

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

4 Yearly Review of Modern Awards
Miscellaneous Award - Coverage
(AM2014/237)

8 November 2019

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/237 – MISCELLANEOUS AWARD 2010 – COVERAGE

1. INTRODUCTION

1. This reply submission is made by the Australian Industry Group (**Ai Group**) in relation to the issues referred to in paragraph [3] of the Directions published by the Fair Work Commission (**Commission**) on 3 July 2019 (**Directions**) concerning coverage of the *Miscellaneous Award 2010* (**Miscellaneous Award**).
2. The Commission asked parties to file in the Commission written submissions and any witness statements and other evidence upon which each intends to rely concerning questions that have arisen as to the coverage of the Miscellaneous Award.
3. In a submission dated 14 October 2019 (**October 2019 Submission**), Ai Group outlined its views in relation to various matters concerning the coverage of the Miscellaneous Award and made the following points:
 - Consistent with the intent of the Australian Industrial Relations Commission (**AIRC**) during the Award Modernisation process:
 - The Miscellaneous Award appropriately excludes those employees in an industry covered by a modern award, who are not within a classification in that modern award or who are in a class exempted by a modern award from its operation.
 - The Miscellaneous Award needs to retain an express exclusion which clarifies that 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”.

- It is not appropriate for the Miscellaneous Award to include a classification for professional employees.
 - The coverage of the Miscellaneous Award should be narrow.
 - The current coverage provisions in the Miscellaneous Award are sufficiently clear.
 - The coverage of the Miscellaneous Award does not conflict with paragraph 4A of the Award Modernisation Request.
 - The current exclusions in the Miscellaneous Award do not offend s.143(7) of the *Fair Work Act 2009* (Cth) (**FW Act**).
 - There is no requirement for modern awards to cover all employees other than those who are excluded from award coverage by s.143(7) of the FW Act and such an outcome is inappropriate.
 - There is no need for additional classes of excluded employees to be identified in the coverage provisions of the Miscellaneous Award.
 - The Commission’s decision in *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* (**Gold Coast Kennels**)¹ has been misinterpreted by some parties.
 - The examples of excluded employees in clause 4.2 of the Miscellaneous Award, described as the ‘principal classes’ of excluded employees in *Gold Coast Kennels*, cannot legitimately be used as a guide to the interpretation of s.143(7) of the FW Act.
4. Ai Group has considered the submissions of the three organisations that responded to the issues raised in the Directions and files this reply submission pursuant to paragraph [2] of the Directions.

¹ *United Voice v Gold Coast Kennels Discretionary Trust t/as AAA Pet Resort* [2018] FWCFB 128.

5. Specifically, this submission responds to the following:
- The submission of United Voice filed of 3 October 2019 (**United Voice Submission**).
 - The submission of the Community and Public Sector Union of 4 October 2019 (**CPSU Submission**).
 - The submission of the Australian Council of Trade Unions (**ACTU**) of 6 November 2019.
6. For the reasons outlined below, the submissions of United Voice, the CPSU or the ACTU do not raise any cogent arguments which should deter the Commission from accepting the views expressed in Ai Group's submission of 14 October 2019.

2. UNION ARGUMENTS ABOUT SUBSECTION 163(4) OF THE ACT

7. United Voice argues for an extended coverage of the Miscellaneous Award partially on the basis of an argument that this would be consistent with s.163(4) of the FW Act.²
8. Section 163(4) of the FW Act reads:

SPECIAL CRITERIA RELATING TO CHANGING COVERAGE OF MODERN AWARDS

...

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

9. It would be extremely inappropriate to provide for coverage of the Miscellaneous Award as broadly as it is defined in s.163(4) of the FW Act. Although this provision was not dealt with in the explanatory memorandum (**EM**) or supplementary EM to the FW Act, it is clear that it was not intended to provide a definitive statement as to the coverage of the award.

² AM2016/3, Submission of United Voice, [16], [17].

10. It is important to interpret s.163(4) in the light of its context within the FW Act. Subsection 163(1) restricts the capacity of the Commission to vary a modern award so that certain employers or employees stop being covered by the award unless the Commission is satisfied that they will instead become covered by another modern award (other than the Miscellaneous Award) that is appropriate for them. Subsection 163(4) merely serves the function of briefly outlining the fact that the coverage of the Miscellaneous Award only extends to cover employees who are not covered by any other award. It should not be taken as restricting or providing a comprehensive guide as to the intended coverage of the Award, nor should it be taken as confining any exclusions that may otherwise apply with respect to the coverage of the Miscellaneous Award.
11. If s.163(4) were interpreted as providing a definitive statement concerning the coverage of the Miscellaneous Award or as limiting the scope of any exclusions which may apply, this would be patently contrary to Part 4A of the Award Modernisation Request which applies additional exclusions as follows **(emphasis added)**:
- 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).
12. Also, interpreting s.163(4) of the FW Act as restricting exclusions which may apply under the Miscellaneous Award would conflict with s.143(7) of the Act which prohibits the extension of award coverage to classes of employee:
- (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.
13. Subsection 163(4) addresses one aspect of the coverage of the Miscellaneous Award. This aspect is addressed in subclause 4.1 of the Award which states:
- 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.

14. If s.163(4) were to be interpreted as defining the coverage of the Miscellaneous Award, clauses 4.2, 4.3, 4.4, 4.5 and 4.6 would have no work to do. Also, the classification structure would have to be extremely wide, as s.163(4) does not refer to classifications. Such an interpretation would be absurd.

3. WHETHER THE COVERAGE PROVISIONS OF THE AWARD ARE SUFFICIENTLY CLEAR

15. United Voice, at paragraphs [10] – [12] of its submissions, and the CPSU, at paragraphs [8] – [10] of its submissions, argue that the coverage clause of the Miscellaneous Award is not clear.
16. Ai Group maintains the contention in our October 2019 Submission that the current provisions are sufficiently clear.
17. The fact that in order to determine whether an employee is covered by the Miscellaneous Award requires consideration of whether a particular type of employment is traditionally award covered, does not mean that the coverage clause is unclear. The Award was only intended to apply to a very limited number of employees and to be primarily directed at application to employees performing work in new industries, as explained in Ai Group's October 2019 Submission.
18. A Statement issued by the AIRC on 25 September concerning the exposure drafts for Stage 4, which included the Miscellaneous Award, included the following explanation which is apposite for the present inquiry (emphasis added):

[81] We publish a draft Miscellaneous Award 2010. (We have renamed the General Award as the Miscellaneous Award to reflect the language of the Transitional Act.) While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it. ...

...

[84] It is unclear which employees will be covered by this award. It may be that it will have application in some areas of the workforce which have not been covered by awards before. Section 576L of the WR Act provides that the Commission may only include terms in modern awards to the extent that they constitute a fair minimum safety net. Because there is doubt about the existing conditions of employees who might be covered we have taken a cautious approach. We have included some provisions found in modern awards of wide application but not included others so as to reduce the risk of significant cost and employment effects.

19. It would be contrary to the intention of the AIRC to more specifically define the coverage of the Miscellaneous Award.
20. United Voice has raised, at paragraph [11] of its Submission, the argument that the Full Bench Decision in *Gold Coast Kennels* was inconsistent with advice from the Fair Work Ombudsman (annexed to United Voice's submission) concerning the coverage of the pet boarding and grooming industry in Queensland. United Voice contends that this is evidence that the coverage clause of the Award is unclear.
21. Ai Group urges the Commission to reject United Voice's argument, which would set the bar too low for a finding that the provisions are unclear to the extent that a variation is required. Differing interpretations of award provisions are frequently espoused between parties. Prior to *Gold Coast Kennels*, the coverage clause of the Miscellaneous Award had been the subject of very little contention since the Award was made.
22. The decision in *Gold Coast Kennels* concerned an industry which was considered by the Full Bench to have historically been award covered in the majority of jurisdictions in Australia at the time of the Part 10A Award Modernisation Proceedings. Extensive argument in the context of this case surrounded whether animal attendants and pet groomers were traditionally award covered. Much of the decision is confined to the unique circumstances of the industry concerned.
23. The CPSU claims, at paragraphs [9] and [10] of its submissions, that the list of 'professional employees' in clause 4.2 of the Miscellaneous Award is unclear owing to ambiguity concerning whether the clause excludes those professions to the extent that they have not been traditionally award covered or if the clause

excludes all employees in those or similar professions despite any history of award coverage in some industries.

24. Ai Group notes that the variation to the coverage provision in the exposure draft of the Miscellaneous Award during the Part 10A Award Modernisation proceedings, followed extensive submissions made by Ai Group concerning the inappropriateness of extending award coverage to professional and managerial employees who were traditionally award free.³
25. It is not controversial that the intent of the AIRC was to exclude from coverage the professional occupations listed in clause 4.2 and associated occupations. This is clear from the fact that at the time when clause 4.2 took its current form, the AIRC altered the classification structure in the Award to delete the graduate level and replace it with an advanced trades/sub-professional classification at a lower minimum wage level.⁴ The Miscellaneous Award does not cover employees for which there is no classification in clause 14 – Minimum Wages.⁵
26. The CPSU proposes, at paragraph [11] of its Submission, four examples of classes of employee which it contends represent those which the Miscellaneous Award was intended to cover. The four examples are more apt to confuse rather than clarify the coverage provisions of the Award. Examples (a) and (b) refer to employees formerly covered by either a pre-reform award or an enterprise award who do not otherwise fall within an industry covered by a modern award. These two examples make no reference to ‘occupation-based awards’. They also provide no limitation as to the extent of historical award coverage. The reference, in example (d) to the coverage of ‘employees in emerging industries which do not fall clearly within the scope of another industry modern award’ is also unhelpful in that it in no way addresses whether such employees perform work similar to that which has traditionally been award covered.

³ AM2008/74, [Ai Group Submission](#), (16 October 2009), [13].

⁴ [2009] AIRCFB 945, [155].

⁵ *Miscellaneous Award 2010*, cl. 4.1.

27. The ACTU's Reply Submission suggests that paragraphs [34] to [35] of Ai Group's October 2019 Submission acknowledge that clause 4.2 is capable of more than one meaning and is therefore unclear. This misconstrues Ai Group's position. Ai Group rejects an interpretation of clause 4.2 which extends coverage beyond that which would be permitted by s.143(7) of the FW Act.

4. CONSISTENCY WITH THE AWARD MODERNISATION REQUEST

28. Ai Group disagrees with United Voice's contention, at paragraphs [13] – [16] of its submission, that the Miscellaneous Award currently excludes a broader group of employees from coverage than contemplated by the Award Modernisation Request.
29. On 16 June 2008, the Hon. Julia Gillard MP, then the Workplace Relations Minister, sent correspondence to the AIRC varying the Award Modernisation Request. The correspondence stated that the Request directs the Commission 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. It stated that this was to ensure that the basic protections such as minimum wages and meal breaks were provided to these employees.
30. The variation to the Award Modernisation Request included a new paragraph [4A] and [8A]. Each are reproduced below:

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 the award as such. This 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.

...

8A In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to paragraph 1(c) and consider how the

modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.

31. The AIRC made the Miscellaneous Award in response to paragraphs 4A and 8A in the Award Modernisation Request, as is evident from a Statement issued dealing with Stage 4 of the award modernisation process on 29 June 2009 which included under the subheading 'General Award'⁶:

See consolidated Award Modernisation Request clauses 4A and 8A

32. The AIRC's intent to reflect the Award Modernisation Request is also apparent from its decision issued on 4 December 2009⁷ in which it referred to the relevant principles as follows:

Miscellaneous Award 2010

[146] The principal issue in relation to the *Miscellaneous Award 2010* (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

"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."

[147] Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

"2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

⁶ See consolidated Award Modernisation Request clauses 4A and 8A, Attachment A.

⁷ [2009] AIRCFB 94.

...

[149] Although s.143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the Miscellaneous Award in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature or seniority of their roles have traditionally not been covered by awards. Many different approaches and drafting techniques were proposed to encapsulate that requirement. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards.

33. In making the Miscellaneous Award, the AIRC took into account submissions of the Australian Government on 16 October 2009 which described its intention in issuing the Award Modernisation Request, as follows: (emphasis added)

Miscellaneous Award 2010

Scope of the award

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).
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

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.
 37. The Government's election policy, Forward with Fairness, contained a clear undertaking that award coverage would not be extended to cover those who are historically award free, such as many managerial employees. Consistent with this, the Minister's request provides that 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, should remain free from award coverage.
 38. By ensuring that these kinds of employees remain free from award coverage, the Commission will ensure the objective of flexible modern work practices through the modern award system is realised.
 39. The Government is encouraged that the Commission is carefully considering this issue, guided by the participation of stakeholders in the award modernisation process.
34. As paragraphs 34 and 35 of the above extract make clear, the current exclusions in clauses 4.2 and 4.3 of the Miscellaneous Award are in keeping with the intent of the Award Modernisation Request. This is especially the case considering the fact that at the same time that the Award Modernisation Request was varied to include paragraph 4A, paragraph 8A was included requiring the AIRC, in making a modern award in accordance with 4A, to have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations. Paragraph 1(c) reads:
1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:
 - (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work

35. It would not be consistent with paragraph 1(c) of the Award Modernisation Request, or the Australian Government's stated intention in making the Request, to extend coverage of the Miscellaneous Award beyond that which currently applies.

5. 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

36. United Voice, at paragraph [17] to [20] of its submission, and the CPSU, at paragraph [18] of its submission, argue that 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 FW Act.

37. United Voice states, at paragraph [18] of its submissions that:

“there appears to be no reasonable reason why employees performing the 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”.

38. United Voice has misconstrued the purpose of the Miscellaneous Award. The AIRC made clear at the time of the finalisation of the Part 10A Award Modernisation proceedings that the coverage of the award was intended to be very narrow and likely to be limited in time where emerging industries were concerned or where expansion of coverage of a modern award was involved.⁸

39. The mandate provided to the AIRC to develop the Miscellaneous Award was 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”.⁹

⁸ [2009] AIRCFB 945, [153].

⁹ Request under s.576C(1) – Award Modernisation (Consolidated Version), 4A.

40. To construe the purpose of the Miscellaneous Award as being to cover all employees not covered by another award and not excluded by s.143(7) of the FW Act would extend coverage beyond that which was intended by the Australian Government at the time of the award modernisation proceedings and at the time when the FW Act was drafted. Such an outcome would be inconsistent with paragraph 2(d) of the Award Modernisation Request that the creation of modern awards was not intended to increase costs for employers. It would also leave clauses 4.2 and 4.3 of the Miscellaneous Award with no work to do.
41. As explained in our October 2019 Submission, there is nothing in the FW Act which states that modern awards must cover all employees other than those excluded from award coverage by s.143(7) of the Act.
42. If clause 4.3 of the Miscellaneous Award excludes certain employees from coverage and these are not otherwise excluded by the operation of s.143(7), this would nevertheless be consistent with the Australian Government's intention in making the Award Modernisation Request, as outlined in its [submission](#) to the AIRC of 16 October 2009: (emphasis added)
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 be 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).
- - -
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.
43. In the Stage 4 Award Modernisation Statement,¹⁰ the AIRC relevantly said:

¹⁰ [2009] AIRCFB 865.

[81] While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it.

44. United Voice states, at paragraph [20] of its submission that the FWO Advice concerning coverage of pet boarding and groomer attendants, relevant to the issues decided in *Gold Coast Kennels*, fell into error as a result of consideration of whether the work was traditionally covered by awards without any consideration to the nature or seniority of the work. Ai Group considers this to be an oversimplified assessment as to the outcome of the decision in *Gold Coast Kennels*. In making its decision, the Full Bench examined in detail the history of award coverage in the relevant industry and assessed this against the coverage provisions of the Award. The Full Bench said: (emphasis added)

[47] Having regard to these fundamental characteristics of the Employees and their work, we do not consider that either of the two conditions for the operation of the exclusion in clause 4.2 is satisfied. First, it cannot be said that work of the class of employees to which the Employees may be characterised as belonging has traditionally not been covered by awards. If that class is characterised in the way proposed by AAA Pet Resorts, namely “animal attendants, their assistants and supervisors in pet boarding establishments”, it is clear that the Victorian Award, the NSW Award and the NT Award all covered the class. The Victorian Award applied, relevantly, to establishments which accommodated pets, and contained classifications for Animal Attendants whose primary functions were feeding animals and cleaning their enclosures or kennels. This award operated on a common rule basis from 2005. The common rule NSW Award applied, relevantly, to establishments or businesses which accommodated animals and household pets, and included classifications of “Food Preparer or Kennel Cleaner” and Animal Attendant. The former classification is not distinguishable from the work of the lower level classifications in the Agreement. As earlier set out, the Animal Attendant under the NSW Award might be required to give injections and take the temperature of animals, but as earlier set out the duties of Level 1-3 employees under the Agreement include the administration of medication. The NT Award, somewhat ambiguously, had coverage of animal welfare establishments, but the specific reference in the award to kennelhands and the residency of two identified kennels makes it reasonably clear that the NT Award covered pet boarding businesses.

[48] If the relevant class of employees is more widely characterised as that of animal attendants performing basic animal care functions, then the NSW Institutional Award, the WA Award and the Queensland Award also provided relevant coverage in veterinary practices and/or animal welfare institutions. We note that there is comity in the qualification requirements for a Level 3 employee under the WA Award and a Level 3 employee under the Agreement.

45. Ai Group disagrees with United Voice's contention that the coverage of the Miscellaneous Award needs to be varied to reflect the terms outlined in the following paragraph [37] of the *Gold Coast Kennels* decision:

[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.

46. Clause 4.2 of the Miscellaneous Award already requires, for the purpose of the exclusion, that the lack of traditional award coverage must be due to the nature or seniority of the relevant employee's role. This does not require any particular aspect/s of that nature or seniority to be defined in order to justify traditional absence of award coverage.

47. The Full Bench, in *Gold Coast Kennels*, merely referred to the ordinary meaning of clause 4.2 of the Miscellaneous Award. It did not in any manner, as contended by United Voice at paragraph [26] of its submission, 'qualify' the classes of employee excluded.

48. Any employees excluded from coverage under the Miscellaneous Award by clause 4.2 or clause 4.3, who would not otherwise be excluded from Award coverage by s.143(7) of the FW Act, should remain so. The Miscellaneous Award currently includes various provisions and restrictions which could be unsuitable for many award-free employees. For example:

- A requirement for ordinary hours for employees other than casuals to be worked according to fixed starting and finishing times over a maximum of six days per week (clause 20);
- Overtime penalties (clause 22.1); and
- Separate penalties for work performed outside the hours of 7.00 am and 7.00 pm Monday to Friday and on Saturday which is not overtime (clause 22.3).

49. Ai Group urges the Commission not to determine that the Miscellaneous Award was intended to apply to all non-award covered employees who are not excluded from award coverage by s.143(7). The full extent of the award-free segments of the workforce are currently unknown and as such, it should not be assumed that the conditions of the Miscellaneous Award would be appropriate to the engagement of employees in these segments.
50. If any union wishes to pursue a claim for any particular types of employees to be covered by a modern award, it is able to do so, subject to the prohibition in s.143(7) of the Act. If such a claim is pursued, the FWC would be able to consider the characteristics of the relevant employees and employers and determine what award conditions are appropriate. Award coverage for currently award-free employees should not be created through an expansion in the coverage of the Miscellaneous Award because the FWC has no way of knowing the impact on the relevant employers and employees and, accordingly, whether the variation to the coverage of the Award is consistent with the modern awards objective. As stated by the Australian Government in its submission of 16 October 2009 about the Miscellaneous Award (emphasis added):
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.....
51. The ACTU's reply submission alleges (at paragraph [9]) that Ai Group's position as to the degree of historical coverage that would qualify the type of work carried out by a class of employee as being "traditionally" covered by modern awards, is inconsistent with paragraph [50] of *Gold Coast Kennels*. This submission should be rejected. The relevant part of the Full Bench's decision merely rejected "the proposition that clause 4.2 could be interpreted or applied on the basis that it had a differential operation as between the various States dependent on the history of award coverage in each State".¹¹

¹¹ [2018] FWCFB 128, [50].

52. Ai Group's position is not to apply clause 4.2 of the Miscellaneous Award in a manner which would preserve State-based differences contrary to s.154(1) of the FW Act. Rather, Ai Group claims that the degree of coverage by pre-modern awards across jurisdictions should be taken into account in determining whether coverage under the Miscellaneous Award applies on the basis of whether a class of employee was 'traditionally' award covered. Such an approach is entirely logical and avoids absurd outcomes as that which was avoided in *Serco Traffic Camera Services (Vic) Pty Ltd*¹² where Commissioner McKinnen found that traffic camera operators in Victoria were not covered by the Miscellaneous Award as the role had not been traditionally covered by modern awards. Commissioner McKinnon stated at [11]:

...traffic camera operations have existed in Victoria for almost 50 years. In all that time, the only award coverage was for less than one year, and only for a proportion of the relevant workforce. This was almost 20 years ago, and award coverage operated then by virtue of the fact that relevant employees were in the Victorian public service.

6. DOES, OR SHOULD, CLAUSE 4.2 OF THE MISCELLANEOUS AWARD OPERATE TO EXCLUDE FROM COVERAGE ANY IDENTIFIABLE CLASS OF EMPLOYEES?

53. Ai Group supports retaining the existing reference to classes of excluded occupations in clause 4.2 of the Miscellaneous Award. The illustrative examples in clause 4.2 are not intended to limit exclusion through clause 4.2, but were rather a response to strong submissions made by Ai Group and others to the AIRC about the importance of managerial and professional employees being excluded.¹³ In this regard, the AIRC Full Bench, in its 4 December 2009 decision which accompanied the making of the Miscellaneous Award, said:¹⁴

¹² *Serco Traffic Camera Services (Vic) Pty. Ltd* [2017] FWCA 5873

¹³ AM2008/74, Ai Group Submissions, 16 October 2009, Chapter 4; AM2008/74, Ai Group and Recruitment and Consulting Services Association Submissions, 16 October 2009

¹⁴ [2009] AIRCFB 945.

[151] Almost without exception employer representatives criticised the breadth of coverage in the exposure draft. They suggested that employees who have traditionally been excluded from award coverage, particularly professional and managerial employees, would be covered, including those deliberately excluded from modern award coverage in earlier stages of the modernisation process.

[152] We have considered all of the submissions and decided to include an additional paragraph in the coverage clause which more closely reflects the terms of the consolidated request and the Fair Work Act. The paragraph also contains some greater definition of the types of employees excluded. It reads:

“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.”

54. With regard to United Voice’s argument, at paragraph [24] of its submission, that roles may be potentially deserving of safety-net protection as a result of a reduction in status, it is the occupations themselves which are subject to the exclusion, not merely any employee with a job title matching that referred to in clause 4.2.
55. United Voice derides, at paragraph [26] of its submission, the concept of ‘traditional award coverage’ as inherently conservative and inconsistent with “Australia’s progressive industrial tradition, the modern awards objective and more broadly the purpose and intent of the FW Act”. This argument ignores the fact that the concept of ‘traditional’ award coverage is enshrined in s.143(7) of the FW Act. It was also a key concept in paragraphs 2(a) and 4A of the Award Modernisation Request and is reflected in paragraph 2(d) which clearly shows that the creation of modern awards was not intended to increase costs for employers.
56. If United Voice considers that a specified occupation or industry which is not covered by any extant modern award should be so covered, the option is available for it to make an application under s.158 for the Commission to extend the coverage of an existing modern award or make a new modern award.

57. United Voice also claims that the classification structure in the Miscellaneous Award was raised as an ‘issue’ in paragraph [3] of the Commission’s 6 June 2019 Statement.¹⁵ Ai Group notes that the Commission has not raised the classification structure in the award as an ‘issue’. Its inclusion in the Statement was merely to provide context to the issues relevant to the present proceedings.
58. Ai Group opposes any variation to the classification structure in the Award to include ‘professional’ employees. As outlined above and in our earlier submissions, the coverage provisions in the Miscellaneous Award were varied to clarify that professional employees are not covered by the Award. This was in response to submissions by Ai Group and other parties that such employees were not traditionally award covered and that the restrictive nature of award conditions does not afford professional employees appropriate flexibility and autonomy to perform their roles. As stated above, when the AIRC determined to vary the coverage provision of the Miscellaneous Award to expressly exclude certain professional occupations, the classifications structure in the Award was also altered to remove the graduate level and replace it with an advanced trades/sub-professional classification at a lower minimum wage level.¹⁶
59. The CPSU has raised, at paragraph [17] of its submissions, the potential for there to be roles that, despite requiring professional qualifications, have traditionally been covered by awards in some industries. Arguments about these matters were dealt with in detail during the award modernisation process. If the CPSU believes that any other relevant roles exist, that have not already been dealt with, it is able to make an application to vary a relevant modern award to cover such role/s. The matter would then be able to be dealt with on its merits.
60. The AIRC wisely intended that the Miscellaneous Award have a narrow coverage. Consistent with the views expressed by the AIRC during the Award Modernisation Process, the award coverage of particular classes of employees is best dealt with in the context of industry-specific or occupational-specific

¹⁵ [2019] FWC 3934.

¹⁶ [2009] AIRCFB 945, [155].

awards. Such an approach enables the characteristics and needs of the relevant employees and employers to be taken into account, and the modern awards objective to be meaningfully applied.

7. DOES, OR SHOULD, CLAUSE 4.3 OF THE MISCELLANEOUS AWARD OPERATE TO EXCLUDE ANY IDENTIFIABLE CLASS OF EMPLOYEES FALLING WITHIN THE SCOPE OF COVERAGE DELINEATED BY CLAUSE 4.1?

61. United Voice's claim that clause 4.3 of the Miscellaneous Award is unclear merely due to the fact that it provides no express justification for the exclusions it provides for, should be rejected. If this argument were to be accepted, a great many award provisions would be found to be unclear as they do not include a note explaining why they operate as they do. Clause 4.3 reflects exclusions from coverage which were proposed by the Australian Government in its submissions of 16 October 2009 as outlined earlier in these submissions. These submissions were made around the time when the Award Modernisation Request had been relevantly amended, and when the FW Act had just been passed by Parliament.
62. United Voice raises the example of child minders and family day carers being excluded from coverage under the Miscellaneous Award due to absence of a classification covering such employees in relevant industry awards. United Voice describes the impact of clause 4.3 as having an "unreasonable exclusionary effect" in paragraph [31] of its submissions. Ai Group urges the Commission to reject this argument as inconsistent with the intent of the Australian Government in drafting the Award Modernisation Request as outlined in paragraphs [33] to [36] of its 16 October 2009 submission to the AIRC. Such employees were deliberately excluded "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)".¹⁷

63. There is nothing 'unreasonable' about the exclusionary effect of clause 4.3. The modern award system merely reflects traditional award coverage at the time of the Part 4A Award Modernisation proceedings. It is not required, nor should it be necessary, to include an additional threshold for the exclusion to apply which requires absence of traditional award coverage to be justifiable with respect to some aspect of the nature or seniority of a specified occupation. It is enough for such occupations to be identifiable by their seniority or nature.
64. United Voice refers, at paragraphs [33] – [43] of its submission, to exclusions which apply as a result of clause 4.3 of the Miscellaneous Award, relating to cleaners and security personnel that are neither covered by the *Cleaning Services Award 2010* or the *Security Services Industry Award 2010* nor a classification within another industry award. At paragraph [37] of its submission, United Voice states that generally, a cleaner who is not employed in contract cleaning and is not covered by an industry award should be covered by the Miscellaneous Award. Beyond this bare assertion, United Voice provides no explanation based on traditional coverage which would justify such a claim. United Voice also takes issue with the operation of clause 4.3(b) of the Miscellaneous Award for security personnel, owing to clause 4.3 of the *Security Services Industry Award 2010* which states:
- 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.
65. United Voice claims that clause 4.3(a) and (b) of the Miscellaneous Award are causing confusion as to the extent of award coverage for cleaning and security personnel. Ai Group disagrees.
66. In Stage 2 of the Award Modernisation Process, the AIRC determined to make an award covering the 'contract cleaning industry' as opposed to an 'occupation based award' covering directly employed cleaners.¹⁸ Similarly, at paragraphs

¹⁷ AM2008/74, [Australian Government Submission](#), (16 October 2009), [33] – [36].

¹⁸ [2009] AIRCFB 50, [58].

[288] – [289], the AIRC indicated that it was not persuaded by submissions by the Australian Security Industry Association and the Liquor Hospitality and Miscellaneous Workers Union that the *Security Services Industry Award 2010* should have occupational operation. Each of these awards are still expressed to cover contract services only.¹⁹

67. If any union wishes to extend coverage of an industry or occupational award to encompass directly employed cleaning or security personnel, a mechanism is available to do so under clause 158 of the FW Act.
68. Ai Group sees no inconsistency between the terms of s.143(7) of the FW Act, paragraph 4A of the Award Modernisation Request and clause 4.3 of the Miscellaneous Award. United Voice has not made out any such case.

¹⁹ *Cleaning Services Award 2010* cl. 4.1; *Security Services Industry Award 2010*, cl. 4.1 and 4.3.