

IN THE FAIR WORK COMMISSION

Matter No: AM2014/283

Section 156 – Four Yearly Review of Modern Awards – Registered and Licensed Clubs Award 2010

SUBMISSION

UNITED WORKERS' UNION

1. This submission is made pursuant to the direction of the Full Bench of 20 December 2019 requesting that the United Workers' Union file a submission regarding the appropriate minimum classification rate for casual fitness instructors engaged under the *Registered and Licensed Clubs Award 2010* ('the Award').
2. In summary, the appropriate classification rate for casual fitness instructors is the rate payable by the Award and the Commission would not be justified in varying the rate downwards in this review.

Background

3. This matter is being agitated in the 4 yearly review of modern awards ('the Review') at a point near the finalisation of the review of the Award. There has been no claim by a participant to vary the rate paid to casual fitness instructors or a work value case heard.
4. Consideration of the rate of an award-covered worker is a work value matter and the rate can only be varied for work value reasons.¹ Disaggregation of the rate is not a work value matter as separating the base rate and the casual loading can be characterised in terms of subsection 135(1) (b) of the Act as resolving an ambiguity.

¹ Subsection 135(1)(a), *Fair Work Act 2009* ('the Act'). There is no plausible sense in which the rate paid can be incorrect in terms of subsection 135(1)(b). The existence of the rate since the Award was made and that it has gone unremarked is the most cogent evidence that while the rate may be seem 'high', the rate cannot be characterised as erroneous. See generally: *4 yearly review of modern awards - Pharmacy Industry Award 2010 FWCFB 762* ('the Pharmacists' Decision') at [122]-[169].

5. The expression “*work value reasons*” is defined under s 156(4) of the Act:
- (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. Within the Review, the Commission’s capacity to vary the rates in a modern award is further constrained by what was subsection 156(3) which noted: ‘*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** (our emphasis) that the variation of modern award minimum wages is justified by work value reasons.*’ This provision is still operative by virtue of the transitional provisions in schedule 1 of the Act.²
7. The terms and conditions for work covered by modern awards do not have to be uniform. There are different modern awards with quite contradictory terms and conditions because there are many different sectors and ‘*jobs*’ within the Australian economy. A ‘*one size fits all*’ approach would frequently be inconsistent with the modern awards objective. Modern awards are statutory artefacts that exist to supplement the national employment standards and the minimum wage because the actuality of a fair and relevant safety net of terms and conditions will vary considerably.
8. The Commission observed in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision at [34]:
- Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. **Different combinations or permutations of provisions may meet the modern awards objective.** (Our emphasis)*
9. Paid hourly rates are by their nature numerical and capable of easy comparison but are not immune to the permissibility of difference. There is very significant variation in what is a safety net hourly rate: the minimum casual hourly rate is \$24.36³ whereas the *Air Pilots Award 2010* contains a safety-net casual hourly rate for captains engaged in general aviation

² Schedule 1, Division 2, item 26.

³ Namely that permitted to be paid by the National Minimum Wage Order.

from \$70.11 to \$285.36 per hour.⁴ The top hourly casual rate for a captain is higher than the remuneration provided by many modern awards for a standard pattern of work for a day.

10. The fact that the hourly rate for work under one modern award is different to another covering similar work is not of itself determinative. If the pattern of work is fundamentally different for similar work an apparent disparity is explicable. Namely under one modern award '*fitness instructors*' have very short minimum engagements, have significant unpaid travel and preparation time, are paid an industry standards and/or but for the employment generally independent contractors, this will explain disparities in the hourly rate where in another modern award the same work is conducted by permanently engaged employees.

Coverage

11. The Award covers employers of employees engaged in the performance of all or any work in or in connection with or for clubs registered or recognised under state, territory or commonwealth legislation and their employees in the classifications within Schedule 3.⁵ The *Fitness Industry Award 2010* ('Fitness Award') contains an explicit exclusion in its coverage for employees covered by the Award.⁶
12. Clause 4.5 provides for a broad labour hire provision and '*any employer which supplies labour on an on-hire basis*' in a club is covered by the Award. If an employer such as Fitness First were to operate a gym within the premises of a larger club or supply its instructors on a labour hire basis for fitness classes within a club, the Award and not the Fitness Industry Award would apply to the work.

A distinct role

13. The Award contains a specific rate and classification for casual fitness instructors. The rate of a casual fitness instructor is \$49.15 per hour inclusive of the 25% loading and there is a 1-hour minimum engagement. A casual fitness instructor's role has a distinct classification which clearly places it outside the stream of related classifications.⁷ The role is a unique one.
14. The Award contains 3 categories of employment: full time, part-time and casual. There is arguably a 4th category of employment under the Award if the unique designation of casual fitness instructor is included.

⁴ Fair Work Ombudsman, *Air Pilots Award 2010-Pay Guide*, 27 June 2019, page 14.

⁵ Clause 4.1.

⁶ Clause 4.2(f).

⁷ Schedule A, item A.7.4.

15. The duties that a casual fitness instructors performs are included, in part, within the work covered by a leisure attendant grade 2 as a leisure attendant grade 2 '*takes classes*' although it is tolerably clear from the text of Award that if a casual employee's job is to take the classes listed in the classification for casual fitness instructors at Schedule A, item A.7.4, the person must be paid as a casual fitness instructor. Some of the work a casual fitness instructor performs may be performed by a part time or full time worker classified as a leisure attendant grade 2 and above should the employer engage the worker on that basis. Significantly, a leisure attendant grade 2 may perform other duties such as assist in the calling of bingo. There is no permanent fitness instructor classification.
16. There is some complexity to the industrial relations of fitness instructors. Fitness instructors appear to be archetypal '*freelancers*' who will possess special skills and complex competitive considerations like '*celebrity*' may affect the paid rate. Work in a gym may also bring with it opportunities for an instructor to negotiate over award payments directly with persons for services such as personal training. There is arguably some disutility associated with a fitness instructor doing the same work in a club that isn't part of the '*fitness industry*'.

Consideration

17. As a work value matter, the Commission must identify '*work value*' reasons to vary the rate of casual fitness instructors.
18. There are *prima facie* reasons to say that the rate is properly set or more correctly there are no cogent work value reasons to vary it.

The nature of the work

19. The rate is intended to apply to an employee who will be engaged for a minimum of 1 hour to perform broadly '*aerobic exercise*' classes although '*walking*' and '*yoga*' are part of the classifications activities for the position.
20. We understand most fitness classes conducted by commercial gyms now run for approximately 30 to 45 minutes. The instructor participates in the class with the participants by doing the exercises vigorously so as to encourage the class to attain '*fitness*'. The work of a fitness instructor is physically demanding as he or she leads the class by performing the exercise expertly. It is pellucid that it is not a job that can be done '*back to back*' for 8 hours a day, 5 days a week. The work is arduous and can only be performed in a few hourly increments a day with breaks.

21. The comparison made in the Decision at [13] of the casual fitness instructor rate and a weekly base rate of \$1,450.70 is unhelpful. A \$1,450.70 weekly rate of pay for this classification is not a possibility under the Award. Casual fitness instructors can only be employed casually. Further were a club to engage a casual fitness instructor for full time hours doing work within the classification, this would require the employees to lead about 35 classes a week requiring the employee to perform over 6 classes per day. This would be an arguably impossible job to perform, requiring extraordinary level of athleticism and be potentially harmful to a person's health and unsustainable.

The level of skill or responsibility involved in doing the work

22. A casual fitness instructors duties fit within the classifications for leisure attendants but are distinct. A casual fitness instructor is *'an employee engaged in instructing people in either aqua aerobics, aerobics, pump, step aerobics, boxing circuits, circuits, walking, cardiac class, yoga or similar disciplines. An employee engaged as a fitness instructor will be engaged for a minimum shift of one hour.'*⁸
23. While the *'skills'* required of a casual fitness instructor are loosely defined some of the indicative task require a high level of skill. Skill here should be informed by the choice provided to employers by the casual nature of the work. A club can rationally be expected to seek fitness instructors for the provision of *ad hoc* classes for members who have some facility. A casual fitness instructor will be engaged because of the special skills the person has in leading fitness classes.
24. Rates within a modern award should be aligned to an amount that would actually allow an employer to engage persons to perform the work. If a club is in effect engaging independent contractors and the rate in the award aligns with the industry standard, the rate is appropriate. If the rate paid for casual fitness instructors is so low that it would be practically impossible to provide *ad hoc* fitness classes for members, there is nothing fair or relevant about the rate.

The conditions under which the work is done

25. Further, one can assume that a casual fitness instructor may be engaged by a club to provide some classes to its members as an *'add-on'* amenity to members. The provision of fitness classes may not be part of the club's core activities and such classes may be infrequent. In a not inconceivable scenario, there may be 3 or 4 classes of one hours' duration a week. The instructor would have to travel at his or her own expense to the club, set up before the class

⁸ Schedule A, Clause A.7.4.

and shower and change afterwards. The employee may also have to supply, maintain and use their own equipment to conduct the class. There are no allowances within the Award that would provide any compensation for this. Accordingly taking into account this plausible pattern of work, the rate is not particularly high or necessarily ‘*absurd.*’

- 26. If a club wants to have a greater focus on fitness classes, the Award does allow a club to engage a person as a leisure attendant on a part time or full time basis. The Award has flexible part time employment.
- 27. It is plausible to assume that the engagement of fitness instructors for a bare 1-hour is more common under the Award than the Fitness Award. The work of a casual fitness instructor under the Award likely carries with it a high degree of precariousness.

Conclusion

- 28. The casual fitness instructor classification and the rate paid under the Award is a defensible permutation of the modern award system.
- 29. The Commission has no evidence that the rate should be varied. There is also no indication that the work has changed one way or another since the rate was set at the time of award modernisation. At this stage, concern that the rate was not properly set is at best a suspicion.
- 30. The rates in the Fitness Award can broadly be characterised as low. The Fitness Award allows an employer to engage a person casually to lead aerobic classes for a minimum of \$28.37 an hour.⁹ We make a comparison below of the rate paid under the Award and the Fitness Award for a 1-hour aerobics class.

Timing of the work	Fitness Award	Clubs Award
ordinary time (permanent)	\$22.70 to \$24.77 ¹⁰	N/A but notionally \$38.18
casual - Monday to Friday	\$28.37 to \$30.96	\$47.72
casual - Saturday	\$35.18 to \$38.39	\$47.72
casual -Sunday	\$40.86 to \$45.59	\$66.81
casual –Public holiday	\$63.56 to \$69.36	\$95.45

⁹ As a grade 3A, Fitness Award, a person at this level works under general supervision. The casual loading is increased to 30% on Saturday. Casuals generally have a 3-hour minimum engagement albeit the classifications within the Fitness Award that appear to be able to take fitness class can all be engaged for a minimum of 1 hour (clause 13.5).

¹⁰ Grades 3A to 4A, Fitness Award, although the 4A classification is likely the closest analogue to the work of a casual fitness instructor under the Award as a level 3A under the Fitness Award works under general supervision. The casual loading does not appear under this modern award to be absorbed by other penalties.

31. In light of the circumstances of the work in the club being precarious, for short durations, possessing contextual disutility for the worker¹¹, special skills and athleticism being required and the arduous nature of the work: the rate provided by the Award is not extraordinary and unjustifiable.
32. The comparison of the Award with the Fitness Industry Awards is unhelpful. The Fitness Award does not apply to fitness classes conducted on the premises of a club. Second, the comparison of minimum wages at [17] to [20] is not apt as casual fitness instructors cannot be permanent workers. As noted above there are *prima facie* plausible work value reasons that provide justification for the rate paid to casual fitness instructors under the Award. But this is not the test. The significance of the rate paid to casual fitness instructors under the Award being plausible demonstrates that the type of work value reasons needed to vary the rate are **not** present.
33. In terms of the threshold jurisdictional fact required to vary the rate, the Commission is unable to be satisfied that a change in the rate is necessary and “*justified by work value reasons*”.¹² Accordingly, the rate should remain as it is.
34. We reiterate our submission that the rate does not absorb all other penalties other than the casual loading and we note the Commission’s view that the rate should be disaggregated and that on the limited material before the Commission ‘*we are not persuaded that the rate in clause 18.4 encompasses all penalty payments.*’¹³
35. In terms of resolving all of these matters in an expeditious way, it may be useful to have a further private conference with the parties.

UNITED WORKERS’ UNION

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¹¹ A fitness instructor has to travel to a venue and work in an environment not purpose built for fitness classes and is working outside the mainstream of his or her calling. Doing the same work in a large gym is done in an environment supportive of the instructor’s calling, with appropriate change rooms, and may generate career and work opportunities such as lucrative personal training work.

¹² Pharmacists’ Decision at [163] to [164].

¹³ Decision of 20 December 2019 at [20]