

Fair Work Act 2009
FAIR WORK COMMISSION
s. 156 – 4 yearly review of modern awards

AM2019/7
Amusement, Events and Recreation Award 2010

Substantive issue – annual leave loading

ADDITIONAL SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. On 13 June 2019, Deputy President Sams issued directions for the filing of material regarding changes sought to the terms of the *Amusement, Events and Recreation Award 2010* (“**Amusement Award**”).
2. The directions require interested parties seeking changes to file details of the changes and submissions by 4pm on 13 July 2019.
3. The Australian Workers' Union (“**AWU**”) continues to press its claim for an annual leave loading of 17.5% to be inserted into the Amusement Award.
4. The AWU relies on its earlier submission dated 10 August 2017¹ and the additional submissions below in support of the claim.

DREDGING AWARD – AWARD REVIEW DECISION

5. The AWU unsuccessfully sought the insertion of annual leave loading into the *Dredging Industry Award 2010* (“**Dredging Award**”) during the current award review process.²

¹ Accessible here: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014257-sub-awu-100817.pdf>

² [2017] FWCFB 5536 at [62] to [75].

6. The following aspects of the Full Bench's decision appear relevant to the consideration of this claim:
- (i) the omission of annual leave loading in the Dredging Award was not an error given none of three relevant pre-modern awards contained annual leave loading³;
 - (ii) the inclusion of annual leave loading conditions in other modern awards does not create an automatic basis for introducing the entitlement. Any claim must be merit based⁴; and
 - (iii) a relevant consideration is what the industry standard was prior to 2010.⁵

PRE-MODERN AWARDS AND AWARD MODERNISATION

7. The Australian Industrial Relations Commission's Award Modernisation Full Bench expressly identified the primary pre-modern award for this industry in its Statement published on 22 May 2009:

The exposure draft of the Amusement, Events and Recreation Award 2010 is based to a large extent on the terms of the AWU Theme Park and Amusement Award 2001 but also incorporates many proposals advanced by the Media, Entertainment and Arts Alliance (MEAA).⁶

8. The significance of this pre-modern award was reiterated by the Full Bench in its ultimate decision which created the Amusement Award dated 4 September 2009:

A number of employers raised concerns about the penalty applicable under the exposure draft. These have been altered to a degree to better reflect the provisions of the AWU Theme Park and Amusement Award 2001 upon which the modern award is largely based.⁷

9. Clause 24.10 of the *AWU Theme Park and Amusement Award 2001* ("**AWU Amusement Award**") prescribed an annual leave loading of 17.5%.

10. The Award Modernisation Full Bench did not give any indication in the Statement or Decision identified above as to why an annual leave loading of

³ Ibid at [68] and [69].

⁴ Ibid at [69].

⁵ Ibid at [69].

⁶ [2009] AIRCFB 450 at [75].

⁷ [2009] AIRCFB 826 at [92].

17.5% was not included in the Exposure Draft it published in May 2009 or the final Amusement Award it made on 4 September 2009. In terms of annual leave entitlements, both instruments simply stated: “*Annual leave is provided for in the NES*”.

11. Further, draft awards filed by the Media, Entertainment and Arts Alliance (“**MEAA**”) and two large employers in the industry did include an annual leave loading of 17.5%.⁸
12. In these circumstances, it is apparent that the situation with the Amusement Award can be distinguished from that which arose with the Dredging Award because:
 - (i) the main pre-modern instrument, which was the only instrument referred to as a reference point for the Amusement Award by the AIRC Award Modernisation Full Bench, did contain leave loading; and
 - (ii) the main industrial parties who had input into the making of the modern award included leave loading in their draft awards.
13. Given this industrial history and the lack of any explanation about why an important condition like leave loading was omitted from the Amusement Award, it does appear the omission was an error.
14. An error such as this is naturally the type of issue that should be addressed in the award review process.

PURPOSE OF ANNUAL LEAVE LOADING AND A NATIONAL STANDARD

15. The purpose of annual leave loading is to compensate employees for the notional loss of overtime earnings while they are on annual leave.⁹
16. Given the Amusement Award has relatively standard overtime conditions for permanent employees, there is no obvious reason why permanent employees working in this industry should be denied annual leave loading – an

⁸ The MEAA draft award is here – see clause 27.5(h):

http://www.airc.gov.au/awardmod/databases/entertainment/Draft/MEAA_ent_draft.pdf; a draft award from the Macquarie Leisure Operations is here – see clause 31.1:

http://www.airc.gov.au/awardmod/databases/entertainment/Draft/MLTG_ent_draft.pdf; a draft award from AEG Ogden Group & Moreton Hire Pty Ltd is here – see clause 28.2:

http://www.airc.gov.au/awardmod/databases/entertainment/Draft/AEG_Moreton_draft.pdf

⁹ 4 *yearly review of modern awards – Annual Leave* [2015] FWCFB 3406 at [425] citing the Australian Government’s ‘[Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation](#)’ (2012) at pp. 99–100 which in turn cites Creighton & Stewart, *Labour law*, 5th edn, 2010, p. 397.

entitlement which was described as a national standard back in 1975 when a Full Bench of the Australian Conciliation and Arbitration Commission stated:¹⁰

Although we are conscious of the economic situation of the pastoral industry we do not believe that station hands should be excluded from a standard which is accepted by and applied to the community generally and which has indeed been accepted by the pastoralists in calculating the rate paid to shearers.

17. An analysis of leave loading conditions in other awards is attached to the AWU's 10 August 2017 submissions. This confirms annual leave loading remains a standard national condition in 2019.
18. The status of annual leave loading as a standard award entitlement was also acknowledged by then Vice President Watson in transitional modern award review proceedings.¹¹

MODERN AWARDS OBJECTIVE

19. The AWU submits it would be consistent with the specific factors that must be taken into account in assessing the modern awards objective for an annual leave loading of 17.5% to be inserted into the Amusement Award.

Relative living standards and the needs of the low paid: s 134(1)(a)

20. A commonly used reference point for determining whether an employee is low-paid is whether they are paid at or below the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010*¹² ("**Manufacturing Award**").
21. The current C10 rate in the Manufacturing Award for permanent employees is \$22.70. An employee working under the Amusement Award must reach the Grade 5 classification before their rate of pay exceeds the C10 rate in the Manufacturing Award.
22. A Grade 5 employee under the Amusement Award is a technician, tradesperson or equivalent who is required to supervise staff, general hands technicians, and/or generally supervise projects including basis administration.

¹⁰ *Pastoral Industry Award, 1965* Print C6842.

¹¹ *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [217] and [220].

¹² See *Application by United Voice for low-paid authorisation* [2014] FWC 6441 at [28].

23. It logically follows that the overwhelming majority of employees covered by the Amusement Award would meet the generally accepted definition of a “low paid” employee because they will be classified below Grade 5.

24. Therefore, the insertion of annual leave loading into the Amusement Award will deliver an increase to remuneration which will naturally improve the living standards of affected low-paid employees.

The need to encourage collective bargaining – s 134(1)(b)

25. This appears to be a neutral factor. The claim is more likely to impact upon the outcome of collective bargaining because it will result in more agreements containing annual leave loading - as opposed to being a determining factor in whether bargaining occurs or not.

The promotion of social inclusion through increased workforce participation – s 134(1)(c)

26. This appears to be a neutral factor.

Promoting flexible modern work practices and the efficient and productive performance of work – s 134(1)(d)

27. The payment of annual leave loading may encourage affected employees to access annual leave because they will be less likely to incur financial loss via forfeited overtime entitlements.

28. The taking of periods of rest and recreation is likely to lead to more efficient and productive employees in the long term.

Providing additional remuneration for various types of work arrangements – s 134(1)(da)

29. This factor weighs in favour of the claim because annual leave loading is compensation for the notional loss of overtime earnings during periods of leave.¹³

Equal remuneration – s 134(1)(e)

30. This appears to be a neutral factor.

¹³ 4 yearly review of modern awards – Annual Leave [2015] FWCFB 3406 at [425] citing the Australian Government’s ‘[Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation](#)’ (2012) at pp. 99–100 which in turn cites Creighton & Stewart, *Labour law*, 5th edn, 2010, p. 397.

Impact on productivity, employment costs and the regulatory burden – s 134(1)(f)

31. The granting of this claim is unlikely to impact upon productivity or the regulatory burden.
32. The variation will inevitably lead to increased employment costs. The additional cost for the various classification levels in the Amusement Award, based on 1 July 2019 rates, is:

GRADE	ANNUAL VALUE OF LEAVE LOADING	WEEKLY VALUE OF LEAVE LOADING
Introductory	\$518.56	\$9.97
1	\$533.47	\$10.26
2	\$553.91	\$10.65
3	\$572.95	\$11.02
4	\$603.75	\$11.61
5	\$622.65	\$11.97
6	\$641.55	\$12.34
7	\$658.77	\$12.67
8	\$692.16	\$13.31
9	\$766.43	\$14.74

33. The AWU submits these additional costs are manageable and this is reflected by the fact that annual leave loading is payable in almost all other modern awards including in industries such as hairdressing and horticulture that typically involve a large number of small business and are often prone to compliance issues.

Ensuring a simple, easy to understand and stable award system that avoids overlap – s 134(1)(g)

34. As highlighted in the AWU's 10 August 2017 submission, annual leave loading is a standard condition in the overwhelming majority of modern awards. That being the case, its inclusion in the Amusement Award will promote a simple, easy to understand and stable award system.
35. The Commission has embraced standard annual leave conditions in the 4 yearly review process and has developed model terms for various issues such as excessive leave, leave in advance and cashing out leave.
36. The insertion of leave loading into one of the few remaining awards that does not currently contain the condition would be consistent with this trend.

Impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – s 134(1)(h)

37. A lack of wages growth in the Australian economy remains a pressing concern. The Reserve Bank recently convened a conference specifically to discuss this issue.¹⁴
38. The Fair Work Commission is uniquely placed as an independent institution that can directly deliver improved remuneration outcomes for Australian workers.
39. The annual wage review is only one facet of this role, albeit an important one. The Commission also has the capacity to deliver improved remuneration outcomes in award review proceedings and when resolving disputation concerning enterprise bargaining.
40. The increase to remuneration that would arise from the granting of this claim will constitute a small step in the right direction in terms of promoting wage growth within the Australian economy.
41. The granting of this claim is unlikely to negatively impact on employment growth, inflation or the competitiveness of the national economy.

DRAFT DETERMINATION

42. The AWU continues to rely on the draft determination which is attachment “AWU 1” to its 10 August 2017 submissions.



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¹⁴ <https://www.rba.gov.au/publications/confs/2019/>