

BACKGROUND PAPER

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards—*Pest Control Industry Award 2010*— Substantive claim

(AM2019/4)

MELBOURNE, 26 NOVEMBER 2019

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

[1] A Statement issued on 1 October 2018¹ (the October Statement) outlined the process for dealing with a number of substantive claims made in the Group 4 awards as part of the Review. Attachment A to that Statement set out a list of claims in each award that had been allocated to separately constituted full benches. Interested parties were asked to confirm whether there were any variations or additions to the claims being pressed in the Group 4 awards.

[2] This statement deals with a substantive claim in the Pest Control Industry Award 2010 (the Pest Control Award) that is being dealt with as part of the Review. The Australian Workers' Union (AWU) is seeking to vary clause 22.3(b) of the Exposure Draft by substituting the reference from 'industry' allowance to 'leading hand allowance.' This claim is the subject of a hearing listed for **9:30 am on Wednesday 27 November 2019**. This background paper is intended to facilitate the hearing of this matter.

[3] Clause 24.7 of the Pest Control Award states, relevantly:

24.7 Payment and loading

Before the start of an employee's annual leave the employer must pay the employee:

(a) instead of the base rate of pay referred to in the NES, the amount the employee would have earned for working their ordinary hours had they not been on leave; and

(b) an additional loading of 17.5% of the employee's minimum rate prescribed in clause 14—Minimum wages, plus industry and first aid allowances where appropriate or, if they were a shiftworker prior to entering leave, their shift penalty, whichever is greater.

[4] The AWU's claim is opposed and directions for the hearing and determination of the claim were issued on 23 August 2019.¹ The following submissions have been filed in accordance with the directions:

- AWU ([19 September](#) and [21 November 2019](#)); and
- AFEI ([30 October 2019](#)).

[5] The AWU seeks to amend the Exposure Draft for the Pest Control Award to clarify that employees receiving a leading hand allowance also receive this allowance during periods of annual leave. In particular the AWU seeks to amend clause 24.7(b) by deleting the word 'industry' and inserting the words leading hand:

'Delete the word 'industry' at clause 24.7(b) and insert the words 'leading hand' as follows:

"(b) an additional loading of 17.5% of the employee's minimum hourly rate prescribed in clause 14 – Minimum wages, plus ~~industry~~ leading hand and first aid allowances where appropriate..."

[6] The amendment proposed is said to be in consideration of two main factors:

- (i) there is no industry allowance in the Pest Control Award; and
- (ii) an analysis of the pre-modern awards shows that employees covered by those awards who were entitled to the leading hand allowance were also entitled to that allowance whilst on periods of annual leave.

[7] The relevant pre-reform awards identified by the AWU as informing the provisions of the Pest Control Award are as follows:

- *Pest Control Industry (State) Award (NSW)*;
- *Australian Environmental Pest Managers Association Ltd Award – State*
- *2005 (QLD)*;
- *Pest Control Industry Award – State 2003 (QLD)*
- *Pest Control Award (SA)*;
- *Pest Control Industry Award 1982 (WA)*;
- *Pest Control Industry (Victoria) Award 2000*; and
- *Pest Control Industry (Northern Territory) Award 2002*.

[8] The AWU submits that all of the pre-reform awards used to inform the Pest Control Award, with the sole exception of the *Pest Control Industry (Northern Territory) Award 2002* provide for the payment of a leading hand allowance and also stipulate that the leading hand allowance is payable to an employee during periods of annual leave.

[9] The AWU submits that the Commission should vary the Pest Control Award to restore an entitlement to the Pest Control Award that existed across the industry (with the exception of the Northern Territory) prior to Award Modernisation. It submits that this entitlement has been removed from the Pest Control Award without any apparent rationale and in the circumstances the removal seems to be the result of an inadvertent error.

¹ [\[2019\] FWC 5888](#)

[10] The AWU submits that the substantive change sought is consistent with the modern awards objective and addresses each relevant consideration below:

- s 134(1)(a) (relative living standards and needs of the low paid): all award-reliant employees in the pest control sector are ‘low-paid’ employees within the meaning of s 134(1)(a) and the variation proposed ‘has the capacity to improve the relative living standards and needs of the low paid by re-introducing a prior entitlement that will result in a small improvement for some low-paid employees in the pest control industry.’
- s 134(1)(b) (need to encourage collective bargaining): granting the claim will have a neutral impact on collective bargaining. The payment of a leading hand allowance to employees on annual leave is unlikely to determine the attitude of employers and employees to negotiating an enterprise agreement.
- s 134(1)(f) (likely impact on businesses): the variation proposed ‘is very unlikely to have a significant impact on businesses in the pest control industry.’ The AWU accepts that the granting of this claim will result in a minor increase to employment costs but as the payment of the leading hand allowance on annual leave is payable only to those few employees who are undertaking work as a leading hand and hence such increased costs will be minor. The AWU also notes that the impact on small business will necessarily be lesser than on medium and large businesses, as the quantum of the leading hand allowance is determined on the basis of how many employees a leading hand supervises. Accordingly, the smaller the business, the less of an impact the granting of this substantive claim would have.
- s 134(1)(h) (likely impact on employment growth, inflation and the national economy): the effect of granting the claim is unlikely to have a significant impact on these considerations.

[11] The AWU submits that the other s 134 considerations are not relevant in its claim.

[12] AFEI disagrees with the AWU’s submission that all pre-reform awards that were used to inform the Pest Control Award (with the exception of the *Pest Control Industry (Northern Territory) Award 2002*) required payment of the leading hand allowance during periods of annual leave. In particular, AFEI contend that the *Pest Control Industry (Victoria) Award 2000* (the Victorian Award) did not prescribe payment of a leading hand allowance during periods of annual leave.

[13] AFEI submits that it cannot be concluded that the absence of such a provision was an error of the award modernisation process. The Review commenced on the presumption that the Pest Control Award achieved the modern awards objective at the time that it was made and the award was made without a requirement for payment of the leading hand allowance during periods of annual leave.

[14] AFEI also submits that the change proposed by the AWU would require merit based arguments that address the relevant legislative provisions, accompanied by probative evidence directed to what are said to be the facts in support of their claim and that no such evidence has been adduced.

[15] Further, AFEI submits that the proposed amendment presents practical issues of how it would operate. A leading hand under the Pest Control Award is defined to be:

‘an employee who is directed to control, supervise and take responsibility for the work performed by two or more employees’

[16] AFEI contend that the nature of the allowance is that an employee is only eligible to receive a leading hand allowance if they are directed to undertake this particular responsibility. The Pest Control Award does not require the ‘leading hand’ be the same person on any particular day, nor is ‘leading hand’ a substantive role under the award. Rather, it is submitted, an employer is able to determine when an employee (if any at all) will be so directed, and for how long.

[17] In a reply submission dated 21 November 2019 the AWU responded to the issues raised by AFEI.

[18] In relation to the historical context, and AFEI’s submission with respect to the the Victorian Award the AWU contends that AFEI’s submissions do not explain the basis of their objection, offer an alternative interpretation of Clause 23.2, or engage with the AWU’s construction of the clause. In light of this, the AWU continues to maintain that the correct reading of Clause 23.2 of the Victorian Award is that the leading hand allowance is payable during periods of annual leave.

[19] The relevant clauses of the Victorian Award are Clause 17.1, which makes provision for a leading hand allowance and Clause 23.2, which states (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. The employee shall pay each worker in advance before the commencement of the employees annual leave.’

[20] The AWU submits that annual leave in the Victorian Award was calculated using the following formula:

‘The employee’s pay rate at the time the employee takes the annual leave + 17.5% of the rate prescribed in the award for the employee’s classification.’

[21] The AWU submits the correct interpretation of Clause 23.2 is that the words ‘employee’s pay rate at the time the employee takes the annual leave’ encompass an employee’s monetary entitlements under the award – including allowances. This is said to be evidenced by the separate calculation of annual leave loading prescribed on the lesser amount of “the rates prescribed for the employee’s classification in the award.”

[22] In the event that the Commission does not accept this interpretation of the relevant clauses of the Victorian Award, the AWU submits that the proposed change would nonetheless be consistent with the overwhelming majority of the relevant pre-modern awards that made provision for a leading hand allowance.

[23] As to the AFEI’s submission regarding the ‘practical operation’ of the proposed amendment the AWU contends AFEI’s submission is misconceived for the following reasons:

1. It appears AFEI conceives of the leading hand role as one that regularly shifts from employee to employee at the discretion of the employer. However, this approach appears divorced from industrial realities. The role of leading hand and the additional responsibility it entails is likely to limit the number of employees who are regularly directed to perform the role;

2. There are numerous other modern awards that specifically require the payment of a leading hand allowance during periods of annual leave including following the following. These include:
 - *Aluminium Industry Award 2010* – clause 22.4(b);
 - *Building and Construction General On-site Award 2010* – clause 38.2(b);
 - *Manufacturing and Associated Industries and Occupations Award 2010* – clause 32.1 and 41.4(b); and
 - *Plumbing and Fire Sprinkles Award 2010* – clause 21.1(k) and 34.2(b).
3. Finally, AFEI’s submission that an employee cannot be paid a leading hand allowance whilst on annual leave due to the fact that at the time of taking annual leave the employee is not undertaking the responsibilities that attract the payment of the allowance is not sustainable. Not only does this submission fail to recognise that annual leave payments naturally require an assumption of earnings during the leave period even though no work will be performed, we additionally note that an employee taking annual leave is not performing any responsibilities during the leave period.

[24] Finally, as to the AFEI’s contention that the AWU has not adduced evidence in support of its proposed variation, the AWU submits that its proposal is self evident and can be determined without the need for an evidentiary case.

[25] The AWU submits that this claim falls within this category of a self-evident change for the following reasons:

- The Award currently requires the payment of an industry allowance during periods of annual leave. However, no industry allowance is prescribed in the Award. This is clearly an error.
- The AWU submits this error should be rectified by this Full Bench by removing the reference to an industry allowance and inserting reference to the leading hand allowance. This will simply result in the Award making provision for an entitlement that existed across the entire pest control industry (with the exception of the Northern Territory) prior to Award Modernisation.