

Fair Work Commission  
Level 4, 11 Exhibition Street  
Melbourne, Vic, 3000  
Via email: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

16 May 2017

**Re: AM2014/279 Pest Control Industry Award 2010**

## BACKGROUND

1. These submissions of the Australian Workers' Union (AWU) are made in relation to the *Draft Report* published by the Commission on 9 May 2017. The AWU and the Australian Federation of Employers and Industries (AFEI) are to provide further submissions on items 2 and 4, and the AWU is to confirm our position in relation to item 5.
2. All clause numbers are those of the *Exposure Draft* for the *Pest Control Industry Award 2016* published by the Commission on 3 November 2016 (the *Exposure Draft*) unless otherwise noted.

## DRAFTING AND TECHNICAL ISSUES

### “Country Work” Allowance – “all meals”

3. During the Award Modernisation process, the full bench of the Australian Industrial Relations Commission (AIRC) published a Statement containing an indicative list of pre-modern awards and NAPSAs for Stage 4 industries<sup>1</sup>. The instruments relevant to the Pest Control Industry are:

3.1. *Pest Control Industry (Victoria) Award 2000*;

3.2. *Pest Control Industry (Northern Territory) Award 2002*;

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<sup>1</sup> [2009] AIRCFB 641.

<sup>2</sup> [2009] AIRCFB 865 at [24].

<sup>3</sup> Ibid at [28], [29].

<sup>4</sup> Ibid at [27], [28], [29].

<sup>5</sup> Ibid at [27], [28].

- 3.3. *Pest Control Industry (State) Award* (NSW);
- 3.4. *Australian Environmental Pest Managers Association Ltd Award – State 2005* (QLD);
- 3.5. *Pest Control Industry Award – State 2003* (QLD);
- 3.6. *Pest Control Award* (SA); and
- 3.7. *Pest Control Industry Award 1982* (WA).

- 4. Only two of the above instruments prescribe a per-night allowance for “lodging and all meals” - the *Pest Control Industry (Victoria) Award 2003* and the *Pest Control Award* (SA). Both provide the scope of the payment in parentheses.
- 5. The *Pest Control Industry (Victoria) Award 2003* states at 17.10.2 (our emphasis at underlined):

*“An employee sent to country work shall be paid an allowance of \$79.80 per night to cover the costs of lodging and all meals (dinner-bed-breakfast)”.*

- 6. The *Pest Control Award* (SA) states at 23(b)(ii) (our emphasis at underlined):

*“An employee sent to country work shall be provided with first class board and lodging or by agreement between the employer and the employee, paid an allowance of \$30.00 per night to cover the costs of lodging and all meals (Dinner-Bed-Breakfast).”*

- 7. The other instruments refer to a weekly allowance, provide for the employer to pay for “reasonable expenses”, or do not deal with country work at all.
- 8. Of the instruments listed above, the phrase “the costs of lodging and all meals” is only used in the *Pest Control Industry (Victoria) Award 2003* and the *Pest Control Award* (SA).
- 9. Both of these instruments describe the term “lodging and all meals” as covering dinner, bed and breakfast.
- 10. We therefore conclude:

- 10.1. The origins of the phrase “the costs of lodging and all meals” that is currently used at 17.3(c)(ii) of the Exposure Draft is found in the *Pest Control*

*Industry (Victoria) Award 2003 and the Pest Control Award (SA);*

- 10.2. In the absence of evidence to the contrary, the description of “all meals” found in the *Pest Control Industry (Victoria) Award 2003* and the *Pest Control Award (SA)* continues to apply to the same phrase in 17.3(c)(ii) of the Exposure Draft;
- 10.3. The AFEI cannot reasonably continue to rely on its submission that the phrase “all meals” at 17.3(c)(ii) of the Exposure Draft covers every meal an employee may have in any one day without such evidence to the contrary.

**“Country Work” – additional meal allowance**

11. The additional meal allowance found at 17.3(c)(iv) of the Exposure Draft is also found only in the *Pest Control Industry (Victoria) Award 2003* and the *Pest Control Award (SA)*. The other instruments do not refer to an allowance of this type.
12. These two pre-modern instruments differ in stating when the meal allowance is not payable due to the payment of another allowance.
13. The *Pest Control Industry (Victoria) Award 2003* states (our emphasis at underlined):

*“17.10.5 When employees are sent from one place to another, as prescribed by this clause, they shall be allowed \$7.08 for each meal. Such allowance will not be payable if provided under 17.7 hereof.”*

14. Sub-clause 17.7 of the *Pest Control Industry (Victoria) Award 2003* deals with a meal allowance for overtime.

*“17.7.1 An employee required to work overtime for more than two hours, Monday to Friday or afternoon on a Saturday without being notified on the previous day or earlier that the employee will be required to work shall either be supplied with a meal by the employer or paid \$10.94 for each meal.”*

15. The Exposure Draft contains the same allowance provision, and the same exception to payment of the allowance. The *Pest Control Award (SA)*, however, contains a different exception (our emphasis at underlined):

*“23(b)(iv) When employees are sent from one place to another on country work as prescribed in this clause, they shall be allowed \$3.00 for each meal. Such allowance shall not be payable on any day the employee is in receipt of the allowance specified in (b)(ii) above.”*

16. The allowance specified in 23(b)(ii) of the *Pest Control Award (SA)* is the per-night allowance discussed above:

*“23(b)(ii) An employee sent to country work shall be provided with first class board and lodging or by agreement between the employer and the employee, paid an allowance of \$30.00 per night to cover the costs of lodging and all meals (Dinner-Bed-Breakfast).”*

17. This exception to the payment of the allowance is consistent with the submission of the AFEI. However, it is inconsistent with the Exposure Draft and also the Current Award.

18. In a Statement, the full bench of the AIRC outlined its decision to publish an Exposure Draft for the *Pest Control Industry Award 2010* modern award<sup>2</sup>.

19. We note that the full bench had regard to all of the awards in the pest control sector<sup>3</sup> when creating this Exposure Draft, with the Victorian<sup>4</sup> and New South Wales<sup>5</sup> instruments being given specific mention.

20. We also note that the Victorian instrument – the *Pest Control Industry (Victoria) Award 2003* – was specifically referred to by the AIRC more than any other pre-modern instrument in the pest control sector in this Statement.

21. Additionally, the current wording relating to this allowance in the Exposure Draft – and the exception to its payment – is significantly similar to the equivalent clause in the *Pest Control Industry (Victoria) Award 2003*, and importantly, significantly dissimilar to all other pre-modern instruments in the pest control sector.

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<sup>2</sup> [2009] AIRCFB 865 at [24].

<sup>3</sup> Ibid at [28], [29].

<sup>4</sup> Ibid at [27], [28], [29].

<sup>5</sup> Ibid at [27], [28].

22. We therefore conclude:

22.1. Clause 17.3(c)(vi) of the Exposure Draft has its origins in clause 17.10.5 of the *Pest Control Industry (Victoria) Award 2003*;

22.2. The full bench of the AIRC was aware of the relevant clauses in both the *Pest Control Industry (Victoria) Award 2003* and the *Pest Control Award (SA)* when creating the modern award;

22.3. In publishing the allowance clause with only one of the two exceptions to its payment found in the pre-modern instruments, the full bench of the AIRC intended to exclude the exception to payment found at 23(b)(iv) of the *Pest Control Award (SA)* when creating the modern award Exposure Draft.

23. In the absence of compelling evidence contrary to the above, the AFEI cannot reasonably continue to rely on its submission that the allowance at 17.3(c)(iv) of the Exposure Draft is not payable when the allowance at 17.3(c)(ii) is being paid.

**“Country work” allowances - operation**

24. For clarity, the AWU position is that the allowance at 17.3(c)(iv) of the Exposure Draft is payable:

24.1. For all meals whilst an employee is travelling to or between ‘country work’ locations;

24.2. Regardless of if the employee is also receiving the allowance at 17.3(c)(ii).

25. In fact, as the definition of “country work” requires that the employee live away from his or her usual place of residence, the allowance at 17.3(c)(iv) is **only** payable in addition to the allowance at 17.3(c)(ii).

26. The AWU submission regarding the operation of the allowance at 17.3(c)(iv) of the Exposure Draft is consistent with the development of the *Pest Control Industry 2010* modern award. The AFEI submissions, however, are not.

27. We once again suggest the following amendment to 17.3(c)(iv):

*~~“An employee sent from one place to another as prescribed in clause 17.3(c)~~  
**travelling to or between country work locations** will be paid a meal allowance  
of **\$8.45** for each meal. This allowance **is payable in addition to the allowance**  
**in clause 17.3(c)(ii) but** will not be payable if the employee is otherwise  
entitled to a meal allowance pursuant to clause 17.3(a).”*

### **Shiftwork**

28. The AWU confirms that we continue to pursue our claim that clause 21 of the Exposure Draft would benefit from further terms defining shiftwork.

29. We suggest that the addition of the definition of a shiftworker<sup>6</sup> at 21.1(a) of the Exposure Draft will largely resolve the issue raised by the Fair Work Ombudsman:

*“(a) **A shiftworker** is an employee who works ordinary hours during any  
shift finishing after 6.00pm and at or before 8.00am. A shiftworker will be  
entitled to payment of penalty rates in accordance with this clause.”*

30. The current paragraphs 21.1(a) and 21.1(b) would be relocated to 21.1(b) and 21.1(c) respectively.

### **Leading hand allowance**

31. The AWU confirms we do **not** propose that the leading hand allowance is an all-purpose allowance. However, we do continue to pursue our claim that where applicable, the leading hand allowance is payable to an employee on annual leave.

32. The following submissions are in support of that claim.

33. As there is no industry allowance provided for in the *Pest Control Industry Award 2010* or any of the pre-modern instruments, we respectfully submit that the word ‘industry’ at clause 22.3(b) was included erroneously, and should be replaced

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<sup>6</sup> Based on the definition of ‘shiftworker’ at s2 of the Exposure Draft for *Plumbing and Fire Sprinklers Award 2016*.

with the words 'leading hand' as follows:

*“(b) an additional loading of 17.5% of the employee’s minimum hourly rate prescribed in clause 6 – Minimum wages, plus ~~industry~~ **leading hand** and first aid allowances where appropriate...”*

34. We refer again to the Award Modernisation process conducted by the full bench of the AIRC. The pre-modern instruments relevant to the pest control industry are:

- 34.1. *Pest Control Industry (Victoria) Award 2000;*
- 34.2. *Pest Control Industry (Northern Territory) Award 2002;*
- 34.3. *Pest Control Industry (State) Award (NSW);*
- 34.4. *Australian Environmental Pest Managers Association Ltd Award – State 2005 (QLD);*
- 34.5. *Pest Control Industry Award – State 2003 (QLD);*
- 34.6. *Pest Control Awards (SA); and*
- 34.7. *Pest Control Industry Award 1982 (WA).*

35. All of these instruments except for the *Pest Control Industry (Northern Territory) Award 2002* provide for the payment of a leading hand allowance **and** stipulate that the leading hand allowance is payable to an employee on annual leave. Each is considered below.

36. The *Pest Control Industry (State) Award (NSW)* states at 9(e) (our emphasis at underlined):

*“The loading is the amount payable for the period or separate period, as the case may be, stated in subclause (d) of this clause at the rate per week of 17.5 per cent of the appropriate ordinary weekly time rate of pay prescribed by this award for the classification in which the employee was employed immediately before commencing his or her annual holiday, together with the leading hand allowance where applicable.”*

37. The *Pest Control Industry Award – State 2003 (QLD)* states at 7.1.5(c) (our emphasis at underlined):

*“... in no case shall the payment by an employer to an employee be less than the sum of the following amounts:*

- (i) the employee's ordinary wage rate as prescribed in clause 5.2 for the period of annual leave (excluding shift premiums and weekend penalty rates);*
- (ii) leading hand allowance prescribed in clause 5.2.2;*
- (iii) a further amount calculated at the rate of 17 ½% of the amounts referred to in clauses 7.1.5(c)(i) and 7.1.5(c)(ii)."*

38. The *Australian Environmental Pest Managers Association Ltd Award – State 2005* (QLD) states at 7.1.4(b) (our emphasis at underlined):

*"Leading hands, etc. – Subject to clause 7.1.4(c), leading hand allowance and amounts of a like nature otherwise payable for ordinary time worked shall be included in the wages to be paid to employees during annual leave."*

39. The *Pest Control Industry Award 1982* (WA) states at 9(2)(a) (our emphasis at underlined):

*"An employee before going on leave shall be paid wages he would have received with the addition of a 17 ½ per cent loading calculated on his ordinary rate of wage in respect of the ordinary time he would have worked had he not been on leave during the relevant period."*

40. The *Pest Control Industry Award 1982* (WA) makes provision for a leading hand allowance at 19(3).

41. The *Pest Control Award* (SA) states at Schedule 1(b) (our emphasis at underlined):

*"An employee who is appointed a leading hand shall be paid \$19.83 per week in addition to any other payment prescribed by this award."*

42. The *Pest Control Award* (SA) prescribes payment for annual leave at 15(i)(i).

43. The *Pest Control Industry (Victoria) Award 2000* states at 23.2 (our emphasis at underlined):

*"The pay rate for annual leave is the employee's pay rate at the time the employee takes the annual leave, plus 17.5% of the rates prescribed in the*



*award for the classification in which the employee was engaged immediately prior to the employee proceeding on leave.”*

44. In order to clarify the calculation of the 17.5% annual leave loading, the above clause creates a distinction between an *employee’s pay rate* and the rate prescribed in the employee’s classification in the award.
45. An ordinary reading of the clause results in an understanding that an employee’s pay rate includes allowances – including the leading hand allowance at 17.1 of the instrument – but the 17.5% loading is payable on the classification rate only.
46. The *Pest Control Industry (Northern Territory) Award 2002* does not provide for the payment of a leading hand allowance.
47. We respectfully submit that our proposed amendment is necessary to reflect the historical position that the leading hand allowance is payable to an employee on annual leave.
48. We base this submission on the following statements that we believe to be uncontroversial:
  - 48.1. All pre-modern instruments in the pest control industry except one make provision for the payment of a leading hand allowance;
  - 48.2. Of those instruments, all make provision for the payment of the leading hand allowance to an employee on annual leave; and
  - 48.3. There is no ‘industry allowance’ in the current award or in any pre-modern instrument.
49. We note that there is no evidence that the full bench of the AIRC intended to exclude the leading hand allowance from annual leave payments in drafting the Exposure Draft of the *Pest Control Industry Award 2010* during the award modernisation process.
50. Consequently, we submit that the wording of 22.3(b) be amended as above to expressly include the payment of the leading hand allowance.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'ZD' with a long horizontal flourish extending to the right.

Zachary Duncalfe

**NATIONAL LEGAL OFFICER**

**The Australian Workers' Union**