

From: Brent Ferguson [mailto:Brent.Ferguson@aigroup.com.au]
Sent: Friday, 24 June 2016 3:24 PM
To: AMOD
Cc: Chambers - Hatcher VP
Subject: Vehicle Manufacturing Repair Service and Retails Award 2010

Dear Associate,

The Ai Group seeks leave to file the attached short submission in relation to the review of the Vehicle Manufacturing Repair Service and Retail Award 2010. It responds to the SDA submissions of 7 June 2016.

Regards,

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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Review of the Vehicle Manufacturing
Repair Services and Retail Award

24 JUNE 2016

Ai
GROUP

4 Yearly Review of Modern Awards

AM2014/93 – Vehicle Manufacturing, Repair, Services and Retail Award 2010

1. Introduction

1. Ai Group makes this short submission in response to the submissions of the SDA filed on 7 June 2016 in support of their application seeking proposed variations to the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* pursuant to s.160 of the *Fair Work Act 2000* (“the Act”)
2. Ai Group opposes the SDA application.
3. The application follows a related claim by the union in the context of the 4 Yearly Review being undertaken pursuant to s.156. In that context, in our submissions of 15 May 2015, we pointed to the statutory requirement that such a variation must be justified on work value grounds and that the union had failed to meet this requirement.¹ We continue to rely on such earlier submissions.
4. The result now pursued by the union constitutes an increase in certain rates of pay applicable under the award.

2. The operation of s.160

5. The union’s application is mounted under s.160. The union seeks that the Commission make a Determination varying a modern award to correct an alleged error.
6. For the union application to be successful the Commission must find that there has been an error and that the variation proposed corrects that error. Section 160 does not afford the Commission a broad discretion as to the manner in which the Award may be modified.

¹ Ai Group submissions of 13 May 2015, paragraphs 108 to 117

7. The identification of an error does not enable the Commission to redraft an award provision in any manner that it may deem beneficial. The scope of the potential remedy is narrowly confined. This is an important consideration as s.160 ought not to be used as a vehicle for circumventing the operation of other provisions of the Act. In the current context, the Commission should reject what amounts to a transparent attempt by the union to circumvent the operation of s.156(3).
8. Section 160 is discretionary in nature. So much is clear from the use of the word “may” in both s.160(1) and s.160(2). The provisions afford the Commission power to vary an award in specific circumstances but do not mandate when such power must be exercised.
9. In considering the exercise of its discretion under s.160 regard should be had to s.138. An award may only include terms that they are: “...*necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.*” The union’s proposed variation to the award should only be granted if it is established that it would be consistent with this prerequisite.

3. There is no error as contemplated by s.160

10. Ai Group contends that the union has failed to establish that the award contains or is a product of any “error”, in the relevant sense.
11. In support of the application the union identifies the mathematical reasoning or basis for the contentious differentials within the relevant rates. Although this explains the relevant variance, it does not itself establish that there is an error.
12. The union has not established any mistake giving rise to the current award terms. It has failed to establish that the current terms are in any way contrary to the intentions of any Commission decision giving rise to the provisions, or the intentions of the relevant parties involved in any related proceedings. There is no evidence to support the SDA submission that the, “...*error in the rates was not the intention of the parties*” or that the, “*understanding of the*

traditional formula was minimal and lacking mathematical understanding".² Such assertions should be given no weight. Regardless, it cannot be accepted that the current provisions reflect some kind of accidental oversight.

13. In seeking to justify their claim, the union's submissions variously describe the current award terms as anomalous, inequitable or unfair. Without conceding that such characterisation of the award's terms is appropriate, we contend that these assertions are not sufficient to ground a claim that the award contains an "error", as contemplated by s.160. They instead represent the type of contention that might be relevant to the Commission's consideration of the merits of the award's terms in the conduct of a Review pursuant to s.156.
14. It is clear from the union's submissions that they take issue with the application of the 'traditional formula' in the calculation of the relevant rates, given the outcome it produces. However, it is not apparent why the application of the formula could be considered to be an error.
15. Instead, the union's submission essentially set out arguments for why, in its view, an alternate approach is desirable. The recalculation of the rates based on the "ratio" referred to in paragraph 80 of the union's submission does not correct an error but rather merely reflects a different approach to the calculation of rates which would achieve an outcome that the union regards as preferable. There is no evidence that the outcome proposed in any way reflects the intention of the Commission or parties.

4. The need to satisfy the requirements of s.138

16. As already identified, a modern award may only include terms that are "necessary" in the sense contemplated by s.138. The following mandatory considerations referred to in the modern awards objective are accordingly relevant considerations and would weigh against granting the claim:
 - The need to encourage collective bargaining (s.134(1)(a))

² SDA submission of 7 June 2016 at paragraph 76.

- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden(s.134(1)(f))
 - The need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g))
17. The union submissions of 7 June 2016 only address the operation of s.134 in a relatively superficial way. There is no evidence in support of any of the factual propositions upon which the claim rests.
18. There has been no attempt to establish the impact of the claim on employers or employees in the sector. The submissions relating to the capacity of employers to handle the cost of the claim do not rise above bald assertions and should be given no weight.
19. Having regard to the abovementioned considerations, the Full Bench should decline to grant the application. Such a course of action should be adopted even if, contrary to our submissions, it identifies an error.