

## Article Information

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## Landmark change to Miscellaneous Award 2020 coverage provisions

**The Fair Work Commission (FWC) has amended the coverage clause in the Miscellaneous Award 2010 (Miscellaneous Award) with effect from 1 July 2020. This amendment expands the coverage of the Miscellaneous Award to include a range of employees that would previously have been without modern award coverage.**

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### Background

Prior to 1 July 2020, the coverage clause in the *Miscellaneous Award* relevantly included the following exclusions:

*“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 [FW] Act.*

In that form, clause 4.2 set out the exclusion for employees traditionally viewed as award-free. Clause 4.3 set out the exclusion for employees excluded or omitted from coverage by a relevant industry award.

### Gold Coast Kennels

In *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort* [2018] FWCFB 128 (**Gold Coast Kennels**), an application had been made for approval of the *AAA Pet Resort Enterprise Agreement 2017* (**Kennels Agreement**). The *Kennels Agreement* included coverage for employees engaged in a pet boarding and grooming business in Queensland. The application was heard by Commissioner Wilson at first instance. There was a dispute as to whether there was an award covering those workers for the purposes of conducting the Better Off Overall Test (**BOOT**). Commissioner Wilson found that the workers were performing work falling within the exclusion in clause 4.2. Accordingly, the *Kennels Agreement* was approved without being subjected to a BOOT analysis in comparison to the *Miscellaneous Award*.

United Voice appealed against the decision of Commissioner Wilson, arguing the Commissioner erred when he found that the relevant employees were not covered by the *Miscellaneous Award*. United Voice argued that the work performed by the Pet Resort workers was “*similar in nature to work which has historically been regulated by [multiple specific pre-modern awards]*”.

Upon appeal, the FWC Full Bench accepted that the work performed by the relevant workers was similar to work previously covered by at least five pre-modern awards outside Queensland. Within Queensland, the *Veterinary Practice Employees’ Award - State* had applied to similar work performed in veterinary practices.

Based on the above, the Full Bench concluded that the workers were performing a role that had **not** been traditionally viewed as award-free across Australia. Consequently, the Full Bench concluded that the *Miscellaneous Award* did cover the relevant employees, and that the FWC had erred at first instance when it failed to assess whether the enterprise agreement passed the BOOT compared to that award.

The Full Bench's conclusion was inconsistent with written advice previously provided by the Fair Work Ombudsman (**FWO**) in 2010. Furthermore, the decision appeared to be broadly inconsistent with the view held by the "*entire pet boarding and grooming industry in Queensland*". Consequently, the FWC President, Ross J, referred the coverage clause in the *Miscellaneous Award* for review by a Full Bench.

## **Full Bench Review**

Hatcher VP, Ashbury DP, and Lee C, formed the Full Bench for the purpose of reviewing the coverage clause in the *Miscellaneous Award*. The Full Bench's decision of 12 February 2020 comprehensively reviewed the coverage clause, and set out amendments to be made to the exclusions set out in clauses 4.2 and 4.3.[\[1\]](#)

### Review of clause 4.2 – exclusion for employees traditionally viewed as award-free

As noted above, the exclusion in clause 4.2 of the *Miscellaneous Award* deals with work which, due to its nature or seniority, has traditionally been viewed as award-free. The Full Bench noted that the *Fair Work Act 2009* (Cth) (**FW Act**), at section 143(7), similarly states:

“(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.”

Under sections 136 and 137 in the *FW Act*, any coverage term would be of no effect to the extent that it was expressed to cover employees effectively precluded from award coverage by section 143(7) in the *FW Act*. Accordingly, in the absence of clause 4.2, employees excluded by that provision would still be precluded from modern award coverage by section 143(7) in the *FW Act*. The Full Bench emphasised that a modern award did not need to repeat the implications of sections 136, 137 and 143(7) in the *FW Act*. Those provisions of the legislation would prevail regardless of what was written into the *Miscellaneous Award*. Therefore, clause 4.2 was unnecessary, because it merely reflected an exclusion which would otherwise apply as part of the relevant statutory framework.

The Full Bench observed that clause 4.2 had created confusion in an entire industry in Queensland. That confusion had led a large number of employers in the Queensland, as well as the FWO in its 2010 advice, to consider that animal attendants or dog groomers employed in boarding kennels in Queensland were award-free due to clause 4.2.

Based on the above issues, the Full Bench decided to remove the express reference to “employees who, because of the nature or seniority of their role, have not traditionally been covered by awards”. However, the Full Bench determined that it would be helpful to retain the list of examples previously set out in clause 4.2. From 1 July 2020, clause 4.2 in the *Miscellaneous Award* states:

“**4.2** The award does not cover managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.”

### Review of clause 4.3 – employees excluded or omitted from other awards

Prior to 1 July 2020, clause 4.3 excluded the following groups of employees from coverage by the *Miscellaneous Award*:

- any employees working in an industry covered by an industry award, but who performed a role omitted from that industry award's classification structure, or
- any employees working in an industry covered by an industry award, but who were expressly excluded from that award.

Workers falling into both of those categories were performing work that could have been award-covered if they worked in an industry covered by a different industry award. For example, cleaners performed work covered by numerous modern awards in different contexts. However, it was possible for an employer to directly engage a cleaner, and for that employer to be in an industry without an industry award providing coverage for cleaners. Clause 4.3 would exclude that employee from the *Miscellaneous Award*. The employee would be award-free, despite performing work that would be award-covered if the employer were in a different industry.

The Full Bench considered that clause 4.3 excluded employees from the *Miscellaneous Award*, even when they fall into the following circumstances:

- The employee performed work of a kind that was **not** traditionally viewed as award-free; and
- The employee was not covered by any other modern award, despite the work they perform being award-covered in other industries.

The Full Bench considered that there was no apparent “*intelligible industrial rationale*” for that situation to exist. Furthermore, clause 4.3 was directly inconsistent with the requirement for the *Miscellaneous Award* set out in the Ministerial Request that led to the creation of that award. That Ministerial Request required the creation of 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)...”

Based on the above, the Full Bench concluded that clause 4.3 would be deleted from 1 July 2020. This means that workers will not be excluded from coverage by the *Miscellaneous Award* merely because they are not covered by an industry award that applies to their industry.

The result of the FWC’s decision to amend the *Miscellaneous Award*’s coverage clause is that many employees now have new entitlements under the *Miscellaneous Award* from 1 July 2020. It is critical to re-assess award coverage if any employee was previously considered to be award-free based on the exclusion in clause 4.3 in the *Miscellaneous Award* prior to 1 July 2020. Affected employees have new award entitlements from 1 July 2020. An audit should be conducted, and any deficit rectified, to ensure that employees do not develop a substantial claim for underpayment of their modern award entitlements.

#### Key takeaways

The FWC’s decision to amend the coverage clause in the *Miscellaneous Award* means that employers should:

- Reconsider the potential award coverage for any employees previously considered award-free due to being excluded from coverage by the *Miscellaneous Award*; and
- Conduct an audit to ensure affected employees do not have a claim for underpayment of entitlements under the *Miscellaneous Award* for hours worked on or after 1 July 2020.

[1] 4 *Yearly Review of Modern Awards—Miscellaneous Award 2010* [2020] FWCFB 754