STRONGER TOGETHER

NATIONAL OFFICE
Level 10, 377-383 Sussex Street Sydney NSW 2000
T: (02) 8005 3333 F: (02) 8005 3300
E: members@awu.net.au W: www.awu.net.au
Members Hotline: 1300 885 653
Daniel Walton National Secretary

ABN 28 853 022 982

IN THE FAIR WORK COMMISSION

Matter No: AM2014/227, AM2014/245
Section 156 – Fair Work Act 2009 – 4 yearly review of modern awards – Fitness Industry Award – Sporting Organisations Award

SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION (AWU)

OVERTIME AND CASUAL EMPLOYMENT

Lodged by: Roushan Walsh Australian Workers' Union, National Office **Address for service:** Level 10, 377-383 Sussex Street, Sydney NSW 2000	**Date of document:** 27 January 2017 Telephone: (02) 8005 3333 Fax: (02) 8005 3300 Email: roushan.walsh@nat.awu.net.au

Background

1. These submissions of the Australian Workers' Union (**AWU**) are made pursuant to the Directions in AM2014/227 and AM2014/245 issued on 14 December 2016 in regards to the *Fitness Industry Award 2010* (**FIA**) and the *Sporting Organisations Award 2010* (**SOA**) ('**the Awards**').

2. Parties are directed to file written submissions and any evidence in support of outstanding technical and drafting claims pursued by 4.00pm Friday 20 January 2017. The AWU was granted an extension of 7 days on 24 January 2017.

3. Via the award stage proceedings and in the drafting and technical submissions of the parties for each of the Awards, the issue of overtime entitlements for casual employees remains outstanding.

4. The AWU are proposing variations to clarify the ordinary hours for casual employees under both the FIA and the SOA and for part-time clerical and administrative employees under the SOA. We further propose to clarify that overtime is payable to coaching staff under the SOA only where an excess of 38 hours are worked. The variations are set out in these submissions.

5. References to the FIA and SOA Exposure Drafts refer to the original publications on 18 December 2015.

Overtime an industrial standard

6. In *Registered Clubs Association of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, NSW Branch* [2000] NSWIRComm 262 (14 December 2000), Justice Glynn analysed a range of historical cases regarding the purpose of overtime payments and then stated:

> *191 Some of the cases mentioned above are concerned with overtime per se and, others particularly in the steel industry, with overtime worked at the weekend. It can be seen from those cases that the issue of overtime has dimensions of public interest that give it an intensity not to be found to the same degree in many of the other workplace circumstances which require compensation for the employees affected. Compensation for overtime has underpinning it society's disapprobation of its being worked at all, it being seen not only as undermining the hard fought right to shorter hours enshrined in legislation but also as inimical to the fair sharing of employment opportunities.*
>
> *192 It was also recognised in those cases and in the legislation (the 1940 Act, s 66) that there were circumstances where, although it was to be discouraged, the working of overtime would take place, and, indeed, might be necessary. The rates struck to compensate for working that overtime were aimed, not only to compensate the employees, but also to discourage management practices that were regarded as being subversive of public policy and of the public interest.*

193 The working of overtime would appear to represent the essence of what the legislature sees as representative of situations in the workplace which call for "penalty" rates i.e. in respect of overtime, to call for rates which are primarily intended to discourage employers calling on employees to work overtime, other than for the most cogent reasons, and, if overtime must be worked, to suitably compensate the employees.

194 Those are the penalty rates specifically nominated by the legislature as not to be taken into account as "ordinary pay" in terms of s 3 of the LSL Act. They are rates whose primary purpose is deterrence against employers' activities that may impinge adversely on employees as individuals or as groups. The compensatory factor is secondary, and a punitive component dominant.

7. This passage highlights the importance of overtime penalty rates in terms of preserving hard-fought conditions for shorter hours of work per week and creating additional employment opportunities. It is not a peculiar entitlement to receive a premium on hours worked outside of the ordinary.

8. It is also well established that the casual loading is measured to satisfy other entitlements enjoyed by part-time and full-time employees, the main entitlements being paid leave including long service leave, differential entitlement to notice of termination and employment by the hour effects.[1] The loading ensures there is a fair and reasonable balance between the main types of employment.

9. There is no rationale known to the AWU to suggest it is appropriate to deny casual employees access to compensation for working overtime where it is afforded to part-time and full-time employees under the FIA and the SOA.

10. A Full Bench of the Commission stated the following in relation to an application to insert overtime entitlements for casual employees in the *Social, Home Care and Disability Services Industry Award 2010* during the Transitional Review of modern awards:

[39] We do not consider there is any sound rationale for casual employees to be excluded from overtime penalty rates in circumstances whereby they apply to full-time and part-time employees. No such rationale was advanced by any party before us. The result of this exclusion is or will be twofold. Firstly, it will result in a reduction in the rate of pay for those casual employees who regularly perform overtime work, without any apparent industrial justification for this occurring. Secondly, it means that it will be cheaper to utilise casual employees to perform overtime work rather than full-time or part-time employees. No party was able to advance any reason why the SCHCDS Award should contain a bias in favour of casual employment and against full-time and part-time employment.[2]

---

[1] See *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] Print T4991 at [196].

[2] *Australian Municipal, Administrative, Clerical and Services Union* [2014] FWCFB 379 at [39].

11. We submit this reasoning is equally applicable to casual employees in workplaces governed directly or indirectly by the FIA or the SOA.

12. The issue of increased costs for employers will undoubtedly be raised by employer groups. This factor must be assessed by reference to how the two Awards legally operate, as opposed to how they are currently being interpreted by employers. If employers are not paying casual employees overtime where applicable, clarification of the entitlement does not increase their costs at all.

Current ambiguity and proposed variations

13. The AWU does not regard the entitlement to overtime for casuals as ambiguous in either of the Awards, however, given there are a number of employer parties opposed to this interpretation it is necessary for the Commission to clarify the entitlement. In preparing these submissions, we have discovered a number of related drafting issues.

14. We regard our proposed amendments as set out below as technical in nature and required by s 147 of the *Fair Work Act* 2009 (Cth) ('the **FW Act**') which states:

    A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award

15. We submit that the Awards do not currently satisfy s 147 because the ordinary hours for each employment type cannot be conclusively determined as required. This includes the following absences:

    - no maximum daily or weekly hours identified for casual employees in either of the Awards; and
    - no maximum daily hours or span of hours identified for casual or part-time clerical employees under the SOA; and
    - no maximum weekly hours for full-time, part-time or casual coaching staff in the SOA.

<u>Fitness Industry Award – daily maximum applicable to casual employees</u>

16. In the FIA proceedings, conflict between parties arose in response to a question published by the Fair Work Commission in the FIA exposure draft as follows:

    If overtime is payable to casual employees, should clause 8.3 be amended to include casuals?

17. The AWU responded in the affirmative and proposed an amendment to clause 8.3 to rectify the error as follows:

"The ordinary hours of work ~~for a full-time or part-time employees~~ must not exceed 10 hours on any one day".[3]

18. Clause 8.3 is directly inconsistent with the overtime entitlement at clause 14.1(a)(iii) which is to apply generally to "an employee" and is prescribed in circumstances where overtime is worked "in excess of 10 hours on any day."

19. Even if our proposed variation were adopted, there would be duplication as clause 14 provides that all employees are entitled to overtime in all circumstances set out under clause 8, and regardless of the operation of clause 8.3. Clause 14.1 appears as follows:

14.1 Definition of overtime

(a) 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.

20. Consistent with our interpretation, the casual employment clauses at 7.4(b)(i) and (ii) refer to the casual loading as payable for each "ordinary hour" – being 25% Monday to Friday, and 30% on Saturdays, Sundays and public holidays. This has been calculated correctly as displayed in the Exposure Draft at Schedule B.2.1 – in the summary of hourly rates of pay. Figures within this table include the casual loading on ordinary hours, with the overtime loading paid instead of the casual loading for overtime hours.

Both Awards – Maximum of 38 hours per week for casual employees

21. We have proposed amendments in identical terms to the casual employment provisions in regards to a 38-hour week (clause 7.4(a) in the FIA and 6.5(a) in the SOA.[4] The proposed amendment is marked up as follows:

a) A casual employee is an employee who is engaged and paid as a casual employee and works less than 38 ordinary hours per week.

22. Without the amendment to the SOA, there is no provision in the Award setting out the maximum weekly hours for casual clerical and administrative employees. The proposed amendment is consistent with clause 8.2, which provides that "Ordinary hours for coaching staff are provided for in the NES".

23. Without the amendment to the FIA, the maximum weekly hours for casual employees are unclear and appear to be an "average of 38 hours per week over a period of four weeks"[5] which is an inappropriate arrangement for unpredictable

---

[3] AWU Submission 19 April 2016 in AM2014/227 at [7] to [9].

[4] See AWU Submission 19 April 2016 in AM2014/227 at [5] to [6] and AWU Submission 18 April 2016 in AM2014/245 at [4] to [5].

[5] See clauses 8.2 and 14.1(a)(ii) of the Fitness Industry Award Exposure Draft published 18 December 2015.

employment, or employment that is not subject to at least a 4-week roster. To ensure the correct observance of the amended clause 6.5(a) *and* clause 8.2 we propose the following additional words to be inserted at clause 8.2 (at underlined):

> *8.2 Ordinary hours of work must not exceed an average of 38 hours per week over a period of four weeks. For casual employees, ordinary hours of work must not exceed 38 hours per week.*

24. More broadly, the proposed amendments would ensure the Awards do not operate to exclude the application of the NES (specifically section 62 governing maximum weekly hours) as mandated by section 55 of the FW Act.

Sporting Organisations Award – daily maximum hours for part-time and casual (clerical and administrative) employees

25. We have identified two omissions in our original submission on the SOA Exposure Draft and further propose to amend clause 8.1(d) as follows:

> *Ordinary hours of work for a[n] ~~full-time~~ employee must not exceed 11 hours on any one day.*

26. This amendment clarifies the application of the daily maximum of ordinary hours for clerical and administrative staff also applies to part-time employees and casuals.

Sporting Organisations Award – maximum weekly hours for coaches

27. Clause 8.2 of the SOA provides that ordinary hours for coaching staff are provided by the NES (38 hours in accordance with section 62), however clause 13.1 excludes coaching staff from the overtime provisions. This exemption is clearly incompatible with clause 8.2 and appears to exclude the operation of section 62 of the FW Act. For this reason, we propose to remove clause 13.1 as follows:

> *~~Clause 13 only applies to Clerical and Administrative staff.~~*

Award Modernisation – Fitness Industry Award

28. The Award Modernisation Full Bench issued a Statement in 2009[6] when the new Fitness Industry Award was first contemplated. Relevantly, at paragraph [98] the Bench provide (our emphasis at underlined):

> *The draft award provides for a casual employee to be paid a 30% loading on Saturdays, Sundays and public holidays instead of other Saturday, Sunday and public holiday penalty rates and the ordinary hours of work and rostering provisions set out in the draft award are largely those advanced by Fitness Australia.*

---

[6] [2009] AIRCFB 865.

29. In regards to 'ordinary hours', a closer examination of the parties submissions reveal the AIRC are referring to the span of hours and maximum daily hours advanced by Fitness Australia,[7] as opposed to the more restrictive arrangement advanced by the Liquor Hospitality and Miscellaneous Union (LHMU)[8]. In the submissions of Fitness Australia, the ordinary hours can be traced to a Queensland NAPSA:

> *We note that the hours of work provisions with the Fitness Australia draft Award has been closely modelled on that currently applicable as part of the Notional Agreement Preserving – 'Health and Fitness Centres, Swim Schools and Indoor Sports Award – State 2005' in Queensland (the Qld NAPSA).[9]*

30. The QLD NAPSA cited by Fitness Australia clearly creates overtime entitlements for casuals. Clause 6.4 appears as follows:

> ***6.4 Overtime***
>
> *6.4.1 All time worked by employees in excess of arranged daily hours, or outside of or in excess of ordinary hours, shall be paid for at time and a-half for the first 3 hours and double time thereafter.*
>
> *6.4.2 All time worked by employees, other than casuals, on arranged days off shall be paid for at time and a-half for the first 3 hours and double time thereafter.*
>
> *6.4.3 An employer may require an employee to work reasonable overtime at overtime rates and such an employee as a condition of employment shall work overtime in accordance with such requirement.*

31. The ordinary hours under the QLD NAPSA also provides clarity in regards to the intended ordinary hours for casuals. Under the NAPSA, casuals were governed by all features of the ordinary hour provisions now appearing in the modern FIA *except* for the averaging provisions. This is consistent with the AWU's proposed variations. Clause 6.1 appears as follows (our emphasis at underlined):

> ***6.1 Hours of work***
>
> *6.1.1 The ordinary hours of work shall be not more than an average of 38 per week to be worked on any 5 consecutive days out of 7 in that particular week, and with 2 full days off in that period. The ordinary hours of work shall be performed within a spread of hours between 5.30 a.m. and 12 midnight except in the case of employees engaged to perform work within the classifications contained in Schedules B and D, in swim schools.*
>
> *Notwithstanding the above an employer and an employee may agree that the ordinary hours of work may be arranged as follows:*
>
> *(a) 38 hours within a work cycle not exceeding 7 consecutive days;*
>
> *(b) 76 hours within a work cycle not exceeding 14 consecutive days; or*
>
> *(c) 114 hours within a work cycle not exceeding 21 consecutive days; or*
>
> *(d) 152 hours within a work cycle not exceeding 28 consecutive days.*
>
> *6.1.2 Where part-time employees are employed, the maximum hours in clause 6.1.1*

---

7 Fitness Australia Submission 09 September 2009 in AM2008/78 at [10] to [17].

8 See proposed clause 21, LHMU Submission 07 September 2009 in AM2008/78.

9 Fitness Australia Submission 09 September 2009 in AM2008/78 at [18].

shall be in calculations of 32 hours.

6.1.3 The ordinary hours of work are to be worked each day in either one or 2 shifts totalling not more than:

(a) 8 (or by prior mutual agreement, 10) hours for full-time employees;

(b) 8 (or by prior mutual agreement 10) hours for part-time employees, provided that no shift shall be less than 3 consecutive hours in duration and there shall be not more than 2 such shifts per day within a span of 12 hours from start of the first shift to the end of the second such shift; or

(c) 8 (or by prior mutual agreement 10) hours, for casual employees, exclusive of any breaks.

6.1.4 The arrangements in clause 6.1.1 are to be recorded and agreed in writing by the employer and employee.

6.1.5 All employees, other than casuals, shall work ordinary hours in accordance with a roster. Each employee shall be advised of their rostered hours at least 7 days prior to the roster coming into effect. Such roster may be changed, in the case of an emergency without notice, or in other cases, by either mutual agreement or by the giving of 7 days' notice.

32. Thus, the AIRC Statement reflects that the Full Bench adopted the proposed ‘ordinary’ span of 5:00am to 11:00pm Monday to Friday / 6:00am to 9:00pm Saturday and Sunday / maximum of 10 ordinary hours per day / 5 days per week, rather than the LHMU’s 9:00am to 8:30pm Monday to Sunday / 7.6 ordinary hours per day.

33. In regards to the ‘weekend and public holiday penalty rates for casuals’, the issue in contention was the magnitude of the penalty rather than whether the overtime provisions applied to casuals on weekends and public holidays. The current Award prescribes a casual loading of 25% for ordinary hours on Monday to Friday and 30% for ordinary hours on weekends and public holidays. These rates were opposed by the LHMU.[10] This issue is further contemplated in relation to a NSW NAPSA immediately below.

Ordinary hours under the Health Fitness and Indoor Sports Centres (State) NAPSA

34. The weekend and public holiday casual rate at clause 7.4(b)(ii) of the modern FIA is derived from the NSW *Health Fitness and Indoor Sports Centres* NAPSA (‘**NSW NAPSA**’).[11] Under this instrument, a casual employee could be employed as an ‘ordinary casual’ or on an ‘all up’ basis for all hours worked.[12] As an ordinary casual, an employee clearly received a casual loading or otherwise the applicable weekend or public holiday penalty rate plus ‘night work’ penalties. The ‘all-up rate’ was alternatively prescribed on the basis that it applied to all hours worked, not just those worked on weekends and public holidays. The relevant provisions are set out below:

[10] See LHMU Submission 15 October 2009 at [28] to [36].
[11] AN120240.
[12] Ibid, clause 5.

35. An ordinary casual was employed on the basis:

> *i) Ordinary Casual — An ordinary casual shall be paid 1/38 of the appropriate weekly rate plus:*
>
> *(1) a 15 per cent loading (except when Saturday, Sunday, public holiday or night work penalties are paid); and*
>
> *(2) the equivalent of one-twelfth of the ordinary hourly rate of pay for a full-time employee for each hour worked.*
>
> *The payments specified in this subclause include statutory obligations under the Annual Holidays Act 1944.*
>
> *An ordinary casual employee shall be paid for a minimum engagement of three hours.*

36. An 'all-up casual was employed on the basis:

> *(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, and the loadings applicable under this award for work on Saturdays, Sundays, public holidays and at night.*
>
> *An all-up casual employee shall be paid for a minimum engagement of three hours. Provided that where an employer has been engaging casual(s) for periods of less than 3 hours prior to the commencement of this award, they may continue to do so, subject to a minimum engagement of one hour and a half. 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.*

37. The current FIA does not include an all-up rate for all hours worked as provided under the NSW NAPSA. The casual rate prescribed for weekend work under the FIA is properly described as a penalty rate and is utilised in place of the generous penalties afforded to part-time and full-time employees working ordinary hours on weekends and public holidays. We have previously submitted that a casual employee is worse off on the weekends and public holidays.[13]

38. In addition, clause 7(d) of the NSW NAPSA provided that "an employee shall be paid a loading of 30 per cent for ordinary hours worked between midnight and 6.00 a.m. on all occasions." This time period could not be characterised as 'night work' as absorbed by the 'all-up' rate set out above. Therefore, this additional provision provided even an 'all up' casual with additional remuneration after midnight and before 6am.

39. In further support of the AWU's contention that the 10 hour daily maximum is intended to apply to casuals, we refer to the clause 7(a) of the NSW NAPSA as

[13] See AWU Submission 05 May 2016 at [7].

follows (our mark-up):

> *The hours of work are to be worked each day in either one or two shifts totalling not more than:*
>
> *(i) Ten hours for full-time employees.*
>
> *(ii) ten hours for part-time employees, subject to subclause (e) of clause 6, Part-time Employment.*
>
> *(ii) Eight hours for casual employees.*

40. In further support of the AWU's overall contention that overtime rates are clearly applicable to casuals, we refer to clause 8 of the NSW NAPSA as follows:

> ***8. OVERTIME***
>
> *(a) All work performed in excess of the hours prescribed in subclause (a) of clause 7, Hours of Work, shall be overtime.*
>
> *(b) Overtime shall be paid at the rate of time and a half for the first two hours and double time thereafter on a daily basis, calculated on:*
>
> *(i) The ordinary rate of pay for weekly employees;*
>
> *(ii) The loaded casual rate (i.e. 15 per cent or 30 per cent loading) for casual employees*

41. Under the NSW NAPSA, a casual employee was entitled to overtime in addition to the casual loading. It was a compounding rate. However, the current Award expresses the overtime rates as applicable to the minimum hourly rate. The AWU is not pressing for the casual loading to be paid for all-purposes. However, should our overall position in regards to ordinary hours and overtime not be adopted, the casual loading should be expressed as payable on all hours, not just ordinary hours. Clause 7.4(b)(i) and (ii) of the Exposure Draft should then be amended to read "for each ~~ordinary~~ hour worked…a casual employee must be paid [the casual loading]."

Interim summary – award modernisation

42. There is no indication in the parties' submissions, the two relevant pre-modern Instruments or importantly the AIRC's cited Statement or Decision issued on 4 December 2009[14] – that any component of the ordinary hour provisions does not apply to casuals (except the averaging provision).

43. In the absence of any ruling on this issue, the AWU consider it notable that the Award Modernisation Full Bench determined to utilise an incredibly broad span and daily maximum of ordinary hours presumably to accommodate the nature of the fitness industry and to ensure employees would not attract overtime rates on many or any of their daily hours. As stated above, the hours adopted protects

[14] [2009] AIRCFB 945 at [71] to [76].

employers from paying overtime for up to 10 hours per day between:

> ***(a)*** *5.00 am and 11.00 pm, Monday to Friday; and*
> ***(b)*** *6.00 am and 9.00 pm, Saturday and Sunday.*[15]

Award modernisation – Sporting Organisations Award

44. The SOA operates in the entertainment and broadcasting industry and is based on the *National and State Sporting Organisations Award 2001* ('the pre-modern SOA')[16] which had the same two career streams – coaches and clerical employees.[17] The ordinary hours for full-time clerical employees are the same as set out at clause 8.1 of the SOA Exposure Draft, while the ordinary hours for part-time employees are by agreement in writing.[18] The Award Modernisation Full Bench inserted a more comprehensive part-time employment provision (now clause 6.4 of the SOA Exposure Draft) including an express reference to the overtime provisions at subclause (f) and a ceiling of 38 ordinary hours per week (clause 6.4(a)(i)). The AWU submits that the same initiative was not made for the casual employment provisions despite that casual employees were previously governed by ordinary hours. The relevant pre-modern provisions appear below.

45. For casual clerical employees (our emphasis at underlined):

> **8. EMPLOYMENT CATEGORIES - CLERICAL**
>
> *…*
>
> ***8.4 Casual employment***
>
> *A casual employee is one engaged and paid as such. A casual employee for working ordinary hours of work shall be paid one thirty-eighth of the total minimum rate prescribed herein, plus 15 per cent.*

46. For casual coaches (our emphasis at underlined):

> **12. EMPLOYMENT CATEGORIES - COACHES**
>
> ***…***
>
> ***12.5 Casual Employees***
>
> *Casual employees are paid an all up hourly rate, together with a 15 per cent loading for each hour which they work, having regard to the criteria set out in clause 17 and on the basis of a 38 hour week. The 15 per cent loading includes full consideration for all leave and public holidays.*

47. Consistent with the current Award and the Exposure Draft, the overtime provisions in the pre-modern Award are of general application in regards to employment types (part-time, full-time and casual). However, the current Award

---

[15] Fitness Industry Award Exposure Draft published 18 December 2015, clause 8.1.
[16] AP811193CRA.
[17] Ibid, clauses 12 and 8.
[18] Ibid, clauses 20.1.1 and 20.2.

is misleading in that it created an overtime provision only for clerical and administrative staff.[19] The Exposure Draft then introduced a new clause 13.1 to preclude the overtime provisions, which reads – "Clause 13 only applies to Clerical and Administrative staff". This is inconsistent with the pre-modern Award and internally inconsistent with clause 8.2 of the Exposure Draft, which prescribes ordinary hours for coaching staff in accordance with the NES.

48. It appears the overtime provisions for the new SOA were not carefully drafted during award modernisation. The oversight is not surprising given the limited features of ordinary hours for coaches under the pre-modern Award. We have proposed that clause 13.1 be removed to rectify the error.

Modern Awards Objective

49. In exercising its powers in the four-yearly review the Fair Work Commission must ensure that the awards together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account the matters listed in s 134(1)(a) – (h) of the *Fair Work Act 2009* ('the FW Act'). This is the modern awards objective.

50. As stated above, the AWU regard our proposed variations as technical in nature. That is, the Awards as they are intended to operate do meet the modern awards objective. However, in support of our position, we consider the opposing interpretation in light of the modern awards objective.

51. We submit there is no apparent rationale that would justify the denial of overtime payments to casual employees under these Awards. To do so would be contrary to the modern awards objective, and in particular:
    - The relative living standards and the needs of the low paid;[20] and
    - The need to provide additional remuneration for employees working overtime[21] and on weekends and public holidays.[22]

52. We refer to each consideration set out at s 134(1) below.

(a) relative living standards and the needs of the low paid

53. We briefly note the expert evidence led by the ACTU in the casual employment proceedings regarding the costs associated with attending employment including child-care, transport and uniforms.[23]

---

[19] See clause 21.1 of the current *Sporting Organisations Award* 2010.
[20] See *Fair Work Act 2009* (Cth), section 134 (1) (a).
[21] Ibid, section 134 (1) (da) (i).
[22] Ibid, section 134 (1) (da) (iii).
[23] See Professor Markey, Dr McIvor and Dr O'Brien 'Supplementary Report: Casual and Part-time Employment in Australia' at page 62 onwards.

54. Casual employees are already subject to short shifts and unpredictable hours. The cost of living is largely constant, while the income of casual employees is inconsistent and unpredictable. In addition to this inherent instability, the casual employees governed by the FIA and SOA are largely low income earning.

55. Significantly, the Level 1 rate under the FIA is $17.70 per hour, which is the National Minimum wage. The rates for clerical and administrative employees under the SOA start at only $19.21 for a Grade 1 employee. Although coaching and related staff under the SOA are on higher wages (23.40 per hour at Grade 1) these employees are not governed by such restrictive ordinary hours. In any case, a Grade 1 coach is only a fraction off being characterised as 'low paid' – earing an additional $9.20 per week compared to a 'low paid' employee.

56. In determining the meaning of 'low paid' the Expert Panel in the 2015-16 Annual Wage Review at [359] note:

> *There is broad acceptance of the proposition that the two-thirds of median (adult) ordinary time earnings constitutes a reasonable basis for identifying the low paid. As in past AWRs, we accept that adult award-reliant employees who receive a rate of pay that (as a full- time equivalent) is below two-thirds of median (adult) ordinary time earnings are an appropriate and practical benchmark for identifying who is low paid. Appropriate adjustments must then be made for juniors (who comprise a large proportion of the award reliant and of the low paid).*

57. The Panel provide an estimate based on the available ABS 2014 data – that two thirds of the median weekly earnings for a full-time equivalent adult sits between $800 and $880.[24]

58. On this basis, the following employees under the two Awards are properly described as being 'low paid':
    - Under the SOA – All clerical and administrative employees classified as a Grade 1 through to Grade 5 (excluding Grade 6 employees).[25]
    - Under the FIA – All employees classified as a Level 1 through to Level 4A (excluding employees classified at Levels 5 to 7).[26]

59. It is not merely the entry-level employees that have difficulty accessing decent wages. Under the SOA, a clerical and administrative employee can climb all the way to Level 5 where they assume a supervisory role and are responsible for others work – and still fall within the definition of 'low paid'. Under the FIA, all non-managerial roles are classified as 'low paid' and only at Level 5, when in a management role holding specific management qualifications do the wage rates fall outside the 'low paid' specifications.

---

[24] Annual Wage Review [2016] FWCFB 3500 at [362] at Table 5.1.

[25] *Sporting Organisations Award 2010* (updated as a result of AWR 2016).

[26] *Fitness Industry Award 2010* (updated as a result of AWR 2016).

60. Given the majority of award covered employees subject to our proposed variations are low paid, the impact reducing their entitlements to overtime is significant. The needs of the low paid must be given great weight.

(b) the need to encourage collective bargaining

61. Although the AWU does not view the ordinary hours under these awards as inappropriately restrictive for employers, if greater flexibility is required, we submit this is an appropriate goal for enterprise bargaining, subject of course to the better off overall test.

62. Removing the overtime entitlement to casual employees under these Awards discourages employers from collective bargaining as they are able to access labour at some of the lowest wage rates and at the ordinary wage rates for any number of hours and at any times 7 days a week, with all the benefit of flexibility already achieved.

(c) the need to promote social inclusion through increased workforce participation

63. If employers are worried that an excess of the maximum daily or weekly hours is required of their employees, then the alternative to paying overtime is to increase employment at the workplace. This is a positive outcome.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

64. As above at paragraphs 61 to 62 in relation to section 134(1)(b).

(da) the need to provide additional remuneration for:

(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts;

65. This is obviously a very strong factor in support of our proposed variations.

66. According to the position of employer parties, the Awards are currently being interpreted and presumably applied to deny casual employees additional remuneration for overtime worked.

67. As previously stated, the AIRC has already adopted a generous daily maximum and span of hours in favour of employers under the FIA, allowing employees to work very early and very late without additional remuneration. The SOA also provides a generous daily maximum of 11 hours with a span of 6am to 6pm Monday to Sunday.

(e) the principle of equal remuneration for work of equal or comparable value

68. This appears to be a neutral factor.

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

69. As above, the span of hours and daily maximums are generous in both Awards. Certainly in regards to the FIA, the requirements of the industry were significantly accounted for during award modernisation. To further extend the protection for employers would of course serve to further disadvantage low paid employees who are already working very late and early ordinary hours.

70. Any increased cost to employees should not be measured against the *perceived* current employment costs.

71. As to the regulatory burden, the proposed variations provide clarity to the ordinary hours and overtime provisions under the Awards, which will promote greater compliance free of error.

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

72. The AWU's proposed variations will provide internal consistency within the Awards, which will enable observance of the ordinary hours provisions and the correct application of overtime.

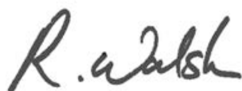
h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

73. As above at paragraph 63 in regards to s 134(1)(c).

Conclusion

74. For the reasons set out above, and in our earlier submissions dated 18 and 19 April 2016 and 05 May 2016 we submit there is a sound basis to adopt our proposed variations in order to clarify the overtime entitlements for all employees, but especially casual employees under the Fitness Industry Award and the Sporting Organisations Award.

END



NATIONAL LEGAL OFFICER
Australian Workers' Union
27 January 2017