



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.158 - Application to make a modern award

Media, Entertainment and Arts Alliance

(AM2010/3)

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER BISSETT

SYDNEY, 18 MAY 2010

Application to make a modern Public Relations Industry Award – whether proposed award necessary to meet the modern award objectives – nature of the industry and impact of proposed award – Fair Work Act 2009 (Cth) ss 134, 157, 158.

Introduction

[1] This decision relates to an application under s 158 of the *Fair Work Act 2009* (Cth) (the Act) by the Media, Entertainment and Arts Alliance (MEAA) for the making of a new modern award covering the Public Relations Industry.

[2] Directions were issued by the Full Bench on 27 January 2010 for the filing of written submissions by interested parties. Written submissions were subsequently received from the Australian Services Union (ASU), the Australian Council of Trade Unions (ACTU), the Australian Industry Group (AIG), the Public Relations Institute of Australia (PRIA), the Australian Chamber of Commerce and Industry (ACCI) and the MEAA.

[3] A number of submissions addressed a threshold issue of whether any modern award should be made for this industry. Other submissions addressed the content of any award. At the hearing of the matter on 29 April 2009 we determined that we would hear and determine the threshold issue prior to any hearing on the other matters. This decision relates to that threshold issue.

Background

[4] A federal Public Relations Industry Award has existed since 1990.¹ It covered approximately 70 named respondents and operated as a common rule award in Victoria and the ACT. No other award-based transitional instrument applies. Operations outside Victoria and the ACT conducted by employers who are not respondent to the award are award free.

[5] During stages two and three of the award modernisation process the award was mentioned in some written submissions and consultation sessions.² The AFEI submitted that the industry was a very small one and should not be used as a basis for the creation of a broader marketing and business services award.³ The MEAA submitted that the work covered by the award had little in common with the Information and Communication Technology

industries and should be considered at a later stage of the award modernisation process in conjunction with journalism.⁴ The Full Bench made no award at stage two covering the industry and no proposals for an award were made at a later stage. In proceedings leading to the making of the *Miscellaneous Award 2010*⁵ (the Miscellaneous Award) the Full Bench inserted a paragraph into that award which excluded from the coverage of the award “managerial and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists”.

[6] The MEAA submits that the public relations industry was overlooked in the award modernisation process and fell into the category of “unfinished business”. It now seeks an industry award which covers employers in a business independent of the client whose function is to provide the following services to clients – public relations, government relations, media relations, issues and crises management, event management, brand and marketing campaigns, corporate social responsibility and sustainability.

[7] There is some uncertainty as to the nature of the industry and employers in the industry. There was no direct evidence on the nature and extent of the industry. The MEAA relied on material on the Department of Employment and Workplace Relations website which suggests that approximately 17,000 public relations professionals are employed across a range of industries. It submits that there could be in the order of 3,000 employers in the industry of providing public relations services including the approximately 300 businesses on the Register of Lobbyists published by the Department of Prime Minister and Cabinet. The MEAA admits that its membership in the industry is small.

[8] PRIA is a peak body of public relations and consultancy firms. Its membership comprises approximately 160 public relations and communications consultancy firms and 3,000 individual practitioners. The AIG asserts that it has a large number of members involved in the industry and that most of those businesses and employees have been traditionally award free. It also submits that employers who provide other services in the market research and information technology industries also provide similar and sometimes overlapping services.

[9] It is common ground that absent any new award, clerical employees engaged in the industry are covered by the *Clerks - Private Sector Award 2010*.⁶ The exclusion of public relations specialists in the scope clause of the Miscellaneous Award results in public relations specialists employed by employers in the public relations industry being award free to the extent they are not covered by another modern award.

The Legislative Test

[10] Section 157(1) of the Act provides:

“157 FWA may vary etc. modern awards if necessary to achieve modern awards objective

(1) FWA may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

[11] The modern awards objective is contained in s134 of the Act. That section provides:

“134 The modern awards objective

What is 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

(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*.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of FWA's *modern award powers*, which are:

(a) FWA's functions or powers under this Part; and

(b) FWA's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: FWA must also take into account the objects of this Act and any other applicable provisions. For example, if FWA is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[12] The AIG and ACCI submit that the qualification 'necessary' in s 157 is a significant limitation on FWA's power to make a modern award outside the four yearly reviews of modern awards. They submit that the term imposes a very high hurdle in applications to make a modern award outside the four yearly reviews and the power to make an award should only be exercised in exceptional and limited circumstances. The peak employer groups rely on the Regulatory Analysis and Explanatory Memorandum issued in conjunction with the Fair Work Bill and the references in such materials to the effect that applications to vary awards outside the four year review of awards can only be made in exceptional circumstances.

[13] The ACTU and the MEAA submit that this is not an appropriate matter to determine broader issues associated with the test under s 157, the matter should be considered on the basis of unfinished business and in that context the award is necessary to give effect to the modern awards objective.

Conclusions

[14] We do not propose to engage in a detailed analysis of the statutory test under s 157.

[15] In our view the case for a modern award covering the public relations industry has not been made out. There was little information put on the nature of the industry or on the impact of any modern award on productivity and employment costs in the industry. Whilst there is existing award coverage in Victoria and the ACT the impact of extending that coverage was not addressed.

[16] In these circumstances it appears to us to be anomalous to establish an award for employers who operate in the public relations industry. We are not satisfied that the making of the award is necessary to give effect to the modern awards objective. The desirability of modifying the scope of existing awards or creating new awards can be considered during subsequent award reviews conducted under other legislative provisions. The application is dismissed.

VICE PRESIDENT WATSON

Appearances:

J Nolan of counsel for the Media, Entertainment and Arts Alliance
D Mamone for the Australian Chamber of Commerce and Industry
N Street for Australian Industry Group
D Sleeman for the Public Relations Institute of Australia

Hearing details:

2010.
Melbourne
April 29

<Price code C, PR997233>

¹ AP825430

² Submissions on behalf of the Australian Federation of Employers and Industries in AM2008/18 dated 31/10/2008;
Submissions of the Media, Entertainment and Arts Alliance in AM2008/18 dated 30/10/2008; Transcript of Proceedings
17 March 2009 in AM2008/38 and AM2008/52 PN45 – PN51

³ Submissions on behalf of the Australian Federation of Employers and Industries in AM2008/18 dated 31 October 2008 at
[22].

⁴ Submissions of the Media, Entertainment and Arts Alliance in AM2008/18 dated 30 October 2008.

⁵ MA000104

⁶ MA000002