

29 September 2020

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Dear Award Modernisation Team

4 yearly review of modern awards – Overtime for casuals – *Sporting Organisations Award 2020*

We write on behalf of Tennis Australia and refer to the Decision of the Full Bench and draft determination in the above matter dated 18 August 2020.

The Full Bench has given interested parties the opportunity to make submissions in respect of the provisional views it reached in its Decision. Tennis Australia has been granted an extension to file its submissions in respect of those provisional views by **29 September 2020**.

We enclose submissions in response to those provisional views in respect of the *Sporting Organisations Award 2020*.

Your faithfully



Michaela Moloney
Partner

**IN THE FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS
COMMON ISSUES - OVERTIME FOR CASUALS**

Matter No.: AM2017/51 – Overtime for casuals
AM2014/245 – *Sporting Organisations Award 2020*

**SUBMISSIONS IN RESPONSE TO PROVISIONAL VIEWS OF THE FULL BENCH
REGARDING OVERTIME FOR CASUALS COVERED BY THE SPORTING
ORGANISATIONS AWARD**

The following submissions are made on behalf of Tennis Australia in response to the provisional views expressed in the Decision of the Full Bench dated 18 August 2020 in respect of the *Sporting Organisations Award 2020 (SOA)*, as extended by the correspondence from the Commission dated 23 September 2020.

Background and provisional views

1. The *Sporting Organisations Award 2010 (2010 Award)* (the predecessor to the current SOA) did not provide for ordinary hours for casual clerical and administrative employees. The overtime entitlement for casual employees was accordingly ambiguous under the 2010 Award.
2. Tennis Australia has previously submitted that, in the absence of ordinary hours for casual clerical and administrative employees, it appeared that the 2010 Award did not apply overtime entitlements to casual employees.¹
3. In its submissions in response to Tennis Australia's comments, the Australian Workers' Union (**AWU**) submitted that the Exposure Draft for the SOA should be varied as follows:²
 - (a) to introduce a limit of 38 ordinary hours per week for casual employees (at [23]);
and

¹ Comments of Tennis Australia dated 10 January 2017 at [4]-[8];

² Submissions of the Australian Workers Union (AWU) - Overtime and Casual Employment dated 27 January 2017.

- (b) to provide that the ordinary hours of a casual employee not exceed 11 hours on any one day (at [25]).
- 4. The AWU submissions did not seek that the Exposure Draft be varied to provide for casual overtime in relation to the span of hours.
- 5. In the Decision dated 18 August 2020, the Full Bench has expressed the provisional view (at [243]) that casual employees covered by the SOA should be paid overtime for work:
 - (a) in excess of 38 hours per week averaged over 4 weeks;
 - (b) in excess of 11 hours in a single day; or
 - (c) work performed outside the span of hours of 6.00am to 6.00pm.
- 6. The Commission has also published a draft determination dated 18 August 2020 which is consistent with the above provisional position.
- 7. Tennis Australia respectfully seeks that the Full Bench reconsider its provisional view solely in respect of imposing a **span of ordinary hours** on casual employees.
- 8. For clarity, Tennis Australia does not oppose the provisional view that casual employees covered by the SOA should be paid overtime for work in excess of 38 hours per week averaged over 4 weeks or in excess of 11 hours in a single day.

Impact of the span of hours on Tennis Australia

- 9. Tennis Australia is a national sporting organisation within the meaning of the SOA and accordingly covered by the SOA in respect of its clerical and administrative and coaching staff.
- 10. Tennis Australia operates several businesses which will be impacted by the draft determination to the extent it imposes a span of ordinary hours on casual employees.
- 11. To the extent that Tennis Australia engages casual employees, a significant proportion of the working hours of such employees occur after 6pm.
- 12. In particular, Tennis Australia:

- (a) operates a number of sporting facilities under the business "Tennis World", which provide the community with access to tennis courts and associated training equipment and programs; and
 - (b) runs a number of public sporting events throughout the year.
- 13. As with many sporting organisations, Tennis Australia is a not-for-profit entity operating these facilities and events in order to:
 - (a) benefit the community by providing opportunities for people to engage in social and community activities; and
 - (b) promote the physical activity, health and wellbeing of the community.
- 14. In respect of its Tennis World facilities, Tennis Australia submits that:
 - (a) a significant proportion of the community accesses these facilities in the evening after 6pm (ie after ordinary business hours) and are unable to access these facilities prior to that time;
 - (b) these facilities already operate on very low margins and the imposition of additional employment costs may make several facilities unviable;
 - (c) in the 2019/2020 financial year, approximately 21% of casual employee hours were worked after 6pm in these facilities.
- 15. In respect of the sporting events it organises and runs, Tennis Australia submits that:
 - (a) many such events occur after 6pm (and it is in the nature of tennis matches that they do not have a fixed end time, meaning it is common for such events to run a significant length of time after 6pm);
 - (b) in the 2019/2020 financial year, approximately 26% of casual employee hours were worked after 6pm at these events.
- 16. Tennis Australia submits that the introduction of an additional wage burden for casual employees working past 6pm will significantly impact both the operation of its Tennis World facilities and its capacity to run tennis events.

17. Tennis Australia expects that similar effects would be experienced by other national and state sporting organisations covered by the SOA, as it understands that such organisations operate similar facilities, programs and events after 6pm.

Impact of COVID-19

18. As the Commission is well aware, the COVID-19 pandemic has had a significant impact on a wide range of industries.³ In particular, the Commission has acknowledged that the "upper cluster" of industries most affected by the pandemic in terms of job losses and wage falls includes the arts and recreation services industry and those organisations covered by, among other awards, the SOA.⁴ It is "*abundantly clear that the restrictions imposed [in response to the COVID-19 pandemic] have caused significant hardship for these businesses and their employees*".⁵
19. In respect of the COVID-19 pandemic's impact on Tennis Australia, it submits as follows:
 - (a) Tennis World facilities have been severely impacted by restrictions implemented in the wake of COVID-19 requiring those facilities to close or operate at reduced capacity, with an estimated revenue decrease of approximately 30-50%; and
 - (b) Sporting events have been severely impacted by restrictions implemented in response to COVID-19 due to reduced crowd capacity and increased costs arising from biosecurity requirements.
20. Further, Tennis Australia submits that the operations of it and other national and state sporting organisations are an important part of the roadmap to recovery for the Australian community, by providing opportunities for the public to re-engage in social and community activities following the lock-downs experienced by many sectors of the community.

³ *Annual Wage Review 2019-20* [2020] FWCFB 3500 (***Annual Wage Review 2019-20***) at [41]

⁴ *Ibid* at [64]-[67].

⁵ *Ibid* at [69].

Span of hours is not necessary to achieve the modern awards objective

21. Tennis Australia understands that the provisional view of the Full Bench is that it was intended that casual clerical and administrative employees covered by the 2010 Award and its predecessor, the *National and State Sporting Organisations Award 2001 (2001 Award)*, were to be entitled to overtime when working in excess of their ordinary hours of work, but that neither award defined the ordinary hours of a casual employee.
22. The Full Bench in its Decision has expressed the provisional view that making the proposed amendment and "*align[ing] their ordinary hours with that of full-time employees*" is necessary in order for the modern awards objective in s 134(1) of the *Fair Work Act 2009 (FW Act)* to be achieved (at [243]).
23. Tennis Australia respectfully submits that the introduction of a span of ordinary hours for casual employees covered by the SOA goes further than is necessary to meet the modern awards objective. Our client also notes that it appears to go further than the amendments sought by the AWU in their submissions dated 27 January 2017.
24. The Full Bench refers to the consideration at s 134(1)(da)(i) - "*the need to provide additional remuneration for employees working overtime*" - as having determinative weight in this context. Tennis Australia accepts this view of the Full Bench but submits that it does not necessitate the imposition of the same span of ordinary hours for casual employees.
25. Tennis Australia notes that it is not without precedent for different awards to provide for different overtime provisions for permanent employees and casual employees, for example:
 - (a) the *General Retail Industry Award 2010* at clause 29.2(a) provides for overtime for permanent employees when they work outside the roster conditions prescribed in clauses 27 and 28, but does not impose those roster conditions on casual employees;
 - (b) the *Amusement, Events and Recreation Award 2020* provides for overtime for permanent employees working "*in excess of the rostered working hours on any one day*" whereas this is not imposed on casual employees.

26. Accordingly, Tennis Australia submits that it is not necessary to achieve the modern awards objective for the ordinary hours of casual employees to "align with" those of permanent employees.
27. Further, Tennis Australia submits that the introduction of a span of ordinary hours for casual employees, when this has not previously formed part of the provisions of the SOA or its predecessor, will:
- (a) negatively impact flexible modern work practices and the efficient and productive performance of work, in that it discourages Tennis Australia and other sporting organisations from operating at the times during the day when its operations are most accessible to and demanded by the public (s 134(1)(d); and
 - (b) increases the employment costs of Tennis Australia's and other sporting organisations' operations at a time when they are experiencing a significant hardship due to factors associated with the COVID-19 pandemic outside their control.

Draft determination

28. Accordingly, Tennis Australia respectfully requests that the Full Bench amend the draft determination dated 18 August 2020 at paragraph [7] to delete the proposed clause 19.2(c)(iii).
29. Tennis Australia's proposed revised clause 19.2(c) would read as follows:

- (c) *Overtime work for casual employees is any work performed:*
 - (i) *in excess of 38 hours per week averaged over 4 weeks; or*
 - (ii) *in excess of 11 hours per day;* ~~or~~
 - ~~(iii) outside the span of hours of 6.00 am to 6.00 pm.~~

Timing of the proposed variation

30. Tennis Australia refers to and repeats its submissions above regarding the impact of the COVID-19 pandemic on the arts and recreation sector and in particular the sports industry.

31. It also notes the approach taken by the Commission in the *Annual Wage Review 2019-20* at [466], where the Commission determined that the increases to minimum wages in the SOA would not commence until 1 February 2021.
32. Tennis Australia respectfully submits that similar considerations ought to be taken into account in determining the commencement date of the draft determination:
 - (a) in respect of the limitation of 38 hours per week and 11 hours per day; and
 - (b) if the Full Bench is not minded to accept Tennis Australia's submissions as set out above, in respect of the span of hours.
33. Tennis Australia submits that in circumstances where the provisional views will impose an additional unexpected cost on businesses significantly affected by the COVID-19 pandemic, that the final determination in this matter should not commence until the first full pay period following 1 July 2021.
34. Tennis Australia is grateful for the Full Bench's consideration of the above submissions and is able to provide further materials in support of these submissions if required.

29 September 2020

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Lawyers for Tennis Australia