

From: Hamish Harrington [mailto:Hamish.Harrington@aigroup.com.au]
Sent: Tuesday, 30 April 2019 11:56 AM
To: Chambers - Bissett C
Cc: Brent Ferguson
Subject: Application to vary the Corrections and Detentions (Private Sector) Award 2010 (AM2018/6)

Dear Associate,

Application to vary the Corrections and Detentions (Private Sector) Award 2010 (AM2018/6)

Please find **attached** a submission of the Australian Industry Group in relation to the above matter.

Kind regards,



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30 April 2019

Commissioner Bissett
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

Dear Commissioner,

Re. AM2018/6 Section 158 Application to vary the Corrections and Detention (Private Sector) Award 2010

We refer to the above matter, the application by Ms Vonni Champman (**Applicant**) received by the Fair Work Commission (**Commission**) on 29 April 2018 (**Application**). We also refer to the hearing which took place before Commissioner Bissett on 15 April 2019 in the course of which, the nature of the variation sought by the Applicant was clarified.

Ai Group opposes any variation to the Award being made on the basis of the material before the Commission.

Ai Group notes that since the Application was initially made, its scope has altered a number of times. The nature of the award variation ultimately proposed was outlined as recorded in the transcript of the 15 April 2019 hearing (**the Transcript**) as follows:

PN104

THE COMMISSIONER: My understanding of the application before me, Mr Harrington, is to insert five levels into the Corrections and Detentions Award that reflect the five levels in the security services industry award and to include in the Corrections and Detentions Award in effect the supervisors' allowance out of the security services industry award. My understanding is that then it won't matter whether people are employed under the corrections and detentions or the security services industry award if they're doing corrections and detentions work because they will get paid the same.

The Applicant's response at PN105 of the Transcript verifies that this is the variation sought.

Nevertheless, Ai Group notes that it remains unclear precisely how the Applicant seeks to amend the Corrections Award to insert the five-level classification structure currently contained in the SSI Award or to include the supervisors' allowance into the Corrections Award in a manner which reflects that contained in the SSI Award. The specific proposed changes to the wording of the instrument have not been identified.

Given this context, Ai Group therefore seeks to address the merits of this application on a broad level, the relevant and essential details required to respond to the Application in a manner which comprehensively addresses the matters in ss 134 and 284 of the *Fair Work Act 2009* (Cth) (FW Act) being unavailable.



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In the course of the 15 April 2019 hearing, the Applicant made various statements in support of the proposed variation.¹ The Applicant contends that the proposed variations are necessary to afford Court Security Officers appropriate recognition and suggests that the amendments are necessary to bring the Award 'up to date'. The Applicant has provided inadequate explanation as to how amending the award would achieve these objectives.

In the 15 April 2019 hearing, the Applicant indicated, in effect, that she views as an injustice a discrepancy she has perceived between rates of pay received by employees covered by the Corrections Award and those received by the SSI Award where employees covered by the latter award are outsourced by an organisation covered by the Corrections Award.

The Applicant has not advanced any probative evidence in support of her claim. Although a range of documentary material has been lodged with the Commission by the Applicant, its relevance to the claim ultimately pressed has not been articulated.

Without accepting the various factual assertions made by the Applicant, Ai Group observes that the coverage of the Corrections Award and the SSI Award are distinct.

Clause 4.1 of the Corrections Award manifests coverage of employers throughout Australia in the corrections and detention industry and their employees in the classifications listed in clause 13 of that Award.

Clause 4.1 of the SSI Award manifests coverage of employers throughout Australia in the security services industry and their employees in the classifications listed in Schedule C to that Award.

As can be seen, the Corrections Award and the SSI Award cover separate industries. The terms of the respective instruments reflect this. Such a situation is not inherently unfair and should not be lightly altered. Moreover, we note that the Applicant only appears to align one element of the two awards, the classification structure. Accordingly, employees would continue to be subject to various divergent terms and conditions when covered by the different awards, even if the application were granted.

In the context of an earlier claim to vary the SSI Award, the Full Bench provided guidance on the nature of a case that must generally be advanced in order to warrant a variation to an award (emphasis added):²

"The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and

¹ AM2018/6, Transcript of Proceedings, PN16 – PN18, PN32, PN34, PN36, PN36, PN51.

² [2015] FWCFB 620, [8].

relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.”

The following points made by the Full Bench of the Commission in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision are apposite to the current matter³:

- *“The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made”.*
- *“Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances”.*
- *“The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances... where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation”.*

The Full Bench also applied these considerations in the *Penalty Rates Case*.⁴

Whilst we observe that the present proceedings occur outside of the context of the 4 yearly review of modern awards, we contend that the above cited reasoning identifies salient considerations that should guide the Commission’s approach to its consideration of application before it.

The variations proposed by the Applicant constitute significant changes, the merit of which is obviously reasonably contestable. Moreover, the Application has not been supported by any analysis of the relevant legislative provisions and is not sustained by probative evidence. Nor has there been any attempt to identify the historical basis for the existence of the two separate and relevantly different awards, or any attempt to grapple with the impact of implementing the kind of major changes proposed.

Ultimately, the Applicant’s contentions appear to reflect mere assertions about her perceptions of practices within the context of a single workplace and opinion as to the manner in which employees in such circumstances should be paid. Such matters cannot reasonably justify varying an award that governs the terms and conditions for an entire industry.

For the reasons here outlined, we respectfully submit that there is not sufficient material before the Commission to establish that the variations proposed in the 15 April 2019 hearing are necessary to achieve the modern awards objective or meet the conditions of the minimum wages objective. As such, the Application should be refused.

³ [2014] FWCFB 1788, [19]-[24]

⁴ [2017] FWCFB 1001, [253], [254], [269].



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Yours sincerely,

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