



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER YILMAZ**

**AM2020/103**

**s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective**

**(AM2020/103)  
Registered and Licensed Clubs Award 2020**

**Melbourne**

**9.39 AM, FRIDAY, 16 APRIL 2021**

PN1

THE COMMISSIONER: Good morning. This is Yilmaz C. I just wish to confirm that I have everyone on line. I believe I have Mr Cooper?

PN2

MR P COOPER: Yes. Thank you, Commissioner.

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THE COMMISSIONER: Mr Crawford?

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MR S CRAWFORD: Yes, I'm here, Commissioner.

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THE COMMISSIONER: Thank you. Mr Redford?

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MR B REDFORD: Yes. Good morning, Commissioner.

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THE COMMISSIONER: Good morning. And for Clubs Australia Industrial, we have Ms Nicola Shaw?

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MS N SHAW: Yes. Thank you, Commissioner.

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THE COMMISSIONER: Thank you. And we also have with you Mr Victor Song?

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MR V SONG: Yes, Commissioner.

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THE COMMISSIONER: And Ms Lena Bertuccio?

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MS L BERTUCCIO: Yes, (indistinct).

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THE COMMISSIONER: Thank you. All right, I have everyone online. This matter has been referred to me to see whether I might be in a position to assist the parties to work through the applications, or the proposed variations to the Clubs Award by Clubs Australia Industrial. There are obviously three applications, or three variations being proposed. One of them relates to the cooks. I have so far seen the material that has been filed Clubs Australia Industrial. I have also seen the AWU submission, and I have read through the most recent document that has been prepared by the Commission as well, which relates to the proposals to vary the adult rates and exemption clauses in the Registered and Licensed Clubs Award. So given that this is an application

by Clubs Australia, perhaps I might just defer to you, Ms Shaw, with respect to the variations that you are proposing.

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MS SHAW: Yes, sure. Thank you, Commissioner. Just to confirm that at this moment we're only seeking two changes, not three. So we've withdrawn the general exemption rates for level 4 to 6 employees and revised that to only be the chefs in those classifications.

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THE COMMISSIONER: Okay.

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MS SHAW: So as you're aware, we have drafted draft determinations, which looks to include exemption rates for trade-qualified chefs and cooks into the award. The exemption rate would allow clubs who have paid their trade-qualified cooks 20 per cent above the award rate to be exempt from the following provisions: the ordinary hours of work provision, meal breaks, broken periods of work allowance, overtime and penalty rates. The reason for this change is we believe it would achieve the objectives of the modern awards better. Chefs are generally paid well above the award rate, as shown in the July 2019 data. This showed on average chefs are paid \$6 to \$4 above the award rate - and just before I go on, I mean chefs and cooks, I'm just using that interchangeably, that term, just so everyone's on the same page. Our data that we've started to gather would suggest that these rates are actually even higher now since July 2019, because there is a skills shortage, and the joint standing committee on migration accepted in March 2021 in their report that there is a shortage of chefs in Australia in their interim report into the inquiry into the Australian skilled migration program. Exemption rates reduce award complexity; they reduce regulatory burden from businesses and encourage collective bargaining. Also, given the circumstances, it would allow for, you know, further employment growth in the industry.

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The industry is somewhat unusual in the sense that exemption rates are common. The current award has an exemption rate for managerial classifications and level 1 to 4 (indistinct) and horticultural employees. Further, the Club Employees NSW (State) Award previously had exemption rates for all levels of employment, which was 33 per cent of the level 4 rate. There wasn't a huge take-up on this, so it wasn't pushed into the modern award, but there has been industry acceptance of the use of exemption rates in this industry, which is different to a lot of industries.

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The other change that we're looking to seek is a drafting, which we propose is a drafting change. We're happy to discuss this separately after - it's only the AWU and the CMAA that want to be involved in that part, or if everyone else is happy to sit in then I can go through that. What would be your preference, Commissioner?

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THE COMMISSIONER: Let's see who has interest in which proposed variations. So in respect of the chefs, perhaps I'll go to you first, Mr Redford.

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MR REDFORD: Yes, thanks, Commissioner. When these proposals were first floated, his Honour the President encouraged the parties to have some discussions about them and we did have some discussions about these proposals, and in those discussions I made - I thought I made the position of the UWU pretty clear in that the proposal to extend the sort of the exemption rate concept into the chef classifications would not be something that the UWU would be prepared to support. When we were next before his Honour, he indicated that his preference was a process in which the Commission would first convene a conciliation conference to discuss these matters further before - if the moving party wanted to pursue the matter, they should then file an application and the matter would ensue. And as would ordinarily be the case, my position in relation to that was that the UWU would be very happy to participate in a conference about these matters notwithstanding that we've made our position clear: we're not prepared to support the proposal.

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But perhaps it would be useful for me to provide some further context in relation to why that is the case. You can probably be forgiven for thinking that United Workers Union and our predecessor, United Voice, and even the OHMU, which is the predecessor union to that, is supportive of the idea of an exemption rate concept in this part of the industry because the clause that appears in the Award, in the one that we're discussing, appears there because - well, one of the reasons it appears there is because my union consented to the inclusion of that clause in the Award.

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But I think I should, and it may be helpful for me to say this, I think I should explain that if you thought that our consent to the inclusion of that clause in the Award was because we support the concept, that is probably a misnomer.

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It's more accurate, Commissioner, to characterise our consent to the inclusion of that clause in the Award as an acceptance that the exemption rates in relation to club managers has been, historically, part of the industrial infrastructure that sort of existed in this part of the industry.

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But that's not to say that the idea of workers being in a situation where their award entitlements can be traded off, if you like, in exchange for a percentage loading, without there being any mechanism to determine whether or not that worker is going to be better off being paid that loading, as opposed to being provided with the entitlement that they would otherwise be entitled to under the Award. And without any mechanism to address any shortfall, if one was found to exist.

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As a matter of principle, that's just not something that my union supports. And it's rather the fact that there was an acceptance within my union that, in relation to club managers, that there's a historical, industrial reality that these provisions have existed. And the problem with this proposal is it extends the concept, a concept that, as I've said, we don't support, it extends the concept beyond that historical,

industrial reality and into areas of the Award where those sorts of provisions haven't traditionally existed, namely, the chef classifications.

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So in other words, you know, the UUW's sort of saying to itself, "Well, look, we don't like this stuff but we can kind of cop it because it's historically been the case", well, that just doesn't - that scenario just doesn't exist in relation to this proposal. There is no basis upon which we could support it.

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And if the - if Clubs Australia decides to file an application of some kind, under the Act, to advance the proposal, well, we'll oppose it.

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THE COMMISSIONER: So Mr Redford, that's in relation to the chefs.

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If there was the potential to allow for the protections that you've alluded to, that are lacking in the proposal, is that something that the UUU would consider more favourably?

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MR REDFORD: I think, Commissioner, it might be that that scenario, and this obviously, would be entirely a matter for Clubs Australia, but it might be that that scenario would be that the organisation decides to pursue the inclusion of an annualised salary clause in the Award.

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Because that kind of clause is one in which there is a mechanism to ensure that workers on the loaded rate, if you like, aren't worse off and there's a mechanism to ensure that if there is any shortfall, that that can be corrected.

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So the concept that I've sort of alluded to is the same as, you know, the annualised-salary concept that exists in other awards. But you know, obviously, if that was something that Clubs Australia decided to pursue, we would have to consider that.

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And we would expect that what would be advanced is something consistent with the Commission's model clause, which has been the subject of a process to the context of the four-yearly review.

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THE COMMISSIONER: Mm hm.

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MR REDFORD: So we'd look at it, Commissioner, but we'd look at it including to ensure that it was consistent with those principles that the Commission's now set down.

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THE COMMISSIONER: Yes.

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All right. Thank you, Mr Redford.

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In relation to the second point raised by Clubs, which is the drafting matter, do you have a position on that? Is that an area - sorry, is that an area that you still have an interest in, for the purpose of today?

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MR REDFORD: We intend to support the position that's been put by the AWU. We agree that the proposal doesn't seem to make sense in the context of the other exemption rate provisions that apply in relation to the horticultural classifications.

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THE COMMISSIONER: Thank you.

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All right. So Mr Crawford?

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MR CRAWFORD: Yes, thank you, Commissioner. I'll only comment in relation to that second issue about the proposed drafting change for club managers.

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Our position is, I think, fairly well summarised in the previous submission we filed, which I heard that you'd read. But in summary, very brief summary, the proposal is to extend the operation of existing, exemption rates that apply to club managers, to horticultural managers into classifications.

PN44

And the primary problem we have with that is that those horticultural managers do not fit within the existing definition of a club manager. They're not - those managers have a separate classification structure in schedule A10 of the Award, in contrast to the club managers, which have their own, separate classification structure in schedule A12 of the Award.

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And also importantly, the horticultural managers have different conditions in a number of key areas to the club managers, including the span of ordinary hours of work and penalty rate conditions, which are obviously, some of the key, core conditions in the Award.

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So on that basis, we simply do not consider it's appropriate to extend the existing exemption rates for club managers to these horticultural managers. And we don't consider there's scope for us to move in terms of that position.

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Mr Redford has already alluded to an existing exemption rate provision that applies in the separate maintenance and horticultural stream for levels 1 to 4. That

appears in clause 18.4B of the Award. If there were to be discussions about exemption rates for these horticultural managers, there'd be a lot more chance of us entertaining an amendment if the proposal was more in line with the conditions in that provision, rather than the provision for club managers.

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THE COMMISSIONER: Yes, thank you.

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Mr Cooper?

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MR COOPER: Thank you, Commissioner. The Association's position on the first proposition about cooks is that whilst that doesn't fall strictly within our scope of membership, in reality, what happens out there is that a lot of head chefs and sous chefs take on managerial responsibilities and are very well paid.

PN51

A lot of clubs have elected to determine them to be a club manager in accordance with schedule A12.2, which empowers a committee of management to create managerial positions with levels 6 through to 13. So by using that mechanism the clubs are able to apply the existing exemption rates for club managers to 20 per cent to 50 per cent, under 18.4.

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We've got no appetite to change the award. We have had in the past long-standing understandings with Clubs Australia Industrial in regards to maintaining the status quo of unique club managers' conditions under modernised award. That first understanding was reached back in 2008 and 2009, and in March of 2009 when the first draft of the award was presented on a consent basis by the then Clubs Australia Industrial, the Miscellaneous Workers Union and the Club Managers Association. I don't believe that there is a great need for change.

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In regard to the first proposition in Chefs, I think it adds another level of complexity which is not really necessary in our view, so we would oppose the 20 per cent exemption creation for chefs falling within the positions of (4) through to (6). As late at the award revoking application, the then head of CAI's industrial division gave a further undertaking on transcript that they wished to maintain the status quo in regards to managers' conditions and that's what has eventuated, and continues.

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There are 10 areas that specifically mention conditions for club managers and we find it vital that we maintain the uniqueness in regards to the exemption levels strictly for club managers, so we would be opposing both applications or draft determinations proposed by Clubs Australia Industrial. Thank you.

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THE COMMISSIONER: Thank you, Mr Cooper. In that case, Ms Shaw, you have had the opportunity to see that there is interest across both of the variations

that you have an interest to pursue, so perhaps we may just get started on the first one which is the chefs. You have had the opportunity to hear what has been said so far. In respect of the proposal that you have, is there any scope to vary your proposal to take into account the comments that have been made so far?

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MS SHAW: With all respect, Commissioner, I guess the reason why we were looking for these exemption rates is that we often have chefs that are paid well over \$100,000, well above the award, but may not have a well written contract outlining what that is absorbing and is at risk for an underpayments claim being brought their way. If that was then a condition that they had to keep all those records and double-check it, then it kind of goes against the point of that proposal in the first place.

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It would just be looking at, I guess, trying to ensure the industry has well written contracts to ensure that they have those exemption rates in. It would be an easier fix than putting annualised salary provisions, we would say.

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THE COMMISSIONER: The thing is though in terms of the proposal that you have, ultimately what will occur is that - sorry, I'm getting feedback and it's just a bit distracting. The concern is that there may not be a concern for those who might be being paid \$100,000, however in respect of the award rates as provided for currently in the award with the annualised salaries in particular, they're nowhere near the \$100,000 that you say sometimes does occur out in industry.

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My suggestion to you is, is there a potential then to deal with this matter in a slightly different way in order to meet the concerns that have been raised by the union as well as the concerns that you have?

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MS SHAW: We can give further thought to that, but what we talk about has - I guess if you're seeking, you know, a higher exemption rate or something like that, the issue then occurs that the level 6 employees would be receiving more than the managerial exemption rates. If you put anything higher than a 20 per cent exemption rate, that then could cause some issues within the organisation.

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We do take the CMAA's point that chefs that are managing employees may well go on to those managerial levels, anyway, but if they sit as a level 6 and they were getting anything higher than 20 per cent exemption then they would then be getting higher than that level A manager 20 per cent, which we think could cause some issues within the industry.

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The difference between those two exemption rates is we are looking to only exempt them from a number of things rather than as many things as the managerial one. That's where we have seen that trade-off. It's still only



20 per cent, but we are only exempting less clauses in the award than those managerial ones.

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THE COMMISSIONER: So is it your position then that having had the opportunity to hear from Mr Crawford and Mr Redford, there is no suggestion to a further variation or amendment to the proposed variations that you are looking at pursuing?

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MS SHAW: At this stage we're happy to consider some further protections potentially around it. I know other industries are looking at putting caps on numbers of hours that they work or potentially hours on weekends worked and things like that to try and limit that exemption rate, and put protections on employees. We are currently undertaking a survey with all our members and potentially with that data coming back we may be in a position to put some further protections around it for lower level employees before we file and can have a discussion with the UWU around that.

PN65

That being said, unless their position as we understand it is "Unless you can show every employee is going to be better off under it", they won't agree to it - so we're not all that hopeful that there will be agreement for it, but we may be able to put something that provides further protection to employees and put some limitations around that if that's what the Commission is suggesting might be more - --

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THE COMMISSIONER: Mr Redford, I have heard your objections. If CAI was to come back with some further protections, would it be something that you would consider?

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MR REDFORD: Commissioner, let me put it this way: this process has now been going on for pretty much a year because it began with the Attorney-General's working groups last year and then it sort of flowed into this process. Throughout that process we have in good faith looked at every proposal that has been floated by everyone who has floated them. We will continue to do that, but Ms Shaw is right, our fundamental principle is that we are not going to support anything that would leave any workers worse off than they are now.

PN68

THE COMMISSIONER: Ms Shaw, in your submission you make reference to a number of agreements that have introduced variations of the sort that you're looking at introducing. Do they provide in your view any further insight or any potential solution to the objections that are raised by both Mr Redford and Mr Crawford?

PN69

MS SHAW: Commissioner, I think I might have referred to the previous Club Employees New South Wales State Award, which is an old NAPSA which had exemption rates for all levels of employees, which was 33 per cent of the level 4

rate. The difference around this clause is there wasn't a huge take-up from Clubs. It needs to be entered in voluntarily, it had to be in writing, was there a cap on hours? Yes, and then could not work more than a maximum of 38-ordinary hours per week, averaged over 52 weeks.

PN70

We would, potentially, be open to something around capping the hours. I guess the issue then comes, if you can't a well-worded contract, in writing, then our concern would be that Clubs might not have an agreement in writing, and then that would make the whole clause kind of null and void anyway.

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So that's where that pushback had - that's where we kind of wanted to move away from just having to have that agreement in writing because I think we would run into the same kind of issues that we see now, already.

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THE COMMISSIONER: All right.

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Is there anything else anyone wants to add in relation to the chefs at the moment? No? So it looks like we're not going to make any progress today, until you do some further work, and some further proposals might be put up for consideration.

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All right. So Ms Shaw, how much time would you need to complete the additional work that you're proposing to do?

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MS SHAW: Probably - a survey is going out today and we'd probably need two to three weeks to compose that.

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Our thoughts are, probably, at this stage, further conciliation is not going to be of much value. And that if we do press it, that we may need to just make an amendment to the void(?) application and go through that process as there has been a number of discussions already, with the Unions, around this.

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If that's what you're asking?

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THE COMMISSIONER: Yes. Well, I mean, you might conciliation may not necessarily be of some assistance but you never know.

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MS SHAW: Yes. I mean, we would be hopeful, as we were hopeful this morning, but also realistic in some sense.

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THE COMMISSIONER: All right.

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Well, I'm happy to relist once you've done that extra work.

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MS SHAW: Yes.

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THE COMMISSIONER: And see whether there might be some scope for at least identifying what those key concerns are in a more definitive way.

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And that might - even if we don't reach agreement, at least we'll have a better understanding of what the key issues are relating to, where there might be some common understandings, or whether there might be some clear objections. That might be of some assistance so that when you choose to pursue your application, that will be much more obvious to the Bench that's dealing with the matter, going forward.

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MS SHAW: Yes.

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THE COMMISSIONER: As well as the parties.

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MS SHAW: Yes, we'd be agreeable to that.

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THE COMMISSIONER: All right.

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So Ms Shaw, if I was to relist this matter in say, four weeks' time, would that coincide with the work that you need to do in order to come back with some further proposals?

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MS SHAW: Yes, that would, thank you, Commissioner.

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THE COMMISSIONER: All right.

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All right. I presume there's no objection from the other parties for that?

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MR REDFORD: No, there's not, and we like that approach, yes.

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SPEAKER: No, Commissioner.

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THE COMMISSIONER: All right.

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In relation to the second matter, Ms Shaw, did you want to speak to that briefly?

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MS SHAW: Yes, Commissioner, thank you. This is a matter that - it kind of arose from an underpayment claim where it was drawn to our attention that there was some drafting errors with the Award.

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Our industry and association had always been under the perception that those managerial exemption rates did apply to the maintenance and horticultural level 1 and level 2 managers. And on further investigation, the issue is kind of made a little bit unclear by the decision that was given by the Commission in the Award Modernisation decision, which I believe is quoted in the AWU's response.

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We believe that the last sentence in that has been - there's been a mistake of including the word, "managerial" into it. And that it should just read"

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*We have included an exemption rate provision of maintenance and horticultural classification in the terms of the New South Wales Bowling and Golf Club Employees State Award.*

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As that is the 33 per cent exemption that has gone into the Award, level 1 (indistinct). And then that first sentence would then make it clear that those managerial position, including the maintenance and horticultural managerial classifications, reflect a true, level exemption rate, which is by that 20 per cent and that 50 per cent, into those classification levels, and that would, therefore, we clear that that's what was intended by the Award.

PN102

To provide further background, when the Award was going through the Award Modernisation process, the AWU was seeking a 33 per cent exemption for all their maintenance and horticultural on the level 4 rate. We've done a quick calculation and for a 20 per cent exemption for maintenance and horticultural level 1, they would be \$4 worse off with the 20 per cent exemption and would be 24 per cent better off with the 50 per cent exemption.

PN103

And then the level 2 employees would be 8 per cent better off with a 20 per cent exemption and 36 per cent off with the 50 per cent exemption.

PN104

Of course, the exemption rates were looking to cover slightly different provisions that was first put forward, so the AWU was seeking at 33 per cent exemption, at the level 4 rate, to cover hours of works, RDOs, overtime, call-backs, public holiday meal allowance and meal breaks.

PN105

We understand that their concern may be around penalty rates now, that wasn't included in their initial proposal. But the managerial 20 per cent exemption does not cover public holidays and the RDOs as well. So there are some differences of what they did cover.

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But our expectation is that employees are actually better off, primarily, on that 20 per cent and 50 per cent exemption.

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The other thing that we've looked into is that it seems to be that there's a bit of issue with what was this managerial horticultural classifications in the State Award. The AWU have put forward that they weren't under the New South Wales Bowling and Gold Club Employees Award, and correct me if I'm wrong there, that you don't believe that those two classifications came from that award.

PN108

It does seem to have coverage to superintendents that they are lower level and were paid well below those maintenance and horticultural managerial classifications that have gone into the Award.

PN109

The AWU, I think, is proposing that they were under this old award, what is it? Sorry. The Club Managers and Secretary State Conciliation Committee. That award, which doesn't seem to have clear coverage of maintenance and horticultural employees, it just has kind of club managers, but no real reference.

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And other than that, it seems to cover club secretaries or assistant secretaries, rather than any direct correspondence to maintenance and horticultural employees which would be very unusual for them to be kind of the deputarian manager of a club.

PN111

The other thing that points towards this 20 per cent and 50 per cent exemption rate with meaning to cover maintenance and horticultural employees, is when that provision first went into the Award, the definition of club manager was defined to only cover kind of the person who was in charge of the whole club.

PN112

Our reading of this is, if that was applied, then that exemption rate could only ever have applied to club levels D to E of the managers levels. Because a level A or level B or level C manager could not have been in charge of the whole club. And this was clearly not the intention of the clause, by the CMAA, for Clubs Australia, when they drafted that clause to have those managerial exemption rates to only apply to a manager level D to E.

PN113

There has been, just for reference, there has been a change to, and agreed change to, the definition of club manager that was made in, I believe, maybe 2016 or 2018, which included all those managerial levels. Or maybe earlier, 2014, to

include managers level A to E, but originally, when that clause went in to the Award, it only covered we would say managerial classifications level D to E.

PN114

THE COMMISSIONER: My understanding was that when the award was initially made it was to cover club managers - managers of the club. The additional levels came in some time later, and when the award was originally made there was an exemption for those that were managing clubs that had a turnover of less than \$500,000. So that's the history there, isn't it? So - - -

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MS SHAW: That's correct.

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THE COMMISSIONER: The intent is that it always covered club managers?

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MS SHAW: Yes, and technically the clause was it always covered level A to level E managers, and that was the cut out that they put exemptions forward(?) under. But if you took just the (indistinct) - and it was read for the title saying level 7 to level 13, but they used it for club manager work, or if you read it strictly, (indistinct) confusion because club managers would only be a level that reached(?) level E. So that's why we're seeking to change that to managerial classifications to just show that that's always been intended to cover all those managerial classifications.

PN118

THE COMMISSIONER: If you were to change it simply to cover, to make sure it's clear that it covers all of those management classifications, is there a concern that it may also capture the league golf professional as well, and is that the intent?

PN119

MS SHAW: Look, that only went into the award last year, that new level. So again we - I guess the change would mean that it would capture the league golf professional. The PGA haven't shown that much interest - my understanding is league golf professionals are again paid well above any award rates that are in there, but potentially with that change it would cover the league golf professional, if that's something that PGA doesn't want to occur, because historically they have been in our award and may not have had exemption rates, then we would potentially be open to a cut-out for those.

PN120

THE COMMISSIONER: Okay.

PN121

MS SHAW: I think for simplicity, you know, our first position would be to just cover them, but if there is a push back, historically we haven't done too much research into that area because it wasn't in the award.

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THE COMMISSIONER: We might need the view of the golf association on that one. Was there anything else you wanted to add at this point, Ms Shaw?

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MS SHAW: Not at this point, thank you.

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THE COMMISSIONER: All right. Mr Redford, anything you wish to add?

PN125

MR REDFORD: I'll defer to Mr Crawford on this one, Commissioner - well, actually - sorry, before I do, the only thing I wish to mention is that just on that last point, I'm sure we have had appearances from the PGA in relation to this matter in previous conferences in which they did express their opposition to this proposal. I probably want to go back to the transcript to be 100 per cent sure, but I just - I'm sure that's in my mind that that happened. So I just mention that, Commissioner, but otherwise just defer to Mr Crawford.

PN126

THE COMMISSIONER: Mr Crawford?

PN127

MR CRAWFORD: Yes, just firstly on that point, that's my recollection too. I think Vicky Crowe is the relevant representative, obviously not here today, but I think she is aware of the issue. My understanding is they oppose the change, but we'd need to confirm that. Commissioner, you made reference to a definition of a club manager and linkage to gross annual revenue of less than \$500,000, but that wording appears in schedule A12 of the award, and that schedule does not and has never applied to horticultural and maintenance managers. They are in schedule A10 of the award. They have completely separate classification definitions to the other club managers. The wording bears no resemblance whatsoever. So we don't think there's any serious doubts that at the moment because the maintenance and horticultural managers do not fall within the definition of a club manager that currently that exemption rate provision does not apply. Why the industry has assumed for 10 or 11 years that it does, we don't know, but that appears pretty clearly, legally, to not be the case, and we don't think this is really a case where you can just right now in 2021 try and guess what the Award Modernisation Full Bench had in mind and try and simply amend the award to reflect their supposed intent. And I mean, on that, I do note that the historical summary document that the Commission produced referred to an AWU draft award, and I see in a cover letter of the AWU's draft awards on the second page:

PN128

*We do not agree to the quantum for the annualised salary proposed by Clubs Australia. It is based on the 20/50 per cent exemptions for maintenance and horticultural employees. This exemption rate should be 33 per cent.*

PN129

So the AWU's position back from 2009 has been to oppose any maintenance and horticultural workers being covered by those 20 and 50 per cent exemption

provisions. So there was certainly no common understanding amongst the parties at the time in 2009 or 2010 that maintenance and horticultural employees were within the definition of a club manager, and it's remained the case right up until now. We still don't agree that was the intent, and we think legally the award now has to be interpreted as it is, and because there is a definition of "club manager", we think the outcome is reasonably clear. As I've indicated, we're open to having discussions to try and find a solution if it is really important for there to be an exemption rate for this category of worker. We're happy to have discussions about developing a provision that might be suitable now in 2021, but we do not accept it's appropriate to simply wind back the clock, amend the current definition on the basis of some contested understanding of what the Full Bench did or didn't want to do.

PN130

THE COMMISSIONER: Mr Cooper?

PN131

MR COOPER: There's a number of problems with that proposition in the drafting. It is very clear at the moment that the 20 and 50 per cent exemptions applies to a club manager, which is clearly defined in the definitions clause. And there is no definition of what a "managerial" employee is. There is also a reference in A12.2, which again I stated before, and how is a respondent club, their management committee, to establish appropriate management classifications for management positions at their respective clubs, and it does there refer to A12.2:

PN132

*A management employee will be classified in accordance with the nature of the job being performed in the following levels -*

PN133

And it mentions levels A through to G, or level 6 through to 13. So again, I put it that if the club wishes to utilise the exemptions, they would firstly have to establish that these horticultural levels 1 and 2 managerial staff are deemed to be a club manager and classified accordingly with schedule A12.2. I think what Clubs Australia Industrial is trying to do is create too much levels of complexity. These conditions are longstanding and they've worked well for the industry. So again, we simply oppose the extending of the 20 or 50 per cent exemptions to non-club management staff. Thank you.

PN134

THE COMMISSIONER: The definitions in the award, in clause 2, there is a reference to "club manager", but there is also a reference to - - -

PN135

MR COOPER: Managerial classifications.

PN136

THE COMMISSIONER: Yes, including the golf trainee and the maintenance and horticultural employee, which again makes reference to schedule A, clause A10. Can I ask, Ms Shaw, was the - the underpayment issue, was that a horticultural



employee or was it one of the other levels of management? Was that your concern?

PN137

MS SHAW: It was a maintenance and horticultural manager classification, and that's where this issue kind of arose in the first place. We got advice, wrongly or rightly, back from 2010 when the award was first changed advising Clubs that maintenance and horticultures were under that 20 to 50 per cent exemption, so that was our clear understanding at the time.

PN138

It was only when we - and we had always looked at maybe to the title of that clause and also our understanding from the negotiations when it says "managerial classifications", and using that term rather than "club managers" if it was intending to only cover club managers which could never have been a level 7 to 9, anyway. That was our understanding at all times.

PN139

I thought it was the AWU's understanding also up until recently, but of course - yes, it is up for - we do understand it's unclear and that's why we were seeking to get that proposal changed, so there wasn't any underpayments risk for Clubs going forward.

PN140

THE COMMISSIONER: Well, it seems you're not going to get agreement on incorporating the horticultural employees - or horticultural managers, should I say.

PN141

MS SHAW: Yes, I understand that. I guess what the AWU's proposal was, was a 33 per cent loading for the level 4 rate and if that's still the rate that they were seeking the exemption on - - -

PN142

THE COMMISSIONER: Mr Crawford?

PN143

MR CRAWFORD: No. Not necessarily now in 2021, no. I mean, I know that some figures were provided before, but as Ms Shaw did indicate, the impact of penalty rates I don't think was necessarily included in those calculations because the maintenance and horticultural workers at the moment in levels 1 to 4, they're guaranteed at least 33 per cent above the level 4 rate; so basically above the highest of the levels amongst that span of 1 to 4 and they retain their right to receive penalty rates, plus the agreement has got to be in writing.

PN144

There is a limit on the hours that can be worked and there is an ability to terminate, so the provision is far superior to the general club manger exemption provision. The basic answer is we're open to discussions, but, no, we're certainly not adopting a clear position that if the exemption rates in clause 18.4(b) was opened up - we don't consider that the level 4 benchmark would be appropriate for

higher level managers. I mean, at the moment the clause is not drafted to cover them. If it was amended to cover them it would require amendment in terms of which rate the exemption rate was linked to, as well.

PN145

MS SHAW: As discussed in our recent discussions, we went and surveyed 20 clubs so far - as understand that's not a huge amount - on the use of superintendents and those managerial classifications on weekends, and their user penalties. So far what we have found is that the majority of the managerial classifications rotate weekend work every two weeks, three weeks or four weeks and out of the 20 clubs no superintendent or maintenance and horticulture level 1 or 2 employee was working more than four hours on a Sunday, so our understanding is those penalty weekend rates aren't used across the industry in a huge amount.

PN146

We will be continuing to provide data on that, but that's just our initial findings of the penalty provisions. The majority of employees didn't work any penalty rates on Saturday because they come in before people start playing golf or start playing bowls, and they work from about 6 am to 10 am on average on Saturday. They do work the weekends and occasionally would work up to four hours on a Sunday, and this would usually only be in summer when grass is growing. We will provide some further data around that for you to help you consider any exemption rates.

PN147

THE COMMISSIONER: Ms Shaw, instead of two different types of exemption provisions for the horticultural employees is there some scope to perhaps have one stream of exemption for those higher level managers? That's a little bit more consistent with the lower levels.

PN148

MS SHAW: Sorry, just for me to understand your suggestion, is it to put them under a similar one to the 1 to 4 employees in maintenance and horticulture?

PN149

THE COMMISSIONER: Yes, and I'm wondering whether that might assist rather than having two completely separate types of exemption arrangements.

PN150

MS SHAW: Yes, our proposal at this stage would be to put them under that 20 to 50 per cent exemption so we would keep the two separate - we wouldn't be adding any exemption rates. It would just be ensuring that they now use that 20 to 50 per cent and that's clear. I mean, we are open to consider the other exemption rates, as well, but I think our first position would be that it's a drafting error and that should be rectified.

PN151

THE COMMISSIONER: I understand your point about the suggestion there might be a drafting error and I think my recollections of what transpired back in 2008 through to 2010 when we had the making of those modern awards, there was

just so much information and sometimes it's not that easy to decipher whether it in fact is a drafting error or whether it was actually a clear decision of the Bench at the time. It might be a little bit of a challenge for you, but at the moment you currently have a stream for the horticultural employees level 1 to 4 that have a 33 per cent exemption.

PN152

As the union says, there are other exclusions in that methodology there, but is it worthwhile considering having discussions with Mr Crawford as to whether for the higher level managers that you're seeking an exemption, that you retain a similar provision around the 33 per cent; that you play around or perhaps consider some different drafting for those individuals?

PN153

MS SHAW: Yes. Our concern with that - and we have looked at it - is when those levels went into the award they had already received about a 200-dollar weekly increase from when they went in in 2010. The superintendent was a level 6 employee and they have moved up to a level 8 and a level 12 equivalent, so they have already received a huge pay rise when those provisions were in the modern award. To then give them a 33 per cent exemption above any other managerial classification, we just don't think it reflects the intention of the modern awards.

PN154

We are open to having a look at it, but, yes, that's what our initial thoughts have been; that there has already been a huge jump in pay for those employees and again paying them penalty rates on top of 33 per cent exemption would be a huge amount for the club.

PN155

THE COMMISSIONER: Mr Crawford, given the concerns that have been raised by Ms Shaw, do you have any suggestions as to how there might be a solution around the problem?

PN156

MR CRAWFORD: Only that if there is a solution to be found, from our perspective it doesn't involve simply opening up clause 18.4(a). We are happy to have negotiations about an alternative proposal and I wouldn't have thought it would be impossible to reach an agreement, but we won't - as I have I think clearly indicated - simply agree to opening up the existing provision.

PN157

I mean, those provisions have the effect that if you're paid for the first Roman numeral 20 per cent above the relevant rate, then the other award conditions fall away, they don't apply, then for the (ii) provision the figure is 50 per cent - but presumably there is maths sitting behind those calculations. It has been calculated that because you're that far above the award you're not going to be worse off, but when there are different conditions that apply to these maintenance and horticultural managers, I believe in every case superior conditions, it's a bit illogical that the same maths, the same percentages, would be appropriate for that stream.

PN158

I think that is going to be highly relevant if the current award needs to be interpreted going forward. I will just reiterate that we're open to discussions, but we won't entertain just opening up that existing provision.

PN159

THE COMMISSIONER: Okay.

PN160

MS SHAW: I guess just on that and noting that you are saying there is provisions in the award that are higher than managers, we would say there are a number of provisions - as Peter Cooper pointed out - that do relate directly to club managers. They get a paid meal and there are other provisions that are incorporated.

PN161

I don't think it's as easy as saying that maybe horticultural employees are way better off compared to club managers, because there are different provisions that do apply to them. I don't think it's clear that that 20 per cent wouldn't be enough to cover them.

PN162

THE COMMISSIONER: Ms Shaw, it sounds like you might need to go back to the drafting table and consider perhaps something that aligns more closely with what's currently in the agreement in relation to those horticultural employees so you don't have two completely different types of exemption provisions. Obviously the detail is important in this and it seems that Mr Crawford is prepared to continue those discussions with you, so there might be a solution around this but it does come down to the detail of the drafting, I think.

PN163

MS SHAW: Yes, yes, we're happy to continue those discussions with Mr Crawford.

PN164

THE COMMISSIONER: Well, seeing that we're not going to resolve those issues today, as well, can I suggest then if we are going to return say in four weeks' time for a further conference, perhaps over that four-week period you engage with Mr Crawford in relation to the drafting matter for those horticultural employees and you can report back. In the meantime we will all have a look at the maths behind it and see whether there might be a clearer drafting solution.

PN165

MS SHAW: Yes. Thank you, Commissioner.

PN166

THE COMMISSIONER: All right. Mr Crawford, you're happy to engage in those discussions obviously.

PN167

MR CRAWFORD: Yes, absolutely, Commissioner. I guess there is perhaps a bit of tension between the parties in terms of - I mean, from our perspective we are

worried about settling what changes should be made to the conditions going forward and from the Clubs perspective I think there has already been reference to an underpayment claim. I think, you know, using award variation proceedings to try and defeat existing underpayment claims inherently has its difficulties, I would say.

PN168

THE COMMISSIONER: Yes, I understand. Mr Cooper or Mr Redford, did you have an interest to participate in those discussions between Mr Crawford and Ms Shaw, as well?

PN169

MR COOPER: No, Commissioner. I think what you have suggested seems to make some common sense. Thank you.

PN170

MR REDFORD: No, I don't think so, Commissioner. I'm not sure that I can make any useful sort of contribution to those discussions that will occur, no.

PN171

THE COMMISSIONER: All right. It seems to me that that approach, if you're able to deal with it without impacting clause 18.4(b), then - because if you impact 18.4(b) then the potential is that you start to impact other classifications, including the golfing classification. If there is a different solution around that, that would be perhaps more beneficial, but if your view is, Ms Shaw, that you intend to pursue your application to align with the club manager level exemptions, then we will need to make sure that the PGA is involved, as well.

PN172

MS SHAW: Yes, we have kept them in the loop in our discussions and have had them at all our talks, so happy to keep them involved with our discussions with the AWU, as well. Finally, I guess another consideration for the AWU would be whether there would be any thoughts on including maintenance and horticultural managerial streams into the definition of club managers. It could be another way to potentially deal with it.

PN173

I'm not saying we're agreeable to it at this time, but that could be another way to change the definition of club managers to include that maintenance and horticultural streams.

PN174

MR CRAWFORD: We would need to see some significant calculations to assess that, because logically that would take the more beneficial maintenance and horticultural conditions away, including span of ordinary hours, penalty rates or whatever. To seriously assess that we would need to see some maths about the financial impact.

PN175

THE COMMISSIONER: Agree. It sounds like, Ms Shaw, you have a bit of work to do to try and convince Mr Crawford.

PN176

MS SHAW: Yes, we will be busy.

PN177

THE COMMISSIONER: Yes, all right. Four weeks will be enough then, will it, just to make sure?

PN178

MS SHAW: Yes, I believe so, Commissioner.

PN179

THE COMMISSIONER: Given that we are now talking about coming back together in four weeks' time, it might be wise to have a look at what our diaries are like in four weeks' time. 14 May? Does anyone have an issue with 14 May to come back for a further conference?

PN180

MS SHAW: We are available. Thank you, Commissioner.

PN181

MR CRAWFORD: No problems, Commissioner.

PN182

MR COOPER: Yes, that's good. Thank you.

PN183

THE COMMISSIONER: All right. So 9.30 on 14 May. Is there anything else anyone needs to raise before we conclude?

PN184

MR COOPER: No, thank you, Commissioner.

PN185

MR CRAWFORD: No, thank you, Commissioner.

PN186

MR REDFORD: No, Commissioner.

PN187

MS SHAW: No, thank you, Commissioner. Thank you for your time.

PN188

THE COMMISSIONER: All right. Thank you. Well, I look forward to some progress and I will talk to you all on 14 May.

**ADJOURNED UNTIL FRIDAY, 14 MAY 2021**

**[10.45 AM]**