

## IN THE FAIR WORK COMMISSION

Matter No: AM2016/3

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

### SUBMISSION OF UNITED VOICE

1. This submission is made pursuant to the Directions of the Fair Work Commission ('the Commission') on 3 July 2019 for the review of the coverage clause of the *Miscellaneous Award 2010* ('the Award'). In the Directions, the Commission stated that any interested party should file written submissions and any evidence by 4 October 2019. The Directions seek responses to 4 specific issues.
2. In addition, we file an advice received from the Fair Work Ombudsman, 8 September 2010, ('the FWO Advice') concerning pet boarding and grooming attendants.

### **Background**

3. The current coverage clause of the Award reads:

#### 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.*

*4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.*

*4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.*

*4.7 This award covers any employer which supplies on-hire employees in classifications set out in Schedule B and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.*

*4.8 This award covers employers which provide group training services for apprentices and trainees under this award and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.*

4. The Award was made on 4 December 2009. There was significant debate about the appropriate coverage of the Award during award modernisation. Coverage was identified as the ‘*principal issue*’ in the decision of the Full Bench of the Australian Industrial Relations Commission (‘AIRC’) of 4 December 2009.<sup>1</sup> Clause 4 has not been amended.
5. Section 163 of the *Fair Work Act 2009* (‘the Act’) is titled ‘*Special criteria relating to changing coverage of modern awards*’. As the Commission noted in its decision in the review of the *Alpine Resorts Award 2010* clarifying a coverage clause within a modern award will not offend section 163 and the modern awards objective requires that unnecessary coverage overlaps are avoided.<sup>2</sup> The Full Bench in the *Alpine Resorts Award* decision observed at [77]:

*A modern award will not constitute a fair and relevant safety net of terms and conditions where there is doubt about the scope of its coverage, having regard, in particular, to the need to ensure a simple, easy to understand modern award system that avoids unnecessary award overlaps (see s 134(1)(g)).*

6. Subsection 163(4) places the Award in a special category amongst modern awards in relation to coverage and reads:

*The miscellaneous modern award is the modern award that is expressed to cover employees who are not covered by any other modern award.*

7. Both of the Explanatory Memorandums to the Bill do not address subsection 163(4) although the subsection is clear on its face. Subsection 163(4) is a specific provision about coverage and only applies to the coverage of the Award.

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<sup>1</sup> [2009] AIRCFB 945, at [146].

<sup>2</sup> *Alpine Resorts Award 2010* [2010] FWCFB 4984 at [52] to [78], for subsection 163(1) see [54] to [55] and [67].

8. Section 143 of the Act deals with coverage terms in modern awards generally. Subsection 143(2) notes that a modern award must be expressed to cover specified employers and specified employees. Subsection 143(5) is titled *'How coverage is expressed'* and subsection 143(6) reads:

*Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.*

9. Some modern awards cover industries or callings<sup>3</sup> and other modern awards cover a subset of labour relations within an industry or calling.<sup>4</sup> The Award cannot define its coverage by a specific industry, type of work or a discrete class of employers but has to define its coverage by reference to employees and employers *'not covered by other modern awards'*. Given the special status given to the Award by subsection 163(4) its coverage clause will be unusual as it will identify the domain of employment which should be covered by the modern award system but isn't covered by another modern award.

**(a) The issues identified in paragraph [7] of the Statement of Justice Ross, President, issued on 6 June 2019 ([2019] FWC 3934)**

*Whether 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.*

10. The coverage clause of the Award is not clear.
11. This is apparent from the 2018 Full Bench decision in *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort*<sup>5</sup> ('the Pet Resort Decision'). Prior to the Pet Resort Decision, the entire pet boarding and grooming industry in Queensland and elsewhere incorrectly considered itself to be award-free.<sup>6</sup> Further, prior to the Pet Resort Decision, the Fair Work Ombudsman ('FWO') was providing advice that incorrectly limited the application of the Award to the coverage of employees in pet boarding and grooming.<sup>7</sup> We file with this

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<sup>3</sup> For example, the *Hospitality Industry (General) Award 2010* covers defined parts of the hospitality sector.

<sup>4</sup> The *Cleaning Industry Award 2010* and the *Security Industry Award 2010* in practise cover the provision of defined types of labour on contract to third parties. As discussed later neither of these modern awards deal comprehensively with the cleaning or the security sector.

<sup>5</sup> [2018] FWCFB 128.

<sup>6</sup> The Statement of President Ross, [2019] FWC 3934 at [6].

<sup>7</sup> An email to United Voice dated 25 September 2018 from the Fair Work Ombudsman 'Engage' service stated: *'Following a decision of a Full Bench of the Fair Work Commission earlier this year, the Fair Work Ombudsman has had to change its view on certain coverage issues relating to the Miscellaneous Award. In the*

submission a copy of the advice received by United Voice on 8 September 2010 concerning pet boarding and grooming attendants. It is now clear that the FWO interpreted the coverage clause of this Award incorrectly.

12. There is value in reviewing clause 4.2 to improve its clarity and to ensure that the clause properly only excludes the classes of employees noted in paragraph 4A of the Ministerial Request of 17 June 2008.

*Whether the coverage of the award is drawn in terms consistent with paragraph 4A of the Ministerial Request set out above*

13. The Ministerial Request in paragraph 4A states that the proposed modern award was 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.*’ We would further note that while not contemplated by this aspect of the statement subsection 163(4) provides direction from the Parliament which is both consistent and refines the import of the Ministerial Request.
14. The Award excludes a broader group of employees from coverage than the Ministerial Request. Clause 4.2 excludes from coverage ‘*managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.*’
15. Further, at clause 4.3(a), the Award again goes beyond the terms of the Ministerial Request in excluding employees in an industry covered by a modern award who are not within a classification in that modern award.
16. The coverage clause of the Award is expressed in terms that are inconsistent with the Ministerial Request and excludes a larger class of employees than is intended by the Ministerial Request and also subsection 163(4) of the Act.

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*decision, United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort [\[2018\] FCWFB 128](#), the Full Bench adopted a narrower interpretation of occupations that are excluded from coverage under the Miscellaneous Award than has been understood to apply. Importantly for pet groomers employed by pet grooming businesses, this has resulted in a change in position regarding the Fair Work Ombudsman’s (FWO’s) advice concerning award coverage for this occupation. The FWO has today published updated advice regarding award coverage for employees working as pet groomers for a pet grooming business.’*

*Whether 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*

17. The Award 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 Act. We note again subsection 163(4) of the Act which indicates the intended function of the Award.
18. The numerous listed exclusions in clause 4.2, and the terms of clause 4.3, excludes certain classes of employees who are not covered by another modern award and who are not excluded from award coverage by s.143(7) of the Act. As discussed later in this submission, there appears to be no reasonable reason why employees performing work of a similar nature to work traditionally regulated by awards, and who are not by the nature or seniority of their role excluded, should not be covered by the Award.
19. As noted, the Pet Resorts Decision's construction of clause 4.2 at [37] is helpful:

*[37] We consider that clause 4.2 has a plain meaning based on the ordinary meaning of the words used. The exclusion in clause 4.2 has two requisite elements. Stated in reverse order, they are:*

- (1) the classes of employees must not have been traditionally covered by awards; and*
- (2) this must have been because of the nature or seniority of their role.*

20. The above construction reflects the terms of the Ministerial Request and the terms of s143.(7) of the Act. The coverage clause of the Award should be amended to reflect the terms outlined in paragraph [37] of the Pet Resorts Decision. The FWO Advice appears to have fallen into error because it appraised the work of pet boarding and groomer attendants in terms of whether the work was traditionally covered by awards and did not given any consideration to the nature or seniority of the work.

**(b) The question of whether clause 4.2 of the Miscellaneous Award does, or should, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1**

21. Clause 4.2 of the Award may operate to exclude from coverage certain classes of employees who should not be excluded.
22. We say that there should not be any occupations specifically listed in clause 4.2. Listing occupations risks excluding employees who should be properly covered by this Award.

23. There is no utility in listing specific professions which are at a senior level *prima facie* excluded from the modern award safety-net. It would be clearer if the clause was more focussed on the seniority and managerial functions of the employee rather than attempting to ‘short list’ some likely excluded professions or specialised areas of work.
24. The nature of particular professional roles may change or become redundant. If a particular calling is not listed this will appear to be of significance when it should not. Roles that might have in the past been labelled senior and were not traditionally covered by awards may due to a reduction in status be deserving of safety-net protection.
25. Almost all of the professions listed in clause 4.2 are to some degree covered by one or more other modern awards.<sup>8</sup> An individual employee engaged in a particular profession role should be award free due to the managerial nature and seniority of the role rather than where the work is performed.
26. The concept of traditional award coverage is inherently conservative and inconsistent with Australia’s progressive industrial tradition, the modern awards objective and more broadly the purpose and intent of the Act. United Voice and its predecessors have a long and creative tradition of identifying groups of workers who did not have the benefits of an award and incorporating these groups into industrial awards.<sup>9</sup> The manner in which the Full Bench in the Pet Resorts Decision at [37] constructs the 2 requisite elements of 4.2 by qualifying classes of employees not traditionally covered by awards because of the nature or seniority of their roles is correct.
27. As noted in the statement<sup>10</sup> one of the issues with the Award is its classification structure which does not cover degree qualified or ‘professional’ employees. The Award’s highest level 4 classification contemplates a ‘sub-professional employee’. A ‘professional’ accountant, finance officer, marketing employee, legal officer, human resource officer, public relations officer and or information technology specialists may because of the industry or sector they work not attract the coverage of another modern award and have the legal minimum wage and the National Employment Standards as their safety net. The Award’s

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<sup>8</sup> Applying the pay calculator tool available on the FWO website and requesting assistance at the second step by ticking ‘No, help me find my award’ for accountants indicates that that the following modern awards cover accountants: the *Banking, Finance and Insurance Award 2010*, the *Black Coal Mining Industry Award 2010*, the *Electricity Power Industry Award 2010*, the *Labour Market Assistance Industry Award 2010*, and the *Rail Industry Award 2010*.

<sup>9</sup> Childcare and home care workers are 2 significant examples. To varying degrees, this work was considered work performed by women in the home or a quasi-domestic setting and was initially not regulated by awards. Home care workers were initially treated as domestic servants. An example of a new type of work where our predecessor union sought recognition for within the award system is trolley collecting.

<sup>10</sup> At [3].

higher classifications may need to be varied in accordance with any contemplated clarification of the Award's coverage.

**(c) the question of whether clause 4.3 of the Miscellaneous Award does, or should, operate to exclude from coverage any identifiable class of employees falling within the scope of coverage delineated by clause 4.1;**

28. Clause 4.3 of the Award is not clear. Clause 4.3 may be read so as to exclude employees falling within the scope of coverage delineated by clause 4.1, without any reasonable justification for doing so.
29. This is apparent from other FWO advice regarding award coverage of certain employees. The FWO advises that a child minder working in a fitness centre, the industry award is the *Fitness Industry Award 2010* and that such employees are award free because *'the Fitness Award doesn't cover a child minder employed by an employer operating a fitness centre, who is not a local government employer or a registered club employer. This is because while the employer is in the fitness industry, there is no classification for a child minder in the Fitness Award. This also means the employee isn't covered by the Miscellaneous Award.'*<sup>11</sup>
30. Similarly, the FWO states in relation to family day care employee, their industry award is either the *Children's Services Award 2010* or the *Social, Community, Home Care and Disability Services Industry Award 2010*, and that such employees are award free because *'No award covers an employee: working for a service providing family day care or family based childcare caring for children in the carers own home. They're entitled to the national minimum wage and the National Employment Standards. They're not covered by the Children's Services Award or the Social and Community Services Award because although these Awards cover employers in the family day care industry there is no classification for them in these Awards. This also means the Miscellaneous Award can't cover these carers.'*<sup>12</sup>
31. The above FWO advices indicate that clause 4.3 of the Award has an unreasonable exclusionary effect.
32. In respect of the roles of child minders and family day carers, these roles are not senior, and concern work of the type that has traditionally been regulated by awards. There is no logical reason for employees such as a child minder (in a fitness service) or for a family day carer to be regarded as award free.

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<sup>11</sup> [https://www.fairwork.gov.au/library/k600192\\_award-coverage-for-a-child-minder-in-a-fitness-centre](https://www.fairwork.gov.au/library/k600192_award-coverage-for-a-child-minder-in-a-fitness-centre)  
<sup>12</sup> [https://www.fairwork.gov.au/library/k600609\\_award-coverage-for-family-day-care-employees](https://www.fairwork.gov.au/library/k600609_award-coverage-for-family-day-care-employees)

33. Further, United Voice has concerns regarding the potential confusion clause 4.3(a) may result in when applied to employees covered by what can be termed ‘*labour hire awards*’. This is where the coverage is defined by reference to a class of employers that provide a labour to a third party. The 3 modern awards that we are concerned with that can be described as labour hire awards are the *Cleaning Services Award 2010*, the *Security Services Industry Award 2010* and the *Corrections and Detentions (Private Sector) Award 2010*.
34. The *Cleaning Services Award 2010* covers the contract cleaning services industry, which means ‘*the business of providing cleaning services under a contract.*’<sup>13</sup> Some organisations employ cleaners directly and the employee may be covered by an industry award (such as the *Aged Care Award 2010*, the *Educational Services (Schools) General Staff Award 2010* or *Local Government Industry Award 2010*). Most awards do not have a cleaning classification.
35. Labour hire awards can overlap with other labour hire awards. The *Corrections and Detentions (Private Sector) Award 2010* (‘the Corrections Award’) does not have a cleaning classification. The Corrections Award’s coverage is the class of employer in the ‘*corrections and detention industry*’ namely employers that operate private correctional facilities and other related functions on behalf of governments. There is a tolerably clear argument that a person engaged as a cleaner within a privately managed correctional facility is doing work covered by the Cleaning Award as it’s a form of contract cleaning but if the Cleaning Award, for whatever reason, does not apply cleaners in privately run ‘*prisons*’ under the current clause 4.3(a) are award free.
36. Australian immigration detention centres have been managed by Serco and this workplace has a history of bargaining. Cleaners are a critical part of Serco’s workforce. A succession of enterprise agreements have been made on the basis that cleaners working for Serco in Australian immigration detention centres are award free and that the only relevant reference instrument for agreement making is the Corrections Award.
37. Generally, a cleaner who is not employed in contract cleaning and is not covered by an industry award should be covered by the Award. However, clause 4.3(a) may create the perception that a cleaner who is directly employed is award free.<sup>14</sup>

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<sup>13</sup> Clause 4.2 of the Cleaning Award.

<sup>14</sup> As an example, a Jobs Australia news article from 31 January 2018 on the Decision states: ‘*The implication of this decision is that the Miscellaneous award may cover other low paid workers who have been regarded as award free. Jobs Australia is reviewing the potential impact of this for members. There may be some job roles that need to be reassessed. An example might be cleaners directly employed by an organisation and who are not specifically covered by a modern award such as the Cleaning Services Award.*’ The news article was downloaded from <https://www.ja.com.au/news/miscellaneous-award-fair-work-decision-clarifies-coverage>



38. The Security Award's coverage notes:

*4.1 This industry award covers employers throughout Australia in the security services industry and their employees in the classifications listed in Schedule C—Classifications to the exclusion of any other modern award.*

*4.2 To avoid doubt, the security services industry includes:*

*(a) patrolling, protecting, screening, watching or guarding any people and/or property, including cash or other valuables, by physical means (which may involve the use of patrol dogs or the possession or use of a firearm) or by electronic means;*

*(b) crowd, event or venue control whether through physical or electronic means;*

*(c) body guarding or close personal protection;*

*(d) the operation of a security control room or monitoring centre;*

*(e) loss prevention; and*

*(f) traffic control when it is incidental to, or associated with, the activities referred to in clauses 4.2(a), (b) or (c).*

*4.3 To avoid doubt, this award does not apply to an employer merely because that employer, as an incidental part of a business that is covered by another modern award, has employees who perform functions referred to in clause 4.2.*

39. A security guard directly engaged by an employer covered by another modern award which does not contain a security classification is arguably award free.

40. We have similar concerns with the operation of clause 4.3(a) in respect of industry awards generally. It is common for an industry award not to contain *all* classifications of work that could be performed in that industry. Cleaning is natural case study as all enterprises require cleaners.

41. Clause 4.3(b) is similarly concerning. Clause 4.3(b) of the Award excludes from coverage employees '*in a class exempted by a modern award from its operation*' and their employers. Like clause 4.3(a), this sub clause has the effect of creating confusion over the proper status of employees. For example, the *Security Services Industry Award 2010* does not apply to an employer '*merely because that employer, as an incidental part of a business that is covered by another modern award, has employees who perform functions referred to in clause 4.2*' (such as patrolling, protecting or watching any people and/or property, crowd control, body guarding and loss prevention).<sup>15</sup> A number of modern awards contain security officer classifications but most awards do not. As with cleaners, United Voice is of the view that where a security officer is not covered by the Security Award, or a different modern award, then the employee is covered under the Award. Again, clause 4.3(b) of the Award creates an arguable case that an employee in this situation is award free.

<sup>15</sup>

Clause 4.3 of the Security Award.

42. The effect of clause 4.3 is that low and modestly paid employees performing work that has traditionally been covered by awards, and should be subject to a fair and relevant safety net of terms and conditions may be treated as award free. This is detrimental to such employees, as the Award provides a range of conditions (such as minimum award wages, penalty rates, and overtime rates) that award free employees have no entitlement to.
43. Clause 4.3 does not reflect the terms of s.143 (7) of the Act nor is it consistent with the terms of the Ministerial Request in paragraph 4A. Clause 4.3 should be reviewed and deleted.

**United Voice  
3 October 2019**



Australian Government

# Fair Work OMBUDSMAN

Reference Number: 3662627  
8 September 2010

Ms Carolyn Tate  
[carolyn@smeassistancegroup.com.au](mailto:carolyn@smeassistancegroup.com.au)

Dear Ms Tate,

I refer to your recent correspondence with Shelby Martin in which you requested clarification of the operation of the Miscellaneous Award 2010 [MA000104] (the modern award).

Specifically we understand that you requested clarification on whether an animal attendant or dog groomer engaged in a boarding kennel facility in Queensland would be covered by the modern award.

Historically these occupations have not been regulated by an award in the state of Queensland.

The modern award applies to national system employers and their employees who are not covered by any other modern award. However there are a number of exclusions to these coverage provisions.

Clause 4.2 states the modern award will not apply to employees who due to the nature of their work have traditionally not been covered by awards. We are of the view that an animal attendant or dog groomer engaged in a boarding kennel facility in Queensland will not be covered by the modern award due to this exclusion.

These employees will continue to be considered award free and entitled to the provisions of the National Employment Standards and the *Fair Work Act 2009*.

We trust this information has been of assistance. If you require further clarification or have any additional queries, please quote the reference number above and email [contactus@fwo.gov.au](mailto:contactus@fwo.gov.au).

Yours sincerely

Suzanne Lewis  
Knowledge Services Team  
Fair Work Ombudsman

**Important note: Disclaimer**

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