

AM2019/4 – Pest Control Industry Award – Substantive Claims

Submissions in response to the Australian Workers' Union

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Introduction

1. These submissions by the Australian Federation of Employers and Industries (AFEI) are made in accordance with Directions by Justice Ross on 23 August 2019, in relation to the *Pest Control Industry Award 2010* (the Award) for parties opposing the Australian Workers' Union (AWU)'s substantive claim.
2. Essentially, the AWU seeks to amend the Award (and corresponding Exposure Draft provisions) to introduce a new entitlement for the payment of the leading hand allowance during periods of annual leave. The AWU proposes to introduce this particular entitlement by amending Clause 24.7(b) of the Award to insert a reference to the leading hand allowance in place of the current reference to industry allowance, as the Award currently reads.
3. The AWU argues in its submissions that the amendment should be made as:
 - a. There is no industry allowance in the Award; and
 - b. The absence of a provision requiring payment of the leading hand allowance on periods of annual leave, was an error in award modernisation.
4. AFEI disagrees with the AWU's submission that all pre-reform awards that were used to inform the 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. Significantly, in our view, the *Pest Control Industry (Victoria) Award 2000* did not prescribe payment of a leading hand allowance during periods of annual leave.
5. More broadly, it cannot be concluded that the absence of such a provision was an error of the award modernisation process. The 4-yearly review of modern awards (the Review) commenced on the presumption that the Award achieved the modern awards objective at the time that it was made,¹ and the Award was made without a requirement for payment of the leading hand allowance during periods of annual leave.
6. 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 claim². No such evidence in support of their contentions about the modern awards objectives has been adduced.

¹ Preliminary Jurisdiction Issues Decision [2014] FWCFB 1788 at [24]

² Ibid at [23]

7. The proposed amendment moreover, presents practical issues of how it would operate. Under the Award and Exposure Draft currently, a leading hand is defined to be:

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

8. As such, 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 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, an employer is able to determine when an employee (if any at all) will be so directed, and for how long.
9. Therefore, it is impractical for the allowance to be paid while an employee is on annual leave, as they cannot be a person directed to undertake leading hand responsibilities while they are on such leave.
10. For the reasons outlined above AFEI submits that the AWU proposal should be rejected.