

From: Luis Izzo <Luis.Izzo@ablawyers.com.au>
Sent: Wednesday, 4 March 2020 2:59 PM
To: AMOD <AMOD@fwc.gov.au>
Subject: AM2014/237 - Miscellaneous Award

Dear Sir/Madam

We act for the Australian Chamber of Commerce and Industry in relation to the above proceedings.

ACCI wishes to file the attached submissions with respect to the decision issued by the Full Bench in these proceedings on 12 February 2020.

Should you have any queries in relation to this matter, please do not hesitate to contact our office.

Yours sincerely

Luis Izzo

Managing Director – Sydney Workplace
Australian Business Lawyers & Advisors

140 Arthur Street North Sydney NSW 2060



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AM2014/237

Miscellaneous Award 2010

**Submission in response to
12 February 2020 Decision
[2020] FWCFB 754**

4 March 2020



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Telephone 02 6270 8000
Email info@australianchamber.com.au
Website www.australianchamber.com.au

CANBERRA OFFICE

Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

MELBOURNE OFFICE

Level 2, 150 Collins Street
Melbourne VIC 3000

SYDNEY OFFICE

Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

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1. BACKGROUND

- 1.1 These submissions are filed on behalf of the Australian Chamber of Commerce and Industry (**ACCI**) in response to a decision (**the February Decision**) and directions issued by the Full Bench on 12 February 2020 with respect to the *Miscellaneous Award 2010* (**Miscellaneous Award**).
- 1.2 Specifically, the February Decision invited parties to provide evidence or submissions in response to the provisional conclusions expressed in the Decision.
- 1.3 Whilst ACCI did not initially participate in proceedings AM2014/237 regarding the Miscellaneous Award, a number of ACCI members have provided feedback to ACCI in relation to the February Decision, prompting the filing of this submission.

2. PROVISIONAL CONCLUSIONS

- 2.1 The Decision identified the following relevant provisional conclusions:
- (a) Clauses 4.2 and 4.3 of the Miscellaneous Award are not achieving the modern awards objective.
 - (b) Clause 4.3 of the Miscellaneous Award should be removed in its entirety, so that the Miscellaneous Award can now cover employees who are in an industry covered by a modern award, even if the industry award does not contain a classification for the relevant employee.
- 2.2 ACCI wishes to respectfully identify its concerns with these provisional conclusions. ACCI outlines, in the sections of these submissions that follow, reasons identifying why:
- (a) The existing coverage terms of the Miscellaneous Award are achieving their intended purpose.
 - (b) The removal of clause 4.3 is inimical to the modern awards objective.
- 2.3 ACCI also provides some feedback on the drafting of the revised coverage clause at section 5 of these submissions below.

3. THE PURPOSE OF THE MISCELLANEOUS AWARD

- 3.1 The Consolidated Award Modernisation Request issued by Minister Gillard pursuant to section 576C(1) of the then *Workplace Relations Act 1996* (Cth) relevantly provided as follows:

4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate.

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.

3.2 It is self-evident from the above text that modern award coverage was primarily meant to be determined along industry lines. However, the Miscellaneous Award was also to be created to cover work that was traditionally award-regulated.

3.3 During the proceedings that were convened by the Australian Industrial Relations Commission (**AIRC**) pertaining to the Miscellaneous Award, the Government identified in written submissions what it saw as the purpose of the Miscellaneous Award:¹

32. Paragraph 4A of the Minister's request requires the Commission to make a modern award to cover employees who are not covered by another modern award and who perform work of a similar to that which has historically been regulated by pre-reform awards or Notional Agreements Preserving State Awards. The Miscellaneous Award 2010 will meet this requirement.

33. The Government's intention is that the making of this modern award will provide an effective minimum award based safety net for employees who should have the benefit of an award safety net – but who are not employed in an industry or occupation covered by an existing industry or occupation based award.

34. Specifically, where the Commission has purposely excluded certain employees from the classification structure of another industry or occupational modern award, the Government's intention is not that those employees would then been covered by the Miscellaneous Award 2010. This is to ensure that the Miscellaneous Award 2010 promotes flexible modern work practices and the efficient and productive performance of work (paragraphs 8A and 1(c) of the request).

¹ Australian Government Submission to AIRC Award Modernisation Full Bench, 16 October 2009

35. *The Government is aware that there are parties who claim that some small classes of employees working in an industry or occupation with a designated a modern award are not covered by the classification descriptions within that relevant modern award when they should be. The Government believes the correct approach for parties in this situation is to make an application to vary the award to apply to that class of employee. From 1 January 2010, this 4 Yearly Review of Modern Awards – AM2014/237 Miscellaneous Award 2010 Australian Industry Group 12 could be at the time Fair Work Australia terminates a current award or NAPSA (see Schedule 5, Item 3 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009).*

36. *The primary purpose of the requirement to create the Miscellaneous Award 2010 is to provide award coverage for those employees in new and emerging industries who perform work of a similar kind to that which has historically been regulated, until such time as a new modern award is created to cover employees engaged in that work or the coverage of an existing modern award is varied to cover those performing this work.* (emphasis added)

3.4 The effect of the Government's submission was two-fold:

- (a) Firstly, it confirmed that the Miscellaneous Award was not intended to be used as a 'catch-all' that provided coverage for employees where the Commission had already determined to exclude such employees from the coverage of their industry awards.
- (b) Secondly, it confirmed that the Miscellaneous Award was primarily focused on ensuring award coverage could be secured for "emerging industries" with work of a similar nature to that work which was traditionally award covered.

3.5 It is apparent that the AIRC adopted this approach when it made the Award.

3.6 This is evident from both the insertion of clause 4.3 in the Award, but also the following passage from the 4 December 2009 decision which gave effect to the Miscellaneous Award:²

"We agree with those who have suggested that the coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned or where the expansion of coverage of a modern award is involved. Accordingly we do not think the award should contain a comprehensive safety

² [2009] AIRCFB 945 at [153]

net designed for any particular occupation or industry. Rather it should contain basic conditions only, leaving room for the application of an appropriate safety net in another modern award in due course.”

(emphasis added)

- 3.7 What these passages demonstrate is that the AIRC was not attracted to the notion that the Miscellaneous Award be created to give rise to standing award coverage for industries already covered by other Awards. Rather, Justice Giudice noted on transcript during the relevant hearings that the AIRC was eager to retain “*customary coverage*” within the relevant industries.³
- 3.8 ACCI accordingly submits that the drafting of the Miscellaneous Award as it presently stands (with clause 4.3 retained) ensures the Miscellaneous Award achieves its original dual purposes of:
- (a) maintaining and not interfering with the prevailing history of award coverage in relevant industry awards; and
 - (b) providing a general or miscellaneous award to cover emerging industries which have not previously been award covered.

4. THE REMOVAL OF CLAUSE 4.3 OF THE MISCELLANEOUS AWARD AND THE MODERN AWARDS OBJECTIVE

- 4.1 The February Decision has expressed the provisional view that clause 4.3 of the Award should be deleted in its entirety.
- 4.2 This would have the effect of increasing the Miscellaneous Award's coverage such that it may now intersect with industries covered by industry modern awards and cover employees engaged in those industries.
- 4.3 At the outset, ACCI notes that such an approach will run counter to the purposes identified when the Miscellaneous Award was first created (as outlined in section 3 above).
- 4.4 More concerning, however, is the fact that the proposed deletion of clause 4.3 sits uncomfortably with a number of elements of the modern awards objective.

³ 7 August 2009 AIRC Conference at [PN80].

4.5 Those elements of the modern awards objective that are particularly affected are identified below.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

4.6 For employers operating in an industry covered by an industry modern award, the navigation of the safety net is assisted by the fact that the employer will often have the single industry award as their focal point for ensuring safety-net compliance.

4.7 By way of example:

- (a) in the retail industry, the *General Retail Industry Award 2010* is well known and applied by many employers;
- (b) in the hospitality industry, the *Hospitality Industry (General) Award* is well known and applied by many employers; and
- (c) in the building industry, the *Building and Construction General On-site Award 2010* and *Mobile Crane Hiring Award 2010* are well known and applied by many employers.

4.8 Whilst ensuring compliance with awards is not always straightforward, employers benefit from having a single industrial instrument source for their compliance obligations (with occupational awards only sometimes applicable at relevant sites).

4.9 By extending the coverage of the Miscellaneous Award, employers can no longer benefit from the simplicity of having a single point of reference for their industrial instrument obligations. Instead, in every case where a classification does not exist for a particular worker in a business covered by an industry award, the February Decision would now require employers to undergo the following process:

- (a) Firstly, an employer must form a view regarding whether the work the employee performs is one which is traditionally award covered. This is in itself a complex exercise. The employer would need to review all award coverage provisions in every State and Territory jurisdiction before 2010 to assess whether there was prevailing coverage for the relevant type of work.

- (b) Secondly, the employer would then need to assess whether the reason that the work was not traditionally award covered was because of the nature or seniority of the role. Again, this would require a relatively forensic exercise in historical research that would be well beyond the means of most employers.
- (c) Thirdly, assuming that the employee's role was traditionally award covered (or was not traditionally award-excluded based on the nature or seniority of the work), the employer would need to classify the employee under the Miscellaneous Award's terms.

4.10 The detailed nature of this exercise is in fact highlighted by the Decision itself, where the Full Bench held as follows:

“An employer engaging low-paid employees performing lower-skilled manual work functions should be very slow to conclude that such employees are excluded by s 143(7) of the FW Act from award coverage, and this should occur only after the receipt of detailed legal advice concerning the FW Act and the relevant history of award coverage.”

4.11 Whilst prudent, the caution expressed by the Commission demonstrates the very complexity caused by the deletion of clause 4.3. If clause 4.3 is retained, then employers covered by industry awards will not need to conduct the complex exercise that the Commission itself has expressed caution about.

Assertion that clause 4.3 is itself not simple or easy to understand

4.12 The February Decision states that clause 4.3 is itself not simple or easy to understand.

4.13 ACCI respectfully disagrees with this contention.

4.14 Clause 4.3 is presently drafted in the following terms:

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.

- 4.15 Clause 4.3(a) provides that employees are not covered by the Miscellaneous Award if the employees do not fall within a classification contained in the industry award applicable to their employer. Whilst views may differ on the complexity associated with construing the classifications in an industry award, the assessment of whether an employee is covered by an industry award is necessarily an exercise every employer will always need to undertake. An employer cannot determine which award should apply to their workforce without assessing the scope of their industry award. Accordingly, clause 4.3(a) does not impose any additional analysis or forensic exercise beyond that already required of employers.
- 4.16 Clause 4.3(b) provides that employees exempted from a modern award's coverage are also excluded from the operation of the Miscellaneous Award. Determining whether an employee is exempted from a modern award's operation is an exercise ordinarily conducted by referring to the express terms of the Award. This is far simpler than the alternative now imposed by the Decision for employers covered by industry awards, which requires employers to assess the history of award regulation and the nature and seniority of positions, before understanding whether the Miscellaneous Award will apply to their workforce.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

- 4.17 The Decision already identifies that the deletion of clause 4.3 will increase employment costs and the regulatory burden on employers. This is because some employees not currently covered by industry awards will likely become covered by the Miscellaneous Award. The Decision references the imposition of the Miscellaneous Award minimum conditions as the source of such increased costs.
- 4.18 However, additional burdens also arise. By way of example:
- (a) the administrative burden now imposed by the somewhat difficult task of assessing whether or not the Miscellaneous Award will apply to a workforce (which has already been addressed at paragraph 4.9 above) is an additional matter which should be acknowledged as contributing to the costs of compliance with the modern award system; and

(b) given the difficult task involved in determining whether the Miscellaneous Award will apply (without the exclusion contained in clause 4.3), employers are more likely to face the prospect of unwittingly being exposed to breaches of the Miscellaneous Award if they are unaware of its application.

4.19 These costs are not offset by any productivity gain.

4.20 The imposition of these costs appears difficult to justify particularly in circumstances where the parties to these proceedings have not identified:

- (a) any specific case (or workplace) where employees have been excluded from the award safety net who should be award covered; or
- (b) any particular disputation arising over the history of the Miscellaneous Award's coverage since 2010.

The promotion of flexible modern work practices and the efficient and productive performance of work

4.21 The deletion of clause 4.3 of the Miscellaneous Award will see employers who are currently bound by a single industry award possibly covered by at least two awards - namely, their industry award and the Miscellaneous Award.

4.22 This will likely give rise to differing regulatory obligations which has the tendency to impede efficiency.

4.23 Rather than treating all employees consistently pursuant to a single set of organisational rules, employers may need to adopt different approaches for employees within the same industry.

4.24 This type of matter was a cause of concern for the Federal Government that issued the Ministerial Request pertaining to the Miscellaneous Award. Specifically, in its submission to the AIRC dated 16 October 2009, the Government submitted as follows:⁴

⁴ Australian Government Submission, 16 October 2009

34. Specifically, where the Commission has purposely excluded certain employees from the classification structure of another industry or occupational modern award, the Government's intention is not that those employees would then been covered by the Miscellaneous Award 2010. **This is to ensure that the Miscellaneous Award 2010 promotes flexible modern work practices and the efficient and productive performance of work (paragraphs 8A and 1(c) of the request).** (emphasis added)

5. REVISED DRAFTING

5.1 Paragraph 59 of the Decision identifies the proposed revised drafting of the Award's coverage clause.

5.2 In particular, a newly drafted clause 4.3 identifies the limits of the Award's scope by referencing unnamed provisions of the FW Act.

5.3 Specifically, the new clause 4.3 provides as follows:

"4.3 The award does not cover employees excluded from award coverage from the Act."

5.4 Unfortunately, most employers would be unfamiliar with the specific provisions of the FW Act which regulate the kinds of employees who may be covered by Awards. Indeed, in the absence of being prompted by the relevant subsection, many industrial relations practitioners may be unable to identify those provisions in the Act which regulate Award coverage and which would operate to limit the scope of the Miscellaneous Award.

5.5 This means that, for most employers, clause 4.3 will either be very difficult to understand or will simply bear no meaning for them. This is an undesirable outcome and one which is inconsistent with section 134(1)(g) of the FW Act.

5.6 A simple solution that addresses this concern is the inclusion of a note following the new clause 4.3 which provides as follows:

"Note: Section 143(7) of the Fair Work Act provides that 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; or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by awards.”

6. CONCLUSION

- 6.1 Having regard to the above, ACCI respectfully requests that the Commission reconsider the provision views outlined in paragraphs 58 and 59 of the February Decision and consider retaining the drafting of at least clause 4.3(a) of the current Miscellaneous Award.
- 6.2 In any event and in addition to the submission at paragraph 6.1 above, ACCI respectfully suggests that the Commission includes a note in the drafting of the Award’s coverage clause to the effect outlined in section 5 of these submissions above.

Filed on behalf of the Australian Chamber of Commerce and Industry by Australian Business Lawyers & Advisors

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