

AM2010/118

**APPLICATION BY THE AUSTRALIAN & NEW
ZEALAND CERTIFIED ENVIRONMENTAL
PRACTITIONER SCHEME TO VARY THE
*PROFESSIONAL EMPLOYEES AWARD 2010***

**SUBMISSION OF THE AUSTRALIAN
INDUSTRY GROUP**



11 October 2010

AM2010/118
APPLICATIONS TO VARY THE
PROFESSIONAL EMPLOYEES AWARD 2010

1. Ai Group opposes the application by the Board of the Australian & New Zealand Certified Environmental Practitioner Scheme (ANZCEPS) to vary the *Professional Employees Award 2010* (the Award), filed on 5 August 2010.

2. Ai Group opposes the application for the following reasons:
 - ANZCEPS does not have standing under the *Fair Work Act* (“FW Act”) to make the application;
 - The application does not meet the requirements of the FW Act for varying a modern award;

3. These issues are explored in more detail below.

Background

4. Over the years Ai Group has played the leading role in representing employers in negotiations with Association of Professional, Engineers, Scientists and Managers Australia (APESMA) and in AIRC proceedings relating to awards covering professional engineers, professional scientists, IT professionals and telecommunications professionals.

5. As FWA is aware, Ai Group took the leading role in representing employers in the proceedings relating to the *Professional Employees Award 2010*, both in negotiations with the APESMA, the preparation of draft award proposals, the filing of several detailed written submissions and appearing before the Full Bench and individual Commission Members at all public consultations.

6. The Board of ANZCEPS did not participate in the award modernization proceedings over the course of 2008 and 2009.

The Application

7. The application seeks to vary the modern award by creating additional descriptions in the Award's classification structure at paragraphs B.1.9 Level 3 Professional and B.1.11 Level 4 Professional in Appendix B to the Award.
8. The additional proposed descriptors do not relate to indicative duties or responsibilities performed for the relevant classification, but specifically refer to a registration system for professional employees under the certification requirements of ANZCEPS.
9. The effect of the proposed variation arguably expands the coverage of the Award by broadening the recognition of professional skills beyond the professional organizations currently identified in the Award.
10. A similar application was made by the Environmental Institute of Australia and New Zealand to vary the Award to include its organization as a recognised body for professional qualifications linked to the Award's coverage (see *AM2009/211*).
11. This application, whilst made under the former *Workplace Relations Act 1996 (Cth)* prior to 1 January 2010, was dismissed by a Full Bench of FWA (see *[2010] FWAFB 1386*) for failing to address key considerations raised by Ai Group and APESMA.

ANZCEPS does not have standing under the *Fair Work Act* to make the application

12. FWA's powers to vary modern awards outside the system of 4 yearly reviews is set out in Division 5 of Part 2-3 of the FW Act.
13. ANZCEPS' application is filed under s.158 of the FW Act. The parties who have standing to make an application to vary a modern award are set out in s.157 of the FW Act. Under that section, an application to vary a modern award may only be brought by:
 - an employer, employee or organisation that is covered by the modern award; or
 - an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
14. We note that "organisation" is defined in s.12 of the FW Act as "an organisation registered under Schedule 1 to the *Workplace Relations Act 1996*".
15. It would appear that ANZCEPS does not fall into any of these categories. As a result, we submit that the application should be rejected by FWA in line with previous decisions of the Tribunal (*AMP Life Ltd AM2010/2 [2010] FWA 2475*).

The application does not meet the requirements of the *Fair Work Act* for varying a modern award

16. Under the provisions of the *Workplace Relations Act*, the AIRC had the power to vary a modern award where the variation was *consistent* with the award modernisation request. This power is applicable only to applications made before 1 January 2010.

17. From 1 January 2010, FWA's powers to vary modern awards, outside the system of 4 yearly reviews, are much more tightly confined.
18. Under s.157(1) of the FW Act, FWA may make a determination to vary a modern award outside the system of 4 yearly reviews (otherwise than to vary modern award minimum wages) if FWA is satisfied the determination is "necessary to achieve the modern awards objective" (emphasis added). The modern awards objective is set out in s.134(1) of the FW Act as follows:

"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;*
 - (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."*

19. The term “necessary” as a qualification on FWA’s power to vary a modern award outside the system of 4 yearly reviews is very significant. By the inclusion of the word “necessary”, the power is reserved for cases where it can be demonstrated that a modern award in its current form is not meeting the modern awards objective and where a particular variation would ensure the objective is met.

20. The Concise Oxford Dictionary (Seventh Edition) defines the word “*necessary*” in the following manner:

“1. a. indispensable, requisite, (to or for person etc.; it is necessary that, to do); requiring to, that must, be done..”

(Emphasis added)

21. The Macquarie Concise Dictionary (Third Edition) defines “*necessary*” as meaning:

“1. that cannot be dispensed with: a necessary law..”

(Emphasis added)

22. The above definitions reinforce our submission that the word “necessary” imposes a very high hurdle upon any application to vary a modern award outside the 4 yearly reviews

23. The following extracts from the Explanatory Memorandum further highlight the legislative intent that it is only in **exceptional and limited circumstances** that applications to vary awards should be entertained outside the system of 4 yearly reviews:

r.105. FWA will be guided by criteria which take into account public, social interest and economic aspects when considering whether and how to vary the content of modern awards. Outside of the four yearly review, FWA will have limited power to vary awards. FWA will be able to vary an award to remove ambiguity, uncertainty and discriminatory terms. To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances. FWA will be able to adjust awards for 'work value' reasons."

“Division 5 – Exercising modern award powers outside 4 yearly reviews and annual wage reviews

609. *Division 5 sets out limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews.*

Subdivision A – Exercise of powers if necessary to achieve modern awards objective

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

610. *Clause 157 provides FWA with the power to vary modern awards outside the system of 4 yearly reviews in limited circumstances.*

611. *FWA may vary a modern award (other than in relation to modern award minimum wages), make a modern award or revoke a modern award outside the 4 yearly reviews if it is satisfied that to do so is necessary to achieve the modern awards objective (subclause 157(1)).*

612. *The modern awards objective requires FWA to take account of a number of matters, including the need to ensure a stable modern award system. It is intended that in deciding whether to vary, make or revoke a modern award outside the 4 yearly reviews, FWA will balance the considerations contained in the modern awards objective to determine whether it is necessary to exercise the power outside the system of 4 yearly reviews. (Emphasis added)*

24. In a decision of 9 July 2010, in relation to an application by the National Retail Association and others to vary the *General Retail Industry Award 2010* to reduce minimum engagement periods for casuals ([2010] FWA 5068), Vice President Watson said:

“[34] The applicants need to establish much more than that the variation is desirable. Under the Act they need to establish that the variation is necessary to achieve the modern awards objective. In other words the applicants must establish that the modern awards objective would not be achieved unless the variation is made. I am unable to reach such a conclusion. Three hour minimum engagement provisions have applied generally in a number of States for many years. There has been no evidence and no submissions made to the effect that significant problems arise in those states which result in the modern awards objective not being achieved. No such submission was made during the award modernisation process and no such submission has been made now.”

(Emphasis added)

25. In a decision of 8 October 2010, a Full Bench of FWA rejected an appeal against Vice President Watson’s decision. The Full Bench concluded that his Honour’s decision was “*free from error*”.
26. In respect of the application by ANZCEPS, Ai Group submits that FWA could not possibly be satisfied that the variation sought is “*necessary to achieve the modern awards objective*”. The application and submission have not identified any basis for concluding that the modern awards objective is not currently being met in the absence of the proposed classification descriptors, and why its inclusion is necessary to achieve the modern awards objective.

27. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, in Section 6 of Schedule 5, provides for a review of modern awards to be carried out as soon as practicable after 1 January 2012. During this Review FWA is required to consider whether modern awards “are operating effectively, without anomalies or technical problems”.
28. Ai Group has not identified any anomalies or technical problems associated with the classification descriptors in the *Professional Employees Award 2010*. If any such problems arise then the issues are able to be addressed during the 2 Year Review in 2012.

Conclusion

29. As set out in this submission:
- ANCEPS does not have standing under the FW Act to make the application;
 - The application does not meet the requirements of the FW Act for varying a modern award.
29. Ai Group submits that the application by ANZCEPS to vary the *Professional Employees Award 2010* should be refused.