

20 January 2017

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Our ref: [monroj.molonem.7375653.00103](#)

Your ref: [AM2014/227](#)
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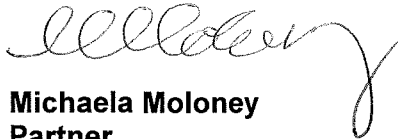
Dear Award Modernisation Team

**4 yearly review of modern awards – Award stage – sub-group 3A
Submissions in respect of claims still being pursued**

We write on behalf of Tennis Australia and refer to the Directions made by Deputy President Clancy in respect of the above matters on 14 December 2016, and the Comments of Tennis Australia filed on 10 January 2017.

In response to Direction 3 of each of the Directions, we enclose submissions in relation to those claims still being pursued by Tennis Australia in respect of the *Fitness Industry Award 2010* and the *Sporting Organisations Award 2010*.

Yours sincerely



Michaela Moloney
Partner

**IN THE FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS
AWARD STAGE – SUB-GROUP 3A**

**Matter No.: AM2014/227 – *Fitness Industry Award 2010*
AM2014/245 – *Sporting Organisations Award 2010***

**SUBMISSIONS IN SUPPORT OF CLAIMS PURSUED IN RESPECT OF
FITNESS INDUSTRY AWARD AND SPORTING ORGANISATIONS AWARD**

The following submissions are made on behalf of Tennis Australia in response to Direction 3 of the Directions of Deputy President Clancy published on 14 December 2016 in the above matter.

Sporting Organisations Award

1. With respect to the Commission's review of the *Sporting Organisations Award 2010 (SOA)*, Tennis Australia relies on its comments as set out in its 10 January 2017 correspondence.
2. Tennis Australia submits that casual employees should not be precluded from working in excess of 38 hours should they wish to do so from time to time, provided that such additional hours are reasonable, having regard to the factors set out at section 62 of the *Fair Work Act 2009 (FW Act)*.
3. Otherwise, Tennis Australia seeks the Commission's clarification with respect to the proper operation of clauses 8.1(a) and 13.2(a) of the revised exposure draft *Sporting Organisations Award 2015*.

Fitness Industry Award

4. With respect to the Commission's review of the *Fitness Industry Award 2010 (FIA)*, Tennis Australia, on behalf of its coach members:

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- (a) opposes the AWU's proposed introduction of "ordinary hours" for casual employees set out at Item 6 of the Further Revised Summary of Submissions published on 22 July 2016;
 - (b) opposes variations arising from the drafting of clauses 8 and 14 of the *Fitness Industry Award 2015 (Revised Exposure Draft)* to:
 - (i) the ordinary hours of casual employees; and
 - (ii) the entitlement of casual employees to overtime; and
 - (c) seeks that clause 14 of the Revised Exposure Draft be varied to clarify that casual employees are not entitled to overtime.
5. Tennis Australia submits that any variation to the FIA that gives rise to an entitlement to overtime for casual employees is contrary to the modern awards objective in section 134 of the FW Act.
6. In support of its submissions in this regard, Tennis Australia refers to and relies upon the witness statement of Steven Marquis, Manager Industry Development.

Current approach in Fitness Industry Award

7. Clause 24 of the FIA provides for limitations on ordinary hours for full-time and (in some circumstances) part-time employees, but not casual employees. It provides that ordinary hours cannot be performed:
- (a) in excess of an average of 38 hours per week over a period of four weeks;
 - (b) in excess of 5 days per week;
 - (c) outside of 5.00am to 11.00pm, Monday to Friday or 6.00am to 9.00pm, Saturday and Sunday; and
 - (d) in excess of 10 hours per day.
8. Clause 26 of the FIA then defines overtime by reference to clause 24 and the limitations on ordinary hours contained in that clause.
9. By reading them together, the effect of Clauses 24 and 26 of the FIA is that casual employees are not entitled to overtime rates when working outside of those limitations

on ordinary hours which apply to full-time and part-time employees as set out at clause 24 of the FIA.

Revised Exposure Draft

10. Clauses 8 and 14 of the Revised Exposure Draft have the effect that casual employees would become subject to limitations on ordinary hours. Casual employees would accordingly become entitled to overtime rates when working outside of those limitations. Tennis Australia submits that the variations arising from the drafting of the Revised Exposure Draft were an unintended consequence of the drafting of the Revised Exposure Draft and did not reflect any position being put by any interested party at the time it was prepared. Tennis Australia says that these variations and those proposed by the AWU:
- (a) are not necessary to achieve the modern awards objective;
 - (b) do not promote flexible modern work practices (section 134(d) of the FW Act); and
 - (c) will have a negative impact on the business of tennis clubs (section 134(f)).
11. Further, by clarifying that casual employees are not entitled to overtime, the Commission will resolve a tension in the FIA and ensure an easy to understand modern award system (section 134(g) of the FW Act).

Amendments to Revised Exposure Draft sought by Tennis Australia

12. Tennis Australia submits that clause 8 of the Revised Exposure Draft should revert to the original drafting of, or otherwise have the same effect as, clause 24 of the FIA. This can be achieved through the following amendments to the drafting of clause 8:
- "**8.1** *Ordinary hours for a full-time employee may be worked over any five days of the week, between the hours of:...*
 - 8.2** *Ordinary hours of work for a full time employee must not exceed an average of 38 hours per week over a period of four weeks".*
13. Further, Tennis Australia submits that clause 14.1(a) of the Revised Exposure Draft should be deleted and substituted with the following:

Overtime work is any work performed outside of ordinary hours, on any day or shift, as defined by clause 8—Ordinary hours of work and rostering.

Variations not necessary to achieve modern awards objective

14. We note that the exposure drafts published by the Commission were not intended to differ in their legal effect from the terms of the current modern awards. The Full Bench has determined that the modern award review "*will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made*".¹
15. Section 138 of the FW Act provides that a modern award may include terms "*only to the extent necessary to achieve the modern awards objective*".
16. Tennis Australia submits that the FIA currently meets the modern awards objective in not providing limitations on ordinary hours or overtime rates to casual employees. Accordingly, it submits that a variation to the modern awards objective to provide for limitations on when ordinary hours may be worked and overtime rates for casual employees is ***not necessary*** to achieve the modern awards objective.

Need to promote flexible modern work practices

17. Tennis Australia submits that by reversing the variations to the legal effect of clauses 8 and 14 of the Revised Exposure Draft the FIA will address the need to promote flexible modern work practices (section 134(d) of the FW Act).
18. Tennis Australia submits that it is uncontentious to say that tennis clubs operate in a very flexible manner in order to meet the needs of students and players. This includes the need for coaches to have flexibility to provide sessions within school terms and to schedule make up sessions at short notice where original sessions need to be cancelled due to adverse weather conditions such as rain and extreme heat.
19. In addition to providing coaching to players and students, tennis coaches facilitate access to tennis club facilities for the conduct of social programs and provide community access to tennis courts and facilities.

¹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 (**Issues Decision**) at [23].

20. The imposition of restrictions on the ordinary hours of casual employees could prevent tennis clubs and tennis coaching businesses from continuing to utilise these practices. This could cause detriment to the efficient operation of tennis facilities, would adversely affect the ability for employees to work flexible rosters that fit into their lives, and the capacity for tennis coaches to offer coaching sessions at convenient times for clients.
21. Tennis Australia submits that the need for flexible work practices are strong defensible reasons in support of retaining the current legal effect of the FIA in respect of ordinary hours for casual employees.

Impact on business

22. Tennis Australia submits that the variations proposed by the AWU and arising from the drafting of the Revised Exposure Draft will have a negative impact on the Australian tennis industry.
23. The evidence of Mr Marquis is that there are significant fluctuations in demand for tennis coaching and the use of tennis courts and facilities which lead to a heavy reliance on casual employees. These fluctuations arise from:
 - (a) the significant impact of adverse weather, in that work cannot be performed during periods of rain or extreme heat;
 - (b) significantly reduced demand for coaching during school holidays;
 - (c) variable community demand for access to tennis courts and facilities for social tennis play and other community activities;
 - (d) peak periods of work during competitions and tournaments.
24. Mr Marquis also gives evidence that it is common that casual employees will work six or seven days per week, particularly during peak periods. It is also difficult for tennis coaches to recruit additional staff to meet peaks in demand due to the need for proper instruction to be provided by suitably qualified and experienced staff. Casual employees working in the industry are typically flexible with respect to their hours of work, as they are eager to support the development of tennis players.

25. By placing limitations on the ability of clubs to deploy casual employees, the Revised Exposure Draft:
- (a) reduces productivity by restricting the classes that will be able to be run at tennis facilities;
 - (b) increases employment costs by giving rise to an entitlement to overtime which has not previously been in place;
 - (c) places a greater regulatory burden on small tennis businesses and facilities, which may have to implement more complex rostering systems in order to comply with the ordinary hours requirements and limit overtime costs; and
 - (d) reduces opportunities for the community to access tennis clubs and their facilities.
26. Tennis Australia submits that these detrimental effects on tennis businesses are an additional reason to retain the current legal effect of the FIA.

Easy to understand modern awards system

27. Tennis Australia submits that there is a tension between clauses 24 and 26 of the FIA. While clause 24 of the FIA specifically and intentionally does not limit the ordinary hours of casual employees, clause 26 does not expressly exclude casuals from overtime rates of pay.
28. Tennis Australia submits that clause 24 of the FIA, by specifically referring to full-time and (in respect of 10 hours per day) part-time employees, specifically excludes casual employees from the limitations on ordinary hours. This creates an inconsistency with the more general provision at clause 26 that "employees" (without limitation) are entitled to overtime when working outside of the limitations in clause 24.
29. Tennis Australia submits that it is the clear intention of the FIA that casual employees are not entitled to overtime rates when working outside of the limitations clause 24 of the FIA imposes on full-time and part-time employees. This is to be inferred from the fact that the Commission, in making the FIA award, specifically determined that casual employees were not subject to the limitations on ordinary hours in clause 24.

30. Accordingly, Tennis Australia submits that the tension between these clauses should be resolved so that ordinary hours (and the consequential right to overtime rates) do not apply to casual employees. In order to ensure an easy to understand modern awards system, this tension ought to be resolved by:
- (a) reverting to the legal effect of the FIA in that casual employees are not subject to the limitations on ordinary hours; and
 - (b) expressly linking overtime rates of pay to ordinary hours.

20 January 2017

K&L Gates
Lawyers for Tennis Australia

**IN THE FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS
AWARD STAGE – SUB-GROUP 3A**

Matter No.: AM2014/227 – Fitness Industry Award 2010

WITNESS STATEMENT OF STEVEN MARQUIS

I, Steven Marquis, Manager Industry Development for Tennis Australia Limited, of Olympic Boulevard, Melbourne Park, Melbourne in the State of Victoria STATE as follows:

1. I am authorised by Tennis Australia Limited (**Tennis Australia**), to make this witness statement on its behalf.
2. I make this statement from my own knowledge unless I indicate to the contrary.

Background

3. I have been employed by Tennis Australia since 2014. Prior to holding the position of Manager Industry Development, I held the position of Venue Sustainability Manager. This role was expanded to my current role of Manager Industry Development in May 2016.
4. In my role as Manager Industry Development, I provide leadership, strategy and direction over the delivery network for tennis in Australia. My role oversees areas including coach development, club development, venue development and sustainability. This includes supporting and guiding the operations of tennis clubs, centres and associations to increase participation and improve operations to ensure sustainable, vibrant and engaging environments for community participation in tennis.
5. I have a very high level of engagement with tennis clubs and coaches in my role, speaking with them on a daily basis, across all of Australia. The nature of my role means that I engage clubs and coaches across the country in understanding their operations and challenges that they face and establishing positive pathways forward.

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I meet regularly with tennis coaches face-to-face at their club, through workshops, forums and masterclasses, as well as providing phone and email support. A key part of my team's work is in the development of resources to assist tennis clubs to do things better.

6. I report to Paul Cammack, Director of Participation. I have a team underneath me, comprised of a Coach Development Manager, Club Development Manager, Venue Sustainability Coordinator, and Tennis World Manager.
7. Prior to working with Tennis Australia, I worked for the YMCA managing leisure centres. I worked for the YMCA in different facilities for around 12 years. I accordingly have extensive experience in the broader fitness industry.

The role of Tennis Australia as a peak body for tennis clubs in Australia

8. There are over 2,300 Tennis Australia affiliated venues across Australia. These venues are made up of local volunteer and professionally run tennis clubs, school and community access courts, and council owned tennis courts.
9. Tennis Australia has established four pillars to assist clubs, coaches and councils across the country. These pillars are:
 - (a) Community Benefit;
 - (b) Accessibility;
 - (c) Sustainability; and
 - (d) Accountability.
10. Tennis courts and facilities are viewed as key community sporting assets, and the four pillars provide a guiding balance between programming, membership access and community hire and participation in them. Tennis Australia uses the four pillars to assist in planning, delivery and decision making so that tennis can play a lead role across the country in sport participation and encouraging active lifestyles.

The "typical" tennis club

11. Each club and coach face unique challenges however there are commonalities across venues in particular in the areas of community accessibility and mobilising a

workforce of both volunteers and paid professionals, to meet the ever evolving demands of consumers in our community.

12. Tennis clubs are typically leased to volunteer community clubs with programs and services operated by a tennis coach who has been engaged by the tennis club under a licence agreement. The tennis coach operates the club programs and services as part of their own small business to deliver tennis programs to the community. It would be rare for a tennis club to employ its own staff other than maintenance staff.
13. Tennis coaches (or their companies) employ other coaches and instructors involved in delivering programs and operating the club. In smaller rural and regional areas, often the club would be operated by one person, who might bring in additional staff only during high peak periods. Coaches in some of the larger clubs might have up to 20 employees.
14. In addition to "traditional" tennis coaching, tennis coaches often perform duties relating to:
 - (a) the conduct of social programs, such as social tennis, provision of club rooms for other community groups, use of on court and off court facilities, cardio tennis and other group fitness. These programs require there to be someone to open the tennis club, supervise and close up again at the conclusion of the program;
 - (b) providing community access to tennis courts;
 - (c) facility and court maintenance where there are not dedicated maintenance people on staff;
 - (d) Administration and accounts; and
 - (e) Future program planning and lesson planning.
15. Tennis is one of the highest participation sports in the country with a leading junior development program in ANZ Hot Shots. This program is targeted to introduce children to the sport using modified equipment to match their age, development and ability. This means that the demand for lessons is generally within gazetted school terms across the country with programs run in both clubs and schools to increase the exposure to the sport and an active and healthy lifestyle.

16. Employees employed by tennis coaches are mostly engaged in program delivery, schools and community engagement. As there is not a consistent pattern in the work required to be performed in a tennis club, the vast majority of employees are employed on a casual basis.
17. Most clubs operate outdoors, and so work is also heavily affected by weather. If it rains and coaching and other programs are not able to be delivered, there is not generally other work that staff can perform during that time.
18. Conversely, peak times of work arise when running competitions on Saturday mornings, and during tournaments which typically take place on weekends.
19. The nature of the casual demand from community members means that court hire bookings can be made at random times. Instead of turning people away from playing and exercising, clubs and coaches strive to provide flexibility and availability of staff to open courts and introduce people to the club, facilities and sport. Most clubs accordingly operate across six or seven days per week and, depending on where the club operates, staff will often work six days per week.
20. Due to all of these significant fluctuations, it would be unusual for a tennis club or a tennis coaching business to have many, if any, permanent staff.
21. Having regard to my experience at the YMCA, I would say that the working environment in tennis clubs is similar to other fitness industries: work is performed for short blocks of time over a number of days of the week, requiring a high degree of flexibility to accommodate the demands of players and students. Most people who work in the industry are very flexible as they are happy to be part of a tennis player's development.
22. Tennis Australia recommends that all instructors and coaching staff employed by tennis coaches hold Tennis Australia qualifications. Most tennis coaches accordingly do not have a large pool of staff they can draw from during peak periods of work. The need for proper instruction to players and students means that it is not possible for a tennis coach to "pull someone off the street" when they face high demand.

The effect of casual employees gaining an entitlement to be paid overtime

23. It is my view that any limitation on how casual employees are able to perform their work will have severe adverse impacts on tennis coaches and tennis clubs.

24. Because of the strong community focus of tennis clubs, many clubs operate on a very marginal basis. The increase in labour costs that would come from a requirement to pay overtime to casual employees would make these marginal clubs unsustainable.
25. By placing limitations on the ability of clubs to deploy casual staff, it is my genuine belief that clubs will be restricted in the classes they are able to offer to players and students. There will also need to be a restriction on the times that tennis courts and other club facilities are able to be made available for community access.
26. While some of the larger operators may be able to manage their workforce to meet variable community demand for access to tennis clubs where ordinary hours for casual employees is limited, a lot of small operators do not have the skillset or resources to manage complex rostering, even if they did have sufficient qualified staff to call upon to meet these needs.

20 January 2017

Steven Marquis

