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05 May 2016

Re: AM2014/227 AWU reply submissions on drafting and technical issues in the Exposure Draft for the for the *Fitness Industry Award* 2016

Background

1. On 23 March 2016 the President, Justice Ross published a Statement directing parties to file submissions in reply to drafting and technical issues raised in Group 3 exposure drafts by 05 May 2016.

2. The following parties filed submissions on drafting and technical issues found in the Exposure Draft for the *Fitness Industry Award* 2016 ('the Exposure Draft') as published on 18 December 2015:

   - Australian Workers Union **(AWU)**[1]
   - Australian Business Industrial and the New South Wales Business Chamber **(ABI)**[2]
   - Business SA **(BSA)**[3]
   - K&L Gates on behalf of Gymnastics Australia **(GA)**[4]
   - HMT Consulting on behalf of Aussie Aquatics **(AA)**[5]

3. The AWU submissions in reply appear below.

Reply submissions

Clarification of the minimum hourly rate

4. **Clause 7.4(b)(i)** [**ABI** paragraphs 8 and 8.1]: We are not opposed to either of the alternatives suggested by ABI at these paragraphs in relation to clarification of the 'minimum hourly rate'.

   a. In considering this term however, we note an issue at clause 9.1(b) of the Exposure Draft that we did not address in our previous submissions on the Exposure Draft. We consider that the reference to the 'minimum hourly rate' at this clause does

[1] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014227-sub-awu-190416.pdf
[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014217andors-sub-abi-150416.pdf
[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014217andors-sub-bussa-150416.pdf
[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014227-sub-GA-140416.pdf
[5] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014227-sub-AA-070315.pdf

not account for the applicable public holiday loading of 250% when an employee works through their meal break on a public holiday. The meal break is only paid at 200% of the minimum hourly rate at this clause.

Ordinary hours and payment of overtime for casual employees

5. **Clause 8.1** [**GA** paragraph 10, **AA** paragraph C.1]: GA and AA find it significant that the reference to full-time employees (at clause 24.1 of the current award) has been removed. GA questions whether this change affects the span of hours, and number of days worked per week for part-time and casual employees. AA say that "currently the hours limitation detailed in 24.1 do not apply to 'casuals' whereas the new wording has universal application."

6. The AWU agree with AA that the wording has universal application to all employees; however, we understand this to already be the case under the current award. We see the new clause 8.1 in the Exposure Draft as a minor amendment offering clarity on the operation of clause 24.1. We are not aware of any compelling explanation for why part-time and casual employees can work more days of the week than 5, and at more unsocial hours than full-time employees without the same compensation as full-time employees. In relation to payment of over time for casuals on weekends we do not accept the argument put forward by AA at paragraph C.3 that:

> *It is both fair and reasonable that staff engaged as casual Swim Teachers, Coaches and their assistants be rostered without recourse to overtime rates for early starts or late finishes on weekends as they are already compensated by the payment of the additional casual loading of 30% under the current clause 13.3 (proposed 7(b) (ii)).*

7. The AWU contend that the casual employee is clearly worse off on the weekends and public holidays and are already precluded from favourable penalty rates afforded to part-time and full-time employees.

    a. On Saturdays and Sundays part-time and full-time employees work their ordinary hours paid with penalties of 125% and 150% (respectively) of their minimum hourly rate, and are also able to access overtime rates. Saturday overtime rates are paid at 150% for the first 2 hours and 200% thereafter, and on Sundays 200% is paid for all overtime. We also note public holidays are paid at 250% of the minimum hourly rate for all hours worked.

    b. If casual employees are also precluded from payment of overtime rates, these employees by contrast will receive only 130% of the minimum hourly rate at all times, falling well below their counterparts for every hour worked on Sundays and Public Holidays, and for all overtime worked on Saturdays. The denial of overtime on the weekends is not offset by the casual weekend and public holiday rate of 130%. In fact, given that the

first 125% of this rate is actually compensation for other entitlements that are not afforded to casual employees such as paid leave, regular hours, and job security – very little is offered to a casual employee on weekends and public holidays.

8. The AWU also see the ordinary hours set out at clause 8.1 as accommodating the unique ordinary hours of the fitness industry. Employees may work up to 10 hours a day, or 38 hours a week, before receiving overtime, and would have to work very early or very late to receive overtime on the basis of 'span of hours'. For ease of reference, the span of hours at clause 8.1 are:

> ***(a)*** *5.00 am and 11.00 pm, Monday to Friday; and*
> ***(b)*** *6.00 am and 9.00 pm, Saturday and Sunday.*

9. **Clause 8.3** [**ABI** paragraph 8.2]: Clause 8.3 confines ordinary hours for full-time and part-time employees as 10 hours on any one day, but does not mention casual employees. ABI say in relation to this clause:

> *On the face of the current Award, casual employees are not entitled to overtime if they work in excess of ten (10) hours on any one day.*

10. **Clause 8.3** [**BSA** paragraph 6.2.1]: BSA say in relation to this clause:

> *Overtime specifically refers to part-time and full-time employees only. Any variation to this clause to include casual would be a substantive change.*

11. The AWU oppose these submissions, and refer to our submissions on the Exposure Draft at paragraphs 8-9. In particular, at paragraph 9 we note:

> *the overtime clause at 14.1 of the Exposure Draft does not exclude casual employees – it applies to all employees.*

12. In Part 5 of the Exposure Draft – Penalties and Overtime, there is a clear system applicable to part-time and full-time employees in relation to penalty rates that does not apply to casual employees (see clause 13). In relation to overtime however, at clause 14.1, the definition of overtime is clearly stated in relation to "an employee" generally. This system is consistent with the current award at clauses 13.3, 26.1, and 26.3.

13. We see the inconsistency between clause 8.3 (which may exclude casuals), and 14.1 (which includes casuals), as a drafting/technical oversight relating to the prescription of ordinary hours of work at clause 8.3, and have proposed that the words "for a full time or part time employee" be removed.

    c. The AWU have also made submissions[6] in relation to clause 7.4(a) to include a term specifying that ordinary hours of work

[6] See paragraphs 5-6 of the AWU Exposure Draft submissions.

are less than 38 hours per week for casual employees, which will assist in rectifying the inconsistency at hand. This submission was originally made to rectify the absence of a modern award required term in accordance with section 147 of the *Fair Work Act* 2009 (Cth) ('the FWA'). That is, ordinary hours are to be specified for each employment type covered by an award.

d. We also note that clause 7.4(b) refers to the casual loading as payable for each "ordinary hour". This is consistent with the current award. Clearly, hours worked outside the ordinary hours are intended to paid at the overtime rate for casuals. This has been calculated correctly at schedule B.2.1 – in the summary of hourly rates of pay. Figures within this table include the casual loading on ordinary hours, with the overtime loading paid instead of the casual loading for overtime hours.

14. **Clause 8.3** [**GA** paragraphs 2-7]: GA say it is unclear whether casuals are entitled to overtime, and go on to consider the same inconsistencies between clauses 8.3 and 14 – although GA refer to the corresponding clauses 24.2 and clause 26 in the current award. GA favour the opposite construction of the inconsistency, and say:

> *…the clear intention of the Award is that the working hours of casual employees are not governed by the concept of "ordinary hours." The concept of overtime relies upon the limitations on ordinary hours and therefore arguably does not apply to casual employees.*

As we have stated above, the casual loading clauses refer to "ordinary hours". We reject the premise that casual employees are not governed by ordinary hours, and prefer the construction that is consistent with section 62(1) of the FWA, which prescribes maximum weekly hours of work for all employees.

Break between Shifts

15. **Clause 14.3** [**BSA** paragraph 6.2.2]: This clause prescribes a minimum of 10 hours break between rostered shifts, and payment of an hourly loading where an employee resumes work before they have had at least 10 hours break. BSA have targeted the word "rostered" as a feature of this clause to operate in the following way:

> *…whilst a shift is not defined in the Fitness Industry Award, it is commonly seen as a regular system of work. If overtime was rostered, then the 10- hour break should occur from the conclusion of the rostered overtime. If the overtime was un-rostered then the 10 hour break should commence from the conclusion of the rostered hours.*
>
> *If a 10-hour break is enforced from the conclusion of un-rostered, ad hoc overtime, this may result in unmanageable staff shortages at the commencement of the next shift. In the circumstances where a set number of staff are required for safety reasons, such as at a swim centre, or staff are*

required for a set appointment with a client, an un-rostered 10-hour break is not viable.

16. **Clause 14.3** [**GA** paragraphs 14]: GA make a similar submission in relation to this clause, and say:

> *…This wording suggests that the 10 hour break is between the **rostered** end of the first shift and the **rostered** start of the second shift, irrespective of any unrostered overtime worked…*

17. The AWU reject this reasoning. The provision for a break between shifts is to protect against exhaustion from actual work performed. It is a work health and safety matter. We do not see the relevance of whether overtime performed was rostered or not – the employee will clearly not rest until they cease working. The proper construction appears to be a 10-hour break between the end of overtime on one shift and the beginning of ordinary hours on the next shift. If this is not viable in the ways set out by BSA, then the 200% loading applies. This construction is consistent with our previous submission on this clause.[7]

18. The significance of the phrase "between rostered shifts" would appear to protect against rostering employees on shifts that are too close in time. For example, late at night, and then early in the morning.

19. We also consider GA's submission in relation to the gymnastics industry. GA say the "unpredictable" nature of competitions means employees may be required to work unrostered overtime. See paragraph 15 of their submissions:

> *… The unpredictable length of gymnastics competitions means that instructors may be required to work unrostered overtime on the evening of a competition due to an unscheduled increase in the length of the day's events. If the 10 hour break were required from the end of such overtime, it would have the effect that employers were required to pay substantial overtime for the entirety of the following rostered shift.*

20. The AWU do not see our construction of the 10-hour break as impeding employers in the peculiar circumstance described by GA. For one, unscheduled overtime is not peculiar to the fitness industry. This is common in other industries, and we refer to the hospitality and construction industries as clear examples. Secondly, if an employee is rostered to work on the day of a competition, (and the GA have actually identified there is a degree of predictability that it will run overtime), then that employee should be either knocked off first on that evening, or rostered later on the following day. This would offset the claimed burden.

21. The AWU appreciate the nature of the fitness industry is that many shifts are in the mornings and evenings, and sometimes quite short, to offer appropriate training times for people with daytime commitments.

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[7] See paragraph 11 of the AWU Exposure Draft submissions.

Although we regard this is an important feature, our position on the 10-hour break differs partly because we do not see it applying in the problematic way that GA have suggested (GA provide a number of examples at paragraph 16 of their submissions). In our own submissions, the AWU provided the following proposed clause:

> *An employee required by the employer to resume work without having a break of at least 10 hours between ~~shifts~~ [the end of overtime on one shift and the beginning of ordinary hours on the next shift] must be paid at the rate of **200%** of the minimum hourly rate for all time worked until they have had a break from work of at least 10 hours.*

We see our proposed clause as assisting GA in the problem they identified in their Example 1(b) at paragraph 16:

> *The same gymnastics instructor is rostered to work her first shift from 6:00am to 9:00am, and then a second shift from 6:00pm to 8:00pm. She does receive overtime for the hours worked in her second shift, because there was not a break of 10 hours between the rostered end of her first shift (9:00am) and the rostered start of her second shift (6:00pm).*

The increased rate would not be payable from the commencement of the night shift even though the employee has not had the 10 hours break between shifts. This is because the morning shift was short, and did not include working overtime. In GA's Example 2 however, we see the identified issue as being the result of poor rostering, as opposed to the offensive operation of clause 14.3. Example 2 is set out as follows:

> *A part-time gymnastics instructor is rostered to work at a competition from 12.00pm to 8.00pm on Thursday, and then from 6.00am to 2.00pm on Friday. These hours are agreed with his employer ion writing pursuant to clause 7/3(c). The competition runs late, and he is required to work until 10.00pm on Thursday. He does receive overtime for the additional hours worked on Thursday, as this is in excess of his agreed hours (cl 7.3(f)). However, he does not receive overtime for the hours worked on Friday, as there was a break of 10 hours between the rostered end of his first shift (8.00pm) and the rostered start of his second shift (6.00pm).*

END

Roushan Walsh
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