

**IN THE FAIR WORK COMMISSION
MATTER NO: AM2014/227.**

Fair Work Act 2009

Section 156 – 4 yearly review of modern awards

Fitness Industry Award 2010

**Reply Submissions on behalf of Australian Swim Schools
Association Ltd. Lodged by HMT Consulting.**

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INTRODUCTION:

1. These reply submissions are made on behalf of the Australian Swim Schools Association Ltd (ASSA), and are pursuant to the Directions in AM2014/227 issued on 7th February 2017 in regard to the *Fitness Industry Award 2010 (the current award)*.
2. These reply submissions are made in accordance with direction 2, and relate to matters raised by the AWU in accordance with direction 1, in regard to classification descriptors and rates of pay.
3. **General matters**
 - 3.1. On 10th January, ASSA lodged submissions relating to the Exposure Draft in accordance with the Directions of 14th December; on 20th January a submission was lodged on behalf of ASCTA; and further, on 23rd February a submission was lodged by the AWU;
 - 3.1.1 The submission of the AWU touches upon matters raised by ASCTA, but not covered in the documentation tendered by ASSA, regarding *'trainee swim teachers'*;
 - 3.1.2 The submissions of ASSA lodged in January were made on the assumption that as a product of an extensive consultative process during 2015-16, (including with the National Office of the AWU), a consensus position had been reached in regard to classification descriptors for Swim Teachers, and their assistants and Coaches and their assistants;
 - 3.1.3 The latest submissions of the AWU, emanating from the Victorian Branch, raise new matters in regard to both descriptors, rates of pay and internal relativities within the classification structure;
 - 3.1.3.1 The matters referred to above, appear not to have been discussed with all relevant parties who have been active participants in the Review Process to date;
 - 3.1.3.2 are not supported by probative evidence;
 - 3.1.3.3 have been raised well outside the reasonable timeframes set by the Commission for the conduct of the Review of this particular Award, to the extent that other parties who have adhered to the nominated timeframes are both inconvenienced and disadvantaged.
 - 3.2 ASSA does not seek to make direct comment on matters relating to classification descriptors raised in the submissions of ASCTA other than to strongly express opposition to any proposal that would:
 - see the incorporation of reference to redundant units of competency in the classification structure;
 - confuse the proper application of the classification levels as they relate to Swim School staff;
 - give rise to the need to incorporate additional classification levels or rates of pay in the award.

4. The AWU Claims

- 4.1 The AWU (1) wrongly attributes ASSA as the proponents of an attempt to introduce ‘*Trainee Swim Teacher*’ in schedule ‘B’ of the current award. This is strenuously denied (2);
- 4.2 The Union seeks the incorporation of a new level 2A to create an effective repricing of the function of a “qualified” Swim Teacher, which falls within the scope of Level 2 of the Classification Structure of Schedule B of the current award;
 - 4.2.1 The Union identifies that the new rate would be three and a half percent (3.5%) higher than the current level 2 rate;
 - 4.2.2 ASSA is not aware that this matter was raised within the context of the 2 yearly review of the current award; during which extensive submissions were entered in regard to the internal relativities arising from the introduction of new levels 3A & 4A (3);
 - 4.2.3 The AWU has failed to tender submissions, underpinned by evidence to demonstrate any evidence whatsoever of a material change in the circumstances since the current award was created (4);
 - 4.2.4 ASSA contends that the contrary is the case (5);
 - 4.2.5 An increase, not underpinned by either increased efficiency or higher levels of skill, would, in the absence of probative evidence, be at variance with the requirements of s156 (4) of the *Fair Work Act 2009*; and further, place at jeopardy water safety standards which would not be in the public interest (6);
- 4.3 The Union, (and ASCTA), seek to replicate references to redundant units of competences and references to defunct training products (7);
 - 4.3.1 Mr Gage details the history of the current descriptors (8) which clearly demonstrates the flawed approach in this part of the AWUs’ claim;
 - 4.3.2 The granting of the claim in the terms sought, would appear to be counter to s134(1) (g) of the Act, in as far as ensuring that the new award would be “*simple, easy to understand, stable and sustainable*”;
- 4.4 The AWU, in making a case for inserting a new (additional) level of pay, misrepresents the intent and application of level 1 in the current award (9), by seeking to limit use of the introductory (level 1) unskilled function to circumstances where the “trainee” has no “*direct contact with customers*” – in a service environment it is hard to comprehend that a level 1 would be totally removed from any contact with the public (in either a pool or non-pool role);

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1. AWU Submissions of 23rd February – paragraphs 4: 8: 13.
 2. Witness Statement of Ross Gage – dated 3.3.17 – paragraph 2.2
 3. AM 2012/28 and AM 2012/230
 4. 4 yearly review Modern Awards Preliminary Jurisdiction Issues – (2014 FWCB1788 at (24)
 5. Witness Statement of Ross Gage – dated 3.3.17 – paragraph 2.3.2
 6. Witness Statement of Ross Gage – dated 3.3.17 – paragraph 2.3.1
 7. AWU Submissions of 23rd February – form of variation proposed Schedule A – classification descriptors
 8. Witness Statement of Ross Gage – dated 3.3.17 – paragraphs 2.4: 2.4.1: 2.4.2
 9. AWU Submissions of 23rd February – paragraph 9: 12

- 4.4.1 Again, Mr Gage puts the current, (and proper), application of the award into context (10);
- 4.5 Mr O'Connor's evidence is the only source relied upon to underpin the changes to both the levels of classifications and consequently internal relativities in hourly rates;
- 4.5.1 ASSA is familiar with the nature of Mr O'Connor's identified employer (11) and the level and extent of training undertaken by that company and others of similar size and service provision mix (12);
- 4.5.2 Mr O'Connor only has direct knowledge of one employing group, (and thence only at one location, it would appear) (13), whilst Mr Gage is the authorised spokesperson for one of two representative organisations covering the entire Swim School & Coaching Sector (14);
- 4.5.3 Mr O'Connor's experiences and understanding of the requirements of the general Swim School Sector, are, it is respectfully submitted, tempered by his personal experiences and employment history. He is employed under an Enterprise Agreement which does not contain a classification structure which replicates that of the current award (15);
- 4.5.4 Mr O'Connor's understandings of the level and duration of training (16), are in stark contrast to that of Mr Gage's (17). The AWU's case must be significantly discounted due to the lack of scope and depth of the evidence upon which they rely.
- 4.6 The Union contends that in seeking to amend the descriptors in relation to Level 3, that ASSA is seeking to disadvantage both current incumbents and further candidates for reclassification to Level 3 (18);
- 4.6.1 ASSA submits that any amendment will only be prospective; and
- 4.6.2 Arguably and specifically in the case of small operators in rural and regional centres, the amended threshold for movement between levels 2 & 3 would in fact be easier (less onerous), than the status quo (19). Such an outcome would be entirely consistent with requirements of s134(1) paragraphs (f), (g) & (h) of the *'Fair Work Act 2009'*, and therefore in the public interest.
5. ASSA rely on the entirety of our submissions and evidence currently before the Commission, in this matter.
- END.**
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10. Witness Statement of Ross Gage – dated 3.3.17 – paragraphs 4.1: 4.1.3
11. Witness Statement of Ross Gage – dated 3.3.17 – paragraphs 1.5: 3.5
12. Witness Statement of Ross Gage – dated 3.3.17 – paragraph 3.3
13. Witness Statement of Mr. O'Connor – paragraphs 1: 3: 4: 5
14. Witness Statement of Ross Gage - dated 3.3.17 – paragraphs 1: 1.1: 1.2
15. Paul Sadler Enterprise Agreement 2013 (A.G. 2013/1019)
16. Witness Statement of Mr. O'Connor – paragraphs 9 – 17
17. Witness Statement of Ross Gage – dated 3.3.17 - Section 3 – paragraphs 3.1 – 3.6
18. AWU Submissions – paragraph 20
19. Witness Statement of Ross Gage – dated 3.3.17 – paragraph 4.2

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

4 yearly review of modern awards

**Fitness Industry Award 2010
(AM2014/227)**

SUPPLEMENTARY WITNESS STATEMENT OF ROSS GAGE

I, Ross Gage of [REDACTED], CEO of the Australian Swim Schools Association Ltd, state as follows:

1. I am the foundation C.E.O of Australian Swim Schools Association Ltd, which came into operation on 4th May 2016 and I am authorised by the Australian Swim Schools Association Ltd (ASSA) to make comments in this matter.
 - 1.1 Prior to being appointed to my current role, I was the C.E.O of Aussie Aquatics Pty Ltd t/a Swim Australia, between 2002 and 2016, and C.E.O of the Australian Swim Coaches and Teachers Association Ltd (ASCTA) between July 2009 and June 2016;
 - 1.2 Concurrently, between 1984 and 2014, I was the proprietor of Westside Swimming a Brisbane based Swim School. During which time I employed staff under the provisions of the Fitness Industry Award and its predecessor, the *'Health and Fitness Centres, Swim Schools and Indoor Sports Award – State (Qld) 2005' [AN 140 142]*.
 - 1.3 This is a supplementary statement, in addition to that sworn by me at Kenmore, Qld on 13th January 2017, and lodged in relation to this matter on behalf of ASSA by HMT Consulting.
 - 1.4 I have read a Witness Statement from Mr Michael O'Connor, an employee of Paul Sadler Swimland Essendon Pty Ltd, lodged by the Australian Workers' Union, in regard to this matter.
 - 1.5 The Paul Sadler Swimland Organisation is a foundation member of ASSA.
2. **AWU CLAIMS**
 - 2.1 I have read the submissions of the AWU dated 24th February 2017, lodged under the signature of Craig Winter of the Victorian Branch of the Union.
 - 2.2 At paragraphs 4, 8 & 13, reference is made to the ASSA seeking to vary the classification structure found in schedule B of the 2010 Award (schedule 'A' of the Exposure Draft) through the incorporation of *'Trainee Swim Teacher'* in the classification structure. ASSA has not made and does not pursue such a claim;
 - 2.2.1 I have authorised the making of submissions in regard to referencing the function of *"assisting with swimming and water safety teaching"*, as a point of clarification of the usage of Level 1 in the Sector currently by member organisations of ASSA.

2.3 At paragraphs 14 through to 19 of the Union's submissions, a case is made for increasing the number of classifications relating to Swim School staff by the addition of a new level 2A, effectively increasing the rate for a teacher with a single qualification by 3.5%, without any apparent increase in skills or efficiency;

2.3.1 In my previous Witness Statement, (at paragraphs 5.2, 7.4 & 7.5), I foreshadowed the negative impact on families being able to provide adequate water safety training to their children, if the economic outcomes arising from the application of the terms of a new award were not offset by gains in efficiency or improvements in the delivery of services, through greater skills. This new claim by the AWU would confirm my concerns.

2.3.2 There has been no substantial change to the requirements of Level 2, in regard to Swim Teachers, nor the expectations of member organisations of ASSA, (or other representative body of Swim Teachers & Coaches), that I am aware of, relating to employees operating at Level 2, since January 2010.

2.4 In detailing the form of variation proposed for the new Level 2A the AWU makes reference to a set of redundant qualifications, essentially replicating the contents of the current Award; further, reference is made at A.3.1 (ii) to "*Junior Squad and Assistant Coach qualification or equivalent*";

2.4.1 This qualification was '*owned*' by Swimming Australia, and was withdrawn from the marketplace many years ago, as they believed that some holders of the qualifications were passing themselves off as '*coaches*';

2.4.2 Currently, in the industry the qualifications that do exist, (and are recognised), are AUSTSWIM's "*Teacher of Towards Competitive Strokes*" and ASCTA's "*Swim Australia Teacher of Competitive Swimming*";

2.4.2.1 Neither of these '*products*' are direct substitutes for the qualification formerly marketed by Swimming Australia.

3. TRAINING REQUIREMENTS

3.1 In Mr O'Connor's statement at paragraph 10 he asserts that "*Training to become a fully qualified swim teacher takes between 3-9 months*"; if it is the intention to convey that between 12 and 40 weeks of full-time employment to become a person qualified as a current Level 2 classified Swim Teacher, I strongly refute that proposition;

3.2 In my earlier witness statement I outlined the nature and composition of the workforce engaged in the Swim School Sector of the Fitness Industry (section 3, generally); in the event that Mr O'Connor was relying upon a personal experience of only working a few hours here and there as a casual, I concede that at a stretch, attainment of a first qualification could have been achieved over an extended period of time, but unlikely, in my experience as an operator in the Industry, to be a maximum of 9 months, unless there were extenuating circumstances. More likely than not if an employer was struggling to meet the necessary requirements of the role, it is likely the case that they would have been redirected to other career options.

- 3.3 Whilst some swim schools undertake the desirable practice of providing their teachers with training additional to, or in conjunction with the attainment of an industry qualification, to my direct knowledge and belief, the practice is minimal in the industry. The overwhelming majority of swim schools accept the industry qualification as sufficient training.
- 3.3.1 In cases where this occurs, to learn that particular swim school's curriculum etc, and in the absence of an Enterprise Agreement, it is my view that those persons could be described as "Trainee Swim Teachers", and should be paid for all hours worked at the current level 1 rate if they do not hold an industry qualification and the level 2 rate, if they hold a qualification.
- 3.4 It is my understanding, gained through extensive and frequent networking with colleagues in the sector, that 95% of qualified swimming teachers in Australia would have the qualifications issued by two Registered Training Organisations (ASCTA & AUSTSWIM);
- 3.4.1 Both of these RTOs have a similar process to gain a qualification: (a) **Theory** & (b) **Practical Induction**.
- 3.4.2 In the case of ASCTA, they use an interactive CD-ROM, requiring from 2 -10 hours of 'study', (usually at home and on the student's own time), to facilitate the "theory". The 'practical induction' involves attendance at an 8 hour seminar/workshop, which is usually conducted over one whole day, (again on the student's own time);
- 3.4.3 AUSTSWIM combines both theory & practical components in an intensive course (usually over one weekend), requiring 16 -20 hours of training, again this is done on the student's own time, and in most cases prior to the individual having any employment in the sector (either in a pool-based, or support role);
- 3.4.4 The contents of both organisations training programs can be accessed at: <http://austswim.com.au/Training/AUSTSWIMCourses/SwimmingandWaterSafety.aspx>
<http://ascta.com/Portals/11/SAT%20CTBY%20Brochure%202016%20WEB.pdf>
- 3.4.5 The third element, (common to both organisations), is competency based. An Assessor needs to 'sign-off' of a student teacher as being competent to take classes. The Assessor tests the candidate usually during a 30 minute – 3 hour session, during which they 'shadow' the candidate in the pool with a group of pupils. Upon being assessed as 'competent' they are issued a formal accreditation by either ASCTA or AUSTSWIM.
- 3.4.6 In order to pass the assessment, a candidate would have to have undertaken in the order of 20 - 30 hours (but may be as low as a few hours) of practice in the pool – this is at the initiative of the candidate and with the consent of the pool owner/proprietor. This is not intended to convey that the candidate is employed by the swim school operator. This is purely a vocational training arrangement.
- 3.5 Much of the commentary provided by Mr O'Connor, which may have validity in the context of a large employing group such as Paul Sadler Swimland, does not reflect the operational arrangements in the sector, particularly in regard to small swim schools and those in regional and rural operators.

3.6 Generally, training for base grade industry qualifications, is undertaken by individuals prior to gaining employment as Swim Teachers.

4. GENERAL MATTERS

4.1 At paragraphs 5- 12, the AWU makes reference to ASSA's proposal to incorporate reference to "*and swimming and water safety teaching*" , as a new B.1.1 (c) (x);

4.1.1 There appears to be confusion between "an assistant swim teacher" & "a trainee swim teacher". An "assistant" is not directing clients or pupils in any aspect of the delivery of swim lessons or coaching – they are clearly not qualified to do so;

4.1.2 By definition, and the proper application of the proposed award ,(indeed the current award), persons either on the front desk or in the pool, engaged at Level 1 must be under close supervision and therefore have no authority to "direct"; to suggest that they must at all times be removed from the presence of 'clients', customers', 'pupils' makes the whole intention of Level 1 unworkable;

4.1.3 I strongly contend that this aspect of the Union's claims is without substance, not only for the Swim School Sector, but likely for all employers under the umbrella of the current *Fitness industry Award 2010*.

4.2 At paragraph 20 of the AWU submissions the assertion is made that changing the requirement from 250 hours experience & two recognised qualifications "*disadvantage those employees currently employed at level 3, but would also make it more difficult for employees to progress through the classification structure.*"

4.2.1 The amendment, if granted by the Commission, would be a prospective measure, ASSA does not intend to advise its members to reduce the status of any existing level 3 Operatives, as a consequence of a rewording;

4.2.2 The proposal, I anticipate, will make it easier, not harder, to qualify for classification to Level 3 from Level 2, particularly in regional and rural centres where the numbers of qualified Swim Teachers are fewer. It will see small operators recruit and maintain long-term personnel who will qualify faster, whereas, many operators do not have the range of services on offer that require multiple (or indeed, specialist qualifications), which is an actual impediment with the current wording of Level 3 in the 2010 Award.

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

Signature of person making the declaration

Signature	[REDACTED]
Declared at (place)	Kenmore, BRISBANE
on (day) of (month) (year)	3 March 2017

Before me,

Signature of person before whom the declaration is made	[REDACTED]		
Full name of person before whom declaration is made	KRYSTLE-MARIE MAY (C.Dec) 122059		
Qualification of person before whom declaration is made			
Address of person before whom declaration is made	[REDACTED]		
Suburb	Kenmore		
State or territory	Qld	Postcode	4069
Phone number	[REDACTED]		