

**STRONGER  
TOGETHER**

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**IN THE FAIR WORK COMMISSION**

**AM2019/4 – PEST CONTROL INDUSTRY AWARD – SUBSTANTIVE ISSUES**

**Section 156 – Fair Work Act 2009 – 4 yearly review of modern awards**

**SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION**

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## BACKGROUND

1. Directions for the Australian Workers' Union (**AWU**) to file submissions in relation to the *Pest Control Industry Award 2010* (**Award**) were published by the President, Justice Ross on 23 August 2019.
2. The AWU has one substantive claim in relation to the Award. The following submissions are in support of this claim.
3. A Draft Determination containing the proposed amendment to the Award is attached to these submissions.
4. The AWU seeks to amend the Exposure Draft for the Award to clarify that employees receiving a leading hand allowance also receive this allowance during periods of annual leave.
5. The AWU proposes to make this clarification by inserting a reference to 'leading hand allowance' in the Payment and loading sub-clause at c. 24.7(b) of the Award, in substitution for the reference to 'industry allowance' found in that same sub-clause of the Award.
6. Such an amendment is in consideration of two main criteria:
  - 6.1. There is no industry allowance in the Award; and
  - 6.2. 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. All clause numbers referenced in these submissions are those of the current Award unless otherwise noted.

## SUBMISSIONS

### History of the Industry Allowance in the Pest Control Award

8. The AWU was unable to find any pre-reform awards in the pest control industry that provide for an industry allowance, nor is there currently an industry allowance in the Award.
9. Rather, as outlined below, all of the pre-reform awards used to inform the 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.
10. In these circumstances, the AWU submits that the only available conclusion to reach concerning the inclusion of the word 'industry' in cl 24.7(b) of the Award is that it was done so inadvertently and in error.

11. The AWU submits that as a result of this error, the words 'leading hand' were mistakenly excluded from cl. 24.7(b) of the modern award, despite all of the pre-reform awards that contain a leading hand allowance making provision for the payment of that allowance on periods of annual leave.

### **Payment of the Leading Hand Allowance During Annual Leave**

12. The relevant pre-reform awards identified as informing the provisions of the Award<sup>1</sup> are as follows:
1. *Pest Control Industry (State) Award* (NSW);
  2. *Australian Environmental Pest Managers Association Ltd Award – State 2005* (QLD);
  3. *Pest Control Industry Award – State 2003* (QLD)
  4. *Pest Control Award* (SA);
  5. *Pest Control Industry Award 1982* (WA);
  6. *Pest Control Industry (Victoria) Award 2000*; and
  7. *Pest Control Industry (Northern Territory) Award 2002*.
13. Each is considered in reference to the AWU substantive claim below.
14. The *Pest Control Industry (State) Award* (NSW) explicitly provides for the payment of the leading hand allowance to an employee during annual leave. The instrument states at cl.9(e) (our emphasis at underlined):
- “The loading is the amount payable for the period or the 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.”*
15. The *Australian Environmental Pest Managers Association Ltd Award – State 2005* (QLD) likewise explicitly provides for the payment of the leading hand allowance during periods of annual leave. This award states at cl. 7.1.4(b) (our emphasis at underlined):
- “Leading hands, etc. - Subject to clause 7.1.4 (c), leading hand allowances 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.”*
16. Clause 7.1.4(c) of this award states (our emphasis at underlined):

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<sup>1</sup> AIRC DECISION OR STATEMENT WHERE THESE AWARDS ARE IDENTIFIED

*'(c) All employees - Subject to clause 7.1.4 (d), 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 by the Award for the period of the annual leave (excluding shift premiums and week-end penalty rates);*

*(ii) leading hand allowance or amounts of a like nature;*

*(iii) a further amount calculated at the rate of 17.5% of the amounts referred to in clauses 7.1.4(c)(i) and 7.1.4.(c)(ii).*

17. The *Pest Control Industry Award – State 2003* (QLD) also explicitly provides for the payment of the leading hand allowance during periods of annual leave. This award states at cl. 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).”*

18. 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.”*

19. The *Pest Control Award* (SA) prescribes payment for annual leave at cl. 15(i)(i) of the Award. The effect of Schedule 1(b) as extracted above is certainly to make provision for the leading hand allowance to be paid to relevant employees during period of annual leave.

20. The *Pest Control Industry Award 1982* (WA) states at cl. 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.”*

21. The *Pest Control Industry Award 1982* (WA) makes provision for a leading hand allowance at cl. 19(3). The AWU submits that it is uncontroversial to state that an employee who is entitled to a leading hand allowance in accordance with cl. 19(3) of this award is entitled to receive that allowance. Accordingly, cl. 9(2)(a) of this

award entitles such an employee to the payment of a leading hand allowance during periods of annual leave.

22. The *Pest Control Industry (Victoria) Award* states at cl.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. The employer shall pay each worker in advance before the commencement of the employees annual leave.”*

23. 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.
24. An ordinary reading of this clause results in an understanding that an employee’s *pay rate* includes allowances (including the leading hand allowance at cl. 17.1 of the instrument), but the 17.5% loading is payable on the classification rate only.
25. The *Pest Control Industry (Northern Territory) Award 2002* is the sole pre-modern instrument that does not provide for the payment of a leading hand allowance.
26. In light of the above, the words ‘leading hand’ at 22.3(b) appear to have been erroneously excluded by the AIRC during the reform process.
27. The AWU could not locate any specific consideration given by the Australian Industrial Relations Commission (AIRC) to exclude the leading hand allowance from annual leave payments during the Award Modernisation process.
28. Further, the AWU could not locate any submissions by parties to the Award Modernisation process that dealt specifically with the leading hand allowance being subject to removal from payments due employees whilst on annual leave.

### **The Modern Awards Objective**

29. The Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net,<sup>2</sup> taking into account the considerations set out at s134(1) of the *Fair Work Act 2009*. This is the modern awards objective.
30. The AWU submits that the substantive change sought in this matter is consistent with the modern awards objective and addresses each relevant consideration below.

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<sup>2</sup> Fair Work Act 2009 (Cth), s134(1)

Section 134 (1) (a) – relative living standards and the needs of the low paid

31. Many award-reliant employees in the pest control industry are low-paid within the definition used by the Expert Panel in the 2018 – 19 Annual Wage Review.<sup>3</sup>
32. In determining the meaning of ‘low paid’, the Expert Panel in the 2018 – 19 Annual Wage Review at [199] noted:
- “A threshold of two-thirds of median (adult) full-time ordinary earnings is the benchmark we use to identify who is ‘low paid’ within the meaning of ss 134(1)(a) and 284(1)(c).”*
33. The Expert Panel in the 2018 – 19 Annual Wage Review states at [205] that according to the most recent data from the Australian Bureau of Statistics, two-thirds of median earnings was equal to \$886.67 per week.
34. The *Pest Control Award 2010* is divided into five classification streams according to the employee’s skill level.
35. Utilising the Expert Panel’s definition of ‘low paid’ in the 2018 – 19 Annual Wage Review, it appears to the AWU that all award-reliant employees in the pest control sector are low-paid employees.<sup>4</sup>
36. Incorporating the AWU’s proposal 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.

Section 134 (1) (b) - The need to encourage collective bargaining

37. We submit that if this claim is granted, it will have a neutral impact on collective bargaining.
38. 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.

Section 134 (1) (f) – The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

39. The incorporation of the AWU’s proposed substantive claim is very unlikely to have a significant impact on businesses in the pest control industry.
40. The AWU accepts that the granting of this claim will result in a minor increase to employment costs. However, as the payment of the leading hand allowance on

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<sup>3</sup> [2019] FWCFB 3500.

<sup>4</sup> The highest classification under the Award is Level 5. The minimum weekly rate for a person in a Level 5 Classification is \$870.40.

annual leave is payable only to those few employees who are undertaking work as a leading hand, such increased costs will be minor.

41. 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.
42. In order to demonstrate the minor financial impact of the granting of this substantive claim, the AWU has made the following calculations regarding the additional costs that businesses may incur following the granting of this claim.
43. For a leading hand in charge of 2 to 10 employees, the current allowance payable under the Award is \$31.57 per week. The additional costs associated with granting the AWU claim would therefore total only \$126.28 per year for such an employee.
44. For a leading hand in charge of 11 to 21 employees, the current allowance payable under the Award is \$47.24 per week. The additional costs associated with granting the AWU claim would therefore total only \$188.96 per year for such an employee.
45. For a leading hand in charge of more than 21 employees, the current allowance payable under the Award is \$64.17 per week. The additional costs associated with granting the AWU claim would therefore total only \$256.58 per year for such an employee.

Section 134 (1) (h) – The likely impact of any exercise of modern award powers on employment growth, inflation and sustainability, performance and competitiveness of the national economy

46. The effect of granting this substantive claim is unlikely to have a significant impact on any of the above.
47. As stated above, any increases in costs to employers will be minor as the proposed changes are confined only to those employees engaged as a leading hand.
48. The other considerations of the modern awards objective do not appear relevant to this claim.

**Conclusion**

49. The AWU urges the Commission to restore an entitlement to the Award that subsisted across the industry (with the exception of the Northern Territory) prior to Award Modernisation. This entitlement has been removed from the Award without any apparent rationale and in the circumstances the removal seems to be the result of an inadvertent error.

50. The AWU respectfully requests the Fair Work Commission to correct this error and amend the Award to provide that the leading hand allowance is payable during periods of annual leave.

A handwritten signature in black ink, consisting of a stylized 'Z' followed by a horizontal line.

**Zachary Duncalfe**

**National Legal Officer**

**THE AUSTRALIAN WORKERS' UNION**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

Part 2-3 Division 4 – 4 Yearly Review of Modern Awards

s.156(2)(b)(i)

**Pest Control Industry Award 2010**

(MA000097)

**4 Yearly Review of Modern Awards**

(AM2019/4)

[INSERT FULL BENCH MEMBERS]

SYDNEY, X 2019

Review of modern awards to be conducted.

[1] Further to the decision and reasons for decision <decision reference>> in <<file no>>, it is determined that pursuant to section... of the Fair Work Act 2009, that the Pest Control Industry Award 2010 be varied as follows.

[2] 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...”*

[3] This determination will operate on and from...

[INSERT PRESIDING MEMBER]