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**IN THE FAIR WORK COMMISSION**

Matter No: AM2014/227, AM2014/245  
Section 156 – Fair Work Act 2009 – 4 yearly review of modern awards – Fitness  
Industry Award – Sporting Organisations Award

**REPLY SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION (AWU)**

**OVERTIME – ORDINARY HOURS**

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## Background

1. This submission of the Australian Workers' Union (**AWU**) is made pursuant to the Directions in AM2014/227 and AM2014/245 issued on 14 December 2016 in regards to the *Fitness Industry Award 2010 (FIA)* and the *Sporting Organisations Award 2010 (SOA)* ('**the Awards**').
2. In accordance with Direction 4, and extension granted on 24 January 2017, we respond to the 20 January 2017 submissions of Tennis Australia and Gymnastics Australia.
3. References to the Exposure Drafts refer to those published by the Commission for the SOA and FIA on 18 December 2015.

## AWU claims – Both Awards

4. The Full Bench in the early stages of the review determined that it is to be assumed *prima facie* that the Awards achieved the modern awards objective at the time they were made.<sup>1</sup> For the avoidance of doubt, the AWU are not seeking to establish otherwise, nor seeking to establish that new evidence has arisen in the interim compelling changes to the Awards.
5. The AWU's submissions are directed at confirming the correct operation of the SOA and the FIA. The proposed changes to the Awards are intended ensure the terms are correctly observed in practice.

## Tennis Australia – Sporting Organisations Award

### Weekly Maximum for casual clerical and administrative employees

6. Tennis Australia oppose the AWU's proposal to amend clause 6.5(a) of the SOA Exposure Draft as follows:

*A casual employee is an employee who is engaged and paid as a casual employee and works less than 38 ordinary hours per week.*

7. The basis of the AWU's claim is to satisfy section 147 of the *Fair Work Act*, to ensure the ordinary hours for casual employees under the SOA can be determined.<sup>2</sup>
8. Tennis Australia assert that casual employees should not be precluded from working an excess of 38 hours should they wish to do so from time to time, provided that such additional hours are reasonable.

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<sup>1</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

<sup>2</sup> See AWU Submission 18 April 2016 at [4] and [5] and AWU Submission 27 January 2017 at [21] and [22].

9. The AWU understands this submission is not inconsistent with our own. A casual employee can work up to 38 ordinary hours per week, and can thereafter work further hours provided they are reasonable in accordance with section 62(1) of the *Fair Work Act 2009* ('**FW Act**'). Section 62(2) also states that an employee may refuse to work unreasonable additional hours. In determining whether the additional hours are reasonable or unreasonable, section 62(3) directs consideration to (our emphasis at underlined):

- (a) *any risk to employee health and safety from working the additional hours;*
- (b) *the employee's personal circumstances, including family responsibilities;*
- (c) *the needs of the workplace or enterprise in which the employee is employed;*
- (d) *whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;*
- (e) *any notice given by the employer of any request or requirement to work the additional hours;*
- (f) *any notice given by the employee of his or her intention to refuse to work the additional hours;*
- (g) *the usual patterns of work in the industry, or the part of an industry, in which the employee works;*
- (h) *the nature of the employee's role, and the employee's level of responsibility;*
- (i) *whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;*
- (j) *any other relevant matter.*

10. The AWU submit that the additional hours are only reasonable taking into account payment of overtime. We have previously made submissions in regards to the relatively low pay of employees under the SOA – especially clerical and administrative employees.<sup>3</sup> We therefore submit, that the SOA does not provide remuneration “reflecting an expectation of, working additional hours” per subsection (d) above.

11. We also note that our submission is consistent with the arrangement of ordinary hours for casual coaching staff, who are governed generally by clause 8.2 of the Exposure Draft, which states, “ordinary hours for coaching staff are provided for in the NES.”

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<sup>3</sup> See AWU Submission 27 January 2017 in AM2014/227 and AM2014/245 at [53] to [60].

### Span of hours for casual clerical and administrative employees

12. Further, Tennis Australia opposes the Commission's draft changes appearing in the Exposure Draft clause 8.1(a). Tennis Australia do not agree that casual clerical and administrative employees share the same ordinary span of hours as part-time and full-time employees and rely on the provisions set out in the current Award.
13. In their submission of 20 January 2017, Tennis Australia state in the alternative to their submissions, they seek clarification as to how the ordinary hours provisions and overtime provisions under the Exposure Draft operate.
14. Given the requirements of section 147, the AWU submit a change is necessary in order to determine the ordinary hours for casual employees. Tennis Australia have not advanced any particular proposal to satisfy the *FW Act*, nor advanced any submissions as to why casual clerical and administrative employees are not entitled to overtime where their part-time and full-time counter-parts are.
15. The submissions of Tennis Australia are limited to what the legal interaction is between the Exposure Draft clauses 8 and 13.<sup>4</sup> That is, if a casual employee's ordinary hours are limited to 38 per week and between 6:00am and 6:00pm in accordance with clause 8, then that employee is entitled to overtime outside those hours in accordance with clause 13. The AWU agree.

### **Tennis Australia – Fitness Industry Award**

#### Weekly maximum, 5-day maximum, daily maximum, span of hours for casual employees and part-time employees

16. Tennis Australia also opposes any construction of the FIA whereby casual employees are entitled to overtime. This includes opposition to:
  - 16.1. The AWU claim to clarify the maximum weekly ordinary hours for casual employees in the same terms as advanced for the SOA. We have proposed a variation to clause 7.4(a) of the Exposure Draft to appear as follows:

*A casual employee is an employee who is engaged and paid as a casual employee and works less than 38 ordinary hours per week.*
  - 16.2. The AWU claim to amend clause 8.3 to include a daily maximum of 10 hours for casuals as follows:

*The ordinary hours of work ~~for a full time or part time employee~~ must not exceed 10 hours on any one day*

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<sup>4</sup> See Tennis Australia Submission 10 January 2017 in AM2014/245.

16.3. The Commission's draft changes appearing in the Exposure Draft clause 8.1 which limits the ordinary hours of a casual employee and part-time employee under the FIA by including the 5 day per week maximum and span of hours.

17. Tennis Australia opposes the changes on the basis that the changes would be contrary to the modern awards objective drawing on sections 134(d) and (f) of the *FW Act*.<sup>5</sup> That is, the changes do not promote flexible modern work practices and will have a negative impact on the business of tennis clubs.<sup>6</sup>

18. The changes proposed by Tennis Australia<sup>7</sup> are to:

- amend clause 8.1 of the exposure draft to revert to clause 24.1 of the current award, to refer only to a 'full-time employee' (removing the 5 day maximum and span of ordinary hours for part-time and casual employees);
- amend clause 8.2 of the exposure draft – to refer only to a 'full-time employee' – removing the maximum 38 hours per week over 4 weeks for casual employees and part-time employees (not consistent with the current award draft in regards to part-time employees); and
- replace the current overtime clause (14.1(a) of the Exposure Draft) with a new clause that removes reference to the span of hours, averaged weekly maximum and daily maximum for all employees.

19. We briefly note that the argument that these changes will ensure an easy to understand modern award system in accordance with section 134(g) of the *FW Act* is neutral as both the AWU and the FWC proposed changes achieve the same clarity.

134(d) – the need to promote flexible modern work practices

20. Tennis Australia submit the following flexibilities are currently provided by tennis coaches:

- providing sessions within school terms;
- making up sessions at short notice due to cancellations relating to adverse weather; and
- enabling community access to tennis courts and facilities.

21. Tennis Australia further submit paying overtime to casuals:

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<sup>5</sup> Ibid, [17] to [21].

<sup>6</sup> Tennis Australia Submission 20 January 2017 in AM2014/227 and AM2014/245 at [5] and [10].

<sup>7</sup> Ibid, [12] and [13].

- could prevent tennis clubs and tennis coaching businesses from offering the flexibilities identified;
  - could cause detriment to the efficient operation of tennis facilities; and
  - could affect the ability to work rosters that fit in with employees lives and clients.
22. It is not clear how paying overtime to casuals for work performed outside ordinary hours reduces the ability to provide any of the identified flexibilities. In any case, the submission is merely that the payment of overtime 'could' have the alleged effects.
23. The ordinary hours for casuals under the FIA that would apply if the AWU's proposed changes, and the FWC draft changes are made, include a maximum of 38 hours per week (without the averaging cycle) over any 5 days of the week, within 10 hours per day, between 5:00am and 11:00pm Monday to Friday and 6:00am to 9:00pm on weekends.
24. The evidence of Mr Steven Marquis led by Tennis Australia is that it is unusual for a tennis club or tennis coaching business to have many or any permanent staff, and that "work is performed for short blocks of time over a number of days of the week".<sup>8</sup> Given the incredibly broad span of hours and 7 day flexibility, it appears highly unlikely on Mr Marquis evidence that a casual employee will ever work more than 10 hours per day, 38 hours per week, or outside the span of hours.
25. The only evidence led that would create payment for overtime for casuals is the circumstance where casuals are required to work six days per week.<sup>9</sup> That being said, there is no evidence as to how often this occurs, or as to how many overtime hours are performed on a sixth day. It would appear on the evidence as a whole that very few hours would attract overtime on that sixth day if overtime is worked.
26. For the reasons above, the AWU also rejects the argument that small operators do not have the skillset to manage complex rostering.<sup>10</sup> An employer simply needs to either pay a small amount of overtime on the sixth day over a week, or otherwise roster someone else on.

134(f) – Impact on business

27. Tennis Australia submit the fluctuations in demand for tennis coaching and the use of courts and facilities has led to a heavy reliance on casual employees because:

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<sup>8</sup> Statement of Steven Marquis dated 20 January 2017 at [20 and [21]

<sup>9</sup> Statement of Steven Marquis dated 20 January 2017 at [19].

<sup>10</sup> Ibid, at [26].

- adverse weather precludes employees from working;
- there is reduced demand during school holidays;
- there is variable community demand for access to courts and facilities;
- tournaments and competitions create peak periods (employees can work 6-7 days per week);
- accessing staff at short notice is difficult as staff must be properly trained and experienced; and
- casual employees are typically flexible with their hours as they are eager to support the development of tennis players.<sup>11</sup>

28. Further, Tennis Australia submit, that limiting the ability of clubs to deploy casual employees will:

- restrict the classes that can be run at tennis facilities;
- increase employment costs;
- create regulatory burden by creating complex rostering systems in order to limit overtime costs
- reduce community access to tennis clubs and facilities

29. We note that the evidence of Mr Marquis at paragraph [19] of his 20 January 2017 Statement is that depending where the club operates staff will often work six days per week, not six to seven days per week as submitted by Tennis Australia at paragraph 24 of their Submission.

30. The AWU regard any “increased costs” as a fallacy. Casual employees have always been entitled to overtime under the Award.

31. As set out above, it is unclear that overtime will arise for casuals and therefore decrease flexibility. If employers begin to observe overtime for casuals, there are simple available methods of rostering in order to avoid the payment of overtime.

32. If it is impossible to roster someone on, and overtime is to be paid on the sixth day, it is unlikely to be paid on many hours given the characteristic ‘short blocks’ of time worked and the special one hour minimum engagement provision under the FIA for ‘Instructors’.<sup>12</sup> We also note that casual employees are precluded from favourable penalty rates afforded to part-time and full-time employees under the FIA. To further reduce the entitlements of casual employees will unbalance the three employment types under the FIA.

33. The fact that there is not consistent work available for tennis coaches and therefore most employees are employed on a casual basis, suggests it is likely

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<sup>11</sup> Ibid, [22] to [26].

<sup>12</sup> See clause 7.4(c)(ii) of the Fitness Industry Award Exposure Draft.

that there are other employees that can be rostered to share the six or seven days over which tennis businesses typically operate.<sup>13</sup>

### **Gymnastics Australia – Fitness Industry Award**

#### Weekly maximum, 5-day maximum, daily maximum, span of hours for casual employees and part-time employees

34. Gymnastics Australia share the same legal representative as Tennis Australia and both parties advance the same reasoning in their opposition to the AWU proposed variations and the draft changes made by the Commission. Both parties seek the same variations. As such, where applicable, we reply in the same terms as set out above.
35. Both parties submit that the Commission has specifically intended that casuals are not entitled to overtime rates under the FIA which is to be inferred from the fact that the Commission, in making the Award, specifically determined that casuals were not subject to limitations under clause 24.<sup>14</sup> The AWU reject this reasoning. We have previously submitted there is no indication during Award Modernisation either in the parties' submissions, the two relevant pre-reform instruments or importantly the AIRC's cited Statement or Decision issued on 4 December 2009<sup>15</sup> – that any component of the ordinary hour provisions does not apply to casuals (except the averaging provision).<sup>16</sup>

#### 134(d) – the need to promote flexible modern work practices and 134(f) – Impact on business

36. Gymnastics Australia submit that the following flexible work practices are required to meet the needs of gymnasts and employees:
- Clubs operate at peak times before and after school hours;
  - It is convenient for many casuals who are often university students to work short shifts over 5-7 days around their primary occupation, studies or other commitments;
  - It is common to “swap shifts” which can result in more than 5 days being worked;
  - Gymnastics competitions may exceed 10 hours on one day; and
  - During gymnastics competitions, coaches may be required to work more than 38 hours per week.<sup>17</sup>

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<sup>13</sup> Statement of Steven Marquis dated 20 January 2017 at [19].

<sup>14</sup> Gymnastics Australia Submission 20 January 2017 in AM2014/227 at [39] and Tennis Australia Submission in AM2014/227 and AM2014/245 at [29].

<sup>15</sup> [2009] AIRCFB 945 at [71] to [76].

<sup>16</sup> See AWU Submission 27 January 2017 in AM2014/227 and AM2014/245 at [28] to [43].

<sup>17</sup> Gymnastics Australia Submission 20 January 2017 in AM2014/227 [27] to [30].



37. Similarly to Tennis Australia, Gymnastics Australia submit that the imposition of ordinary hours for casual employees 'could' prevent clubs from utilising these flexible practices, reduce efficiency, reduce roster flexibility and reduce capacity to coach gymnasts at appropriate times.
38. Again, it is not clear how the imposition will reduce flexibility. The span of hours under the FIA more than accommodates for work to be performed outside of school hours and the nature of 'short shifts' suggests casuals are unlikely to perform more than 10 hours a day or 38 hours per week. Moreover, the responses in the "Club FIA Quick Poll" to Question 6<sup>18</sup> submitted by Gymnastics Australia indicate that there are no hours performed outside the span of ordinary hours by gymnastics coaches.
39. Again the only exposure to applicable overtime appears to be where casuals work over 5 days in a week, or during gymnastics competitions where coaches can work more than 10 hours in a day, or more than 38 hours in that week. This is consistent with Question 7 of the Quick Poll relied on by Gymnastics Australia. Gymnastics Australia summarise responses to this question as providing that (our emphasis at underlined):
- 59.69% of clubs reported that a proportion of their casual employees worked more than 5 days per week, including "shift swaps" or "fill-in" shifts; and
  - 23.03% of clubs reported that a proportion of their casual employees worked more than 10 hours in a day.
40. However, this summary is very misleading. The Quick Poll at page 18 reveals that the instance of overtime hours performed by casuals is very low. We note that only half (129) of clubs surveyed answered this question and have concerns that the range increase of 25% hides a significant amount of data.
41. The 'proportion' of casual employees referred to above:
- that perform work over 5 days per week
    - for 40.31% of clubs is 0%
    - for 37.98% of clubs is between 1 and 25%
    - for 7.75% of clubs is between 26 and 50%
  - that normally perform work over 10 hours in a day
    - for 75.97% of clubs is 0%
    - for 15.50% of clubs is between 1 and 25%
    - for 4.65% of clubs is between 26 and 50%

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<sup>18</sup> Ibid, Annexure BI-1.

- that work more than an average of 38 hours per week over a 4 week period
    - for 69.77% of clubs is 0%
    - for 20.93% of clubs is between 1 and 25%
    - for 4.65% of clubs is between 26 and 50%
42. There is a significant drop in percentages of casuals currently performing overtime at the 26% mark in regards to a 5 day maximum, and at the 1% mark in regards to a 10 hour or 38 hour averaged maximum. This evidence should be considered carefully and also in the context that employers are not currently attempting to roster casual employees to avoid working excessive overtime.
43. Given that gymnastics competitions are held on set dates and gymnastics clubs are familiar with these events, the AWU does not regard such circumstances as overly difficult to accommodate with an appropriate roster. The evidence of Ms Irvine at paragraph [36] of her Statement<sup>19</sup> is that coaches will usually work at one or more competitions in a year. This is evidently very infrequent. If overtime is paid, there is no indication in the submissions or evidence led by Gymnastics Australia that a significant number of overtime hours are currently worked. If indeed casuals are to work overtime hours on occasion, payment of overtime penalties is entirely appropriate given the significant burden to the employee, who, on the evidence of Gymnastics Australia, is often holding down two jobs or otherwise undertaking studies.
44. With regard to shift swaps for gymnastics coaches, the AWU regard the availability of collective bargaining under the FW Act, as the appropriate avenue for ensuring this practice can be utilised for the mutual benefit of employees and employers, rather than to remove the entitlement to overtime to all casual employees working under the FIA. This is consistent with section 134(1)(b) of the Modern Awards Objective. Alternatively, employees could reach an agreement with the employer to for an individual flexibility arrangement utilising the award flexibility provision of the FIA<sup>20</sup>.

## **Conclusion**

45. The AWU submits that the changes sought by the Union set out in our 27 January 2017 Submission and the changes drafted by the Commission for the Exposure Drafts are necessary to ensure the correct operation of the SOA and the FIA.
46. The changes to the FIA sought by Tennis Australia and Gymnastics Australia are not necessary to achieve the modern awards objective pursuant to section 138 of the *FW Act*.

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<sup>19</sup> Statement of Brooke Irvine 20 January 2017.

<sup>20</sup> *Fitness Industry Award 2010*, clause 7.

47. The AWU regard the changes sought as substantive changes that go beyond correcting errors or avoiding uncertainty and as such, the parties must show that the changes are necessary, not merely desirable.<sup>21</sup>
48. The evidence led by Gymnastics Australia and Tennis Australia should be viewed in context. Tennis clubs and gymnastics clubs form part of a broader industry group that utilise the FIA.
49. Tennis Australia and Gymnastics Australia have not shown that the changes sought by the AWU and the changes drafted by the Commission will have a significant effect on businesses and the flexible practices employed in gymnastics clubs and tennis clubs. The AWU submit that these two factors do not outweigh other relevant considerations required to meet the modern awards objective. This includes consideration of subsections 134(1)(a), (b), (c) and (da).
50. The AWU have previously reviewed the current Awards and the pre-reform instruments that pre-dated them.<sup>22</sup> There is every indication that the ordinary hours provisions and the overtime provisions apply to casual employees currently and have applied in the past. Further, the AWU have addressed all considerations set out at section 134(1) of the *FW Act* in our submissions, and consider that on the balance, the changes to the FIA sought by Gymnastics Australia and Tennis Australia should not be made.
51. We rely on the entirety of our submissions currently before the Commission.

**END**



**NATIONAL LEGAL OFFICER  
Australian Workers' Union  
13 February 2017**

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<sup>21</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [39].

<sup>22</sup> AWU Submission 27 January 2017 in AM2014/227 and AM2014/245 at [28] to [48].