

*Fair Work Act 2009*

s.156-4 yearly review of modern awards

(AM2017/52)

## **FITNESS INDUSTRY AWARD 2010**

(ODN AM2008/78 [MA000094])

Health and welfare services

### **Submissions of ASCTA – Fitness Industry Award – Classifications**

This matter is before the Fair Work Commission as part of the four-yearly review of modern awards. The relevant award is the *Fitness Industry Award* and Deputy President Sams has been assisting particular parties in the 'swim industry' to reach resolution on 'classification matters' as raised by them for consideration for inclusion within the *Fitness Industry Award*.

Specifically, to date all three (3) parties have sought inclusions within the classification provisions, and despite attempts at agreement have not been able to reach agreement that might be considered by the Commission for consideration and approval.

For the purposes of the award review and classification matters, the relevant parties from the swim industry are:

1. ASCTA (Australian Swimming Coaches and Teachers Association)
2. ASSA
3. AWU

When the matter was last before Deputy President Sams, it became apparent that a consent position between the parties could not be reached. Deputy President Sams has, as a result, listed the classification matters for hearing on **26 and 27 June 2018**.

The parties have already provided to the Commission significant materials and Deputy President Sams has sought any further additional materials by way of Submissions, and other materials, that each party may deem relevant on the disputes on classification matters.

#### **Provision of Submissions and additional material by ASCTA**

On behalf of ASCTA, brief Submissions are outlined below, and two additional brief statements are provided by Mr Brendon Ward and Mrs Nancy Shaw, on behalf of ASCTA.

#### **Position of ASCTA**

The position of ASCTA to the classification matters is really quite simple. In its materials to date, it has sought to add simple clarification wording to the classification provisions on the basis that, for its members (approx. 27,000 employees and approx. 550 employers), the award has worked well in

those classification matters, but it believes that, in dealing with the award and working with it over the period since its introduction (a period of approximately eight years), those clarifications would be of benefit for the industry moving forward.

Its simple proposed additions commenced at level 1 of the award, and then progressed through some additional wording in other classification levels as set out in its previous materials.

With ASSA seeking also to advance inclusions that it considers would assist the swim industry in how the award has been used and dealt with to date and moving forward, ASCTA has considered ASSA's suggestions, and in the main, supports them. ASCTA's position, on matters of support for ASSA's suggestions, are on the record in terms of matters that have been dealt within listings before Deputy President Sams.

ASCTA's, and for that matter ASSA's position, commenced at level 1, and then moved through the classification levels with wording that will assist the swim industry, given its experience with the award to date, and moving forward.

What has become apparent, though, is that the AWU in its position, has hardened. It appears that it has formed the view that level 1 does not in fact have a training or trainee inclusion, and that as a result there should be another level inserted within the award. Now, ASCTA's position has been made clear and it emphasises that there is no need for another level to be inserted into the award.

ASCTA has already provided materials to the Commission outlining the impacts upon the swim industry of the introduction of another level and relies upon those materials. In effect, the position of ASCTA is:

1. The swim industry has treated level 1 as a training level and for very good reason – level 2 distinctly and clearly recognises that an employee has completed 456 hours training at level 1, so as to enable the employee to perform work within the scope of this level 2, or has obtained a swim teacher or coach qualification. The wording could not be more clear at level 2 (in its current wording). The swim industry has rightly, and with absolute justification, identified and used the clear words at level 2, in recognising the training element at level 1, used level 1 for employees to commence employment and undertake 456 hours of training and/or undertake courses to obtain coaching qualifications.
2. It is to be noted the evidence of ASCTA and in, for example, the brief additional statement of Brendon Ward and the statement of Nancy Shaw as attached, reconfirms that most trainee employees undertake the coaching qualification courses and advance to level 2 quite quickly, and within a period of four – six months. Even with 456 hours of training (i.e. a trainee that does not undertake course work), the advancement to level 2 is within a period of 46 weeks. To emphasise the point, on level 1 and training, the award at A.1 level 1 A.1.1, in its introductory words states:

*“an employee at this level works under direct supervision... Duties may include any or all the following:*

*(c) undertaking structured training/learning in the following areas...”\**

\*Our emphasis added

3. Now it is apparent, and that is why ASCTA has made reference to the inclusion of a ‘trainee swim instructor’ within its submissions and material to date – that there is no direct reference to duties of a trainee swim instructor/teacher, or for that matter, a trainee swimming and water safety teacher. Nevertheless, by reference to what is included within the introductory words, as outlined above in level 1, and by reference to the definitive words at level 2, there is no doubt that training for a swim teacher or coach was contemplated at level 1 – and this is how the industry has met that intention. The industry has treated it as such in the eight years since the inception of the award, and rightly so.
4. What then ASCTA (and ASSA for that matter) has suggested, is that there needs a simple clarification by inclusion of wording referencing within level 1, wording such as a ‘*trainee swim instructor/teacher*’, or for that matter, a ‘*trainee swimming and water safety teacher*’. This simple clarification will confirm what definitely was the intention at level 1 and the definitive words at level 2, and how the award has been used within the industry for 8 years.
5. To complicate matters for the swim industry by the introduction of a further level, in what is clearly contemplated and been acted upon by the industry to date with level 1 and level 2, would create confusion and unnecessary expense. Further it adds the potential, as we outline below at level 2, for the swim industry to ‘contract’ in terms of cost pressures and lesser number of trainees being taken within the industry, with consequences for the community and the learning of swimming and water safety.
6. To add a level would have complication and unnecessary re-interpretation of the award and certainly, contrary to what was the clear intent of the award when it was introduced.
7. Now, there has been some debate about what wording might be used within level 1 to confirm what has been the interpretation and practice under level 1 in the years since the introduction of the award. It is true to say that ASSA has proposed reference within level 2 to a ‘*swimming and water safety teacher*’ and generally ASCTA would have no objection to that type of wording being inserted within level 1, as it has supported the amendments sought by ASSA within levels 2, 3 and 4. What needs to be decided for the industry, is what the most appropriate wording is, to confirm what has been the industry practice at level 1.

For example, ASCTA would have no difficulties with the addition of wording, such as:

- *undertaking training as a swimming and water safety teacher; or*
- *trainee swimming instructor working under direct supervision; or*
- *providing assistance to swimming and water safety teachers and swimming coaches whilst receiving training; or*
- *providing assistance to swimming and water safety teachers or swimming coaches as a trainee swimming instructor.*

What the Commission needs to decide is whether there needs to be a repeat of words referencing ‘*training/learning*’ given they already exist at A.1.1(c). Further, the Commission needs to decide whether there needs to be a reference to “*direct supervision*” given that it is already in existence at A.1.1.

The position, then, of ASCTA is simple clarification is necessary and it will at hearing, continue to press its case that all the award needs in terms of referencing trainee swimming instructors, or trainee swimming and water safety teachers at level 1, is a form of words such that all within the swim industry see the progression that already exists to level 2 (the training having been obtained) and recognising what has in fact occurred within the swim industry at level 1 in the years since the introduction of the award.

8. ASCTA will not dwell in these submissions on the materials before the Commission in the attachments to the last statement provided by Brendon Ward on behalf of ASCTA, except to say that it emphasises that the introduction of another level would introduce a totally new structure for the industry; it would necessarily add a cost burden to the training of swim teachers and coaches and places at risk for the industry, the number of trainees that might necessarily be taken on within the swim industry, and then places at risk for community the number of trainees and then consequentially, teachers and coaches, and further introduces additional cost burdens on the industry such that swimming lessons will necessarily need to increase in cost making swimming lessons less attractive to the general community.

#### **Potential Issue – Direct Supervision**

9. The AWU has raised a potential issue that is difficult to address without seeing or knowing its submissions for the hearing of this matter. This issue is one of concern that swim schools are utilising trainees for the actual teaching and coaching, such that they are providing level 2 ‘work’ while still being paid at level 1. As can be seen from the statements of Brendon Ward and Nancy Shaw, the position of ASCTA (and Nancy Shaw herself runs a swim school together with her partner) is that if such activity is occurring, it is extremely limited. The position of ASCTA is that, from its experience with its members, swim schools want to advance the training of the trainee swim instructors as quickly as possible, as the benefits to the swim schools is to have qualified teachers and coaches at level 2 and beyond. Further as can be seen from the statement of Brendon Ward, and confirmed by Nancy Shaw, their experience is that most swim schools progress training through the coaching courses route, and as such, trainees move to level 2 quite quickly and within four – six months of commencement. Then if there are schools and/or trainees that pursue the 456 hours, those hours should be completed within 46 weeks.

I note that once someone has completed their coaching courses they are eligible for insurance as a swim teacher. This is very attractive for a swim school owner to mitigate risks.

If it is the case that there is concern about the level of ‘coaching’ being undertaken, i.e. the issue of whether level 2 duties are being performed by trainees within level 1, then, one remedy might be to insert similar wording within Level 1 as currently suggested as potential resolution wording that the trainee is not responsible for the delivery of a lesson.

Further it might be considered necessary to add a similar suggested inclusion as has been suggested for higher levels, such as:

*“any dispute concerning an employee’s entitlement to be paid at level 2, rather than at level 1, as a swimming teacher or swimming coach, may be referred to the Fair Work Commission for determination. The Fair Work Commission may require an employee to demonstrate to its satisfaction that the employee utilises skills and knowledge required at this level (level 2)*

*if the submission of the employee is that employee should be paid at level 2, rather than at level 1.”*

### **Other Submissions**

10. ASCTAs position on its proposed amendments to date in its earlier materials has been referenced above, and subject to the Submissions on Level 1, maintains its other suggested inclusions at other levels be considered favourably by the Commission. Otherwise, ASCTA supports the inclusions suggested by ASSA. It is to be noted, for example, in respect of A.5.4 level 4, and at A.5.3, ASCTA has no difficulties that in lieu of *‘attended’* the words *‘successfully completed’* being inserted.
  
11. ASCTA continues to support that the Competencies be referenced as previously proposed by it and will provide to the Commission further information and outline of the current Competencies.

Aitken Legal

For ASCTA

21 May 2018

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### **Statement – Brendon Ward**

I, BRENDON WARD say as follows:

1. I refer to my previous statement of 6 March 2018, and to the two attachments to that statement, and repeat and rely upon that information and those support statements.
2. I have read the Submissions prepared by ASCTA and agree with and support those Submissions and the positions taken within those Submissions.
3. On the issue of level 1 and how it has worked to date for trainee swim instructors, I say that from my own perspective and that of ASCTA, the industry has no doubt that level 1 is a training level and trainees are taken through level 1 so that they may advance to level 2.
4. The training qualification is as set out in level 2, i.e. trainees receive 456 hours of training and/or they complete coaching qualification courses to enable them to be qualified as a swim teacher or coach.
5. My experience is that most swim schools utilise the coaching qualification courses as their primary approach to training and trainees are encouraged to take such course work.
6. The position of ASCTA is, further, that the course work approach is usually completed within a period of four – six months of a trainee commencing.
7. The experience of ASCTA is that if 456 hours training is used, then that should be completed within a period of approximately 46 weeks, given that most trainees, on average, would obtain work of 10 hours per week.
8. From our experience and the feedback from members, 90 per cent of trainees take the course work approach.

9. To further emphasise the point about level 1, the position of ASCTA, and its experience, is that since the introduction of the modern award, there has been no doubt within the industry that level 1 is the training level and that is because level 2 has clearly stated a reference to 456 hours or obtaining coaching qualifications (which is through course work).
10. I again reference the material previously submitted by ASCTA about the impacts of the introduction of a further level on the industry, both from the perspective of complication and cost. These are two matters that the industry does not need and would impact the industry quite severely, in my view, and I refer to the submissions in that respect.
11. Finally, then, the position of ASCTA is the award, at level 1, needs a simple clarifying approach and then the other amendments sought (including through ASSA) are clarification matters that will support the industry to ensure that the coaching/teaching is at the highest level possible, both from experience and quality for all of our swim schools and teachers and coaches.



Brendon Ward

Dated: 21/5/18.

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Health and welfare services

### Statement – Nancy Shaw

My full name is NANCY ELLEN O'NEIL-SHAW and I hold an advisory position with ASCTA, but I also run, with my husband Tony, a swim school known as Holsworthy Aquatic Centre, at 26 Huon Cres, Holsworthy NSW 2173.

1. I have read the Submissions on behalf of ASCTA and agree with and support them.
2. Having been involved with ASCTA for many years and also owning with my husband and running a swim school for many years, I am in a unique position to assist the Commission in its assessment of the award. I have had experience with the award since its inception.
3. I am available, and will provide any evidence necessary, at the hearing of this matter on 26 and/or 27 June 2018.
4. In particular, I want to emphasise that, from my perspective and from my experience through ASCTA, there has been no doubt within the industry that level 1 is the training, or entry level, for trainee swim teachers/instructors. We have all utilised it in that way and it has worked well. We all recognise that level 2 sets the standard for what trainees must achieve at Level 1, i.e. 456 hours or course work through course work qualification and in some instances, there would also be hours in training, but once a recognised training course is completed and qualifications received by the trainee the employee moves to level 2 and the 456 hours is not necessary, nor utilised.
5. My experience and practice has been that as soon as a trainee gains their qualification they are immediately moved to Level 2. This is regardless of the hours worked at Level 1. I say this because the course work is excellent, and coupled with hands-on training experience at pool level, it benefits our trainees to move to level 2 as quickly as possible and also assists us in marketing our product to the community,

that we are delivering an excellent product in teaching and coaching for children of the community.

6. From my own perspective, I have not seen that employers have abused level 1 by having trainees, within the 456 hours or coursework periods, undertake responsibility for lessons. This may have occurred, but I would find it very unusual. My own experience is that the qualified coaches and teachers guide/train the trainees and have complied with the award in terms of direct supervision, and in particular, these trainees are not responsible for lessons.
7. My view is that what the award needs is a simple clarification of trainee swim instructors or teachers at level 1, because that is how the industry has treated level 1 in all of the years since its inception.
8. My view is that a separate level is not necessary.
9. If a separate level was inserted, it would place complication, in particular cost burdens on swim schools, which may very well impact upon the number of trainees, but also impact upon the level of service that might be able to be delivered to the community i.e. the cost of lessons would necessarily need to increase. Given that historically Level 2 has been utilised for those employees who have completed their qualifications such a separate level serves no purpose.
10. As it is the case that trainees, in my view, are moved to level 2 as quickly as possible, there is no need for another level to be introduced to the Award.

  
Nancy E O'Neil-Shaw

21 May 2018