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**Fair Work Commission: 4 Yearly Review of Modern Awards**

**AM2014/227: FITNESS INDUSTRY AWARD**

**Australian Business Industrial (ABI)**

**-and-**

**NSW Business Chamber (NSWBC)**

**13 MARCH 2017**

## 1. BACKGROUND

- 1.1 These reply submissions are filed in relation to proceedings AM2014/227 (**Proceedings**) by:
- (a) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members; and
  - (b) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.
- 1.2 ABI and NSWBC have a material interest in the Four Yearly Review of the Fitness Industry Award (**Fitness Award**) given that both entities represent numerous employers who operate in the industry which are covered by the Fitness Award.
- 1.3 These submissions are made in reply to the Australian Workers' Union's (**AWU**) submissions filed on 23 February 2017 in relation to its response to the proposed classification definitions relating to swimming coaches submitted by the Australian Swim Schools Association Ltd (**ASSA**) together with its proposal for amendments to the classification structure for swimming coaches (**AWU and ASSA Claim**).
- 1.4 On 7 February 2017, Deputy President Clancy published Directions in relation to the AWU and ASSA Claim which required:
- (a) the AWU to file a written submission and any evidence in relation to the proposed classification definitions relating to swimming coaches submitted by the ASSA together with its proposal for amendments to the classification structure for swimming coaches, by 24 February 2017; and
  - (b) interested parties to file written submissions and any evidence in reply by 10 March 2017.
- 1.5 ABI and NSWBC are not pursuing any substantive claims in relation to the Fitness Award.
- 1.6 These reply submissions are filed in accordance with Direction 2 of the Directions and primarily respond to the submissions filed by the AWU on 23 February 2017.

## 2. OVERVIEW OF CLAIMS BEFORE THE FAIR WORK COMMISSION

- 2.1 In summary, the claims before the Fair Work Commission include the following:
- (a) The ASSA advances a claim to include the words "*and assisting with swimming and water safety teaching*" at Level 1 of the classifications as a point of clarification of the usage of Level 1 in relation to trainee or unqualified swim teachers.
  - (b) The AWU advances a claim that Level 2 of the classification structure should be amended to encompass trainee or unqualified swim teachers and introduce a new Level 2A into the classification structure to cover qualified swimming and water safety teachers (who are currently classified at Level 2).

## 3. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

- 3.1 The legislative framework applicable to the 4 Yearly Review has been canvassed in great

detail in various proceedings currently before the Full Bench. In summary, this legislative framework is as follows:

- (a) Section 156(2) of the FW Act requires the Full Bench to review all modern awards. In doing so, the Full Bench may make determinations varying modern awards.
- (b) Section 134(1) of the FW Act sets out the modern awards objective. The modern awards objective requires that modern awards along with the National Employment Standards provide a “*fair and relevant minimum safety net*” of terms and conditions.
- (c) What is “fair and relevant” is conditioned by the requirement to take into account the matters set out in s 134(1)(a) to (h) of the FW Act.
- (d) Section 138 of the FW Act outlines that

*A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.*

#### **Merit based evidence required**

- 3.2 The discretion to make determinations varying modern awards is expressed in general terms. However, the need for a ‘stable’ modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation (4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**the Preliminary Issues Decision**) at [60]).
- 3.3 When considering the merit basis to make variations, the Commission held in the Preliminary Issues Decision that:
  - (a) there may be cases where the need for an award variation is self evident. In such circumstances, proposed variations can be determined with little formality (at [23] and [60]);
  - (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation (at [23] and [60]); and
  - (c) in conducting the Review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue and the particular context in which those decisions were made (at [27]).

#### **4. TASK OF THE FULL BENCH**

- 4.1 Given the considerations outlined in the Preliminary Issues Decision, the Full Bench is now required to determine whether:
  - (a) the parties have advanced a case (as contemplated by the Preliminary Issues Decision), including the requirement for probative evidence properly directed to

demonstrating the facts supporting the proposed variation<sup>1</sup>, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;

- (b) any such exercise of discretion is consistent with s 134 of the FW Act; and
- (c) the proposed changes would be consistent with s 138 of the FW Act.

## 5. THE CLAIMS

5.1 We understand that the ASSA seeks to vary Level 1 to include the words *“and assisting with swimming and water safety teaching”* in order to clarify the usage of Level 1 (**ASSA Claim**).

5.2 We also understand that the AWU, in response in the ASSA Claim, proposes:

- (a) at paragraph 13 of its submissions dated 23 February 2017 that a *“trainee swim teacher”* definition needs to be included in the classification structure, but disagrees that it should be included in the classification structure at Level 1;
- (b) at paragraph 14 of its submissions dated 23 February 2017 to amend Level 2 of the classification structure to encompass trainee swim teachers; and
- (c) at paragraph 15 of its submissions dated 23 February 2017 to introduce a new Level 2A into the classification structure of cover qualified swimming and water safety teachers (who are currently classified at Level 2),

(together **“AWU Claims”**).

5.3 For clarity, our clients are of the view that the AWU has used the term *“trainee swim teacher”* to describe the type of person engaging in the activity of *“assisting with swimming and water safety teaching”* which the ASSA has proposed in its submissions. Our clients consider that the term *“trainee swim teacher”* has been incorrectly considered as separate and distinct from an employee *“assisting with swimming and water safety teaching”* and should only be considered to the extent that it describes a person *“assisting with swimming and water safety teaching”*.

5.4 Accordingly, we understand the AWU claim to be the variation of the Fitness Award by amending Level 2, specifically B.2.1 of Schedule A to read as follows:

### **B.2 Level 2**

**B.2.1** *An employee at this level has completed 456 hours training at Level 1 so as to enable the employee to perform work within the scope of this level or is undertaking training to become a swim teacher or coach.*

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<sup>1</sup> Preliminary Issues Decision at [23] and [60].

- 5.5 In addition, we also understand the AWU claim to be the variation of the Fitness Award by inserting Level 2A into Schedule A to read as follows:

**A.3 Level 2A**

A.3.1 *An employee at this Level is able to fulfill a role at Level 1 and 2. In addition an employee at this Level is required to hold one of the following qualifications:*

- (i) *beginner swimming and water safety teacher, being a holder of any current qualification with the following competencies:*

*SRC AQU 0038 Respond to an aquatic emergency using basic water rescue techniques;*

*SRC AQU 0088 Apply the principles of movement in water to aquatic activities;*

*SRC AQU 0108 Instruct water safety and survival skills;*

*SRC AQU 0098 Instruct the strokes of swimming; and*

*SRC CRO 0078 Operate in accordance with accepted instructional practises, styles and legal and ethical responsibilities.*

- (ii) *coaching beginner swimmers (including mini and junior squads), being a holder of a current Australian Swimming Coaches and Teachers Association (ASCTA) "Junior Squad and Assistant Coach" qualification or equivalent.*

- 5.6 We understand that the AWU claims that the appropriate Level 2A rate of pay should be \$717.70 per week or \$18.89 per hour on the basis that Level 2 currently equates to approximately 93% of the standard rate, and the proposed \$18.89 sits at 96.5% of the standard rate.

- 5.7 At paragraph 19 of its submissions dated 23 February 2017, the AWU claims that in introducing the Level 2A classification at the rate proposed, this would move the current minimum hourly rate from \$18.21 per hour to \$19.56 per hour.

- 5.8 Our clients submit that the AWU Claims should fail on the basis set out **below**.

**6. 'WORK VALUE' CONSIDERATIONS**

- 6.1 The AWU submits that the introduction of new Level 2A in the classification structure "*will have minimal financial impact on employers*" and that the AWU "*cannot identify any significant impact on productivity, employment costs or regulatory burden*".

- 6.2 It should be clear, from the submissions of the AWU and as set out at items 5.6 and 5.7 of our submissions, that the changes proposed will substantively change the rates paid to both unqualified and qualified swim teachers. The AWU also seek to create a new entitlement to higher rates of pay for qualified swim teacher employees. The effect of the proposed changes being that:

- (a) qualified swim teachers will receive \$18.89 per hour, which is a pay rise of \$0.68 per hour; and
- (b) unqualified swim teachers will receive \$18.21 per hour, which is a pay rise of \$0.51 per hour.

6.3 That being the case, the Commission must be satisfied that work value reasons justify the changes sought by the AWU. This is because of the operation of sections 156(3) and (4) of the FW Act, which provide as follows:

*“Variation of modern award minimum wages must be justified by work value reasons*

*(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.*

*(4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:*

- (a) the nature of the work;*
- (b) the level of skill or responsibility involved in doing the work;*
- (c) the conditions under which the work is done.*

6.4 In the present case, the changes sought are substantive as they vary the actual rates to be paid to unqualified and qualified swim teacher employees by creating a new level of classification. The changes are also significant given the insertion of a Level 2A classification would increase the current minimum hourly rate of pay.

6.5 In advancing this claim, the AWU needs to justify the changes by work value considerations and submit probative evidence to support its claim.

6.6 However, the AWU have not advanced any material evidence to substantiate their claims. Their claims simply rely upon an argument that the changes to be made relate to an “oversight” during the award modernisation process and that the changes would have minimal financial impact. However, it has been demonstrated that the changes are not minor in nature.

6.7 The AWU has advanced one witness statement from an employee, Michael O’Connor who is employed as a swimming teacher and deck supervisor. The AWU advances the proposition that an unqualified swim teacher is unable to be categorised under a Level 1 classification because an unqualified swim teacher provides a “direct service” to customers as evidenced in the witness statement of Mr O’Connor, which the AWU proposes is inconsistent with B.1.1(c)(ii) and therefore, the only alternative is to categorise unqualified swim teachers at a Level 2 and create a new Level 2A.

6.8 Our clients consider that this witness statement does not adduce evidence of the work value justification relating to why qualified swim teachers should receive a higher rate of pay than they currently receive.

**7. CONCLUSION**

- 7.1 Our clients submits that the AWU has not made out work value considerations to justify the insertion of a new Level 2A which would increase the rates of pay for qualified swim teachers on the basis of the evidence submitted in its submissions.
- 7.2 Our client submits that the AWU's Claims should fail on this basis.



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