

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Application to vary
Security Services Industry Award 2010
(AM2019/11)

06 September 2019

Ai
GROUP

**SUBMISSION IN RESPONSE – APPLICATION TO VARY THE
SECURITY SERVICES INDUSTRY AWARD 2010 -
AM2019/11 – HOSPITAL SECURITY OFFICERS**

1. INTRODUCTION

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to paragraph [2] of the Amended Directions issued by Commissioner Bissett on 30 July 2019 (**Directions**) in relation to the application by Angus Hibbins (**Applicant**) to vary the *Security Services Industry Award 2010* (**Security Award**) to insert into the Award a separate classification for employees who perform duties in a health facility. For the purposes of this submission, such employees shall be referred to as Hospital Security Officers.
2. The initial application uploaded on the Fair Work Commission (**Commission**) website on 2 July 2019 described the Applicant’s proposed variations to the Award in a variety of ways, none of which indicate with any certainty what amendment is sought. The suggested variations were variously described as:
 - A ‘review’ of the Security Award to “suit a role within the industry that is not recognized and pay increase”.
 - A ‘review of the Security Award “and future awards to allow for hospital security officers to have their own subsection in the award”
 - A variation to the award for a “new category of Hospital security officer to “ensure, easy to understand role working with in a public hospital and mental health environment”.
 - A “training program in this field would be best result to bring the award to modern award standard, so security can understand what the patient maybe suffering from”.
 - A variation to the wages of the Security Award “to a subclass of hospital security officers or allowance to an hourly rate suited to the tasks

completed and working in a field that responds to emergency's in mental health and emergency with people in crisis. other than to responded to fire..."

- A review of the Security Award "as per ss 160 Variation of modern award to remove ambiguity or uncertainty or correct error as a whole..."
- A determination to vary the Security Award "and future awards to include a sub section allowing for hospital security officer to have its own part and minimum rate or allowance".
- "Security officers in hospital require their own classification on pay and need to be paid more".

3. In response to the Directions, the Applicant filed submissions in support of the application which were uploaded on the Commission website on 9 August 2019. Again, the proposed variation was described in a number of ways which fail to provide with any certainty what variation is sought to the Security Award. The proposed amendment was described in the Applicant's submissions as:

- The Security Award "and beyond need to be amended with a role of Hospitality security officer"
- A review of the Security Award "and future awards to allow for hospital security officers to have their own subsection in the award"
- A variation to the award "for a new category of Hospital security officer to ensure, easy to understand role working with in a public hospital and mental health environment."
- "I believe it would not be unreasonable for a security officer working in a department with mental health, emergency department and public hospital attached to be paid similar to that of a security officer Level 4 or Level 5 officer with adjustments applied for 2020".

4. Ai Group recognises and understands the difficulties and complexities experienced by unrepresented applicants in seeking a modern award variation. The workplace relations system allows for individual applicants to propose variations to modern awards which apply to an entire industry. An individual worker or employer covered by a modern award has standing to make an application under s.158 of the *Fair Work Act 2009 (FW Act)*. Nevertheless, this does not remove the clear necessity of making an application to vary a modern award with a sufficient degree of clarity that would enable parties to respond accordingly with arguments in support or opposed to any proposed variation.
5. Despite the Commission's Directions for the Applicant to detail the variations sought and any particular rate of pay that is sought to be inserted into the Award, it remains unclear precisely what variation is sought. Aside from the suggestion in the Applicant's submissions filed on 9 August 2019 that certain security officers should be paid similar to that of a security officer classified as Level 4 or 5 under the Award, it remains unclear what rate of pay the Applicant seeks to apply to the proposed classification.
6. The Applicant has not established with any certainty how the proposed classification is to be defined. All that is known is that the proposed new classification would cover security officers that spend some amount of time in a hospital.
7. The application initially referred to dedicated allowances and pay rates to apply to the proposed new classification. There is no reference to an allowance in the submissions filed on 9 August 2019.
8. Considering the persistent lack of clarity from the Applicant in providing any detail concerning the proposed variation to the Security Award, the Commission should reject the application on this basis alone.
9. If the Commission is not minded to dismiss the application on the material before it, Ai Group alternatively submits that the proposed variation is inconsistent with the modern awards objective and is unnecessary to ensure that the Award meets the modern awards objective. Also, the proposed

variation is contrary to the minimum wages objective, as defined under Division 2 of Part 2-6 of the FW Act.

10. Ai Group's submissions are necessarily premised on the following assumptions concerning the application currently before the Commission:
 - The Application has been made under s.158 of the Act and is intended to be pursued on the basis of s.157 of the FW Act.
 - The Applicant is not seeking to revoke a modern award, despite the relevant box being checked in paragraph [2.1] of the initial application.
 - The Applicant is no longer pressing the inclusion in the Security Award of any separate allowance for Hospital Security Officers.
 - Broadly, the Applicant is seeking for an additional classification to be inserted into the Security Award which provides for separate rates of pay that are similar to either a Security Officer Level 4 or Level 5 under the Award.
 - The proposed new classification would cover security officers that are currently covered by the Security Award.
 - The proposed new classification would cover security officers that spend some, a majority, or all of their time working in a health facility.
11. If any of the assumptions upon which these submissions are based are incorrect, we request that an additional opportunity be provided for parties to make submissions responding to any clarification provided by the Applicant.

2. Ai GROUP'S RESPONSE TO THE APPLICANT'S ARGUMENTS IN SUPPORT OF THE PROPOSED VARIATION

Health risks associated with deployments to health facilities

12. The Applicant claims that a separate classification for Hospital Security Officers with specified rates of pay would be justified on the basis of various health risks which are claimed to be associated with working in health facilities. Although this point is not elaborated upon in the Applicant's submissions, the application refers to 'regular contact with blood borne diseases, mental health and aggressive public', personal danger, both physical and mental and a heightened risk of exposure to blood borne viruses and viral infection due to exposure to various bodily fluids.
13. In support of these claims, the Applicant refers to incidents where he has allegedly been spat at, been exposed to blood and conducted searches of patients that "are blood borne disease positive".
14. Ai Group acknowledges the unpleasant nature of the incidents that the Applicant describes. However, it is unclear why the health risks described would warrant creation of a new, separate classification for such employees.
15. The Applicant's descriptions of the nature of the work he has undertaken or witnessed are merely a representation of his own experience. No evidence has been provided that the health risks described are encountered by employees generally who work in health facilities. It would be inappropriate to make an award variation covering the security services industry on the basis of an individual's claimed experience in one or more health facilities.
16. The dangers and risks which the Applicant refers to should not be assumed, without clear evidence, as being ubiquitous across all, or even most, health facilities. A separate classification for all security officers operating in health facilities would not be appropriate where the conditions referred to by the Applicant are merely representative of a small subset of work tasks in some facilities.

26. Security services are required in numerous contexts which potentially involve risk of exposure to physical violence or unsafe substances. Security guards may be engaged at large scale events, sporting tournaments, nightclubs and concerts. Such deployments potentially carry a level of risk that requires appropriate management under work health and safety legislation. Employers are required to exercise an appropriate level of care to provide and maintain a safe and healthy workplace and safe and healthy systems of work. The risks referred to by the Applicant should not be used to divert resources required to respond to such risks by imposing a higher wage cost on employers.
27. Employers in the security services industry commonly do not generally have the benefit of wide profit margins. As Commissioner Gregory said in his decision in relation to an application for approval of the *IFS Head Franchise Pty Ltd Enterprise Agreement 2017*:¹
- I have some understanding about the security industry from previous experience of dealing with agreements in the industry and the exercise of dispute resolution functions. It is clearly a highly competitive industry with wage costs typically representing a significant proportion of business expenditure. ... In addition, some employers in the industry have indicated their concerns about being undercut by businesses that are not necessarily having regard to payment of the appropriate wage rates and other conditions. However, this is not to suggest that the Applicant is involved in any such behaviour.
28. The Applicant's claim that violence is increasing in hospitals, requiring the use of stab vests and body cameras is similarly unsupported by evidence. Moreover, the provision of personal protective equipment by an employer should not be considered grounds for the inclusion within the Security Award of a separate classification for Hospital Security Officers.

Difficulty in attracting appropriate staff

29. In support of the proposed variations, the Applicant asserts that security staff operating in hospitals are put at risk due to difficulties in attracting appropriate staff. The Applicant's supporting submissions state that "equal and monetary compensation for the task will allow hospitals to attract appropriate officers

¹ [2019] FWC 4706, [25].

providing efficient and productive performance of work under the award. Currently staff within hospital are put at risk due to being unable to attract appropriate staff, often hospitals are left to on call guards whom do not understand mental health and its requirements”.

30. In the absence of clear probative evidence in support, the Commission should place little or no weight on these assertions. The Applicant is not well-placed to make broad statements concerning the ability of industry in general or even his own employer to attract and retain security staff. It is worth noting that none of the individual occupational reports published by the Department of Employment, Skills, Small and Family Business include security officers amongst the occupations for which there is a current skills shortage.² Ai Group is not aware of any difficulty that businesses generally have in attracting and retaining staff who undertake security services in health facilities.

Distinctive duties of Hospital Security Officers

31. Much of the Applicant’s submission is based on what may be described as claimed ‘exceptionalism’ regarding the work required of security officers when operating in a health facility.
32. Pages 4-5 of the application includes a list of duties associated with security operations within a hospital containing a mental health unit. This list should not be taken as representative of security officers who perform their duties in mental health facilities generally. Neither should the list be taken as including skills and duties that are not required in other forms of security work. To take two examples, requirements to “assist with aggressive people” or undertake “removal of contraband” are unlikely to be endemic to security services undertaken in health facilities.
33. The Applicant states that ‘hospital security’ requires, in addition to the criteria mandated for security workers classified at Levels 1-3, aspects of work typical

² Department of Employment, Skills, Small and Family Business, *National, state and territory skill shortage information*, 8 August 2019 < <https://www.employment.gov.au/national-state-and-territory-skill-shortage-information>>.

of prison guards or health clinicians. However, the Applicant provides no indication of what these 'aspects' are. Mental health clinicians are often degree qualified and undertake highly specialised and sensitive work. To assert that security guards are undertaking the work of 'mental health clinicians' in a health facility is untrue and should not be entertained to support a wage increase.

34. The Applicant refers to a list of incidents that he has allegedly encountered in his own career. The list refers to events which are distressing and unpleasant, some of which may potentially be considered reportable incidents under the relevant WHS legislation. However, the Commission should acknowledge that they merely represent the bare assertions of the Applicant. They should not be taken, on the material provided, as representative of the experience of security officers generally or security officers who perform their duties in health facilities. An application for a variation to a modern award is not the appropriate forum for the Applicant to raise the concerning incidents he may have experienced.
35. The work undertaken by security officers is already covered by the classifications within the Security Award which are based on indicative skills and tasks referred to in Schedule C of the Award. It is unnecessary to establish a separate classification for such employees even if the Commission accepted that some common attributes of security work undertaken in health facilities were uncommon elsewhere in the industry. The Applicant's claim for a variation appears to be premised on the assumption that security officers undertaking their duties in a health facility may only be classified under Levels 1-3 of the Security Award and proposes that the rates for a new classification covering only Hospital Security Officers be 'similar' to either the Level 4 or Level 5 rates.
36. The Applicant is mistaken in his apparent assumption that security officers deployed to health facilities may only undertake work at the Level 1 to Level 3 classifications. The classification structure contained in Schedule C is based on a significant number of indicative skills and tasks, none of which cap Hospital Security Officers at a Level 3 classification. The classification descriptors in the Security Award are defined with a sufficient degree of generality to enable security officers to progress to Level 5. Should the Applicant's proposed

variation be accepted, a dedicated classification level would likely prevent progression beyond the specified level.

37. Moreover, it is clear that the classification descriptors in Schedule C, being framed with a high degree of generality, retain significant flexibility to enable the classifications to be applied to the varied nature of security work. It would be contrary to the intent and design of the classification structure to insert a classification which is clearly limited to one subset of the industry. This would serve to overcomplicate the classification and wage structure under the award and potentially open the door to a large volume of claims relating to other sectors within the industry.

3. EVIDENTIARY THRESHOLD, MODERN AWARDS OBJECTIVE AND MINIMUM WAGES OBJECTIVE

Evidentiary threshold

26. The FW Act sets a significant hurdle on substantial award variations. This was recognised in the Preliminary Jurisdictional Issues Decision in the following terms (emphasis added)³:

... Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.

27. The following frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*⁴ was adopted by the Full Bench in the above decision:

³ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [36].

⁴ [2012] FCA 480.

“... a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.”

28. As to the threshold which must usually be met for the purposes of making a sufficient case in support of a proposed variation, the Full Bench of the Commission said in *Re Security Industry Award* (emphasis added):⁵

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.

29. As already mentioned, the Applicant’s submissions are unsupported by the material required to meet the requisite evidentiary threshold to enable the Commission to be satisfied that the proposed variation would be necessary to achieve the modern awards objective. The application is supported by numerous bare assertions, most of which relate only to the Applicant’s own experience. The Applicant has not filed material that is capable of meeting the standard necessary to satisfy the Commission that the proposed variation meets the requirements of ss.134, 135 and 138 of the FW Act.

Modern Awards Objective

26. In making any amendments to a modern award, the Commission is required to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in s.134(1)(a) to (h).
27. As stated in the *Penalty Rates Decision*, no particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award:⁶

“The Commission’s task is to take into account the various considerations and

⁵ [2015] FWCFB 620 at [8].

⁶ [2017] FWCFB 1001, [115], [116] and [196].

ensure that the modern award provides a 'fair and relevant minimum safety net'".

Paragraph 134(1)(a) – Relative living standards and needs of the low paid

28. Security guards who perform their duties in health facilities will not, as claimed by the Applicant, necessarily be classified at the Level 1- Level 3 classification levels under the Security Award. Depending on a particular employee's skills and duties, they may be classified at Level 4 or Level 5 under the award.
29. Should the Commission be minded to include within the Security Award a dedicated classification for security officers who perform their duties in health facilities, this would necessarily disconnect the classification from the broader structure in the award and likely prevent progression to the highest pay grade.
30. As such, Ai Group submits that the proposed variation would not be in the interests of addressing the needs of the low paid.

Paragraph 134(1)(b) – The need to encourage collective bargaining

31. If employees undertaking security work in certain facilities consider the specific disabilities they experience as justifying a higher pay rate, Ai Group submits that this would best be addressed through enterprise-level bargaining.
32. If each potential applicant's dissatisfaction with the minimum rate of pay within any particular enterprise prompted an award variation, this would overtax the resources of the Commission and sidestep the role of enterprise bargaining.
33. Ai Group submits that this consideration weighs in favour of rejecting the applicant's proposed variation.

Paragraph 134(1)(c) – The need to promote social inclusion through increased workforce participation

34. The Applicant claims, in his submissions, that this consideration favours making a variation. In submissions uploaded to the Commission's website on 9 August 2019, the Applicant states that the proposed amendment would attract reasonable security officers.

35. To the extent that the applicant is claiming that employers are currently experiencing difficulty in attracting and retaining staff to perform security services in health facilities, Ai Group has already addressed this assertion. No evidence has been provided that employers are finding it difficult to attract appropriate staff to perform relevant duties in the industry.
36. By requiring classification of employees above the Level 3 rate for any security officer deployed to a health facility, the proposed variation would require employers to classify even junior staff toward the upper end of the wage structure. Ai Group submits that the proposed variation would therefore, in many cases, discourage employers from engaging new staff to undertake such work.

Paragraph 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

37. This is a neutral consideration in this matter.

Paragraph 134(1)(da) – The need to provide additional remuneration

38. This is a neutral consideration in this matter.

Paragraph 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

39. This is a neutral consideration in this matter.

Paragraph 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden

40. The inclusion of a dedicated classification for Hospitality Security Officers in the award above the Level 3 would most likely result in an overall cost increase for employers that deploy security officers to health facilities.
41. The cost pressures in the industry to which these submissions have already referred, reduce the capacity employers retain to respond to increases in wage rates. Considering the level of risk associated with the security services

industry, Ai Group considers that employers' resources are more sensibly diverted toward minimising employees' exposure to danger through provision of appropriate equipment and protective gear.

42. Given the fact that it is unknown what proportion of security officers deployed to health facilities are engaged at Levels 1-3, the cost impact on employers by the proposed variations are unknown. Nevertheless, it is likely the variation would result in a net cost increase for employers.
43. For that reason, this consideration weighs against making the amendments sought by the Applicant.

Paragraph 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards

44. As already stated in these submissions, the classification structure within the Security Award is broadly framed and sufficiently flexible to enable classification of employees who undertake a variety of duties covered by the Security Award. None of the classification descriptors limit employees to a specific subset of the industry.
45. By including a new classification level which would be specific to hospitals or health facilities, the proposed variation would be contrary to the intent and design of Schedule C and introduce excessive complexity into the classification schedule.
46. Moreover, it is entirely possible that numerous subsectors within the security services industry are attended by various specific conditions and disabilities which are either unencountered or rarely encountered by employees deployed in other subsectors. Should the Applicant's variation be granted, this could give rise to numerous variation applications for specific classifications covering separate subsets of the security industry. This, in turn, would result in a more complicated, difficult to understand and less stable Security Award.

47. The proposed amendment is not supported by the considerations mandated by s.134(1)(g).

Minimum Wages Objective

48. Introducing a new classification covering only those employees deployed to perform duties in a health facility would have a direct impact on the minimum wages of employees who are already classified under an existing level contained in Schedule C of the Award. As such, the minimum wages objective applies in the context of these proceedings.
49. For the reasons already outlined in these submissions, the considerations to which the Commission must refer in making any variation which enlivens the minimum wages objective do not support making the amendments proposed. The importance of safeguarding business competitiveness and viability is a significant concern which weighs against making the proposed variation, given Commissioner Gregory's comments regarding cost pressures in the security services industry in *IFS Head Franchise Pty Ltd Enterprise Agreement 2017* referred to above.
50. The Commission can only make a determination varying modern award minimum wages "if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons" (s.157(2)(a)).
51. "Work value reasons" are defined in s.157(2A) as follows:
- Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.
52. The Applicant has not demonstrated that the nature of the work, the skill and responsibility required for its execution and the conditions under which the work

is done are either common across security operations in health facilities or endemic to this subset of the industry.

53. As earlier stated, the insertion of a new classification level covering only employees deployed to health facilities would necessarily disconnect this classification from the staggered classification structure in Schedule C of the Security Award which allows for progression based on increases in skill and responsibility level. By divorcing classification of Hospital Security Officers from their level of skill and responsibility and removing such employees from the wider classification structure, the proposed variation would detach classification of Hospital Security Officers from many aspects of work value, allowing for only one classification level based on the location in which the employee works. The current classification structure provides for determination of classification level based on relative skill and responsibility assumed by security officers. This method of classification takes into account work value considerations and should not be disturbed based on the material provided by the Applicant.
54. For the reasons outlined above, the jurisdictional requirements for the Commission to make the variation proposed to modern award minimum wages are not satisfied.

4. CONCLUSION

55. For the reasons outlined in this submission:
- The application does not meet the jurisdictional requirements for the granting of an application to vary a modern award; and
 - The application does not have merit.
56. Accordingly, the application should be dismissed.