Clubs Australia
INDUSTRIAL

IN THE FAIR WORK COMMISSION

FWC MATTER Nos: **AM 2020/26 (formerly AM2014/283)**

Registered and Licensed Clubs Award 2010

PARTY: **Clubs Australia Industrial**

FURTHER OUTLINE OF SUBMISSIONS

CLUBS AUSTRALIA INDUSTRIAL

1. This Outline of Submissions supplements and expands upon the Outlines of Submissions previously filed by CAI in relation to the 4-year Review of the Registered and Licensed Clubs Award 2010 (the **2010 Award** or the **Award**).

2. CAI has identified a number of matters upon which variation to the Award is sought as part of the Review (the **outstanding matters**).

3. This Outline in relation to the identified clauses of the Award relies upon the Exposure Draft dated 30 April 2020 of the Award and which following the completion of the Review will be as varied made as the Registered and Licensed Clubs Award 2020 (the **2020 Award**).

4. For the purposes of this Further Outline unless identified to the contrary any reference to the Award extends to the 2010 Award and the Exposure Draft of the 2020 Award.

Shiftworker definition and annual leave entitlements

5. Within the Award there is no definition of what constitutes "shift work" for the purposes of the Award.

6. There is in clause 2 Definitions of the Award a definition of a "shift worker".

7. This definition of a "shift worker" is utilised in clause 25.1 (b) Annual leave of the Award to identify those employees who are entitled under the National Employment Standards (**NES**) to 5 weeks annual leave.

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8. CAI's position is that the definition of "shift worker" within the Award and utilised within clause 25 Annual leave to define those employees who under the NES are shift workers and entitled to 5 weeks annual leave is deficient.

9. The definition in clause 2 Definition reads:

> **shiftworker** means a 7 day shiftworker who is regularly rostered to work on Sundays and public holidays, and includes a club manager.

10. There is no definition of a 7 day shiftworker within the Award.

11. Clause 25.1 (b) Annual leave of the Award reads:

> 25.1 (b) For the purpose of the additional week of leave provided by the NES, a **shiftworker** means a 7 day shiftworker who is regularly rostered to work on Sundays and public holidays, and includes a club manager.

12. The definition of shiftworker in clause 2 Definitions is simply reproduced at clause 25.1 (b) Annual leave to satisfy s 87 (1) (b) (i) of the *Fair Work Act 2009* (the **FW Act**).

13. Unless a modern award defines or describes an employee as a shiftworker for the purposes of the NES that applies to the employee no statutory entitlement to 5 weeks of paid annual leave would arise.

14. The definition that was included within the 2010 Award when made following the award modernisation process appears to derive from the annual leave provision at clause 21.1.2 of the *Licensed Clubs (Victoria) Award 1998* [AP787060CRV] (the **Victorian Clubs Award**) which provided:

> 21.1.2 Seven-day shift workers, that is full-time or regular part-time employees who are rostered to work regularly on Sunday and holidays, must be given an additional one week's leave including non-working days.

15. The addition of "a club manager" into the definition within the 2010 Award appears to derive from the annual leave provision in the NSW *Club Managers' (State) Award 2006* [AN120138] (the **NSW Managers NAPSA**) which provided:

> 25.1 Annual leave entitlement
>
> Five weeks paid annual leave shall be allowed to an employee after each completed year of service and an employee whose services are terminated or who leaves their employment during a twelve monthly

period shall be entitled to pro rata annual leave for the period of employment served.

16. There was no identification within the NSW Managers NAPSA that this entitlement required the working of shift work by an employee covered by the NAPSA. No definition of "shiftwork" or "shiftworker" was included within the NAPSA.

17. There was no definition within the Victorian Clubs Award of "shiftwork" or "shiftworker" other that in clause 21.1.2.

18. The system of work described in s 87 (3) of the FW Act in relation to an "award/agreement free employee" as defined in s 12 of the Act is 7 day continuous shift work in which shifts are worked over 24 hours per day/7 days per week/365 days per year.

19. The system of shiftwork worked by a "shiftworker" as defined in clause 2 Definitions of the Award and utilised in clause 21.1 (b) Annual leave of the Award is not so defined.

20. The definition of "shiftworker" in clause 2 Definition requires variation.

21. Consequent upon this variation the entitlement of annual leave for all employees and the source of that entitlement needs to be identified and clause 25.1 Annual leave varied.

22. CAI seeks that the definition in clause 2. Definitions be varied in order to provide greater particularity and clarity to the words "regularly rostered to work".

23. CAI seeks that the definition in clause 2 Definitions of the Award is varied to that set out in the Draft Determination filed with the Commission on 15 May 2020.

24. The variation sought provides further definition by identifying the number of Sundays and public holidays required to be worked by a 7-day shift worker derived from the case law surrounding the issue and conveniently collected in ***O'Neill v Roy Hill Holdings Pty Ltd*** **[2015] FWC 2461** (at [15] to [36], inclusive) and based upon the number of days that are worked by 7 day continuous shift workers which is the pattern of work consistent with that described in s 87 (3) of the FW Act.

25. CAI refers to the definition of shiftworker within the Draft Determination and notes the position of a club manager.

26. The inclusion of the club manager and the identification of the entitlement without the need to be regularly rostered on such days reflects the position adopted upon

the making of the 2010 Award. CAI has included this identification of the club manager as a shiftworker in the definition for consistency whilst recognising that the basis for the entitlement of 5 weeks paid leave derives from pre-reform industrial instruments such as the NSW Managers NAPSA.

27. CAI observes that the definition of “shiftworker” has been utilised within clause 25.1 (b) of the Award to establish entitlements derived from the definition and description of shiftworker for the purposes of the entitlement of 5 weeks annual leave from the NES.

28. CAI states that if the Full Bench considered it was appropriate to remove the club manager from the definition of shiftworker as proposed CAI would not oppose this position but would submit that a provision would have to be included in similar terms within the annual leave provisions of the Award by way of separate paragraph establishing and maintaining the condition as a term of the employment of club managers within the club industry.

29. CAI without seeking a variation in such terms would suggest to the Full Bench that if it was so minded to remove the club manager from the definition of “shiftworker” an appropriate provision would be that as set out below:

> 25.1 (c) A club manager who is classified at Level 6 to Level 13 of clause 18.3 Minimum rates – Adult employee rates of the Award will accrue annual leave based on an entitlement of 5 weeks of paid annual leave.

Club managers

30. A “club manager” is defined in clause 2 Definitions of the Award. The definition reads:

> **club manager** means a person appointed as such who is responsible for the direction and overall operation of a registered and licensed club, subject to the strategic direction determined by its Board of Directors or Committee of Management. A club manager has duties and responsibilities as referred to in clause A.11 of Schedule A—Classification Definitions.

31. Issues have arisen in the interpretation of the Award where the words “club manager” or “club managers” are utilised within the Award. The difficulty has been in determining whether the reference is to the employee who is appointed to and works in the position of the club’s manager (howsoever described) or is a reference to a broad class of managerial employees, and including the employee appointed to the position of the club’s manager.

32. CAI's position is that the definition of "club manager" (or club managers) in clause 2 Definitions ought to apply to any managerial employee who is employed by a club employer and is classified in accordance with clause A.11.2 of Schedule A and paid thereafter in accordance with clause 18.3 Adult employee rates of the Award in Levels 6 to 13, inclusive.

33. CAI seeks that the definition of "club manager" in clause 2 Definitions be varied to reflect the position of the **NSW Managers NAPSA** by, in essence adopting or giving effect to the broad definition in clause 5.5 of the NAPSA which read:

> 5.5 Employee shall mean any Manager (by whatever title), or Trainee Manager employed by the Club.

34. CAI refers to the Outline previously filed with the Commission and dated 4 March 2020 (at paragraphs 14 to 29, inclusive) and also to the Draft Determination filed seeking amendment of the definition of "club manager" in clause 2 Definitions of the Award.

35. The variation within the Draft Determination seeks to address the issue of the interpretation to be given to a "club manager" (or "club managers") within the Award by identifying first in paragraph (a) a person who is appointed to a position of a club manager (howsoever described) whilst paragraph (b) seeks to define the class of managerial employees to whom the Award covers and applies, including the person appointed to the position of the club's manager by reference to the classifications in Schedule A and which relate to the "managerial classifications at Levels 6 to 13" in clause 18.3 and as further utilised thereafter in clause 18.5 of the Award.

36. The substantive variation sought within the Draft Determination filed 12 May 2020 was:

> [1] By amending clause 2- **club manager** as follows:
>
> **club manager** means:
>
> a. a person appointed as such who is responsible for the direction and operation of a registered and licensed club, subject to the strategic direction determined by its Board of Directors, Committee of Management or more senior management;
>
> and/or

b. has duties and responsibilities as referred to in clause A.11.1 of Schedule A—Classification Definitions and will be classified according to Clause A.11.2 of Schedule A—Classification Definitions.

37. CAI would further amend the Draft Declaration filed as set out below:

club manager means a person who is employed and appointed as such and who:

a. is responsible for the direction and operation of a registered and licensed club, subject to the strategic direction determined by its Board of Directors, Committee of Management or more senior managers; and,

b. is classified as a club manager according to Clause A.11.2 of Schedule A—Classification Definitions based upon any or all of the duties and responsibilities as referred to in clause A.11.1 of Schedule A; and,

c. is paid at a managerial classification (Levels 6 to 13) in clause 18 Minimum rates of the Award.

Clause 18. Minimum rates

38. CAI refers to the Draft Determination seeking variation of clauses 18.5 (a) (i) and 18.5 (a) (ii) of clause 18 Minimum rates and filed in the Commission on 12 May 2020 seeking the insertion of the following matters:

- 17.2—Meal Breaks; and,
- 25.3—Annual Leave Loading.

as provisions excluded from having application to club managers classified and paid at Levels 6 to 13 inclusive of the Award and based upon the payment of the identified excess of the minimum annual rates in clause 18.3 Adult minimum rates.

39. CAI has agreed to hold discussions with the CMAA concerning clause 18 Minimum rates and the proposed variation of the clause to include the additional matters identified in paragraph 38 of the Outline and does not make further submissions at this time but reserves its right to do so before or at hearing should a consent position not be reached in discussions.

40. CAI at this time relies upon its submissions as previously filed to date in relation to this issue and pending discussions with the CMAA.

CAI in view of the discussions with the CMAA that are due to occur next week has not at this time filed any evidence in support of its position but reserves its right to do so in a timely fashion prior to hearing, including any further evidence and submissions in reply in accordance with the Directions.

41. CAI seeks in relation to clause 18 Minimum rates further variation to the clause as set out below:

By amending clause 18.3 Minimum rates by:

[1] moving the classification *"Club manager of a club with a gross annual revenue of less than $500,000"* in Level 6 of the table at clause 18.3 under that of *"Child care worker grade 3"* and drawing a line of separation between the two classifications and inserting an annual rate of "49,072" such that the columns reading left to right read:

Level 6	*Club manager of a club with a gross annual revenue of less than $500,000"*	941.10	24.77	49,072

By amending clause 18.5 (a) Managerial classifications -levels 7 - 13 inclusive in clause 18.3 by:

[2] Deleting *"levels 7 - 13"* from the heading and inserting: "Levels 6 – 13".

42. The purpose of the variations sought and identified by CAI in paragraph 41 above is to include the Level 6 club manager classification within the other managerial classifications for which an annual rate has been established within the Award and permitting the application of clause 18.5 (a) of the Award to all managerial classifications to which Schedule A - Classification Definitions (clause A.11.2) applies at the election of the employing club.

43. CAI considers that the variations proposed in paragraph 41 above are non-contentious in that save for extending a right to elect to pay an excess to the Level 6 club manager classification the provisions of the Award remain otherwise unchanged.

Exclusionary provisions of the Award at clause 18.5 (a)

44. The exclusionary provisions of clause 18.5 (a) operate within and upon the Award to in effect create a number of "awards within the Award" in relation to employees classified and paid as club managers and who are employed in managerial

classifications within Levels 6 to 13 in clause 18.3 Adult employee rates of the Award.

45. This is particularly so where the operation of the exclusionary provisions following the making of the excess payment does not lead to a full exclusion of an award provision. This also arises where in such a case of partial exclusion reference is made within a retained provision to another fully excluded provision.

46. CAI refers to clause 18.5 (a) (i) of the Award and which provides for the exclusion of the application of identified clauses of the Award where such exclusion is partial as in the case of:

- 15 Ordinary hours of work (other than clause 15.8 - Special provisions for accrued rostered days off - club managers); and,
- 24 Penalty rates (other than penalty rate provisions relating to public holidays (see clause 24—Penalty rates));

when a decision is made by the employing club to pay to a club manager the 20% excess under clause 18.5 (a) (ii) of the Award.

47. CAI has filed a Draft Determination seeking to clarify the entitlement of employees under the Award to time off instead of payment for overtime arising from the application of clause 22.8.

48. CAI refers to the Draft Determination filed with the Commission on 12 May 2020.

49. CAI has sought to have included a Note within the provision which reads:

> NOTE: Clause 22.8 does not apply to work performed on a Rostered Day Off. Refer to clauses 15.6 and 15.7 for arrangements for accrued time off in lieu of overtime payments when an employee works on a Rostered Day Off.

The reference made to “clauses 15.6 and 15.7” should have read “clauses 15.7 and 15.8”.

50. Clause 15.7 of the Award applies to employees who are not employed as “club managers” (that is, employees employed in non-managerial classifications at Levels 1 to 6 of clause 18.3 of the Award).

51. Clause 15.8 of the Award applies to employees who are employed as “club managers” (that is, employees employed in managerial classifications at Levels 6 to

13 of clause 18.3 of the Award) and who may or may not be paid an excess above the minimum annual rate under the provisions of clause 18 Minimum rates .

52. Where a managerial employee is paid an excess under clause 18.5 (a) (ii) of the Award all of clause 15 Ordinary hours of work and all of clause 22 Overtime does not apply to the employee (club manager).

53. Where a managerial employee is paid an excess under clause 18.5 (a) (i) of the Award all of clause 15 Ordinary hours of work apart from clause 15.8 and all of clause 22 Overtime does not apply to the employee (club manager).

54. Where a managerial employee is not paid any excess under clause 18.5 (a) (i) or 18.5 (a) (ii) the provisions of clause 15 Ordinary hours of work and clause 22 Overtime apply in full to the employee (club manager).

55. The situation described in the above three paragraphs are an illustration of the “awards within the Award” situation that can arise under the operation of the exclusionary provisions and the associated difficulties in reconciling the situation.

Clause 15 Ordinary hours of work and clause 22 Overtime

56. As a general observation these two clauses should be mutually exclusive in that work performed by an employee on or within ordinary hours is not work performed as additional hours upon which overtime is paid. Reference is made to clauses 22.1 and 22.2 Overtime.

57. Addressing first clause 15.7 of the Award.

58. Clause 15.7 (a) refers to “Accrued rostered days off”.

59. “Accrued rostered days off” are different to “normal rostered days off” as identified within clause 15.2.

60. Clause 15.2 reads:

> 15.2 Each full-time employee is entitled to 2 full days off per week as normal rostered days off.

61. This provision drawn from the Victorian Clubs Award which read:

> 15.2 Each full-time employee must be entitled to two full days off per week (normal rostered days off).

62. Clause 15 of the Award substantially reproduces the provisions of the Victorian Clubs Award in that clause 15.7 of the Award was drawn from clause 15.6 of the Victorian Award.

63. The provisions contained within clauses 15.3 and 15.5 are important to the operation of clause 15.7 of the Award in that an "accrued rostered day off" arises from the operation of the particular rostering arrangement in clause 15.3 (a).

64. Clause 15.5 (b) provides:

> 15.5 (b) where an employee works more than 20 days in a 4 week period, the 21st and any subsequent days worked in the 4 week period must be paid at the rates prescribed in clause 22.3.

and it is observed that "clause 22.3" refers to the overtime rates of the Award.

The reference in the Victorian Award from which the award provision appears to have been drawn was to "the rates prescribed in clause 16 – Overtime" and might explain how the word "Overtime" came to be included in clause 15.7 of the 2010 Award when made such that the introductory words read: "Overtime accrued days off" in what was then clause 26.7 (a) of the Award.

65. If the arrangements in clause 15.3 are reviewed and the 4-week period is equated to 28 calendar days then in order to comply with the obligation imposed in clause 15.2 (8 normal rostered days off) the number of days on which ordinary hours can be worked become 20 days.

66. The arrangement in clause 15.3 (d) does not give rise to an accrued rostered day off (or **accrued RDO**) and the days not worked are each a normal rostered day off (**normal RDO**).

67. Of the other arrangements described the arrangement in clause 15.3 (a) gives rise to 9 days off consisting of 1 accrued RDO and 8 normal days off.

68. The arrangement worked in clause 15.3 (b) would not give rise to an accrued RDO.

69. The arrangement in clause 15.3 (c) may appear to give rise to up to 2 accrued RDO's in a 4-week period but the provision does not specify that work under the arrangement is performed on a 4-week basis. Alternatively, each of the days rostered off could be a normal RDO or if clause 15.7 (b) has an application then there

would be one accrued RDO and all other days off when worked under this arrangement would be a normal RDO.

70. The arrangement in clause 15.3 (e) appears only to give rise to normal RDOs.

71. All of the above arrangements that may be worked have to then be further reconciled with the provisions in clauses 15.5 and 15.7. It is possible that clause 15.5 (b) may only relate to the arrangement in clause 15.3 (e).

72. When the 2010 Award was first made clause 28.5 provided:

> 28.5 Notwithstanding the rates prescribed in clause 28.2 at the instigation of the employee there may be an agreement in writing between the employee and the employer to take time off with pay equivalent to the amount for which payment would otherwise have been made. Such accumulated time must be taken within four weeks from the time of accrual.

73. The present provision at clause 22.8 of the Exposure Draft of the Award became operative from 14 December 2016 following the Decision in the ***Award Flexibility Matter*** **[2016] FWCFB 7737** and applied to the Award by variation [PR585804].

74. There is no issue arising that if a rostered day off whether it be considered an accrued RDO or a normal RDO is worked that the work performed on the RDO gives rise to an obligation to pay overtime under the Award.

75. A decision by an employee to “bank” an accrued RDO or take time off in lieu for working a normal RDO gives rise to differing outcomes under the Award.

76. It is important that this distinction is made clear and maintained under the Award.

77. CAI having regard to the Note which was sought to be included in clause 22.8 of the Award would make an amendment to the Note sought to be inserted which would read (identifying the amendments made):

> NOTE: Clause 22.8 does not apply to work performed by an employee on an accrued Rostered Day Off as overtime. ~~Refer to~~ Clauses 15.7 and 15.8 are to apply ~~for~~ to any ~~arrangements~~ agreement made for ~~accrued~~ time off in lieu of overtime payments when an employee works on an accrued Rostered Day Off as defined within the Award. The provisions of this clause apply to overtime when worked on a normal rostered day off.

In the alternative, CAI proposes that the Award provision could be varied by adding the underlined words to that of the existing clause by way of variation as set out below:

> 22.8 Time off instead of payment for overtime
>
> (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee. This provision does not apply where an employee works overtime on an accrued rostered day off and where the provisions in clause 15.7 or clause 15.8 apply to the employee.

78. CAI observes that within the Award a definition of **rostered day off** is included in clause 2. Definitions which reads:

> **rostered day off** means any continuous 24-hour period between the completion of the last ordinary shift and the commencement of the next ordinary shift on which an employee is rostered for duty.

79. CAI seeks in addition to the existing definition in clause 2 Definitions a definition of “normal rostered day off” and a definition of “accrued rostered day off” be included within the Award.

80. CAI seeks that the Award is varied to include definitions of “accrued rostered day off” as follows:

> **accrued rostered day off** means the day nominated by the Board or Committee of a club (or their nominee) as the accrued rostered day off in any 4-week period or roster cycle for the working of an average of 38 hours per week under the arrangement in clause 15.3 (a) of the Award by a full-time employee and to which the provisions in clause 15.7 of the Award are applied or in the case of a club manager to whom the provisions in clause 15.8 of the Award are applied the day nominated within the 4 week period as the accrued rostered day off.

81. CAI also seeks that the Award is varied to include a definition of “normal rostered day off” as follows:

> **normal rostered day off** means any day other than an accrued roster day off upon which an employee is not rostered to work provided that an employee's rostered day off shall be a period of twenty-four hours commencing from the

completion of a period worked on ordinary hours or when last rostered to perform their work.

In the alternative, CAI proposes that the existing definition of "rostered day off" be varied as set out below:

> **rostered day off** (and including **normal rostered day off)** means any continuous 24-hour period between the completion of the last ordinary shift (or rostered period of work) and the commencement of the next ordinary shift (or rostered period of work) on which an employee is rostered for duty.

82. CAI considers that the further definitions as sought are necessary in order to provide a clear identification of the rights and entitlements of both employers and employees under the Award.

83. Dependent upon whether the Full Bench accedes to the submission to include the definitions sought in paragraphs 80 and 81 above, CAI considers that further minor variation might need to occur in respect of the heading in clause 15.7 of the Award by the addition of the words: *employees other than club managers* and the heading in clause 15.8 to read: *Deferral of accrued rostered days off*.

Clause 17 Meal Breaks

84. CAI has indicated that it seeks two variations to Clause 17 Meal breaks.

85. CAI sets out the Draft Determination it seeks in relation to the clause (formal parts omitted) below:

By amending clause 17.2 by:

[1] Inserting after the words *"If an employee"* the following:

(other than a club manager)

By amending clause 17.4 by:

[2] Deleting the number *"10"* and inserting the number "15".

86. The variation in [1] above seeks to remove the requirement for all club managers with the effect of permitting club managers to determine when the meal break is to be taken by them in the performance of their work and in meeting the requirement to take a meal break in clause 17.1. The meal break is given by the club on this basis and it is the responsibility of the club manager to take the meal break within the allotted time.

CAI observes that if this variation was made to the Award it would obviate the need for the inclusion of clause 17.2 Meal breaks as an identified and excluded provision in both clause 18.5 (a) (i) and clause 18.5 (a) (ii) of the Award. This would leave the position concerning the inclusion of clause 25. Annual leave (annual leave loading) as the only issue to be determined and subject to the outcome of the further discussions to be held with the CMAA should a consent position not be reached as to the variation as sought in clause 18. Minimum rates.

87. The variation in [2] is sought to be made in recognition of the definition of a “small business employer” within section 23 of the FW Act in order to provide consistency and certainty with the statutory provision.

Casual Fitness instructor

88. CAI refers to and relies upon the Outline of Submissions filed 31 January 2020 in relation to the history of this classification.

89. When this history is considered it appears on one view that as opposed to the heading in clause 18.4 Casual fitness instructor rates the position or classification was never identified as a casual employee’s position in the NAPSA created from the Club Employees (State) Award 2004 (the **NSW NAPSA**).

90. A “casual employee” under the NSW NAPSA in clause 9 and clause 10 was entitled to a minimum continuous engagement of “3 continuous hours per day”.

91. CAI refers to the Outline previously filed at paragraph 6 and observes that the clause within the NSW NAPSA has been reproduced in full (8.9 Fitness Instructor).

92. There is no reference within the clause to casual employment.

93. It is open to conclude that when the classification was first included within the NSW NAPSA the basis of employment was not casual employment but hourly hire.

94. There is no reference to any payment of a casual loading to employees engaged as a Fitness Instructor.

95. Curiously, there is reference to the clause not applying the fitness instructors who are full-time employees. However, the NSW NAPSA makes no provision for a classification rate upon which the terms and conditions of the NSW NAPSA that apply to full-time employment attach. This leads to an inference that fitness

instructors employed on a full-time basis were not covered by the NSW NAPSA and might have otherwise been viewed as “award free”.

96. The inclusion of the classification and rate appears to have been introduced to permit short term engagement of this class of worker within the club industry in NSW.

97. It appears that the clear intention of the inclusion of the classification whether the engagement be described as casual or hourly hire was to provide an all-inclusive rate.

98. CAI in the Outline dated 31 January 2020 at paragraph 14 referred to the Note that had been inserted into the Award in July 2010. This Note has been omitted from clause 18.4 of the Exposure Draft.

99. CAI at paragraph 17 proposed an addition to the Note to exclude not only the casual loading but all penalty rates in clause 24 Penalty rates of the Award.

100. CAI seeks this variation if the Full Bench considers that the fitness instructor classification is employment on a casual basis for the purposes of the Award. However, a full consideration of the history of the classification does point to its initial creation as one of hourly hire.

101. CAI as an alternative to the variation sought by the Note puts forward the following Draft Determination (omitting formal parts) below:

Clause 18.4 - Casual fitness instructor rates

By amending clause 18.4 - Casual fitness instructor rates by:

[1] Deleting *clause 18.4 - Casual fitness instructor rates* and by inserting the following heading and clause:

18.4 Fitness Instructor – hourly hire

18.4.1 Fitness instructor is an employee engaged other than as a casual Leisure attendant on an hourly basis and who is required to instruct one or more persons in either aquarobics, aerobics, pump, step aerobics, boxing circuits, circuits, walking, cardiac class, yoga or any similar disciplines.

18.4.2 Hours:

(a) An employee engaged as a fitness instructor will be engaged for a minimum period of 1 hour.

(b) The spread of hours for a fitness instructor on any day will be 15 hours from the commencement of their first shift to the cessation of the last shift within a day.

18.4.3 Rate: The hourly rate of a Fitness instructor is $49.15 per hour. This hourly rate is an all-up rate (or all-inclusive rate) and comprehends all payments otherwise required to be made to an employee under any provision of this Award.

A Fitness instructor is a casual employee for the purposes of the NES.

CAI observes that the definition included in 18.4.1 above in the Award is found in Schedule A - Classification Definitions in clause A.7.4 and if the above variation was made then clause A.7.4 should be deleted from the Schedule. CAI favours the inclusion of the definition of the classification in the proposed Award clause as it would mean that all terms and conditions of the employment that apply to the classification under the Award are identified in clause 18.4 Fitness instructor – hourly hire.

102. CAI regardless of the mode of variation to be accepted by the Full Bench in relation to the classification of Fitness instructor and whether the manner of employment or engagement be viewed as casual under the Award or hourly hire seeks a further consequential variation to clause 11.6 Casual employees of the Award.

103. CAI seeks variation of clause 11.6 Casual employees in the terms of the Draft Determination (omitting formal parts) below:

Clause 11.6 Casual employees

By amending clause 11.6 Casual employees by:

[1] Inserting after the words in brackets *"assistant bingo caller"* the following words:

"or as a Leisure attendant Grade 2 or a Leisure attendant Grade 3".

[2] Inserting at the end of the clause the following words:

A casual employee engaged as a Leisure attendant Grade 2 or a Leisure attendant Grade 3 is entitled to a minimum payment for 1 hours' work when performing work as an instructor or trainer other than on a public holiday where the minimum engagement is 4 hours to be paid at the penalty rate in clause 24.1 of the Award.

104. The variation as sought is consistent with the provisions applying within the Fitness Industry Award 2010 at clause 13.5 Casual employment.

Other matters

105. CAI in the prior Outlines filed identified further matters upon which variation was sought such as the Draft Determination seeking variation to clause 24.3 which in essence is a formatting change and the variations proposed to the "maintenance and horticultural references" in terms of "levels" as opposed to "grades" first identified in the submissions erroneously dated "16 November 2014" but filed 16 November 2015.

106. CAI is further reviewing the Exposure Draft and should any other matters be identified CAI will advise both the Full Bench and other parties prior to the hearing dates.

107. CAI will supplement the Outlines of Submissions made including this Further Outline in oral submissions at hearing.

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25 June 2020