



# STATEMENT

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 Yearly Review of Modern Awards—Miscellaneous Award 2010**

(AM2014/237)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 6 JUNE 2019

[1] The *Miscellaneous Award 2010* (Miscellaneous Award) was established as a result of the award modernisation process conducted by the Australian Industrial Relations Commission pursuant to the now repealed Part 10A of the then *Workplace Relations Act 1996*. Specifically, the Miscellaneous Award was made pursuant to a Ministerial Award Modernisation Request issued by then Minister for Employment and Workplace Relations, which relevantly stated:

‘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.’

[2] Clause 4 of the Miscellaneous Award has at all times since it came into effect relevantly defined the award’s coverage as follows:

### **‘4. Coverage**

**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.  
...’

[3] The classification structure in the Miscellaneous Award (set out in Schedule B to the award) contains four classifications expressed in generic terms. Level 1 is an entry level classification operating for the first three months of employment, and has a rate of pay aligned with the National Minimum Wage and the C14 rate in the *Manufacturing and Associated Industries and Occupations Award 2010*. Level 2 applies after the initial three months of employment and has a rate aligned with the C12 rate. Level 3 applies to employees performing trade-qualified duties and aligns with the C10 rate. Level 4 applies to employees performing advanced trade-qualified duties and sub-professional employees, and aligns with the C7 rate.

[4] Section 143(7) of the *Fair Work Act 2009* (Act) applies to the coverage of all modern awards, including the Miscellaneous Award. It 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.’

[5] The proper interpretation of clause 4.2 of the Miscellaneous Award was the subject of consideration in the 2018 Full Bench decision in *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* [2018] FWCFB 128. That decision concerned whether the Miscellaneous Award was the reference award for the purpose of the better off overall test in relation to an application for approval of an enterprise agreement entered into between the respondent employer and its employees. At first instance, it was decided that no award covered the employer and its employees, who performed duties in the pet-boarding and grooming industry in Queensland. The Full Bench quashed the decision under appeal, and determined that the Miscellaneous Award covered the employer and employees in question. Specifically, the Full Bench determined that the exclusion in clause 4.2 did not apply because the class of employees in question had not traditionally been award free at least in a number of states, and in any event there was no discernible reason why such employees should not traditionally have been award-covered because of the nature or seniority of their role.

[6] It became apparent from evidence and submissions received in the Full Bench proceedings that the entire pet boarding and grooming industry in Queensland incorrectly considered itself to be award-free. It also became apparent that arguably incorrect advice concerning the coverage of the Miscellaneous Award had been given by the Fair Work Ombudsman.

**[7]** The Full Bench decision has exposed a number of issues concerning the coverage provisions of the Miscellaneous Award, including whether:

- (1) 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;
- (2) the coverage of the award is drawn in terms consistent with paragraph 4A of the Ministerial Request set out above;
- (3) 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.<sup>7</sup>

**[8]** The transitional provisions in cl.26 of Schedule 1 to the Act enable the Commission to continue to apply the repealed s.156 of the Act to a review of a modern award conducted as part of the 4 yearly review that had commenced but had not been completed before 1 January 2018. Section 156(2) required the Commission to review all modern awards and empowered the Commission to make determinations varying or revoking modern awards and to make modern awards.

**[9]** While the 4 yearly review of the Miscellaneous Award has not yet been completed, there may be a question as to whether new issues concerning the coverage provisions of the award can be dealt with in the continuing review under the transitional arrangements.<sup>1</sup> Whether or not these issues can be dealt with under the transitional arrangements, they clearly can be dealt with in award variation proceedings under s.157 of the Act. Proceedings under s.157 may be brought on the Commission's initiative.<sup>2</sup>

**[10]** Whether proceeding under the transitional arrangements or under s.157, in exercising its powers the Commission must apply the modern awards objective in s.134(1).<sup>3</sup>

**[11]** A Full Bench will be allocated to review the coverage provisions of the Miscellaneous Award and in doing so to give consideration to the above issues and any other issues that might be raised by interested parties.

PRESIDENT

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<sup>1</sup> See [2019] FWCFB 361 [21]–[23].

<sup>2</sup> Section 157(3)(a).

<sup>3</sup> Section 134(2)(a).