From: Stephen Bull <Stephen.Bull@unitedworkers.org.au>
Sent: Tuesday, 18 February 2020 10:32 AM
To: AMOD <AMOD@fwc.gov.au>
Cc: Mikhail Ushakoff <MUshakoff@clubsnsw.com.au>; Chambers - Bissett C <Chambers.Bissett.c@fwc.gov.au>
Subject: AM2014/283 Registered and Licensed Clubs

Dear Amod

There were a few typos/ unclear sentences in the submission. I have made a correction and clarified some bits. Can this corrigendum be accepted. The substance has not changed. Thanks

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Corrigendum: 18 February 2010

IN THE FAIR WORK COMMISSION

Matter No: AM2014/283

Section 156 – Four Yearly Review of Modern Awards – Registered and Licensed Clubs Award 2010

SUBMISSION IN REPLY

UNITED WORKERS' UNION

1. This submission is made pursuant to the direction of the Full Bench of 20 December 2019 ('the Decision') requesting that the United Workers' Union file a submission in reply regarding the submission of Clubs Australia Industrial ('CAI') concerning whether penalty rates generally are '*loaded'* within the rate for casual fitness instructors under the *Registered and Licensed Clubs Award* 2010 ('the Award').

2. The Commission's view that *'we are not persuaded that the rate in clause 18.4 encompasses all penalty payments*'[1] should not be departed from and is consistent with the text of the Award, the preparatory acts before the making of the Award and what happened immediately after the Award was made.

3. It is not on a fair minded review of the text and the award history appropriate to categorise as a mistake the absence of a clear statement that the rate of casual fitness instructors in the Award includes all penalties. In effect, Clubs Australia Industrial (CAI) offers only that the Award's treatment of casual fitness instructors is not a carbon copy of a similar provision in a predecessor instrument, the *Clubs Employees (State) Award* 2004 ('NSW NAPSA'), for the proposition that the rate is erroneous. Namely that there was a translation error during award modernisation.[2]

4. A general riposte to this argument is that it is too late. The time to alert the Commission to translations errors in award modernisation is not now. In 2010, the CAI made a timely

[1] Decision of 20 December 2019 at [20].

[2] Submission of CAI, 31 January 2020, at [15]: '… *the casual fitness instructor clauses of the Award were intended to essentially replicate the casual fitness instructor provisions of the NSW NAPSA'*.

application to resolve errors which directly touched on this matter. The CAI did not identify the error it now says is apparent.[3] No claim has been made about the matter in this review and a new iteration of the Award is about to be made.

5. A more complete response is that a review of the award history clearly provides support for the text of the Award concerning casual fitness instructors being accurate. Namely, its ordinary and plain meaning is that penalties generally are not excluded.

6. On 20 March 2009, the updated parties' draft of the award contained words indicating that the rate for casual fitness instructors was inclusive of penalties: '*no penalty or weekend payments of any type apply.*' This provision replicated an identical provision in the NSW NAPSA. This document was as the name implied the parties draft and not the draft of the tribunal.

7. On 22 May 2009, the first exposure draft of the Award was published by the then Australian Industrial Relations Commission. This iteration of the proposed award is the Commission's first draft and contains clauses concerning casual fitness instructors which are identical to the text of the Award.

8. There is a period of 2 months between the parties draft and the first exposure draft where various submissions where made by various interested industrial parties. None appear to directly address the rate of pay of casual fitness instructors. After 22 May 2009, there were further submissions made by interested parties on the exposure draft. None of these submissions directly address the rate of pay for casual fitness instructors but there was significant debate concerning the coverage of the instrument and the application of its penalty rates clause. Absence of debate may, among other things, mean that the parties accepted the unremarked text.

9. The Award is a modern award. The Award's coverage is broadly that of all work on the premises of a club whereas the NSW NAPSA was an instrument with respondents and covered persons employed by the club. That the penalty rate clause of the Award should apply to all persons covered by the Award was a contentious issue and the settlement of the current coverage clause deliberate.[4] The broader coverage of the Award and the general application the penalty rate clause was to avoid '*differential rates of pay and conditions of employment*

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[3] *Determination- Registered and Licensed Clubs Award* 2010, 11 October 2010, Vice President Watson, Fair Work Australia.

[4] *Statement - Award Modernisation* [2009] AIRCFB 450 at [100]; and *Decision - Award Modernisation* [2009] AIRCFB 826 at [119].

being paid for the same work when that work has been performed by persons who are not employees of the licensee.'[5]

10. On 4 September 2009, the Award was made[6]. The Full Bench in its decision notes at the outset: '*There are a significant number of changes resulting from submissions and proposals made in relation to the exposure draft*.'[7] There was a dispute concerning prescribed wage rates for casual employees at sports grounds in Victoria.[8] This dispute was resolved this dispute on the basis that '*the general classification structure and wage rates, and related additional entitlements, in the modern award provide an appropriate safety net'*.[9]

11. On 11 October 2010, the CAI made a successful application under section 160 of the *Fair Work Act* 2009 ('the Act') to '*remove ambiguity or uncertainty or errors'* in the recently made award concerning 3 matters. This was in effect a timely omnibus application made by the CAI to correct award modernisation '*errors'*. The terms and conditions of casual fitness instructors were scrutinised. By consent 3 variations were made and according to VP Watson were '*in the nature of ambiguities and you* (the CAI) *say reflected the intention in any event*.'[10] As the Decision notes [10] one of these variations was to insert the current note underneath clause 17.6 indicating that the rate for casual fitness instructors '*is inclusive of the 25% casual loading in clause 10.5.*' The purpose of the variation was to remove an ambiguity about the rate paid to casual fitness instructors namely whether their minimum rate per hour was the base rate of pay and that '*the 25 per cent casual loading would be on top of that rate of pay.'*[11] The variation was made on the basis that the rate '*at least'* encompassed the casual loading.[12] The variation was made by consent. There was no mention or statement that the rate included penalties. The Award was made on the basis that its penalty rate clause generally applied to an '*employee other than a maintenance and horticultural employee'*.[13] There was explicit general debate and consideration of this when the Award was made. There is a clear objective intention[14] that other than the limited category of employees excluded, the penalty rate clause of the Award applies to all employees.

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5 Submission in reply of the Liquor, Hospitality and Miscellaneous Union, AM2008/40-Licensed and Registered Clubs, 19 June 2009, [4.1].
6 *Award Modernisation* [2009] AIRCFB 826.
7 As above [117].
8 As above [125].
9 As above [127].
10 Transcript, 11 October 2010, PN95.
11 As above at PN58.
12 As above at PN59.
13 Clause 29.
14 '*The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions*.' See: *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2004) 218 CLR 471 at 483 [34] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

12. The text of the Award is clear. The rate encompasses the base rate and the 25% loading and not all penalties. Casual fitness instructors are not intended to be excluded from the Award's penalty rate clause. Any ambiguity, we say there is none,[15] is clearly resolved by a review of the award history. The variation made very soon after the Award was made touched directly on possibility of an error concerning the components of the rate, the rate was scrutinised and the CAI clearly proceeded on the basis that the rate comprises the base rate and the casual loading only.

UNITED WORKERS' UNION

14 February 2020

[15] Hence the need now for the CAI to confect an *'error'*.