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Your ref: AM2014/227
AM2014/245

Dear Award Modernisation Team

**4 yearly review of modern awards – Award stage – sub-group 3A
Comments in respect of revised Exposure Draft etc.**

We write on behalf of Gymnastics Australia and refer to the Directions made by Deputy President Clancy in respect of the above matters on 14 December 2016.

In response to Direction 1 of each of those Directions, we enclose comments in relation to the *Fitness Industry Award 2010 (FIA)* and the *Sporting Organisations Award 2010 (SOA)*.

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***

**COMMENTS REGARDING SUB-GROUP 3A
FITNESS INDUSTRY AWARD AND SPORTING ORGANISATIONS AWARD
FURTHER REVISED SUMMARY OF SUBMISSIONS AND REVISED EXPOSURE DRAFT**

The following comments are made on behalf of Gymnastics Australia in response to Direction 1 of the Directions of Deputy President Clancy published on 14 December 2016 in the above matters:

FITNESS INDUSTRY AWARD – AM2014/227

In respect of the revised Summary of Submissions published 22 July 2016 and the Revised Exposure Draft published 29 July 2016:

1. **Item 6** – Gymnastics Australia maintains its opposition to the AWU's proposal.
2. **Item 10** – Gymnastics Australia's position is that clause 8.1 of the Revised Exposure Draft has a different legal effect from clause 24.1 of the FIA. This position is set out in Gymnastics Australia's Reply Submissions dated 5 May 2016, and summarised accurately at Item 11 of the Further Revised Summary of Submissions.
3. **Item 11** – Gymnastics Australia maintains its claim that overtime is not currently, and ought not become, payable to casual employees.
4. **Item 16B** – Gymnastics Australia has proposed variations to the classifications in the FIA to better reflect the nature of work performed by gymnastics coaches. These have been agreed to by the interested parties, as reflected in:
 - (a) Item 16 of the Report to the Full Bench published on 3 June 2016;
 - (b) The transcript of the conference held on 9 August 2016; or
 - (c) Item 6 of the Report to the Full Bench published on 25 August 2016.

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The Revised Exposure Draft does not reflect these agreed variations. Gymnastics Australia is still pursuing these variations.

5. **New item** – The Further Revised Summary of Submissions does not include the proposal of the Australian Swim Schools Association (**ASSA**) made on 4 August 2016 to vary clause 3.4 of the FIA (in relation to administrative and other operational support). Gymnastics Australia has suggested in discussion with the interested parties that the wording proposed by ASSA may be unclear in how it extends to providers of gymnastics services.
6. The Further Revised Summary of Submissions and Revised Exposure Draft otherwise accurately reflect the position of Gymnastics Australia.

Difference in legal effect of FIA and Revised Exposure Draft

7. In respect of items 10 and 11, Gymnastics Australia maintains its position that clause 8 of the Revised Exposure Draft has a different legal effect to clause 24 of the FIA. This will have consequential effects on the entitlement of casuals to overtime under clause 14 of the Revised Exposure Draft, corresponding to clause 26 of the FIA. Pursuant to Direction 2 of the Directions published on 14 December 2016, the basis for this is set out below.

Effect of clauses 24 and 26 of the FIA

8. Clause 24 in the FIA provides for ordinary hours of work for **full-time** and **part-time** employees, as follows:
 - (a) Clause 24.1 provides that "*The 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. Such hours may be worked over any five days of the week, between the hours of...*" [emphasis added];
 - (b) Clause 24.2 provides that "*The ordinary hours of work for a **full-time or part-time** employee must not exceed 10 hours on any one day*" [emphasis added].
9. By specifying full-time and part-time employees in this way, the legal effect of clause 24 is that the limitations on ordinary hours apply to full-time and part-time employees only, as follows:

Type of employee	FIA clause	Restriction on ordinary hours
Full-time	24.1	38 hours per week over a period of four weeks
Full-time	24.1	5 days per week
Full-time	24.1	Span of hours: <ul style="list-style-type: none"> • 5.00 am to 11.00 pm, Monday to Friday • 6.00 am to 9.00 pm, Saturday and Sunday
Full-time and part-time	24.2	10 hours per day

10. Clause 26 of the FIA sets out that employees will be entitled to overtime by reference to the limitations in clause 24, as follows:

All time worked by an employee outside the spread of hours prescribed in clause 24.1, in excess of an average of 38 hours per week over a period of four weeks or in excess of 10 hours on any day is deemed to be overtime...

11. As the limitations in clause 24 are not expressed to apply to casual employees, it is GA's position that it is to be inferred casuals are not entitled to overtime pursuant to clause 26.

Effect of clauses 8 and 14 of the Revised Exposure Draft

12. Clauses 8.1 and 8.2 contain restrictions on ordinary hours that do not specify a particular type of employee. Only clause 8.3 is limited to full-time and part-time employees. It appears that the effect of Clause 8.1 and 8.2 is to provide a restriction on ordinary hours for all employees including casuals.
13. Accordingly, the legal effect of clause 8 is that the following restrictions on ordinary hours apply to employees as follows:

Type of employee	Revised Exposure Draft clause	Restriction on ordinary hours
All employees	8.2	38 hours per week over a period of four weeks
All employees	8.1	5 days per week
All employees	8.1	Span of hours: <ul style="list-style-type: none"> • 5.00 am to 11.00 pm, Monday to Friday • 6.00 am to 9.00 pm, Saturday and Sunday
Full-time and part-time	8.3	10 hours per day

14. Clause 14.1(a) of the Revised Exposure Draft sets out that employees will be entitled to overtime as follows:

Overtime is all time worked by an employee:

- (i) outside the spread of hours prescribed in clause 8.1; or*
- (ii) in excess of an average of 38 hours per week over a period of four weeks; or*
- (iii) in excess of 10 hours on any day.*

15. The legal effect of clause 14.1 in combination with clause 8 is that all employees, including casual employees, are entitled to overtime when working outside of the restrictions on ordinary hours, as set out in Clause 8.1 and 8.2 as these seem to apply to all employees.
16. Further, by listing (ii) and (iii) as independent sub-clauses, clause 14.1 seems to infer that these apply to all employees including casuals. This inference seems to arise even if the corresponding restrictions on ordinary hours do not apply to casual employees (eg: ordinary hours limited to 10 hours per day as per Clause 8.3).

Difference in legal effect between FIA and Revised Exposure Draft

17. The effect of clause 24 of the FIA is that the following restrictions on ordinary hours only apply to full-time employees:
 - (a) an average of 38 hours per week;
 - (b) a maximum of 5 days per week;
 - (c) the spread of hours.
18. The different effect of clause 8 of the Revised Exposure Draft is that these restrictions are extended to part-time and casual employees.
19. This has the consequential effect that, the current position pursuant to clause 26 of the FIA, is that casuals and part-time employees are not entitled to overtime in those circumstances, whereas under clause 14 of the Revised Exposure Draft, casual employees would be entitled to overtime.

SPORTING ORGANISATIONS AWARD

20. In respect of the further revised Summary of submissions published 22 July 2015 and the revised Exposure Draft published 29 July 2016 in respect of the SOA, Gymnastics Australia agrees with the submission of Tennis Australia dated 8 August 2016 that clause 8 of the revised Exposure Draft seems to have a different legal effect from clause 21 of the SOA.

10 January 2017

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