

***4 yearly review of modern awards***

*Miscellaneous Award 2010*

**REPLY SUBMISSIONS OF THE ACTU**

1. These submissions are made in response to the submissions of Australian Business Industrial & the NSW Business Chamber ('ABI') and the Australia Industry Group ('AIG'). We file these submissions pursuant to the Directions issued by the Full Bench on 3 July 2019. In these submissions, we refer to the Miscellaneous Award 2010 as 'the Award'.

**Ambiguity in clause 4.2 of the Award**

2. Paragraphs [45]-[46] of AIG submissions indicate that AIG do not accept that exclusionary provisions in clause 4.2 of the Award are ambiguous. This is difficult to reconcile with paragraphs [34]-[35] of those same submissions, which seem to acknowledge that clause 4.2 is capable of more than one meaning. ABI assert in their submissions that clause 4.2 is "sufficiently clear".
3. However, the fact that the Full Bench in *Gold Coast Kennels* disagreed with the views both of a single member of the Commission and the views of the labour inspectorate strongly suggests that clause 4.2 is capable of more than one meaning. That in itself suggests there is "ambiguity" as referred to in s. 160(1) of the Act (and its statutory predecessors), so as to create a discretion to vary to remove that ambiguity<sup>1</sup>. It also clearly engages the arguably more restrictive requirement in the modern awards objective that modern awards be "simple and easy to understand".<sup>2</sup>

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<sup>1</sup> *Property Sales Association QLD, Union of Employees re Real Estate Industry Award 2010* [2012] FWA 10134  
<sup>2</sup> s. 134(1)(g)

Lodged by:	Australian Council of Trade Unions
Address for Service	Level 4, 365 Queen Street, Melbourne 3000
Telephone:	(03) 9664 7333
Facsimile:	(03) 9600 0050
Email:	<a href="mailto:tclarke@actu.org.au">tclarke@actu.org.au</a>

## The Award Modernisation Request

4. We concur with ABI's observation in section 3 of its submission that the Award Modernisation Request needs to be read in context. It is therefore perplexing that ABI make no reference to clause 8A of the request which directly engages with 4A and contemplates that the Award will operate in industries where other modern awards also operate. The same may be said of clause 2(a) of the request, which contemplated award coverage extending into new occupations in an industry otherwise regulated by an award, where the work performed in that occupation was of a "similar nature" to work which had traditionally been award covered.
5. The explanatory table at paragraph [3.4] of the ABI submission obfuscates the two clear misalignments between the Request and the coverage clause, namely:
  - (a) the phrase commencing "including managerial employees and professionals...." is apt to be construed as part of the *definition* of the class of employees in the phrase which precedes it, whereas in the Request the reference to "managerial employees" is raised only as a potential example.
  - (b) The descriptors in clause 4.3 of the award operate on the basis of gaps in coverage of extant modern awards, in the form of explicit exemptions from coverage or where the work performed by a relevant employee is within an industry covered by an award but the work they perform cannot be classified under that award. The Request framed the exclusion impliedly, and on a different basis, being where the employee does not perform work of a *similar nature* to that which has *traditionally* been regulated by awards. The concepts are clearly different, and there are clear indications (referred to below) the former is not a reliable predictor of or proxy for the latter.
6. In any event, the ambiguity provides an independent basis for variation, which is not dependant on the application of the *Preliminary Issues* decision.

## Section 143(7) of the Act

7. The fact that ABI are unable, at paragraph [4.5] of their submissions, to point to specific examples of clause 4.3 of the Award constraining coverage beyond that required by section

143(7) is not to the point. Nor is their inductive reasoning at paragraph [4.4] that, because section 143(7)(b) provides a basis to exclude a class of employees from a modern award, all (or most) classes of employees who were excluded from modern award coverage were excluded on that basis.

8. More relevant is their recognition at paragraph [4.3] of the possibility that some employees may be excluded by clause 4.3 of the Award who are not required to be excluded by section 143(7)(b).
9. The arguments advanced by AIG at paragraph [30] of their submissions as to the “degree” of historical award coverage required to qualify as “traditionally” covered by awards is at odds with paragraph [50] of the decision of the Full Bench in *Gold Coast Kennels*, and should not be accepted.

**The ambit of the exclusion in clause 4.3 of the Award.**

10. Contrary to what is put in section 6 of the ABI submissions, clause 4.3 of the Award is not a proxy for limiting the Award’s coverage to those classes of employees who have been traditionally covered by awards. Even if it did do that, it would misfire. Clause 4.3 of the Award is an attempt to exclude employees who are not covered by another award AND who do not perform work of similar nature to that traditionally covered by another award.
11. However, that attempt reflects an assumption that the exclusions which exist in industry and occupational awards (whether explicit or not) exist purely for the reason that the work was not traditionally covered by an award.
12. Contrary to that assumption, Item 29 of Schedule 3 and Item 3 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* contemplated that not all employees covered by “award based transitional instruments” would transfer to coverage by an industry or occupational modern award (that is, an award other than the Miscellaneous Award). This outcome was also contemplated in the historical submissions quoted at length by AIG.

13. We dispute the characterisation in paragraph [6.8] of the ABI submission of the position taken by the ACTU in the hearing before Justice Giudice on 7 August 2009. Paragraphs [PN78]-[PN90] of the transcript to which they refer clearly demonstrate that the ACTU was concerned about and wished to avoid an outcome whereby:
- (a) Workers would be excluded from the modern award system in total where they had been traditionally award covered but were the subject of an exclusion in one award; or
  - (b) Workers would be excluded from the modern award system inadvertently.

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