

IN THE FAIR WORK COMMISSION

Matter No: AM2016/3

Section 156 - Four Yearly Review of Modern Awards – *Miscellaneous Award 2010*

SUBMISSION IN REPLY OF UNITED WORKERS' UNION

4 March 2020

1. This submission is responsive to the Full Bench decision ('the Decision') of 12 February 2020¹ concerning the coverage of the *Miscellaneous Award 2010* ('the Award').
2. We support the submissions of the Community and Public Sector Union of 4 March 2020.
3. We welcome the Full Bench's provisional view at [59] of the Decision. The coverage clause proposed by the Full Bench will more completely align the coverage of the Award with the modern awards objective and ensure low paid workers who should be covered by the Award are more readily identified within its coverage.
4. The proposed clause creates distinct coverage principally through proposed clauses 4.1 and 4.3. The Full Bench's provisional construction of the clause in effect imports the statutory formulae of subsection 143(7) of the *Fair Work Act 2009* ('the Act') and applies this express general statutory exclusion with the framework of the classifications within the Award. The classifications (and the rates) of the Award to a greater degree than other modern awards will define the coverage of the Award.
5. The Award's coverage will vary in the sense that the Australian workforce will change. As the Decision notes there will be areas of coverage in '*new or emerging types of work who have not yet been the subject of any application or considered for award coverage ... (and) obscure groups of employees who have historically simply 'fallen through the gaps' of award coverage.*'²
6. We welcome the clear recognition of the residual nature of the Award's coverage.

Deletion of clause 4.3

7. The deletion of clause 4.3 is entirely appropriate and it cannot be said that its deletion will result in any class of employee being inappropriately covered. The Act demands that coverage clauses should express coverage of specified employees and employers.³ Here, the specific class is defined but broadly so.

¹ 4 yearly review of modern Awards –*Miscellaneous Award* [2020] FWCFB 754.

² As above [35].

³ Subsection 143(2) of the Act.

8. The Award has 4 rudimentary classifications which due to the coverage of the Award are expressed with appropriate precision. Level 4 is the highest classification within the Award. A level 4 under the Award is an employee with advanced trade qualifications carrying out duties requiring such qualifications or is ‘*a sub-professional employee*’. The term sub-professional appears to be an alternative classification descriptor to ‘*advanced trade qualifications*.’ These descriptors are general but have specificity. Further, the weekly earnings of a level 4 employee is \$941.10. The minimum hourly rate for a level 4 is \$24.77.
9. The Commission uses a threshold of two-thirds of median (adult) full-time ordinary earnings as the benchmark to identify who is ‘*low paid*’ within the meaning of s 134(1) (a).⁴ The Commission uses two measures to assess this figure, the ABS *Characteristics of Employment Survey* (CoE) and the ABS *Survey of Employee Earnings and Hours* (EEH). In accordance with the CoE measure in 2018, two-thirds of median earnings were equal to \$886.67 per week, or \$23.33 per hour.⁵ According to the EEH measure for 2018, two thirds of median earnings were equal to \$973.33 per week, or \$25.61 per week.⁶
10. In accordance with the above measures, all employees covered by the Award can be regarded as ‘*low paid*’ except level 4 and then only if the EEH measure is applied. A level 4 cannot be said to be definitively not low paid.
11. The fact that the Award’s safety net terminates at a modest remuneration level defeats any accusation that the Full Bench’s provisional coverage clause will cover any particular class of employee that it should not.

A note

12. The Award has no domain of intuitive coverage like most other modern awards: *i.e.* the *Nurses Award* 2010 principally covers what most in the community would understand as nurses. The provisional coverage clause of the Award performs its ‘*works*’ as a function of the subsection 143(7) boundary and the Award’s classifications.
13. It may be useful to place a note under provisional clause 4.3 alerting the reader to its connection to subsection 143(7) as follows:

Note: Subsection 143(7) of the Act sets out employees not traditionally covered by awards.
14. Other modern awards incorporate aspects of the subsection 143(7) boundary. For example, the level 6 classification in the *Banking, Finance and Insurance Award* reads:

A.6 Level 6

⁴ *Annual Wage Review 2018-19* [2019] FWCFB 3500, paragraph [52].

⁵ FWC Statistical report –Annual Wage Review 2018-19, published 23 May 2019, page 41.

⁶ As above.

A Level 6 position typically performs a middle managerial role primarily to control the conduct of a part of the employer's business and in which decisions are regularly made and responsibility accepted on matters relating to the administration and conduct of the part of the business. Those responsible for managing more than 10 people must be classified at this level provided that this level 6 classification does not cover classes of employees:

(a) who, because of the nature or seniority of their role, were not traditionally covered at all by awards; or

(b) who perform work that is not of a similar nature to work that has previously been regulated at all by awards. (Our Emphasis)

Indicative job list—branch manager, human resources or fraudulent relations manager, financial planner, information technology specialist, relationship manager, senior analyst, subject matter manager, divisional manager.

15. A note as proposed may be useful to assist future users of the Award.

United Workers Union

4 March 2020