiguity.
- 2.11 Additionally, were clause 4.2 of the Award to be amended in the manner envisaged in paragraph 19 of United Voice’s submission, it would leave coverage ambiguous.

3. UNIONS POSITION REGARDING CLAUSE 4.3

- 3.1 The Unions have alleged that:
 - a) clause 4.3 of the Award limits the potential coverage of the Award without justification; and
 - b) the limitations imposed by clause 4.3 of the Award impact on the desired coverage of the Ministerial Request.

No justification

- 3.2 ABI and NSWBC respectfully disagree with United Voice and the ACTU’s assertion that the operation of clause 4.3 of the Award acts as an unjustified additional limitation on coverage not envisaged by the Ministerial Request.
- 3.3 There is clearly reasonable justification for the inclusion of clause 4.3 of the Award. Clause 4.3 is designed to preserve the customary award coverage that existed prior to the modern awards system. If an industry award did not include a classification or class of employees, it is likely that this was because of the customary coverage in that particular industry.²

¹ At [43].

² 7 August 2009 AIRC Conference at [PN80].

3.4 The Australian Industrial Relations Commission (**AIRC**) aimed to preserve this customary award coverage through the inclusion of clause 4.3 of the Award. This being the justification for its inclusion.

Examples of coverage exclusions

3.5 United Voice, in their submissions, have provided some theoretical examples of potential scenarios where employees are performing work that is similar to work that might have been traditionally award covered.

3.6 These include:

- a) child minders working in a fitness centre;
- b) family day care employees; and
- c) cleaners and security guards working for an employer covered by an industry award without a classification for these classifications;

3.7 However, no specific examples of employees being excluded from the Award safety net have been provided.

3.8 In any event, if a class of employees is identified who were traditionally award covered but who have since become award free, amending clause 4.3(a) to ensure they are covered by an award is not necessarily the most appropriate course of action.

3.9 Rather, as envisaged by both the ACTU and Australian Chamber of Commerce and Industry (**ACCI**) during award modernisation, the appropriate step to take would be to vary the coverage of the relevant industry modern award to ensure the appropriate award coverage and to minimise cross-coverage between awards.³

Filed on behalf of ABI and NSWBC by

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³ Ibid at PN[36].