

IN THE FAIR WORK COMMISSION

FWC MATTER Nos: AM2014/283

Registered and Licenced Clubs Award 2010

Clause 18.4: Casual Fitness Instructors

APPLICANT: Clubs Australia Industrial

OUTLINE OF SUBMISSIONS ON BEHALF OF CLUBS AUSTRALIA INDUSTRIAL

1. This submission is made pursuant to the directions of the Full Bench of the Fair Work Commission (**FWC**) on 20 December 2019. This submission is made in respect of clause 18.4(a) of the Registered and Licensed Clubs Award 2010 Exposure Draft (**the Exposure Draft**), published on 15 April 2019.
2. In accordance with that direction, Clubs Australia Industrial (**CAI**) provides the following responses to the Commission's questions.

CAI is asked to set out precisely which penalty payments the clause 18.4 'loaded' rate is said to encompass and detail the relevant arbitral history of clause 18.4

3. It is CAI's position that the loaded rate in clause 18.4 of the Exposure Draft is an all-inclusive rate and that no weekend, public or late/early shift penalty rates from clause 24 of the Exposure Draft apply.
4. Prior to the introduction of the federal Registered and Licensed Clubs Award 2010 (MA000058) [**the Award**] a number of Pre-reform Awards and Notional Agreement Preserving State Awards (**NAPSA**) applied to the Club Industry on a state by state basis.

5. Apart from the Club Employees (State) Award 2004 (**NSW NAPSA**) that applied in New South Wales, no other Pre-reform Award or NAPSA contained a casual fitness instructor classification.

6. The relevant classification in the NSW NAPSA was clause 8.9, which read as follows:

8.9 Fitness Instructor

8.9.1 Definition:

(a) *This Clause does not relate to fitness instructors who are full-time employees.*

(b) *"Fitness Instructor: is an employee engaged in instructing people in either aquarobics, aerobics, pump, step aerobics, Boxing circuits, circuits, walking, cardiac class, yoga, or similar discipline.*

8.9.2 Hours:

(a) *An employee engaged as a fitness instructor shall be engaged for a minimum shift of 1 hour.*

(b) *The spread of hours for fitness instructors shall be 15 from the commencement of their first shift to the cessation of the last shift within a day.*

8.9.3 Rate of Pay

The minimum all-up rate of pay shall be as set out in Table 1 Rates of Pay (iv), (v), &(vi). No penalty or weekend payments of any type will apply. The actual hourly rate shall be negotiable on a club by club basis.

7. The minimum all-up rate of pay in Table 1 at the time that the Award Modernisation process commenced in March 2008 was \$36.56 per hour.

8. As part of the Award Modernisation process (AM2008/40) Clause 8.9 of the NSW NAPSA was replicated in its entirety in Schedule A of the Parties' draft award- The Registered and Licensed Clubs Industry Award 2010, filed with the Australian Industrial Relations Commission (**AIRC**) on 6 March 2009.



9. The Parties' draft modern award was drafted with the agreement and input of CAI, the Liquor, Hospitality and Miscellaneous Workers Union (**LHMU**) and the Club Managers' Association of Australia (**CMAA**).

10. An updated Parties' draft award was filed with AIRC on 20 March 2009. The casual fitness instructor classification at Schedule A.6(d) read as follows:

A.6(d) *(Casual) fitness instructor means an employee engaged in instructing people in either aqua aerobics, aerobics, pump, step aerobics, boxing circuits, circuits, walking, cardiac class, yoga or similar disciplines.*

An employee engaged as a fitness instructor shall be engaged for a minimum shift of 1 hour.

The minimum all up rate shall be as set out in Clause 20.1; no penalty or weekend payments of any type apply.

11. The relevant rate in clause 20.1 of the updated Parties' draft award was \$37.13, which was the NSW NAPSA rate (clause 8.9.3) plus the \$0.57 wage increase that was handed down by the Australian Fair Pay Commission (**AFPC**) in July 2008.

12. The First Exposure Draft of the Registered and Licensed Clubs Award 2010 was issued by the AIRC on 22 May 2009, the relevant provisions of the First Exposure Draft were at clause 17.8 and Schedule A as follows:

17.8 Casual Fitness Instructors

- (a) *Minimum rate per hour is \$37.13.*
- (b) *Minimum engagement – one hour.*

A.7.4 *(Casual) fitness instructor means an employee engaged in instructing people in either aqua aerobics, aerobics, pump, step aerobics, boxing circuits, circuits, walking, cardiac class, yoga or similar disciplines. An employee*



engaged as a fitness instructor will be engaged for a minimum shift of one hour.

13. It appears that the sentence *'the minimum all up rate shall be as set out in Clause 17.8; no penalty or weekend payments of any type apply'* was omitted in the Exposure Draft, for reasons unknown or as a drafting error. None of the submissions filed by all the interested parties between the release of the updated Parties' draft award addressed the issue of casual fitness instructors at all.

14. In July 2010, the Award was amended on application to FWC by CAI with a note inserted into clause 17.8 as follows:

NOTE: The hourly rate specified in this clause is inclusive of the 25% casual loading in clause 10.5.

15. Despite the omission it is quite clear that the casual fitness instructor clauses of the Award were intended to essentially replicate the casual fitness instructor provisions from the NSW NAPSA and were intended to include all penalty/weekend rates as an all-inclusive/all-up rate. All of the parties to the Parties' draft award, including the LHMU (now the United Workers Union [UWU]), agreed to this in 2009.

16. The principles of Award interpretation, as outlined in the case of *Re City of Wanneroo v Michael Lindsay Holmes* (1989) FCA 369, specify that *"ambiguity in an Award may be resolved by a consideration, inter alia of the history and subject matter of the award"* and that one must *"endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award."*

17. On this basis, CAI proposes that the issue be resolved, consistent with the history of the Award and the general intentions of the relevant parties involved in its drafting. We therefore propose that an addition to the Note at clause 17.6 is made as follows:



NOTE: The hourly rate specified in this clause is inclusive of the 25% casual loading in clause 10.5 and the penalty rates in clause 24.

18. CAI also submit that this is consistent with the Modern Awards objective to provide *'a fair and minimum safety net of terms and conditions.'*

19. As outlined in the FWC Full Bench Decision on 20 December 2019 (4 yearly review of modern awards- Registered and Licensed Clubs Award 2010 [2019] FWCFB 8585), the casual fitness instructor rate is far in excess of all the other minimum classification rates in the Award and in the Fitness Industry Award 2010, including club managers.

20. To interpret the Award in a way that applies the penalty rates in clause 24 to the already inflated rate of the casual fitness instructor rate in the Award would not accord with the modern awards objective and would result in rates of pay in excess of \$100 per hour on Sundays and public holidays. This would be excessive and as the Full Bench stated is *'an absurd proposition and inherently unlikely.'*



Mikhail Ushakoff, Legal Counsel- Workplace Relations

Clubs Australia Industrial

31 January 2020

