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Daniel Walton National and NSW Secretary

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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****Lodged by:** Zachary DuncalfeThe Australian Workers' Union, National
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BACKGROUND

1. These submissions in reply are filed in accordance with the directions of the President, Justice Ross, on 23 August 2019 in relation to the 4-yearly review of the *Pest Control Industry Award 2010* (**Award**).
2. The Australian Workers' Union (**AWU**) continues to press its claim for the Award to be amended to require that employees who are entitled to a leading hand allowance should also receive this allowance during periods of annual leave.
3. The AWU submits this outcome can be achieved simply by inserting a reference to 'leading hand allowance' in the annual leave payment and loading sub-clause at cl. 24.7(b) of the Award, in substitution for the reference to 'industry allowance' found in that same sub-clause.
4. The AWU's submissions in reply to the submissions of the Australian Federation of Employers and Industries (**AFEI**) dated 30 October 2019 are below.

SUBMISSIONS IN REPLY

5. The AWU continues to rely on our earlier submissions in this matter. The AWU makes the following reply submissions in addition to our earlier submissions.

Modern Award Review

6. In its submissions, AFEI references the need for a merit argument and evidence to support a proposed substantive change to a modern award.
7. The AWU does not dispute the need for a party to mount a merit-based case in support of a substantive variation. Indeed, from [29] – [48] of the AWU's submissions dated 19 September 2019, the AWU advanced a merit-based claim with reference to the modern awards objective.
8. Further, as the Full Bench stated in *Preliminary Jurisdiction Decision [2014] FWCFB 1788* (our emphasis is underlined):

'The extent of such an argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality.'¹

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

9.1. It is illogical that the current award provides for the payment of an industry allowance during periods of annual leave when no such allowance exists in the Award; and

9.2. The proposed change reflects the historical position of all pre-modern instruments in the pest control industry (with the sole exception of the *Pest Control Industry (Northern Territory) Award 2002* which, relevantly, does not provide for the payment of a leading hand allowance at all).

Historical Context

10. AFEI disputes the AWU's submission that all pre-modern awards that provide for the payment of a leading hand allowance specify that this allowance is payable to an employee during periods of annual leave.

11. AFEI point specifically to the *Pest Control Industry (Victoria) Award 2000* ("**Victorian Award**") as a pre-reform instrument that did not require the payment of the leading hand allowance during periods of annual leave. AFEI's submissions do not explain the basis of their objection, offer an alternative interpretation of cl. 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 cl. 23.2 of the Victorian Award is that the leading hand allowance is payable during periods of annual leave.

12. The relevant clauses of the Victorian Award are:

12.1. Clause 17.1, which makes provision for a leading hand allowance; and

12.2. Clause 23.2, which states (our emphasis at underlined):

¹ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60]

“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.”

13. In accordance with cl. 23.2, 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.

14. The AWU submits the correct interpretation of cl. 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 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.”
15. Even if the Commission does not accept this interpretation of the relevant clauses of the Victorian Award, 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. These are:
- 15.1. The *Pest Control Industry (State) Award* (NSW) at clause 9(e);
 - 15.2. The *Pest Control Industry Award – State 2003* (QLD) at clause 7.1.5(c);
 - 15.3. The *Australian Environmental Pest Managers Association Ltd Award – State 2005* (QLD) at clause 7.1.4(b);
 - 15.4. The *Pest Control Industry Award 1982* (WA) at clause 9(2)(a); and
 - 15.5. The *Pest Control Industry Award* (SA) at clause 15(i)(i).
16. It is not at all contentious that the amendment to the Award proposed by the AWU will simply restore an entitlement that existed on a widespread basis in the pest control industry prior to the introduction of the Award in 2010.

The Operation of the Proposed Amendment

17. AFEI submits that the proposed variation presents a practical challenge because leading hands are designated at the discretion of an employer. Additionally, in AFEI's submission, it would be impractical to pay this allowance during periods of annual leave, as employers would not direct an employee to undertake this responsibility while on annual leave.

18. The AWU submits AFEI's submission is misconceived for the following reasons:

18.1. Firstly, 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;

18.2. Secondly, 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:

18.2.1. *Aluminium Industry Award 2010* – clause 22.4(b);

18.2.2. *Building and Construction General On-site Award 2010* – clause 38.2(b);

18.2.3. *Manufacturing and Associated Industries and Occupations Award 2010* – clause 32.1 and 41.4(b); and

18.2.4. *Plumbing and Fire Sprinkles Award 2010* – clause 21.1(k) and 34.2(b).

18.3. 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.

CONCLUSION

19. 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.
20. 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.

DRAFT DETERMINATION

21. The AWU continues to rely on the draft determination as attached to its 19 September 2019 submissions.

A handwritten signature in black ink, appearing to read 'ZD', followed by a long horizontal line.

Zachary Duncalfe
National Legal Officer
THE AUSTRALIAN WORKERS' UNION