

## IN THE FAIR WORK COMMISSION

**Matter No:** AM2021/62  
**Applicant:** Total Toning Fitness Pty Ltd

### OUTLINE OF SUBMISSIONS - UNITED WORKERS UNION

#### *Fitness Industry Award 2020*

1. The fitness industry in Australia is a highly casualised, low paid and insecure industry to work in, in which it is common for employees to work unsociable and exhausting working hours.<sup>1</sup>
2. The United Workers Union (UWU) opposes the application made by Total Toning Fitness Pty Ltd (**the Applicant**); to grant it would be contrary to the modern award objectives because an expansion to the existing broken shift ‘span of hours’ would fail to recognise the needs of low-paid workers<sup>2</sup>, creating an even more unsustainable and unsociable work practice.
3. The evidence from the UWU should persuade the Full Bench that it would be inappropriate to grant the application on the variation sought. The evidence includes the following:
  - a. Statement from Kirsty Pepper (**UWU-KP**)
  - b. Statement from Anthony Garcia (**UWU-AG**)
  - c. Award modernisation comparison table, relating to ‘Hours of Work’ in pre-modern awards pertaining to the fitness industry (**UWU-01**); and
  - d. Class timetable of the gym operated by the Applicant in Torrensville, SA (**UWU-02**).

#### Background

4. On 20 May 2021, the Applicant made an F46 application to vary a modern award (**the Application**), specifically the *Fitness Industry Award 2020* (**the Award**).
5. The Application seeks to vary Clause 13.4(c) of the Award, which currently provides:

**13.4** An employee may be rostered to work a broken shift on any day provided that:

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<sup>1</sup> A report by Deloitte in 2012 (commissioned by Fitness Australia) detailed the reasons behind the high turnover of staff in the industry, citing low wages, poor career path options, undesirable hours, and the inability to work in a full-time capacity: *Deloitte Access Economics Pty Ltd, ‘Fitness Industry Workforce Report: 2010 – 2020’* (Report, January 2012), v-vi.

<sup>2</sup> *Fair Work Act 2009*, ss134(a) and 134(da)

- (a) the shift is not broken into more than 2 parts;
  - (b) the total length of the shift is not less than 3 hours, exclusive of meal breaks; and
  - (c) the span of hours from the start of the first part of the shift to the end of the second part of the shift is not more than 12 hours.
6. The Application seeks to expand the span in 13.4(c) from 12 hours to 13 hours.
7. A conference was convened on 4 June 2021 (**the June conference**) at the Fair Work Commission (**FWC**) before Deputy President Clancy to have a preliminary discussion about the application. The UWU was present at this conference and signalled our objection to the application, primarily on the grounds that the variation sought isn't necessary to meet the modern award objective (**MA Objective**) as set out in s134 of the *Fair Work Act 2009* (**the Act**).<sup>3</sup>
8. The UWU continues to object to the Application on that basis.

#### **Award variation and the 'Modern Awards Objective'**

9. Sections 134(1)(a), and (da)(ii), two components within the MA Objective are relevant to this matter:
- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
    - (a) relative living standards and the needs of the low paid; and
    - ...
    - (c) the need to promote social inclusion through increased workforce participation
    - ...
    - (da) the need to provide additional remuneration for:
      - ...
      - (ii) employees working unsocial, irregular or unpredictable hours
10. Per s157 of the Act, the FWC can only vary an award '...if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.' The MA Objective then is a crucial element which the FWC must consider in this matter.
11. The UWU posits that varying the Award as sought by the Applicant would cause the Award to fail the MA objective to provide a minimum safety net, as it would only create for even more unsociable hours than it already does, without providing for any extra remuneration or

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<sup>3</sup> Transcript of Proceedings, s.158 - *Application to vary or revoke a modern award* (Fair Work Commission, AM2021/62, Deputy President Clancy, 4 June 2021) PN25 (Erin Keogh)

security of employment. Given the already low-paid nature of the industry, outlined below, it cannot be said that creating more unfavourable working conditions would meet the MA objective.

### **Broken shifts in Modern Awards**

12. As part of the award modernisation process commenced in 2008, the Australian Industrial Relations Commission (**AIRC**) created comparison tables for various provisions in the following awards which were predecessors to the Award<sup>4</sup>:
  - a. *Fitness Industry (Victoria) Interim Award* (AP811317CRV);
  - b. *Health, Fitness and Indoor Sports Centres – NSW* (AN120240);
  - c. *Health and Fitness Centres, Swim Schools and Indoor Sports Award - State 2005 – QLD* (AN140142);
  - d. *Health Recreation & Fitness Award – SA* (AN150063);
  - e. *Health Attendants Award 1979 – WA* (AN160154); and
  - f. *Health and Fitness Centres Award – Tas* (AN170043).
13. One of these comparison tables, relating to ‘Hours of Work’, was obtained from the Library & Records Team at the FWC on 9 September 2021 and is attached (**UWU-01**).
14. None of the above instruments contained a provision for broken shifts, with the *Health Recreation and Fitness Award SA* (AN150063) specifically prohibiting it<sup>5</sup>. It is worth noting therefore than the ability to roster workers on a ‘broken shift’ in South Australia, where the Applicant’s studio is based, is a relatively new concept.
15. Further, there are currently only 18 Awards which provide for ‘broken shifts’<sup>6</sup>, with only one of those, the *Cleaning Services Award 2020*, providing for a 13-hour span.
16. It is reasonable then, based on the above, to posit that working a broken shift is not a common working condition, and that the general expectation of workers is to have a singular continuous shift.
17. It is also uncontroversial to say that there is a disadvantage to working a broken shift – phrased recently as a ‘disutility’ in the 4-yearly review of modern awards with respect to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**).

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<sup>4</sup> These awards were considered in Stage 4 of the award modernisation process, being matter AM2008/78, and finalised in *Award Modernisation* [2009] AIRCFB 945, [71]-[76]

<sup>5</sup> *AN150063 – Health Recreation and Fitness Award*, cl 6.1.4,  
<[https://www.fwc.gov.au/documents/consolidated\\_awards/an/an150063/asframe.html](https://www.fwc.gov.au/documents/consolidated_awards/an/an150063/asframe.html)>

<sup>6</sup> Statement [2021] FWCFB 5428 (6 September 2021), [7]

18. It is this ‘disutility’ which is presumably behind the allowance at Clause 17.2(b), although it is our position that an allowance of \$14.16 is relatively low compensation for such an arrangement. This is especially so given clause 13.4 of the Award allows for an employer to schedule employees for only three hours of work that 12-hour duration, which would more than likely be paid at only the base rate, given the span of ordinary hours in the Award is exceptionally broad, being from 5am to 11pm on weekdays<sup>7</sup>. This arrangement provides employers with an exceptionally broad entitlement which, if expanded with the variation sought, may serve to benefit the employer but would only serve to disadvantage the employee.

### **Broken shifts in the fitness industry**

19. Certainly, the evidence from the UWU shows that employees already consider working broken shifts under the current 12-hour span to be a significant disadvantage of working in the industry<sup>8</sup>:

- (a) Kirsty Pepper, a manager at the Melbourne Sports and Aquatic Centre says during her time working split shifts “...having worked both mornings and evenings in the past as a Personal Trainer (PT) my quality of life plummeted... Any sociable hours are forfeited, so spending time with friends and family is almost impossible, and you are usually completely exhausted by the weekend, especially given the physical nature of the job.”<sup>9</sup>
- (b) Anthony Garcia, a fitness manager at a Genesis Health and Fitness gym says that during the 6 months he worked broken shift he was “...totally exhausted” and “...at one point I was so tired I crashed my motorbike while riding to work. I barely saw my partner or family and didn’t have time for anything else other than work. Even though this was a full-time permanent position, I hated living like this...”<sup>10</sup>

20. Expanding the span of hours to 13 would create longer days with no benefit to the workers and would only exacerbate the poor conditions outlined above. One of the MA objectives is ‘...the need to promote social inclusion through increased workforce participation’<sup>11</sup>. In 2010, what was then Fair Work Australia published a literature review on social inclusion and its relationship to minimum wages and workforce participation, stating that ‘...workforce participation is a key protective factor against social exclusion and has [a] major role in facilitating social inclusion.’<sup>12</sup> The same paper later goes on however to recognise that where workers are engaged in ‘nonstandard’ work arrangement, including long or unsocial hours, a

<sup>7</sup> *Fitness Industry Award 2020*, cl 13.1(a)

<sup>8</sup> Statement of Kirsty Pepper (UWU-KP), [12] and [15]; Statement of Anthony Garcia (UWU-AG), [4]

<sup>9</sup> UWU-KP at [12]

<sup>10</sup> UWU-AG at [4]

<sup>11</sup> *Fair Work Act 2009*, s134(1)(c)

<sup>12</sup> Nelms, L & Tsingas, C, ‘Literature review on social inclusion and its relationship to minimum wages and workforce participation’ (Research Report 2/2010), Minimum Wages and Research Branch – Fair Work Australia, February 2010) 14

worse ‘work/life’ balance was found, which can lead to poor social inclusion in other areas of life<sup>13</sup>. This outcome certainly evidenced in the Statements provided by the UWU.

21. Further, the Application appears to be premised on the idea that if the broken shift span of hours was increased to 13, then ‘...we could offer a more secure position in full/permanent part time if the span was 13 hours to cover those peak times of the industry mentioned above.’<sup>14</sup> While this reasoning is admirable, and the UWU supports the creation of permanent jobs, it is unclear why expanding the span of hours would facilitate this.
22. The Applicant claims that ‘Due to industry peak times at 6am & 6pm we require a trainer at a span of 13 hours’<sup>15</sup>. The Applicant, Total Toning Fitness Pty Ltd, operates a gym in Torrensville, South Australia (**the gym**). The gym runs classes on weekdays commencing at 5.15am and finishing with an 8.00pm class; and on weekends commencing at 7.00am and finishing with a 10.30am class. The gym itself is open on weekdays between 5am and 9pm, and on weekends between 7am and 11am (timetable attached, **UWU-02**). These times indicate a span of at least 16 hours on weekdays.
23. The Application acknowledges this broad span, positing that “...if the commissioner see it fit, spanning a 14 hour day with employees still getting 10 hour break would be even better as 7am/7pm classes are also considered peak times we need covered.”<sup>16</sup> It is unclear then, based on the long span of hours which the gym operates how a 13 hour working span would actually be of any greater benefit than the existing 12 hour span – more than one employee is required regardless.
24. In the same vein, the existing 12-hour span permitted under the Award should be no barrier to the Applicant in employing staff on a permanent basis, part time or full time, given the sheer number of hours the gym operates.

## Conclusion

25. The Commission should be satisfied on the evidence that:
  - (a) There is very little appetite in the industry to work broken shifts at all even under the current 12-hour span. It stands to reason then that there would be no appetite for a 13-hour span;
  - (b) Working consistent broken shifts (as opposed to the occasional broken shift) under the existing 12-hour span leads to a breakdown of a healthy work/life balance and is viewed as unsustainable by workers in the industry<sup>17</sup>. It would therefore be

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<sup>13</sup> Ibid at 24

<sup>14</sup> Form 46A from Total Toning Fitness Pty Ltd in matter AM2021/62, dated 20 May 2021, question 2.3, para 2

<sup>15</sup> Ibid, para 1

<sup>16</sup> Form 46A from Total Toning Fitness Pty Ltd in matter AM2021/62, dated 20 May 2021, question 2.3, para 5

<sup>17</sup> UWU-KP, [12]

undesirable to work a full-time permanent position where broken shifts formed the bulk of the workers roster;

(c) The existing 12 hour span should provide no barrier to the Applicant in offering permanent full time or permanent part time work; and

(d) The application sought is not necessary to meet the MA objectives in the Act.

26. The Application should be dismissed.

**HANNAH MIFLIN**  
**For the United Workers Union**  
**22 September 2021**

Filed by United Workers Union

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## IN THE FAIR WORK COMMISSION

**Matter No:** AM2021/62

**Applicant:** Total Toning Fitness Pty Ltd

### STATEMENT OF ANTHONY GARCIA

I, Anthony Garcia, of [REDACTED] say as follows:

1. I have worked in the fitness industry (**the industry**) under the roles of personal trainer (employed and contractor), group fitness instructor and fitness manager for 10 years.
2. I am currently employed by Genesis Health & Fitness (**Genesis**) in a full-time capacity as a fitness manager and group trainer. My shifts are 6.00am – 2.00pm four days per week, and 12pm – 8pm one day per week.
3. In 2018, I was employed by a BPM Fitness (**BPM**), a small studio in Hampton, Victoria. I was employed full-time doing both management and teaching classes.
4. I did broken shifts at BPM every day, working 6.00am–10.00am and then returning for the second half of the shift; being 5.00pm – 9.00pm. These times didn't include opening and closing the club and setting up all the equipment and then packing it away, so I would really work from approximately 5.30am – 10.30/11.00am and then 4.00pm until 10pm. In between my shifts, I would come home and sleep and then return to the club. I did this for 6 months until I was totally exhausted, at one point I was so tired I crashed my motorbike while riding to work. I barely saw my partner or family and didn't have time for anything else other than work. Even though this was a full-time permanent position, I hated living like this, it wasn't realistic or sustainable. In the end I decided it wasn't worth it and decided to resign.
5. In July 2019 I took on a role with Virgin Active (**Virgin**) as a personal trainer. This role included training clients and instructing classes in both the mornings and evenings. Leaving work between these shifts wasn't feasible due to the travel time to and from work, so I would frequently stay at the club the entire time and would normally sleep in the studios between my shifts.
6. I had hoped the role with Virgin Active would be better, even though it still included the split shifts, as the shifts were not as long, and it was not every day of the week. Again though, I decided it wasn't sustainable long term and I couldn't make a career with that arrangement. In April 2021 I left my job at Virgin because of this and sought a role with consistent hours and no split shifts, which Genesis was able to give me.

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7. Whilst permanent work is important to me for security, I would leave the industry before returning to working the split shifts I used to do.

**Anthony Garcia**  
20 September 2021

A solid black rectangular box used to redact the signature of Anthony Garcia.

Signature



## IN THE FAIR WORK COMMISSION

**Matter No:** AM2021/62

**Applicant:** Total Toning Fitness Pty Ltd

### STATEMENT OF KIRSTY PEPPER

I, Kirsty Pepper, of [REDACTED] say as follows:

#### Background

1. I have been employed by United Workers Union ('UWU' or 'the Union') as a Member Organiser since 28 June 2021 in the 'Allied Industries' Portfolio, for one day a week. This Portfolio covers a range of industries, including the fitness industry (**the industry**). I am authorised to make this Statement for UWU.
2. I also work full time in the fitness industry, employed by the State Sports Centre Trust as a 'Health and Wellness Manager' at Melbourne Sports and Aquatic Centre (**MSAC**). I have worked at MSAC since March 2021; however I have worked in the fitness industry for over 12 years.
3. Over the last 12 years I have worked for:
  - a. Council Leisure Centres
  - b. Fitness First
  - c. Goodlife Health Clubs
  - d. Genesis Health + Fitness
  - e. Fernwood Fitness
  - f. Re-Creation Health Clubs
  - g. South Pacific Health Clubs; and
  - h. Virgin Active.
4. I have worked a variety of roles for these employers, including:
  - a. Personal Trainer
  - b. Group Fitness Instructor
  - c. Group Fitness Manager
  - d. Personal Training Manager
  - e. Regional Manager; and
  - f. Reception/Customer Service
5. I am currently stood down from my job at MSAC due to the Covid-19 lockdown in Melbourne. Prior to the pandemic however the shifts I typically did was 11am – 7pm, or 12pm – 7pm, doing a mix of admin tasks and instructing classes. I specifically do not teach morning classes as I do the evening ones instead.

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## **The fitness industry**

6. The 'fitness industry' encompasses a very broad range of jobs and types of employment.
7. The types of jobs typically undertaken in this industry include:
  - a. 'Independent' PTs – working as a 'contractor'; paying rent to large gyms to train their members
  - b. 'Employed' personal trainers – usually paid per client, which is generally the percentage of the rate that the client pays to the gym for that session. This is typically 30% to the trainer and 70% to the gym.
  - c. Fitness instructors (gym floor) – paid a normal hourly rate to work shifts, typically 4-8 hours in length
  - d. Fitness instructors in large gyms (group classes) – generally paid per class
  - e. Fitness instructors in studios (group classes, e.g. F45 or KX Pilates) – typically paid an hourly rate to work a 'shift' of classes, e.g. to run classes from 6am – 10am, or 5pm – 8pm.
  - f. Reception/Customer Service/Sales/Management – these roles are paid an hourly rate to work a range of shifts. Sales and management are typically employed full time.
8. A typical shift for management is 9am – 5pm, however shifts for other types of workers are generally 5.30am – 2.00pm or 2.00pm – 10.00pm (or similar) if full time, and 6.00am – 10.00am, or 4pm – 10.00pm if part time.
9. The employment types vary as well. Most PTs are contractors or employed casually. This is the same for fitness instructors in large gyms. Fitness instructors in studios like F45 are typically permanent employees, both full time and part time.
10. The industry is highly casualised and low-paid, with many workers engaged as contractors.

## **Split shifts in the fitness industry**

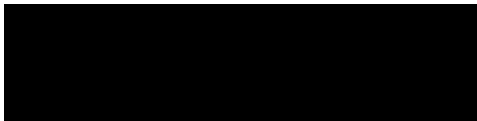
11. It is understood when you start working in the fitness industry that the peak times people want to train are mornings and evenings, which is generally when classes are scheduled. However, I did not expect that I would need to work both mornings and evenings on a consistent basis. Generally, people choose to do one or the other.
12. In my experience, having worked both mornings and evenings in the past as a Personal Trainer (**PT**) my quality of life plummeted. Working these broken shifts involved being available for morning shifts, filling the gap in the afternoon with various things like eating, sleeping or running errands, then returning for more work in the evening, before returning home to eat, sleep, and prepare for the next day to do it all over again. I would also need to travel back and forth from work twice, which was tiring and further ate into my day, as well as adding travel costs. Any sociable hours are forfeited, so spending time with friends and family is almost impossible,

and you are usually completely exhausted by the weekend, especially given the physical nature of the job. This arrangement became completely unsustainable.

13. If you don't live close to the facility, travel time makes returning home not worthwhile, so people will simply stay at work for the entire time. I have seen many people sleeping in staff rooms and studios between their split shifts.
14. Nearly every trainer I have known has lived like this at some point. Eventually, they choose between mornings or evenings but not both; as I have done. Alternatively, they will exit the industry. The turnover of people within the fitness industry is extremely high, I believe working broken shifts is one of the reasons why.
15. While it is definitely true that the casuals I have worked with over the years would prefer permanent work over casual hours, very few would want to do broken shifts every day in order to get permanent work. No one enters this industry expecting to have to always work broken shifts in order to have a career and nor should they have to.

**Kirsty Pepper**

20 September 2021



Signature

Health and welfare services (remainder) - Fitness, lifestyle and leisure services Comparison - Federal award & NAPSAs - Hours of Work						
	<a href="#">AP811317CRV - Fed</a>	<a href="#">AN120240 - NSW</a>	<a href="#">AN140142 - QLD</a>	<a href="#">AN150063 - SA</a>	<a href="#">AN160154 - WA</a>	<a href="#">AN170043 - TAS</a>
<b>NES-Div 2 AM s.576J(1)(c) Hours of Work arrangements</b>	<b>Fitness Industry (Victoria) Interim Award</b>	Health, Fitness and Indoor Sports Centres	Health and Fitness Centres, Swim Schools and Indoor Sports Award - State 2005	Health Recreation & Fitness Award	Health Attendants Award 1979	Health and Fitness Centres Award
	<a href="#">cl 23</a>	<a href="#">cl 7</a>	<a href="#">cl 6.1</a>	<a href="#">cl 6.1</a>	<a href="#">cl 10</a>	<a href="#">cl 15</a>
<b>Hours of work - ordinary</b>	• 38 hours per week • not more than 7.6 hours per day	38 hours per week	38 hours per week	38 hours per week	38 hours per week	38 hours per week
Day Workers	-					
Continuous Shift Workers	-					
Non Continuous Shift Workers	-					
<b>Span</b>	cl 23.1.1 - 9.00am to 8.30 pm Monday to Sunday	cl 7(g) - Employees in weight loss centres - • 6.00am - 8.00pm Mon-Fri • 8.00am-6.00pm Saturday	cl 6.1.1 - 5.30 am to 12.00 midnight • 5 consecutive days out of 7 per week	No mention	No mention	cl 15(b) - 7.00am- 6.00pm Mon- Fri
Daylight Saving	No mention					
Rostering	cl 23.1.2 - Four weeks of 8 hour days with 0.4 of one hour per day accumulated for an RDO after 19 days					
Rest Breaks	cl 24.2 - 10 mins in morning and 10 mins in afternoon • Only applies to casual shifts in excess of 3 hours •Masseurs break after 4 consecutive massages					
Meal Breaks	cl 24.1 - 30 mins after 5 hours					
Rostered Days Off	cl 23.1.3 - RDO after 19 day, 8 hour cycle					
Make-up Time	cl 23.3 - make up time by agreement					
Hours Other	-					



# KICK PUNCH LIFT

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
5:15am	KICK n CARDIO	KICK n HIIT	KICK n BUTT	PB's	KICK n CORE		
6:00am	KICK n HIIT	KICK n CARDIO	LIFT	KICK n CORE	KICK n BUTT		
7:00am	LIFT	KICK n BUTT	KICK n HIIT	LIFT	KICK n CORE	KICK n CARDIO	KICK n HIIT
8:00am	KICK n CORE	KICK n HIIT	KICK n CARDIO	KICK n CORE	KICK n HIIT	KICK n HIIT	LIFT
9:30am	KICK n BUTT	LIFT	KICK n CORE	KICK n CARDIO	LIFT	KICK n CORE	KICK n CARDIO
10:30am	30 KICK n CARDIO	30 KICK n CORE	30 LIFT	30 KICK n BUTT	30 KICK n HIIT	STRETCH	STRETCH
12:15pm	30 KICK n CARDIO	PB's	30 KICK n CORE	30 LIFT	30 KICK n HIIT		
4:00pm	KICK n CARDIO	KICK n CORE	KICK n BUTT	KICK n HIIT	PB's		
5:00pm	LIFT	KICK n HIIT	LIFT	KICK n CORE	KICK n BUTT		
6:00pm	KICK n HIIT	KICK n BUTT	KICK n CARDIO	LIFT	KICK n HIIT		
7:00pm	PB's	KICK n HIIT	KICK n CORE	KICK n BUTT	LIFT		
8:00pm	KICK n CORE	LIFT	KICK n HIIT	KICK n CARDIO	KICK n CORE		

### Memberships

- AAA. Gold \$29.99pw
- A. Premium \$19.99pw
- B. Locked \$14.99pw
- C. Casual \$24.99pw

### Packs & PT's

- 10 Session Pack \$119.99
- Single Session \$20.00
- PT's from \$33.00

More Options available on tour

**Timetable is updated from time to time. Refer to [WWW.TTFKICKBOXING.COM](http://WWW.TTFKICKBOXING.COM) for most recent & special classes.**

**Open Hours - Gym tour essential, please contact to book.**

**Mon - Fri 5:00am - 9:00pm | Sat & Sun 7:00am - 11:00am, Closed Public Holidays.**

**A. 233A Henley Beach Rd Torrensville SA, 5031.**

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