

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.576E – Procedure for carrying out award modernisation request

Request from Minister for Employment and Workplace Relations

Award Modernisation – Entertainment and Broadcasting Industry (Other than Racing)
(AM2008/35)

**Submissions of Lander & Rogers on behalf of the
organisations listed in the Attachment**

SPORTS AWARD

Representation

1. Lander & Rogers acts for a large number of sporting organisations at all levels and in all States and Territories. The firm is specifically instructed to make this submission on behalf of the organisations listed in the Attachment (**Sports Bodies**). This list is current as at 24 April 2009.

Background

2. In accordance with the Full Bench Statement of 30 January 2009, public consultations were conducted on behalf of the Full Bench by Commissioner Deegan at Melbourne. This included AM2008/35 – Entertainment and Broadcasting Industry (other than Racing) on 16 March 2009.
3. Lander & Rogers was not instructed to appear at that Consultation and we understand that no appearance was entered by any sporting organisation employer at that time.
4. A Notice of Listing dated 9 April 2009 was subsequently received by some clients with an interest in one or more of the following awards and NAPSA.
 - (a) Australian Cricket Award 2002
 - (b) Australian Rugby League Players Award 2000
 - (c) National and State Sporting Organisations Award 2001
 - (d) National Basketball League Players Award 2005
 - (e) Sportspersons, Coaches, Umpires and Associated Support Staff Interim Award
5. As a result of the notification, Lander & Rogers was instructed to seek leave to appear for the Sports Bodies at the further Consultation on 20 April 2009.

Submission

6. This submission is made in response to Commissioner Deegan's invitation during the Consultation on 20 April 2009.

7. The Submission is predicated on the presumption that the Full Bench intends to make a separate modern award for "sport" and that the Media, Entertainment and Arts Alliance (**MEAA**) draft Sports Award 2010, is being used as a discussion document to elicit comments at this stage of the Consultation from other interested parties, including the Sports Bodies.
8. The Sports Bodies support the making of a separate modern Sports Award reflecting the requirements and conditions of work in and meeting the needs of the sports industry.

Modern Sports Award 2010

9. The making of a modern Sports Award is consistent with the organisation and operation of sport in Australia.
10. While sport falls within the Australian Industrial Relations Commission's industry allocation of "Entertainment and broadcasting", sport is statistically recognised as part of Division R "Arts and Recreational Services", Subdivision 91 "Sports and Recreation Activities", Group 911 "Sports and Physical Recreation Activities", Class 9112 "Sports and Physical Recreation Clubs and Sports Professionals" and Class 9114 "Sports and Physical Recreation Administrative Service".¹ Sports coaching forms part of Class 8211 "Sports and Physical Recreation Instruction", which forms part of Group 821 "Adult, Community and Other Education", which forms part of Subdivision 82 "Adult, Community and Other Education" of Division P "Education and Training".²
11. The major activities of "sports administrative service" and "sports coaching" mirror (to a large extent) the coverage of the National and State Sporting Organisations Award 2001 (**NSO Award**).
12. The Sports Bodies submit that the coverage of the modern Sports Award 2010 should go no further than the coverage of the NSO Award.
13. The proposed coverage of the Award to "employers throughout Australia engaged in the sports industry and their employees" together with the proposed definition of sports industry to mean "all employers and employees who are engaged in or in connection with or in or about sports as either competitors or players, or match or game officials, or as coaching, support or administrative staff" has the potential of applying the proposed award to employers in a range of activities that may not have been intended. These might include the fitness industry and licensed clubs, etc and to bodies operating below the National and State levels.
14. It is suggested that the coverage of the modern Sports Award be:
 - "4.1 This Award which operates throughout Australia covers employers who are recognised National or State sporting bodies in Australia engaged in organised sports and their employees in the Sports Industry in the classifications set out in this Award to the exclusion of any other modern award."
15. It is also suggested that the definition of "sports industry" be as follows:

¹ In accordance with the *Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 (Revision 1.0)*

[http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1292.0Contents12006%20\(Revision%201.0\)?opendocument&tabname=Summary&prodno=1292.0&issue=2006%20\(Revision%201.0\)&num=&view=](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1292.0Contents12006%20(Revision%201.0)?opendocument&tabname=Summary&prodno=1292.0&issue=2006%20(Revision%201.0)&num=&view=)

² See above reference.

"4.2 **Sports industry** means all employers who are recognised National or State sporting bodies in Australia and their employees who are engaged in or in connection or in or about organised sports conducted by their employer as coaches or administrative staff."

16. The proposed award exclusions (in clause 4.3) should also extend to exclude a person employed by an employer covered by the Award as its Chief Executive Officer (howsoever styled). This is consistent with the existing operation of the NSO Award.³
17. The above submissions are consistent with the current situation and paragraph 2(a) of the Request under Section 576C(1) – Award Modernisation (Consolidated version) (**Request**).
18. Paragraph 2(a) of the Request states that:
 - "2. **The creation of modern awards is not intended to:**
 - (a) **extend award coverage to those classes of employees, such as managerial employees who, because of the nature or seniority of their role, have traditionally been award free.** This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including state awards) in Australia." (emphasis added)
19. There are no Federal awards that provide for match or game officials.
20. The only Federal awards that currently provide for "players" are the:
 - (a) Australian Rugby League Players Award 2000; and
 - (b) National Basketball League Players Award 2005 (**Players' Awards**).
21. Each of these awards are applicable only to employers and employees engaged in a single professional sporting competition or "franchise" and could properly be regarded as an "enterprise award" within the definition provided by section 576U of the *Workplace Relations Act 1996* (**WR Act**).
22. Section 576U defines "enterprise award" to mean an award that regulates the terms and conditions of employment in a "single business only (being the single business specified in the award)".
23. In the case of the Australian Rugby League Players Award 2000, the single business is the premier rugby league competition conducted in Australia by the National Rugby League Limited.
24. In the case of the National Basketball League Players Award 2005, the single business is the premier basketball competition conducted by NBL Management Limited.
25. The Players' Awards would fall within the proposed provisions to apply to Modern enterprise awards under the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.⁴

³ See NSO Award clause 5.1.

26. The Players' Awards would also meet the test of whether a business, project or undertaking is carried on as a common enterprise in accordance with the Full Bench's decision in *Qantas Airways Limited and AFMEPKIU*, (Polites SDP, Watson SDP and Gay C, 6 October 2000).⁵
27. In the Sporting Bodies' submission, the existence of the players' awards cannot and should not be used as a basis to extend coverage to "competitors or players" or "match or game officials" as proposed by the MEAA in the coverage provisions of the modern Sports Award.⁶
28. The South Australian NAPSA – Sportspersons, Coaches, Umpires and Associated Support Staff Interim Award, states that it applies to persons engaged as employees in the capacity of player, coach, umpire (including referee), trainer and/or directly associated support staff in connection with sporting activities of all kinds. Clause 10 of the NAPSA states that "Subject to the other terms of the Award [NAPSA], the payments and conditions of employment will be as agreed between the employer and the employee from time to time." The NAPSA only provides for sick leave/carer's leave, bereavement leave, annual leave and parental leave. Each of these will be regulated by the National Employment Standards from 1 January 2010.
29. In these circumstances, there would appear to be no compelling reason for the proposed Sports Award to be influenced by the existence of this NAPSA.
30. In the event that the Full Bench is minded to extend coverage of the modern Sports Award to employed "competitors or players" and employed "match or game officials", then significant changes are required to any proposed modern Sports Award. Without being exhaustive, this would include:
 - (a) amendment to the employment categories proposed to provide for **piece-rate employees** (see particularly clauses 10.1 and 10.2) and consequential changes elsewhere in the award;
 - (b) providing for a relevant one-level only classification and rates of pay reflecting the minimum rate of pay for any new categories of employee;
 - (c) providing for appropriate hours of work provisions, such as providing that
 "Over a period of 52 weeks: an average of 38 hours a week for a full-time employee; or the lesser of 38 hour and the employee's ordinary hours of work in a week for an employee who is not a full-time employee."
31. The categories of employees to whom the MEAA wishes to extend award coverage, have not been historically regulated by awards within the proper meaning of that phrase in the Request.

Players' Awards

32. If the Commission accepts the relevant submissions made under the previous heading, to the effect that the Players' Awards are enterprise awards, then they are excluded from the award modernisation process by virtue of paragraph 2(e) of the Request.

⁴ See Schedule 6 clause 3(2) - meaning of single enterprise, which provides that 2 or more employers can carry on a business, project or undertaking as a joint venture or common enterprise and be taken to be one employer.

⁵ Print T1582.

⁶ See clause 4.2 and clauses 16.1 and 16.2.

33. It would be up to the Players' Awards parties to effect the modernisation of each award in accordance with the provisions proposed by Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

Coaches

34. In the event that the Commission is not disposed to limit the scope of the modern Sports Award in the manner suggested by the Sports Bodies, they are concerned about how the award may operate on their respective "affiliated clubs". That is to say, bodies that operate below the National and State level. For example, the award might operate at a local club level. In this circumstance, extension of the award's coverage will expose these employers to unsustainable minimum terms and conditions. This is particularly a concern for those bodies employing coaches. This is because the minimum Grade 1 salary of a coach under the NSO Award and the proposed Modern Award is \$37,927.
35. There ought to be a coaching grade below the existing Coach Grade 1 Level for these kinds of employers (that is, below the National and State level) that is commensurate with the nature of their activities. This rate would be based on the minimum wage of \$543.78 per week or \$28,367.19 per annum.
36. Also, at this level many coaches are juniors. There is an important need to provide for a junior wage rate to ensure these young people continue to have an opportunity to be employed in the industry.
37. As a result, the following junior rates are suggested.

Age	Percentage of Coach Grade 0
Under 16 years of age	45%
16 years of age	50%
17 years of age	60%
18 years of age	70%
19 years of age	80%
20 years of age	90%

Specific conditions of the proposed award

38. It is submitted that apart from the coverage of the modern Sports Award being based on the NSO Award, that the terms of that award should also be based on the NSO Award.
39. In addition to the above comments, the Sports Bodies comment on the following proposed provisions of the MEAA's Sports Award 2010 with reference to the NSO Award (where relevant).

Clause	Comment
4	<p>This clause should read as follows.</p> <p>4. Coverage</p> <p>4.1 This Award which operates throughout Australia covers employers who are recognised National or State sporting bodies in Australia engaged in organised sports and their employees in the Sports Industry in the classifications set out in this Award to the exclusion of any other modern award.</p> <p>4.2 Definition of sports industry</p>

	<p>Sports industry means all employers who are recognised National or State sporting bodies and their employees who are engaged in or in connection or in or about organised sports conducted by their employer as coaches or administrative staff.</p> <p>4.3 Exclusions</p> <p>This Award does not cover:</p> <ul style="list-style-type: none"> (a) an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award; (b) an employee excluded from award coverage by the Act; (c) an employee employed by a licensed club; (d) an employee employed in the fitness industry; and (e) a person employed by an employer covered by the Award as its Chief Executive Officer (howsoever styled). <p>4.4 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.</p> <p>NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and the employee are covered by an award with occupational coverage.</p>
14.1	Amend clause 14.1 to read "Notice of termination by an employer is provided for in the NES." This is a consequence of clause 14.2 providing for the notice of termination by an employee.
New clause 16.3A	<p>Insert a new provision:</p> <p>Coach Grade 0</p> <p>A coach Grade 0 is employed by an employer covered by this Award who is not a recognised National or State Sporting body:</p> <ul style="list-style-type: none"> (i) Who has formal coaching qualifications and works under supervision of a well qualified coach in applying established techniques and methods in a program. The coach may be starting on a professional coaching career and may assist in a range of coaching duties from drawing up training programs, supervising programs for individuals and squads. The coach may be assessing and/or counselling athletes and/or planning competition schedules. The coach may be conducting development programs. (ii) Alternatively a coach Grade 0 may be a technical specialist who is involved only in narrow technical elements of the total program for the sport and is not undertaking development for a broader role. (iii) Alternatively a coach Grade 0 may be a coach of junior athletes or teams or an assistant coach who has only just obtained or is obtaining formal coaching qualifications and is starting on a professional coaching career. Coaches may be field officers

	working in schools with established development programs for their sport.														
16.3(a)(i)	Add new sentence "The coach may be assessing and/or counselling athletes and/or planning competition schedules."														
16.3(a)(iii)	Second line after "who has just obtained" add "or is obtaining".														
16.3(b)(i)	6 th line after "at the appropriate" add " and/or senior"														
17.1	Delete														
17.2	Delete														
17.3	<p>Add to the table in clause 17.3 a new classification "Coach Grade 0" with a per annum rate of \$28,367.19 and a weekly rate of \$543.78. Add at the bottom of the table junior rates based on the following ages and percentages.</p> <table border="1" data-bbox="529 690 1310 929"> <thead> <tr> <th>Age</th> <th>Percentage of Grade 0</th> </tr> </thead> <tbody> <tr> <td>Under 16 years of age</td> <td>45%</td> </tr> <tr> <td>16 years of age</td> <td>50%</td> </tr> <tr> <td>17 years of age</td> <td>60%</td> </tr> <tr> <td>18 years of age</td> <td>70%</td> </tr> <tr> <td>19 years of age</td> <td>80%</td> </tr> <tr> <td>20 years of age</td> <td>90%</td> </tr> </tbody> </table> <p>(Note it is <u>not</u> intended that the proposed junior rates operate in the same manner as for clerical and administrative staff – see clause 17.4)</p>	Age	Percentage of Grade 0	Under 16 years of age	45%	16 years of age	50%	17 years of age	60%	18 years of age	70%	19 years of age	80%	20 years of age	90%
Age	Percentage of Grade 0														
Under 16 years of age	45%														
16 years of age	50%														
17 years of age	60%														
18 years of age	70%														
19 years of age	80%														
20 years of age	90%														
18.2	Similar but not identical to clause 30.1.1 of the NSO Award														
18.3	Similar but not identical to clause 30.1 of the NSO Award														
18.4	Similar but not identical to clause 21.3 of the NSO Award														
18.5	Delete														
18.7	Similar but not identical to clause 31.1 of the NSO Award														
18.8	Delete														
19.1	Replace existing clause with: "An employer must pay wages weekly, fortnightly or monthly."														
20.3(a)	Delete "22.2".														
20.4(a)	Insert names of other relevant industry funds														
21.2	Delete or replace with "Over a period of 52 weeks: an average of 38 hours a week for a full-time employee; or the lesser of 38 hour and the employee's ordinary hours of work in a week for an employee who is not a full-time employee"														
21.3	Delete														
21.4	Delete														
21.5	Delete														
24.2(a)	Delete														

Trainees

40. The NSO Award (by clause 32) references the National Training Award 2000. Any final Modern Sports Award should provide for trainees in accordance with the relevant principle and schedule.⁷

Supported wages

41. The NSO Award (by clause 8.6) provides for supported wages in accordance with the Supported Wage System. Any final Modern Sports Award should provide for supported wages in accordance with the relevant principle(s).⁸

Further submissions

42. The Sports Bodies trust these submissions are helpful to the Commission's current Consultation process (especially given the tight time frames) and will make further submissions on the relevant Exposure Draft when it becomes available. The extent of any further submissions will depend on the course proposed to be taken by the Full Bench in its proposed modern Sports Award.

Lander & Rogers
LANDER & ROGERS
Lawyers

⁷ In accordance with the Award Modernisation Full Bench Decision [2009] AIRCFB 345, at para [30].

⁸ We note that the Award Modernisation Full Bench has left this matter for Stage 4 of the award modernisation process, see [2009] AIRCFB 345, paras [33] to [35].

ATTACHMENT

Australian Canoeing Inc.
AFL
AFL Q
AFL NSW/ACT
Australian International Shooting Limited
Australian University Sport
Australian Volleyball Federation Inc. (for itself and also on behalf of Volleyball ACT, Volleyball SA, Volleyball WA and Volleyball Tasmania)
Badminton Australia
Basketball Australia
Bowls Australia Inc.
Cricket Victoria
Confederation of Australian Sport Inc
Cycling Australia
Diving Australia Inc.
Equestrian Australia Limited
Football Federation Victoria Inc.
Football NSW Limited
Golf Australia Limited (for itself and on behalf of its member bodies)
Gymnastics Australia Inc. (and also representing Gymnastics Victoria, Gymnastics NSW, Gymnastics Queensland, Gymnastics ACT, Gymnastics Tasmania, Gymnastics South Australia, Gymnastics Western Australia and Gymnastics NT)
Hockey Australia Inc.
Hockey Victoria
Life Saving Victoria Ltd
Motorcycling Australia Ltd
NBL Management Ltd (for itself and on behalf of clubs which are respondents to the National Basketball League Players Award 2005)
Netball Australia
Netball Victoria
Ski & Snowboard Australia Limited
Softball Australia Limited
Surf Life Saving Australia Ltd
Surf Life Saving NSW Inc
Surf Life Saving NT
Surf Life Saving Queensland Inc.
Surf Life Saving SA Inc.
Surf Life Saving Tasmania Inc
Surf Life Saving Western Australia Inc.
Surfing Australia Inc.
Swimming NSW Ltd
Touch Football Australia
VicSport
Yachting Australia Inc.
Yachting New South Wales