

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Budget Estimates 2017 - 2018

Agency – Fair Work Commission

Department of Employment Question No. EMSQ17-004128

Senator Lines asked on 06 June 2017 on proof Hansard page 31

Question

FWC - Scope of miscellaneous award

Senator LINES: What is the scope of the award titled 'Miscellaneous Award'?

Ms Parker: That is a good question.

CHAIR: Ms O'Neill, would the Fair Work Commission know the answer to that?

Ms Parker: I can take it on notice. I do not have that with me. We can look it up, if you want to go on.

...

...

Senator LINES: and I am now drawing your attention to the award titled 'miscellaneous award', which, to my understanding, is the cover-all award. There will still be the odd worker who is not picked up. I am just concerned that not the full extent of the relevant awards has been—that you have responded to today in response to Senator Marshall.

Ms O'Neill: I will take the same question on notice.

...

...

Ms Parker: We will take it on notice.

Answer

The Fair Work Commission provides the following response:

The following is the coverage clause of the Miscellaneous Award 2010:

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.'

The Award Modernisation Full Bench issued a statement on 25 September 2009 and a decision on 4 December 2009 relating to the making of the Miscellaneous Award. The following extracts from those documents relate to the coverage of the award.

Extract from statement of the Award Modernisation Full Bench dated 25 September 2009:

'Miscellaneous award

[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. There are also provisions ensuring that the general award does not overlap with modern enterprise awards or state reference public sector awards.

...

[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.

Extract from the decision of the Award Modernisation Full Bench dated 4 December 2009:

'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;”

[148] Several parties also drew our attention to s.143(7) of the Fair Work Act:

“143 Coverage terms

Employees not traditionally covered by awards etc.

...

(7) 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 (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.”

[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.

[150] A number of submissions canvassed the purpose or function of the award. The ACTU, for example, submitted that the functions of the award should be twofold. The first is to fill gaps in modern award coverage which became apparent during the process of setting aside award-based transitional instruments as required by the Transitional Act.³⁸ The second function is to provide interim coverage for emerging industries pending the making of a new modern industry award or an appropriate extension to the coverage of an existing modern award. The Australian Government took a very similar approach, while stressing the importance to the economy of ensuring that employees who have not traditionally been covered by awards remain free from modern award coverage as well. In an earlier stage in the consultations ACCI proposed that the coverage of the award should not be settled until after an audit of modern award coverage to ascertain what if any gaps there are by comparison with the existing pattern of federal and state award coverage. AiGroup and ACCI both suggested that the award be limited to employees covered by a federal or state award or a Notional Agreement Preserving a State Award (NAPSA). AiGroup proposed in addition that industries and employers could be specified in a list attached to the award to permit new industries and employers to be added as necessary.

[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.”

[153] We deal now with conditions of employment. Our approach to conditions of employment is influenced by the nature of the award’s coverage. 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 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. That said, there is still room for the exercise of considerable discretion in formulating appropriate wages and conditions.