



Attn : Ms Lauren Thomas

Associate to Deputy President Clancy

Fair Work Commission

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By email: chambers.clancy.dp@fwc.gov.au

**Submissions on behalf of Fitness Australia by Wentworth
Advantage Pty Ltd**

MATTER – AM2014/227

**Re ; Submissions in reply to the Fitness Industry Award (FIA)
Exposure Draft of 18 December 2015 (AM 2014/227 & others)**

26 May 2016

1. General Background

1.1 Fitness Australia is the peak national fitness industry body which has been involved in the developing and making of the original modern Fitness Industry Award 2010 (FIA) and the subsequent 2 Year Award Review of the Award in 2012-13. Further Fitness Australia had been involved in the earlier stages of the 4 Year Award Review process in late 2014 and early 2015, and is now choosing to be involved again.

1.2 During the award modernisation process and the 2012 Award Review process Fitness Australia has been involved in meaningful and collaborative negotiations with the major parties in this Award being United

Voice, AFEI, and the now named Aussie Aquatics (AA) (formally Swim Australia) among other parties.

1.3 With Wentworth Advantage having now been given confirmation to act on behalf of Fitness Australia again, we have participated in the parties teleconference this week as organised by K&L Gates on behalf of Gymnastics Australia and Tennis Australia. Wentworth Advantage on behalf of Fitness Australia has also had various other telephone discussions with certain other parties in order to help in resolving some of the outstanding “ITEMS” that still appear on the “Summary of Submissions” document previously released by the Fair Work Commission.

1.4 From what Fitness Australia can ascertain numerous “ITEMS” noted on the “Summary of Submission” have been worked through diligently by the parties and a resolution or a compromise position has been found with many of them. Yet with certain other “ITEMS” the parties are still in dispute as to the interpretation of the currently operating Fitness Industry Award 2010 (FIA) and the now proposed Exposure Draft of 2015.

Fitness Australia in the very short time it has had to review all that has been happening to date in this Award Review process would like to make the following comments on some of the contentious issues that are currently being debated.

2. Comments by Fitness Australia on the FIA 2015 Exposure Draft

2.1 ITEMS 9, 10, and 11 of the Exposure Draft Submissions Summary- Casual Employment Hours and Overtime – firstly Fitness Australia agrees that this matter should be dealt with in the Award Stage of the review and not referred to the Part-Time and Casual Full Bench. Secondly, the wording in the current FIA is not ambiguous as claimed by certain parties as Casuals don’t receive overtime and Fitness Australia agrees with AA, GA, Bus SA, and ABI on this point. Fitness Australia believes this was the intention that when the modern award was made. It was done in order to give flexibility in relation to the planning and the placing of staff for short engagements as is the want and need of the industry and often overtime was not considered necessary. Also along these lines research has shown that the vast majority of employed staff in the fitness industry are casuals on short engagements.

2.2 The industry has based it’s membership costing on the current award as it now reads with very little margin on a low cost base. This is even more

prevalent with the of rise of 24 hour x 7 day per week fitness centres with the community demanding much more convenience and more availability of fitness centres with a much smaller footprint and less rent costs etc. The fitness industry is evolving very quickly with very high levels of competition in the market. In fact it not unusual for some fitness centres not having had an increase in membership fees for 5-6 years. Consequently, any potential increases in wage costs would significantly impact the viability of many businesses in the fitness industry – especially the smaller operators.

2.3 The “all-up casual loading” concept. The “Definitions” clause at Schedule G of the Exposure Draft has omitted a very important concept which was the basis of making the original modern Fitness Industry Award that came through from the award modernisation process in 2008- 2009. The FWC 2 Year Award Review in 2013 put the definition of “all-up casual loading” front and centre when relating to the “Transitional Provisions” seen in “Schedule A” of the current Award – in the Definition Clause 3 of the current Award as follows-

“all-up casual loading means the all up casual loading payable to casual employees under the terms of the Notional Agreement Preserving the *Health, Fitness and Indoor Sports Centres (State) Award (NSW)*“

2.4 In drawing up the Exposure Draft this definition has been omitted as it is deemed that this only relates to the “Transitional Provisions” which are now obsolete. Fitness Australia agrees that the “Transitional Provisions” are now obsolete but the intention of the original modern Award was founded on the premise of the “all-up casual loading” concept being paramount and we again refer back to this principle in providing for the industry’s needs.

2.5 This concept was based upon the applicable NSW pre-modern state NAPSA that covered the fitness industry where stated at Clause 5 (b) (ii) under “Casual Employment” was the following –

“(ii) All-up Casual - An all-up casual shall be paid 1/38 of the appropriate weekly rate plus a loading of 30 per cent for each hour worked. This 30 per cent loading includes statutory obligations under the *Annual Holidays Act 1944 (NSW)*, and the loadings applicable under this award for work on Saturdays, Sundays, public holidays and at night.
Provided that....(a previous circumstance that is not relevant to this point)...xxxxx.....

Also provided that an all-up casual employee involved in the presentation or conducting of sports games/training (e.g. instructors) shall be paid for a minimum engagement of one hour.”

- 2.6** So this then meant that Clauses 13.3, 13.4, 13.5 and 26.3 (a)-(c) in the current FIA and Clauses 7.4 (b), 7.4 (c) and 18.3 (b) in the Exposure Draft have come into being.
- 2.7** These principles had been initially adopted in the new modern FIA and again with them eventually being preserved and protected throughout the 2 Year Award Review after having been challenged by the Fair Work Ombudsman (FWO) before the 2 Year Review. This then shows the intention of the FWC to keep these principles still intact especially during the transitioning period for casual wage rates. Further it is argued after that period up until now.
- 2.8** Therefore Fitness Australia opposes the contention made by FWO that because of the way that the FIA is written that payment of casuals working on public holidays is unclear. The FWO does not necessarily know the nuances that are attributed to the fitness industry and the background to it.
- 2.9** Fitness Australia further therefore does not agree with the other columns shown in Table B.2.1 on page 30 of the Exposure Draft beyond the first two columns of the ordinary casual rate of 125% Mon - Fri and the “all up casual” rate of 130% for Saturday, Sunday and public holidays. We do not agree because this is the way the current award is written and has been interpreted since 2010 i.e. that ordinary hours relate only to full-time employees as per Clause 24.1. With Clause 24.1 and the principle behind it having not altered or amended during the 2 Year Award Review and to attempt to do so now would mean a substantive change. As it can be argued that the current Award as it stands in fact was deemed to have met the modern Award objectives.
- 2.10** ITEM 5 of the Exposure Draft Submissions Summary - Part-Time employees and allowances - Fitness Australia also agrees with the insertion of the following two clauses developed by Aussie Aquatics (AA) and agreed to by the AWU and then circulated to the parties by K&L Gates on the afternoon of Thursday 27 May -
- a. “A new 11.2.1 in the following terms be incorporated in the 2015 award draft:

“Employees engaged, other than on a full-time basis under sub-clause 7.2 be paid pro rata the wage related allowances detailed in paragraph (a) Leading hands and supervisors.”

- b. That 11.2 (b) **Broken shift allowance**, be amended to read as follows:

“An employee, other than a casual engaged under sub-clause 7.4 (c) (ii), working a rostered broken shift must be paid per day \$12.24 extra and for excess fares and expense related allowance of \$1.89 per day.”

3. The current position of Fitness Australia

As mentioned earlier in this submission Fitness Australia has not fully had an opportunity to work through all the party’s submissions to date nor have we been privy to the all teleconferences and communications between the parties nor have we been involved in many of the FWC hearings to this point in time. So considering this Fitness Australia reserves the right to make further submissions in relation to any of the matters that have previously been addressed in the 4 Year Fitness Industry Award Review if it deems it appropriate to do so in the future.



Signed by

David Wilkinson

on behalf of Fitness Australia.