AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION SUBMISSIONS IN RESPONSE TO THE PARTIES' SUBMISSIONS ON THE EXPOSURE DRAFT FOR THE ALPINE RESORTS AWARD 2014

1 Introduction

1.1 These submissions made in response to the parties' submissions on the exposure draft for the proposed *Alpine Resorts Award 2014* ("**Exposure Draft**") are made by the Australian Ski Areas Association ("**Association**").

1.2 The Association has reviewed the parties' submissions on the Exposure Draft and sets out below its submissions in reply.

1.3 In these submissions, the Association collectively refers to the Exposure Draft and the *Alpine Resorts Award 2010* ("**Current Award**") as the "**Award**".

2 Preliminary matters

2.1 The Association notes that, having had the opportunity to consider the decision of the Full Bench of the Fair Work Commission ("**Commission**") on 23 December 2014, which considered, *inter alia*, general drafting and technical issues common to multiple exposure drafts, it does not press for the variation sought in paragraph 9.2 and in Schedule 1 – paragraph 5 of its submissions on the Exposure Draft, filed 30 January 2015 ("**Submissions on Exposure Draft**").

2.2 For abundant clarity, the Association notes that it does not press for a sub-clause to be inserted at clause 6.5(b) in the Exposure Draft, identifying provisions that do not apply to casual employees.

3 AWU – proposed variation to insert annual leave loading

3.1 The Association makes submissions in response to the Australian Workers' Union's ("**AWU**") submission on annual leave loading in the Exposure Draft ("**Annual Leave Loading Submissions**"), that seeks to insert an entitlement to annual leave loading at clause 26.1 of the Current Award (clause 18.1 in the Exposure Draft). In this regard, the Association notes that it is its submission that clause 26.1 of the Current Award should not be varied to include an entitlement to annual leave loading.

3.2 The Association firstly notes that, whilst the AWU have referred to its proposed variation in the context of the AWU having been alerted to this variation during the Full Bench proceedings regarding alleged NES inconsistencies, the Full Bench has not found the absence of annual leave loading in the Award to be inconsistent with the National Employment Standards within the *Fair Work Act 2009* (Cth) ("**FW Act**") ("**NES**").

3.3 Further, the NES contains no provisions in respect to annual leave loading. Relevantly, section 139 of the FW Act provides [emphasis added]:

> (1) A modern award ***may*** include terms about any of the following matters:
>
> …
>
> (h) leave, leave loadings and arrangements for taking leave;

3.4 This position is advanced by the explanatory memorandum for the Fair Work Bill 2009, which, at [1144], states [emphasis added]:

> The definition of modern award minimum wages does not include incentive-based payments, bonuses, overtime rates, penalty rates, allowances and leave loadings. These components of remuneration ***can*** be included in modern awards under Part 2-3.

3.5 In this regard, the Association refers to the AWU's recognition, in its Annual Leave Loading Submissions, that a number of modern awards do not contain provisions in respect to an entitlement to annual leave loading.

3.6 The Association, however, rejects the AWU's submission that the Commission has generally determined that modern awards should supplement the NES by providing for the payment of annual leave loading of at least 17.5%.

3.7 Instead, the Association submits that the proper rational for the inclusion of the entitlement to annual leave loading in certain awards and agreements, including certain modern awards, is to ensure that employees are not financially disadvantaged during their taking of annual leave, when they would ordinarily receive payments for overtime, other penalties and allowances during the course of their employment. That is, they are compensated for these payments by way of a loading on their ordinary rate of pay whilst on annual leave.[1]

3.8 The Association further notes that when the Commonwealth Conciliation and Arbitration Commission considered the "Annual Leave Cases 1971", it refused to make a general ruling in respect to the payment of an "extra bonus" whilst workers are on annual leave loading. [2]

3.9 The Association further notes that annual leave loading is not an entitlement that is paid by way of a "bonus" or an "extraneous payment", but, rather, is a compensatory payment.

3.10 It follows that annual leave loading should only be provided for in modern awards where employees would otherwise be financially disadvantaged during their taking of annual leave, as a result of the non payment of overtime, other penalties and

[1] *The Municipal Officers (Glenorchy City Council) Award 1971* (1971) 144 CAR 538, 544 ('*Annual Leave Cases 1971*').
[2] Ibid 535.

allowances, which, but for the taking of annual leave, they would have received in the course of their employment.

3.11 In this context, the Association notes that employees under the Award can be employed in the following categories of employment:

(a) full-time;

(b) part-time;

(c) seasonal (either part-time or full-time); and

(d) casual.

3.12 The breakdown in the utilisation of these different and distinct categories of employment varies between the Alpine Resorts (as defined by the Award) that are covered by the Award. However, as an example, other than managerial staff, Perisher Blue Pty Ltd (being the largest Alpine Resort) employs 62% of its staff as seasonal employees and the remaining 37% as casual employees.

3.13 The Association further notes that Snowsports Instructors are a separate category of employees within the Award, who are typically engaged on a casual basis.

3.14 Further, as seasonal employees are only employed for a limited period of time, due to the seasonal nature of the Snowsports Industry, their hourly rates currently include a loading in respect of annual leave. Casual employees also receive a loading in respect of annual leave.

3.15 A detailed summary of the nature of seasonal employment and annual leave is set out in the Association's submissions on the draft determinations, filed 13 January 2015 ("**Submissions on Alleged NES Inconsistencies**") and, in particular, at paragraphs 5.2 to 5.7 of those submissions.

3.16 As noted in the AWU's Annual Leave Loading Submissions, employment under the Award is unique, in that there are no weekend penalty rates and the industry is marked by a high level of casual and seasonal employment. Further, limited allowances are paid to employees covered by the Award.

3.17 In these circumstances – where part-time and full-time employees receive relatively low levels of overtime, other penalties and allowances as part of their earnings during the course of their employment – it is the Association's submission that if a clause was to be inserted into the Award creating an entitlement to annual leave loading, such a clause would amount to a "bonus" or an "extraneous payment", which is not the proper basis for the inclusion of such an entitlement.

3.18 In its submissions in this regard, the Association further refers to the unique nature of the snowsports industry and its industrial regulation, and relies on the following pre-modernisation snowsports industry awards, which properly form the basis of the Award:

(a) Victorian *Alpine Resorts (Australian Workers Union) Award 2001*;

(b) NSW *Ski Industry (State) Award* (now a Preserved Collective State Agreement ("**PCSA**"));

(c) NSW *Ski Instructors (State) Award* (now a PCSA); and

(d) NSW *Ski Tube (State) Award* (now a PCSA) ("**NSW Skitube Award**").

3.19 With the exception of the NSW Skitube Award, none of the above pre-modernisation snowsports industry awards contain an entitlement to annual leave loading.

3.20 Further, the Association notes that all employees covered by the Award who are employed as train drivers (previously covered by the NSW Ski Tube Award) are employed as seasonal or casual employees.

3.21 Further again, it is the Association's contention, as it was during the award modernisation process, that the *Victorian Alpine Resorts Award 1999* (VIC) ("**VAR Award**"), which the AWU relies on in its submission, was not the primary pre-modern award for the snowsports industry and that it is inappropriate to benchmark the terms contained in the Award against those contained in the VAR Award.

3.22 The Association made extensive submissions during the award modernisation process regarding the unsuitability of the VAR Award as a benchmark for the Award.[3]

3.23 The Association reiterates its position that the Award should not be varied to include a blanket entitlement to annual leave loading.

4 AWU submissions

4.1 In addition to the AWU's Annual Leave Loading Submissions, the AWU has made further submissions on the Exposure Draft. The Association responds to certain submissions made by the AWU on the Exposure Draft, adopting the same paragraph numbering as that used in the AWU's submissions, as follows:

2. Clause 6.5(b)(i)

4.2 The Association does not disagree with the AWU's submission on clause 6.5(b)(i) of the Exposure Draft, insofar as it submits that the beginning of clause 6.5(b)(i) of the Exposure Draft should be amended to read: "For each hour worked, a casual employee must be paid….".

4.3 The Association, however, relies on part 4 of its Submissions on Exposure Draft and notes that it is its submission that casual employees are excluded from the benefit of overtime.

4.4 In this regard, the Association submits that, in the interest of providing further clarity to the Exposure Draft, the references to "ordinary hourly rate" in the first and second dot points in clause 6.5(b)(i) of the Exposure Draft should be amended to read: "the

[3] See paragraphs 3.1 to 3.4 of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009.

minimum hourly rate", given that the Exposure Draft does not contain all-purpose allowances and does not otherwise define "ordinary hourly rate".

5. Clause 6.6(c)(iv)

4.5 The Association does not disagree with the AWU's submission on clause 6.6(c)(iv) of the Exposure Draft, however, it notes that issues concerning casual conversion provisions in the Commission's exposure drafts have been referred to the Casual Employment Common Issues Full Bench.

4.6 The Association reserves its right to make further submissions in this regard.

7 and 8. Clauses 7.5 and 13, Schedule C and Schedule D

4.7 In response to the AWU's submissions in this regard, the Association relies on its Submission on Alleged NES Inconsistencies, and notes that it is its submission that clause 11.5 of the Current Award (7.5 in the Exposure Draft) is not inconsistent with the NES, regarding the entitlement to annual leave.

4.8 It then follows that the hourly rates for seasonal employees should not change in clause 13, Schedule C and Schedule D in the Exposure Draft.

4.9 The Association submits, however, that if the Commission find that there exists an inconsistency between clause 7.5 in the Exposure Draft and the NES, regarding the entitlement to annual leave, seasonal employment will need to be de-loaded, since the loading applies solely in place of the entitlement to annual leave.

4.10 Given the significant impact that the de-loading of seasonal rates will have on returning and current seasonal employees, particularly given that many of the employers operating alpine resorts are in the process of offering seasonal employment for the upcoming ski season (beginning in early June, depending on the snow conditions), the Association reserves the right to make further submissions regarding the transitional provisions that ought to apply to the de-loading of seasonal employment, in the event that this is required.

9. Clause 8

4.11 The Association accepts the drafting of clause 8 in the Exposure Draft.

10. Clause 10.3

4.12 The Association relies on part 2 of its Submissions on Exposure Draft and presses for the variations that it sought in this regard, particularly in the absence of any substantiative argument from the AWU opposing this requested variation.

13. Clauses 14.2(c) and 14.3(d)

4.13 The Association supports the AWU's proposed variations to these clauses, as staff on dual-role employment and on multi-hiring arrangements could undertake roles of a higher duty, outside the parameters of the arrangements in clauses 14.2 and 14.3 of the Exposure Draft.

17. Clause 15.3(d)(ii)

4.14 The Association disagrees with the AWU's submission on clause 15.3(d)(ii) of the Exposure Draft that the new clause allows for too much discretion for an employer. To the contrary, it is the Association's submission that clause 15.3(d)(ii) in the Exposure Draft limits the circumstances in which an employer can charge a loss against an employee's wages, as the words "loss due to any cause of damage through misuse" in clause 17.5(b) of the Current Award have been amended to read "any loss or damage through misuse" in clause 15.3(d)(ii) of the Exposure Draft.

4.15 Despite this, the Association notes that it is content with the current drafting of clause 15.3(d)(ii) in the Exposure Draft. However, in the alternative, its submission is that clause 17.5(b) in the Current Award is retained.

19. Schedule C.1.3 and clause 17.1(b)

4.16 The Association disagrees with the AWU's interpretation of clause 25.1 of the Current Award (clause 17.1 in the Exposure Draft). The Association relies on part 5 of its Submissions on Exposure Draft and notes that clause 25.1 of the Current Award clearly provides that the rate of double time and a half is to be paid on the base rate of pay.

4.17 Further, the Association notes that clause 10.5(a) of the Current Award does not require the casual loading of 25% to be paid on all hours worked, as submitted by the AWU. Rather, clause 10.5(a) of the Current Award requires that "a casual employee…. must be paid a casual loading of 25%".

4.18 In this regard, the Association notes that clause 25.1 of the Current Award provides for the rate of double time and a half for hours worked on public holidays, which, in the case of casual employees, includes the casual loading of 25%.

4.19 In this way, since double time and a half includes a 25% casual loading in the case of casual employees - it does not replace the 25% casual loading - Schedule C.1.3 and clause 17.1(b) in the Exposure Draft are consistent with the proper operation of casual loading in clauses 25.1 and 10.5(a) in the Current Award.

4.20 The Association submits that Schedule C.1.3 and clause 17.1(b) in the Exposure Draft should not be varied.

5 Australian Industry Group

5.1 The Association responds to certain submissions made by the Australian Industry Group ("**Ai Group**") on the Exposure Draft, using the same paragraph numbering as that used in the Ai Group's submissions, as follows:

23 and 24. Clause 7.6 – Seasonal employment

5.2 In support of the Ai Group's submission on clause 7.6 of the Exposure Draft, the Association relies on part 6 of its Submissions on Exposure Draft.

25. Clause 8.1 – Apprentices

5.3 In response to the Ai Group's submission on clause 8.1 of the Exposure Draft, the Association relies on part 7 of its Submissions on Exposure Draft, which, it submits, provides more clarity and consistency with the Current Award, than the Ai Group's proposed variation of clause 8.1 of the Exposure Draft.

27 to 30. Clause 10.1 – Ordinary hours of work

5.4 In support of the Ai Group's submission on clause 10.1 of the Exposure Draft, the Association relies on paragraphs 9.3 to 9.11 of its Submissions on Exposure Draft.

31 and 32. Clause 10.5 – Make-up time

5.5 The Association notes that while the Ai Group's submission refers to clause 10.5 make-up time, the Association suggests that the Ai Group is, in fact, referring to clause 10.4. It is the Association's submission that as long as the "consent of the employer" qualification remains in 10.4 (a) and (b), the Association supports the drafting of clause 10.4 in the Exposure Draft.

35 and 36. Clause 13.6(c) - Minimum wages – adult apprentices

5.6 The Association supports the drafting of clause 13.6(c) in the Exposure Draft.

37 to 39. Clause 15.3(d)(ii) – Allowances – Expense related allowances – Protective clothing reimbursement

5.7 In respect to the Ai Group's submission on clause 15.3(d)(ii) of the Exposure Draft, the Association notes that its primary contention is that the current drafting of clause 15.3(d)(ii) in the Exposure Draft is retained.

5.8 As submitted in paragraphs 4.14 and 4.15 above, the Association notes that it is content with the current drafting of clause 15.3(d)(ii) in the Exposure Draft. However, in the alternative, it is the Association's submission is that clause 17.5(b) in the Current Award is retained.

43. Clause C.1.4 – Schedule of hourly rates of pay – Alpine resort workers – Full-time and part-time seasonal employees –ordinary and penalty rates

5.9 Subject to the retention of seasonal loading, the Association has no issue with the tables provided in this clause. If, however, the payment of seasonal loading in place of paid annual leave if found to be in breach of section 87(1) of the FW Act, these rates of pay will need to be amended so that the seasonal loading of 8.33% is removed.

44. Clause C.1.5 – Schedule of hourly rates of pay – Alpine resort workers – Full-time and part-time seasonal employees –overtime rates

5.10 Subject to the retention of seasonal loading, the Association has no issue with the tables provided in this clause. If, however, the payment of seasonal loading in place of paid annual leave if found to be in breach of section 87(1) of the FW Act, these

rates of pay will need to be amended so that the seasonal loading of 8.33% is removed.

6 Falls Creek and Mount Hotham Chamber of Commerce

6.1 In opposition to the submission made by Falls Creek and Mount Hotham Chamber of Commerce regarding the coverage of the Award ("**Coverage Submission**"), the Association relies on parts 8 and 10 of its Submissions on Exposure Draft.

6.2 The Association further relies on its written (in particular its outline of submissions dated 24 June 2014 ("**Submissions on Application to Vary the Award**")) and oral submissions during the proceedings respect of an application to the Commission made by Falls Creek Oversnow Pty Ltd and DPSI General Pty Ltd on 23 May 2014, which sought to vary the coverage of the Current Award in a similar manner to the Coverage Submission. The Association made substantial submissions in this regard.

6.3 In addition to the above, the Association makes further submissions in response to certain submissions in the Coverage Submission, as follows:

(a) the Coverage Submission relies heavily on the *Alpine Resorts (Management) Act 1997* (VIC) ("**ARM Act**") and the characterisation of "alpine resorts" and the establishment of "Alpine Management Boards" under that act.

The Alpine Management Boards, established under the ARM Act, are closely aligned with the Victorian Public Service, creating a significant difference in the objectives of the Alpine Management Boards than that of the commercial entities, which employ the majority of employees in the snowsports industry.

The Association made extensive submissions in this regard during the award modernisation process for the forming of the Current Award.[4]

Against this background, it is the Association's submission that it would be highly inappropriate to benchmark the coverage of the Award against the classification of "alpine resorts" within the ARM Act and the operations of the Alpine Management Boards; and

(b) the submission that the coverage of the Award should be extended to cover employers and employees in certain geographical regions should not be considered as a basis for the variation of the Award, as modern awards are industry based, rather that geographically based.

7 Mount Hotham Management Board

7.1 The Association responds to the submissions made by the Mount Hotham Management Board ("**Board**") dated 27 February 2015.

[4] See paragraphs 3.1 to 3.4 of the of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009.

7.2 It is the Association's first submission that despite being characterised as a submission in reply, the submissions made by the Board are, in fact, submissions on the Exposure Draft. Therefore, those submissions should not be considered during this process.

7.3 The Board had the opportunity to raise this variation in accordance with the timetable set by Justice Ross for the Group 2 Awards in the Award Stage, however, it failed to do so.

7.4 However, in the event that the Commission allow the Board to make its submissions, the Association responds to those submissions as follows.

7.5 With respect, the Association notes that the Board has misunderstood the Association's objection to the Coverage Submission. The Association relies on part 6 above in this regard and notes, in particular, that the creation of alpine lifting facilities requires major capital investment and that extreme poor weather can have a decimating impact on the revenue generated by those entities that have invested heavily in alpine lifting facilities (the Alpine Resorts).

7.6 This has been summarised in paragraph 3.7 of the Submissions on Application to Vary the Award:

> The closure of ski lifts due to high winds and the closure of slopes due to poor snow cover has a decimating impact on the revenue generated by the Alpine Resorts as the vast majority of their revenue is generated from the operation of their ski lifting activities

7.7 The Association further refers to paragraphs 45, 47, 49 – 50 of the transcript of the proceedings on 13 June 2014 in relation to an application to vary the Current Award and, in particular, the following passages:

> [45] In recognition of that the companies that we represent and the AWU constructively over many years have introduced flexibilities that are not found in any other award in this country. It's a very refined set of flexibilities that had to be limited to the companies that incur the specific difficulties that the AWU and those companies have represented or recognised by consent over many years and that includes any five and seven arrangement, very limited penalties, a whole range of flexibilities which understandably many employers might desire to apply, but because of those very unique arrangements, both the unions involved – and there are some five or six unions appearing all concerned about the spread of this consent arrangement – and the companies were very specific to limit it to those companies that had lifting arrangements.
>
> [47] It's in recognition of that investment but also, your Honour, the fact that the weather can decimate the revenue that would otherwise be derived from that investment and render the resorts non-viable either across an entire season or from day to day, depending upon the weather and so - - -
>
> [49] … can I just explain this: you can imagine that, say, 60 per cent of the industry is located in New South Wales and the largest resort in the country, for example, is Perisher. Now, a large number of people go to

> Perisher. They're primarily going to take ski lifts up the mountain and ski. If there is no snow, that massive area of potential revenue is decimated. People who would otherwise be utilising the mountain actually stay in the village and increase business for restaurants, hotels, other aspects of business operations while the resort operator that has made a massive capital investment in building and maintaining those lifts believes (indistinct).

7.8 Against this background, the Association refers to paragraph 1.6 of the Board's submissions, where it acknowledges that it does not operate an alpine lift and, as a result, it and its employees "arguably" do not fall within the scope of the Award. It is the Association's submission that it is this very reason why the Board and its employees are, and should remain, not covered by the Award.

7.9 The Board is not revenue dependent on alpine lifting, as, despite managing an Alpine Resort, it has not been required to invest heavily in alpine lifting facilities, which is a substantial capital investment. The revenue of the Board is largely fixed in nature, arising from site rentals and is not variable and subject to the same weather and snow vulnerabilities that those operating alpine lifting facilities are subject to on a daily and weekly basis.

7.10 For abundant clarity, it is not the management of an Alpine Resort that affords an entity and its employees coverage of the Award, but, rather, its investment in, and operation of, alpine lifting facilities.

7.11 The Association refers to the Board's submission that it was previously covered by the now defunct VAR Award. As the Association has submitted in its Submissions on Exposure Draft, its Submissions on Application to Vary the Award and throughout the award modernisation process for the Award (in particular, see paragraphs 3.1 to 3.4 of the Association's 8 April 2009 submissions) the VAR Award was not the primary pre-modern award for the snowsports industry and it is inappropriate to benchmark the terms contained in the Award against those contained in the VAR Award.

7.12 The Association further submits that to vary the Award in the terms sought by the Board will extend the scope of the Award significantly – to all employers that have, or may at some point in the future have, statutory responsibility for the management and operation of an Alpine Resort. This would afford employers flexibilities that have historically been afforded to employers in recognition and compensation for its major capital investments in alpine lifting facilities, which can be rendered not operational by extreme poor weather, which is not uncommon in the snowsports industry.

7.13 The Association further refers to clause 4.4 of the Current Award and notes that it is its preliminary submission that the inclusion of this clause is an indication of a conscious decision by the Commission to exclude entities such as the Board from the coverage of the Award.

7.14 The Association reserves its rights to make further submissions in response to the Board's submissions, given that the Association was unaware of the Board's

proposed variation until its submission was posted on the Commission website on 2 March 2015.

8 Further matters

8.1 The Association notes that at the hearing before the Full Bench of the Commission on 26 February 2015, regarding alleged NES inconsistencies, Deputy President Hatcher noted that the amending of seasonal rates, following a determination that there exists an inconsistency between section 87(1) of the FW Act and clause 11.5 of the Current Award, would require further consideration and, potentially, significant evidence. The Association reserves its rights in this regard.

8.2 The Association relies on its Submissions on Alleged NES Inconsistencies. The Association, however, submits that if the Commission determine that there is, in fact, an inconsistency between section 87(1) of the FW Act and clause 11.5 of the Current Award, the "seasonal hourly rate" column should be deleted from clause 13.1 of the Exposure Draft, the "snowsports instructor seasonal hourly rate" column should be deleted from clauses 13.2 and C.2.1 of the Exposure Draft, clauses C.1.4 and C.1.5 in the Exposure Draft should be removed, and the "standard rate" should be amended to Resort Worker Level 2.

8.3 The Association reserves its right to make further submissions in this matter.

Harmers Workplace Lawyers

4 March 2015