



## DECISION

*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

**“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)**  
(AM2010/89)

### **PASSENGER VEHICLE TRANSPORTATION AWARD 2010**

[MA000063]

COMMISSIONER BISSETT

MELBOURNE, 19 AUGUST 2010

[1] This is an application by the AMWU to vary Clause 20 - Superannuation of the *passenger Vehicle Transportation Award 2010* (PVT Award) to add “MTAA Superannuation Fund” (MTAA Super) as a default superannuation fund.

[2] Submissions were received from the AMWU, the Bus Industry Confederation (BIC) and the Transport Workers’ Union of Australia (TWU). The BIC and TWU opposed the application.

[3] The matter was listed for hearing on 27 July 2010. Following the hearing all parties were given an opportunity to lodge further submissions in response to matters I had raised during the hearing. Further submissions were received from the AMWU and the TWU.

#### **Statutory Provisions**

[4] Fair Work Australia may make a determination varying a modern award outside the 4 yearly review if it is satisfied that such a determination is necessary to meet the modern awards objective.<sup>1</sup>

[5] The modern awards objective is set out in s.134 of the Act:

#### **134 The modern awards objective**

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and

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<sup>1</sup> *Fair Work Act 2009* s. 157.

- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

[6] An application to ‘vary, omit or include terms’ in a modern award can only be made (as is relevant in this case) by an organisation entitled to represent the industrial interests of one or more employees that are covered by the modern award.<sup>2</sup>

[7] There is no debate that superannuation is a term that may be included in modern awards.<sup>3</sup>

### **Grounds for application and consideration**

[8] The AMWU provided a number of grounds in support of their application. I now deal with each of the grounds.

#### *Modern awards objective*

[9] The AMWU submitted that their application is in accordance with the modern awards objective, in particular they cite s.134(f). Alternatively they seek to rely on s.160 of the Act (which allows an award to be varied to remove ambiguity or correct an error).

[10] In support of this the AMWU submitted that the inclusion of MTAA Super would reduce the regulatory burden on businesses by providing clarity on the default funds in the award. I am not convinced the grant of this application will necessarily result in a reduction of the regulatory burden on business.

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<sup>2</sup> s.158.

<sup>3</sup> s.139(1)(i).

[11] I do not consider that there is any ambiguity or error in the current PVT Award clause that suggests the variation sought is necessary.

*Full Bench consideration*

[12] Second, the AMWU submitted that the application is consistent with the views expressed by the Award Modernisation Full Bench. In their decision of 2 September 2009,<sup>4</sup> in discussing the model superannuation clause to be included in modern awards, the Full Bench stated:

[65] In its decision of 19 December 2008, the Commission, in commenting on the model superannuation clause, said:

“[90] The terms of the exposure draft concerning the default fund provision were the cause of a number of submissions from employer and employee interests, from superannuation funds and the superannuation industry. We have decided to allow as a default fund any fund to which the employer was making contributions for the benefit of employees on 12 September 2008. This approach is likely to minimise inconvenience for employers. While funds other than those provided for will not qualify as default funds employees may still exercise their right to choose in favour of these funds.”

[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision.

[13] For the reasons expressed below I do not consider that the application is consistent with the views of the Full Bench. The Full Bench clearly established two grounds for the inclusion of a default fund in a modern award. The first is that the fund was nominated as a default fund in an award-based transitional instrument *relevant to the coverage of the modern award*, or second, that it is a consent position. The overriding consideration is that the nomination of default funds should not lead to any disruption.

*Employers covered by PVT Award have MTAA Super as a default already*

[14] The third ground relied on is that MTAA Super was nominated as a default fund in the *Clerical and Administrative Employees, Hire Cars and Taxis (State) Award* [AN120131]

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<sup>4</sup> [2009] AIRCFB 800.

(State Clerical Award) and that employers previously covered by that award are now covered by the PVT Award.

[15] Employers covered by the State Clerical Award contributed to MTAA Super as a default fund only with respect to those employees covered by the State Clerical Award. Whilst those employers may be covered by the PVT Award it is not in respect of the employees previously covered by the State Clerical Award. Those employees are now covered by the *Clerks - Private Sector Award 2010*, which has MTAA Super as a default fund. The employers covered by the State Clerical Award still have MTAA Super as a default fund with respect to their clerical employees. This is not a ground for inclusion of MTAA Super as a default fund in the PVT Award.

*The scope of the PVT Award includes awards which had MTAA Super as a default fund*

[16] As I understand this ground, the AMWU submits that there are a number of award-based transitional instruments whose scope/application now come within the coverage of the PVT Award in that work performed under those instruments is similar or the same as work performed under the PVT Award. These award-based transitional instruments have MTAA Super as a default fund and therefore the PVT Award should also have MTAA Super as a default.

[17] If this is the case there are grounds for granting the application on the basis of the Full Bench view that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award.

[18] Before considering these instruments it should be noted that the PVT Award covers work in designated classifications in the industry defined as follows:

**Passenger vehicle transportation industry** means the transport of passengers by:

motor vehicle, limousine or hire car;

bus or coach; and

electric tramway, monorail or light rail.

[19] I have considered the application or coverage of each of the following award-based transitional instruments as submitted by the AMWU:

- *Vehicle Industry Repair, Services and Retail (State) Award* [AN120631].
- *Vehicle Industry (South Australia Repair Services and Retail) Award* [AN150167].
- *Motoring Services Award – Southern-Eastern District 2003* [AN 140184].
- *Garage and Service Attendants Award – State (excluding Southern - Eastern Districts) 2003* [AN 140129].
- *Automotive Services (Northern Territory) Award 2002* [AP818846CRN] (each mentioned in AMWU second submission).

[20] I do not believe that the coverage or application of any of these instruments comes within the coverage of the PVT Award. These instruments applied to work in garages and service stations and the like. The submission of the AMWU that there is overlapping coverage with the PVT Award and therefore MTAA Super should be included as a default fund in the PVT Award because it is in these award-based transitional instruments does not stand scrutiny.

[21] Two of these award-based transitional instruments mention application in the repair and servicing of motor vehicles in the establishment of an employer engaged in the motor vehicle rental business. I note that this work is specifically covered by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.<sup>5</sup>

#### *The Tasmanian Public Vehicles Award*

The AMWU submits that the *Public Vehicles Award* (a Tasmanian NAPSA) has MTAA Super listed as a default fund and that the PVT Award covers this area.

[22] The *Public Vehicles Award* did apply to the operation of public motor vehicles. As such it may well fall within the scope of the PVT Award.

[23] The *Public Vehicles Award*, as an award of the Tasmanian Commission, was varied in 1991 to exclude a number of named employers from the obligation to contribute to the TWU Superannuation Fund on the basis that they were contributing to other named funds. One employer was exempted from the TWU Super Fund on the basis that they were contributing to MTAA Super.<sup>6</sup> A further variation to the superannuation provisions of the award in 1995 still named only one employer contributing MTAA Super.<sup>7</sup>

[24] However, this award was further amended on 22 May 2003 by consent pursuant to s.23 of the *Industrial Relations Act 1984* and Principle 13 - Award Modernisation of the Tasmanian Industrial Relations Commission. As a result of this variation to the award no superannuation funds were specified as default funds.<sup>8</sup>

[25] There are therefore no funds named in any respect in the *Public Vehicles Award*. This NAPSA does not provide grounds for the inclusion of MTAA Super in the PVT Award. Further, no evidence has been provided that there is any employer covered by the PVT Award that was previously covered by the NAPSA that was contributing to MTAA Super as a default fund for employees now covered by the PVT Award.

#### *Decision in AustSafe Super*

[26] The AMWU argue that their application is consistent with the decision of Commissioner Lewin in an application by AustSafe Super Pty Ltd to vary the *Aquaculture Industry Award 2010*.<sup>9</sup> In that decision the Commissioner stated that:

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<sup>5</sup> Clause 4.1(d).

<sup>6</sup> Order No. 8 of 1991.

<sup>7</sup> Order No. 3 of 1995.

<sup>8</sup> Order No. 1 of 2003 (by consent).

<sup>9</sup> [2010] FWAFB 3426.

The relevant considerations for determining whether or not AustSafe Super is eligible to be included as a default fund under the *Aquaculture Industry Award 2010* are, whether or not the fund was a fund specified in a superannuation clause as a default fund under an award or NAPSA, or alternatively, any fund to which an employer was making contributions for the benefit of employees on 12 September 2008.<sup>10</sup>

[27] I do not disagree with the Commissioner. My approach to this matter is not inconsistent with the approach taken by him or the decision of the Award Modernisation Full Bench in their decision of 2 September 2009.

[28] The AMWU also referred me to the decision of the Full Bench to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* to include REST Super in that award.<sup>11</sup> I see nothing in that decision to assist me in this matter.

### **Opposition to application**

[29] The BIC submitted that, while there may be a small number of bus operators who contribute to MTAA Super for some of their staff, these are properly caught by Clause 20.4(e) such that MTAA Super does not need to be named.

[30] Further, they submitted that none of the awards listed by the AMWU in their application of 25 June 2010 were included in the Australian Industrial Relations Commission list of awards considered in award modernisation in AM2008/51 - Private Transport (remaining sectors) or AM2008/53 - Public Transport (other than rail). On this basis they submit that an award-based transitional instrument relevant to the coverage of the modern award does not apply. On this basis the application should be rejected.

[31] The TWU submitted that the application did not satisfy the statutory pre-requisites for a variation to a modern award. Further they submitted that the *Clerical and Administrative Employees, Hire Cars and Taxis (State) Award* (the State Clerks Award) - an award-based transitional instrument in which the MTAA Fund is mentioned - has no relevance to the inclusion of MTAA Super in the PVT Award in that, while there were *employers* covered by the PVT Award who were covered by the State Clerks Award those employers have no *employees* covered by the PVT Award who had been previously covered by the State Clerks Award.

[32] I have considered these submissions in reaching my decision.

### **Conclusion**

[33] The matter for determination here is whether MTAA Super should be specifically named as a default fund in the PVT Award in circumstances where there is no evidence that employers covered by the PVT Award previously had MTAA Super as a default fund *for their employees now covered by the PVT Award*.

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<sup>10</sup> [2010] FWAFB 3426 at [4].

<sup>11</sup> [2010] FWAFB 1683.

[34] It is not relevant that employers now covered by the PVT Award previously had MTAA Super as a default fund in award-based transitional instruments for employees covered by awards *other than* the PVT Award.

[35] There is nothing that would lead me to find that MTAA Super was nominated as a default fund at 12 September 2008 in an award-based transitional instrument relevant to the coverage of the PVT Award. There is clearly no consent to the variation.

[36] If there are employees that I am not aware of who are covered by the PVT Award who do have contributions made to MTAA Super as a default fund they can continue to do so by the operation of clause 20.4(f) of the PVT Award. Nothing in this decision will alter that.

[37] For the reasons given the application is dismissed.

COMMISSIONER