

From: Stephen Crawford <stephen.crawford@nat.awu.net.au>
Sent: Tuesday, 30 March 2021 10:38 AM
To: Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>
Cc: AMOD <AMOD@fwc.gov.au>; Nicola Shaw <nshaw@clubsnsw.com.au>; Ben Redford <Ben.Redford@unitedworkers.org.au>; peter@cmaa.asn.au; Vicki Crowe <vcrowe@pga.org.au>; Sunil Kempfi <skempfi@actu.org.au>
Subject: Re: Award flexibility – Hospitality and retail sectors

Dear Associate,

I'm unable to attend the Conference listed for 10:30am tomorrow concerning the *Registered and Licensed Clubs Award 2020 ("Clubs Award")*: Matter AM2020/103. Apologies for this.

The AWU opposes the claim by Clubs NSW to extend the operation of the exemption rates in clause 18.4(a) of the Clubs Award to employees in the maintenance and horticultural management classifications. A brief submission from the AWU outlining the reasons for our opposition is attached.

Mr Redford has indicated the UJU supports the AWU's position and he will be attending the Conference tomorrow.

Regards,

STEPHEN CRAWFORD

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Fair Work Act 2009 FAIR WORK COMMISSION

- s. 157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective
AM2020/103 – Award flexibility – Hospitality and Retail Sectors

AWU SUBMISSION IN RELATION TO CLUBS NSW PROPOSAL – CLAUSE 18.4 OF THE REGISTERED AND LICENSED CLUBS AWARD 2020

BACKGROUND

1. This submission concerns a proposal from the Registered Clubs Association of New South Wales (“**Clubs NSW**”) to vary clause 18.4(a) of the *Registered and Licensed Clubs Award 2020* (“**Clubs Award**”) as part of the award flexibility proceedings initiated by the Fair Work Commission on 10 December 2020: Matter AM2020/103.
2. The Australian Workers’ Union (“**AWU**”) is opposed to the variation sought by Clubs NSW for the reasons that follow.

CURRENT AWARD

3. Clause 18.4(a)(i) of the Clubs Award currently excludes the operation of various conditions for a “club manager receiving a salary of 20% in excess of the minimum annual rates for the appropriate classification”. Clause 18.4(a)(ii) excludes the operation of a longer list of conditions for “club managers receiving a salary in excess of 50% above the minimum annual rate for the appropriate classification”.
4. The term “club manager” is defined in clause 2 of the Clubs Award to mean:

club manager means a person who is appointed to a position which is covered by a managerial classification in clause [A.12.2](#) of [Schedule A—Classification Definitions](#) and has duties and responsibilities as referred to in clause [A.12.1](#) of [Schedule A—Classification Definitions](#).
5. Employees falling with the definition of a Maintenance and horticultural manager level 1 or 2 in Schedule A.10.5 and A.10.6 of the Clubs Award do not fall within the definition of a “club manager” because their classifications do not appear in Schedule A.12.2. As a result, these employees are not currently covered by the exemption rates in clause 18.4(a) of the Clubs Award.

6. The variation proposed by Clubs NSW would substantively alter the operation of the Clubs Award because it would permit the exemption rates in clause 18.4(a) to be paid to Maintenance and horticultural managers in lieu of the listed award conditions when this cannot currently lawfully occur.
7. The AWU does not accept the variations proposed by Clubs NSW can be fairly described as simply clarifying the intended operation of the Clubs Award on the basis of paragraph [118] of the Decision in *Award Modernisation* [2009] AIRCFB 826 which reads:

[118] We have applied the exemption provisions within the exposure draft to all managerial positions, including the maintenance and horticultural managerial classifications, reflecting a two level exemption process. We have applied 20% at the first exemption level, reflecting the terms of the major federal award for club managers. ²⁷ We have also included an exemption provision for maintenance and horticultural managerial classifications in the terms of the New South Wales Bowling and Golf Clubs Employees (State) Award.²⁸

8. With respect, it is not clear from this paragraph what the Award Modernisation Full Bench intended to prescribe in terms of an exemption rate for the maintenance and horticultural management classifications. These classifications are referred to in the first two sentences of paragraph [118] above, which appear directed at what has become the 20% and 50% exemption provisions in clause 18.4(a) of the Clubs Award. However, the classifications are then referred to again in the last sentence which appears directed at the 33% exemption rate provision in clause 18.4(b).
9. For completeness, the *Bowling and Golf Clubs Employees (State) Award* did not cover the managerial classifications – see the exception for employees within the jurisdiction of the Club Managers and Secretaries (State) Conciliation Committee in clause 35 of that award.¹

MERIT ISSUES ARISING FROM THE PROPOSED VARIATION

10. The AWU does not consider it can reasonably be argued that clause 18.4(a) of the Clubs Award currently covers employees falling within the definition of a Maintenance and horticultural manager level 1 and level 2. The use of the defined term “club manager” in clause 18.4(a) prevents that operation.
11. Further, the AWU submits it is problematic to now simply extend the operation of clause 18.4(a) to cover these managers in 2021 given the range of superior conditions that employees in the maintenance and horticultural stream of the Clubs Award are entitled to in comparison with employees outside of that stream. For example:

¹ https://www.fwc.gov.au/documents/consolidated_awards/an/an120079/asframe.html

- (i) Clause 15.6 prescribes a more beneficial span of ordinary hours;
- (ii) Clause 17.6 prescribes superior rest break conditions; and
- (iii) Clause 24.2 prescribes superior penalty rate conditions.

12. Given these important superior conditions, it cannot be assumed that the 20% and 50% exemption rate conditions in clause 18.4(a) are fair and appropriate for maintenance and horticultural managers. The appropriate value for forfeiting the listed award conditions may be greater for the maintenance and horticultural employees given the superior conditions.

13. In addition, the variation proposed by Clubs NSW will generate an inequitable outcome in terms of exemption rate conditions for employees within the maintenance and horticultural stream.

14. Specifically, employees in maintenance and horticultural levels 1 to 4 will have a 33% exemption rate condition² which requires their agreement and does not exclude the operation of the penalty rates conditions in clause 24.

15. However, more qualified horticultural and maintenance managers could be compelled onto the 20% or 50% exemption rate conditions in clause 18.4(a) and would be excluded from the penalty rate conditions in clause 24.

16. The above outcome is unjust in circumstances where the superior conditions for employees in the maintenance and horticultural stream apply equally across all classifications in that stream.³

² This is calculated on the maintenance and horticulture level 3 tradesperson rate making the condition more advantageous for level 1 and 2 employees but less so for level 4 employees.

³ This is the effect of the definition of "maintenance and horticultural employee" in clause 2 and the wording used in, for example, clauses 15.6, 17.6 and 24.2.