



REPORT TO THE FULL BENCH

Fair Work Act 2009

s.156 - 4 YEARLY REVIEW OF MODERN AWARDS:

Alpine Resorts Award 2010

(AM2014/198)

DEPUTY PRESIDENT BULL

SYDNEY, 7 DECEMBER 2015

Four yearly Review of Modern Awards: Alpine Resorts Award 2010, Updated Report to the Full Bench, conference held on 8 October 2015

[1] On 7 October 2015, a hearing was held before the Full Bench in relation to the four yearly review of the sub group 2A modern awards, which the *Alpine Resorts Award 2010* (the Award) is a part of that group.

[2] At that hearing, relevant parties were invited to attend a conference before me the following day, to discuss any outstanding issues in relation to the *Alpine Resorts Award 2010*. During the course of the proceedings, the *Thredbo Chamber of Commerce* and the *Australian Ski Areas Association* (ASAA), raised a claim in relation to the extension of coverage of the Award, and stated that it would file written submissions pertaining to that claim.¹

[3] The conference was held before me on the following day, 8 October 2015. In attendance were the:

- Australian Industry Group (Ai Group) , represented by Mr Ferguson;
- Australian Workers' Union (AWU), represented by Mr Crawford; and
- Australian Ski Areas Association (ASAA), represented by Mr Harmer and Mr Shaw.

[4] The *Thredbo Chamber of Commerce* was not present at the conference but has subsequently filed written submissions.

¹ PN45 and PN80

Written submissions

The NSW Business Chamber Ltd Industrial and the Thredbo Chamber of Commerce

[5] Subsequent to the conference, the NSW Business Chamber Ltd Industrial and the Thredbo Chamber of Commerce (the Chambers) filed an outline of submissions pertaining to their application seeking a variation to the coverage of the Award. In summary, the Chambers contend that the ‘alpine or alpine resorts industry’ should not be limited to the small number of alpine resorts that operate alpine lifts, but rather a broader definition should apply so as to cover employers that carry on businesses within, or in close proximity to, an alpine resort and which provide services essential to the operation of the alpine resort.

[6] The Chambers submit the rationale behind this is such that the Award creates an illogical situation where two businesses of essentially the same nature and in close proximity are governed by different industrial terms and conditions simply by reason that one business operates a ski lift, and the other does not.

[7] The Chambers seek to have the issue of coverage to be dealt with by a separately constituted Full Bench.

Australian Ski Areas Association (ASAA)

[8] Written submissions were received from ASAA on 21 October 2015, as per the discussions of the conference. The ASAA advised that following the conference, the ASAA and the AWU had reached a consent position with respect to all outstanding matters regarding the Award, except those concerning coverage and higher duties.

[9] ASAA submit that issues pertaining to coverage be referred to a specially constituted Full Bench.

[10] With respect to the consent position between ASAA and the AWU, a number of issues appear to have been resolved between the parties. These are reflected in the final outcomes in the tables below. Additionally, ASAA advises that the AWU agrees to secure the removal of the Australian Council of Trade Unions claim concerning minimum engagement, insofar as it relates to the Award.

The Australian Workers’ Union (AWU)

[11] On 1 December 2015, the AWU advised the Commission² that the AWU and ASAA had reached a joint ‘Without Prejudice Consent Position’ whereby the AWU and ASAA had reached a number of agreed positions on the basis of a ‘package of variations’. The AWU and ASAA’s position on the issues agreed between the parties may change if the ‘whole package of variations’ is not given effect. In particular, these relate to the following items in the tables below: 1, 7, 14, 15, 17, 22, 23, 24, 25, 28 and 30.

² And ASAA confirmed this position via written correspondence on 4 December 2015

Final Outcomes

[12] Listed below are the issues discussed at the 8 October 2015 conference and their outcome. Written submissions filed from the Chambers and ASAA have been incorporated to reflect the final positions of the parties.



DEPUTY PRESIDENT

Alpine Resorts Award 2010

Issues agreed between parties (Resolved)					
Issue no.	Summary of subs. Ref	Party	Clause (Exposure draft)	Summary of issue	Outcome
1.	3	ASAA	6.4(a)(ii) and 10.3	<p>Part-time employment & ordinary hours of work Propose part-time employees be characterised as employees “engaged to work an average of at least eight and less than 38 hours per week over a work cycle of four weeks”. Press for the variations particularly in absence of any substantive argument from AWU opposing variation.</p>	<p>Agreed</p> <p>Currently, the exposure draft refers to part timers working up to 35 hours per week, ASAA seeks to vary this to 38 hours per week.</p> <p>At the conference, ASAA proposed that it will hold discussions with the AWU in attempt to resolve.</p> <p>Written submissions received from the ASSA states that the AWU agrees with ASAA’s proposed variation to the characterisation of part time employment.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
2.	5	AWU	6.5(b)(i)	<p>Types of employment— Casual employment— Casual loading Provision substantially changed and should be amended.</p>	<p>Parties agree that that the reference at 6.5(b)(i) to the words “each ordinary hour worked” be replaced with the words “each hour worked” and the reference to “ordinary hourly rate” be replaced with “minimum hourly rate”.</p>
3.	6	Ai Group	6.5(b)(i)	<p>Types of employment— Casual employment— Casual loading Term “ordinary hourly rate” should be replaced with “applicable minimum hourly rate”.</p>	<p>Parties agree that in accordance with the FB decision of 23 December 2014 [2014] FWCB 9412– reference to “ordinary hourly rate” should be replaced with “minimum hourly rate”.</p>

4.	7	AWU	6.5(b)(ii)	Types of employment— Casual employment— Casual loading ED provision substantially changed, current wording should be retained.	Parties agree that current award text to be retained.
		Ai Group		Retain text of current award.	
5.	8	AWU	6.6(c)(iv)	Types of employment— Casual conversion— Full-time or part-time conversion Reference to “subject to clause 5—facilitative provisions” an error. Reference should be “subject to clause 6.6(c)(i) and (ii)”	Parties agree that the wording in 6.6(c)(iv) subject to ‘clause 5 Facilitative Provisions’ should read ‘subject to other relevant provisions of clause 6.6’
		ASAA		Do not disagree with AWU Issues concerning casual conversion have been referred to the Casual Employment Common Issues Full Bench.	
		Ai Group		Types of employment— Casual conversion— Full-time or part-time conversion Appropriate cross references to be in included in clause are 6.5(b) (iii), 6.5(d) (i) and 6.5(d) (ii).	
6.	9	AWU	6.7(b)	Types of employment— Casuals—Minimum engagement Provision could be made clearer and consistent with current clause. Seek amendment.	Parties agree that 6.7(b) be amended to add the words “on each occasion they are required to attend work”
		Ai Group		Do not oppose AWU proposed amendment	

7.	10	AWU	7.5 and 13 and Schedules C and D	Seasonal employment—pay rates—alleged NES inconsistencies matter Full Bench in decision 8 May 2015 [2015] FWCB 3023 determined that seasonal employees are entitled to annual leave.	At the conference, parties agreed to hold discussions regarding removal of seasonal employee hourly loading and the inclusion of an alternate annual leave loading. Written correspondence received from the ASSA states that ASAA and the AWU agree to the amendments pertaining to clauses 7.5, 13, and schedules C and D of the Exposure Draft.
		ASAA		Rely on submissions in relation to alleged NES inconsistencies, that clause 11.5 of current award is not inconsistent with NES re entitlement to annual leave. Therefore, hourly rates for seasonal employees should not change. If FWC find inconsistency, seasonal employment will need to be de-loaded, since loading applies solely in place of entitlement to annual leave.	<i>Agreement is conditional on the approval of the package of variations.</i>
		ASAA		Refers to finding of FB that there is inconsistency between cl.11.5 and NES. If Commission removes ability to pre-pay annual leave, allowing a seasonal employee to take annual leave, they should be paid at minimum hourly rate with no seasonal loading.	
8.	11	Ai Group	7.6	Seasonal employment—pay rates Reference to “loading in clause 7.5” at end of clause 7.6 of ED confusing. Words “plus the loading in clause 7.5” should be deleted.	Parties agree that the words “plus the loading in clause 7.5” be deleted.

9.	12	AWU	8	Apprentices Clause needs amended in accordance with determination issued 23 Dec 2014.	All parties agree that apprenticeship provisions to be amended with the FB decision of the <i>4 yearly review of modern awards – Apprentice conditions</i> [2014] FWCFB 9156
10.	13	Ai Group	8.1	Apprentices In addition to clause 13.4, clauses 13.5 and 13.6 also deal with apprentice rates of pay. Clause 8.1 should also refer to those provisions.	Parties agreed that the reference in cl.13 should be in reference to “clause 13- minimum wages”
11.	14	Ai Group	9	Classifications Amend a drafting error: “... are set out <u>in</u> Schedule A— Classification Definitions.”	Parties agreed that the drafting error to be corrected
12.	15	Ai Group	10.1	Ordinary hours of work Parties are asked whether “any five days of the week” should be changed to “any five days from Monday to Sunday” or “Monday to Friday”. Do the days need to be consecutive? Clause should not be amended. Five days need not be worked consecutively.	Parties agree to leave exposure draft as is
13.	16	AWU	10.1 and 17.2	Ordinary hours of work Seek variation so that casuals are entitled to overtime. The two clauses are in conflict.	At the conference, parties agreed that issue of casuals being entitled to overtime to be dealt with by the part time casual Full Bench.

		ASAA		<p>Clauses currently sufficiently clear, no variation sought. If Commission finds there is a conflict, clause 10.1 should be amended so it only applies to full-time and part-time employees (so casual employees are not entitled to overtime).</p>	<p>Written correspondence received from the ASSA states that they agree to the AWU's proposed variation entitling casual employees, other than Snow-sports instructors to a penalty rate for overtime hours worked.</p> <p>The overtime penalty rates will be inclusive of the 25% casual loading. Overtime will only be payable in circumstances of work in excess of ten hours per day or an average of 38 hours per week over a maximum work cycle of four weeks.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
14.	18	Ai Group	10.4	<p>Make-up time The opening words of clause 22.5 of current award have been removed in ED and should be retained.</p>	<p>Parties agreed to insert current award wording at cl. 22.5: "notwithstanding the provisions of this award" at commencement of cl10.4 "Make up time"</p>
15.	19	Ai Group	13.1	<p>Minimum wages—resort workers Seasonal hourly rate for Resort Worker Level 2 in current award is \$18.81; however in ED, rate is \$18.80. Consistent approach should be taken to calculation methods and rounding.</p>	<p>At the conference, parties agreed that issue would be resolved with the removal of seasonal hourly rate as per NES decision.</p> <p>Written correspondence received from the ASSA states that they have reached a consent position with the AWU in proposed amendments to table 13.1.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
16.	22	Ai Group	13.6(c)	<p>Adult apprentices Retain current wording</p>	<p>Parties agree to insert the words "under this award" after the word 'employer' at cl.13.6(c)</p>

17.	25	FWO	17.1(b) and Schedule C.1.3	Penalty rates—casual employees Unclear what casuals are paid on a public holiday	At the conference, parties agreed that discussions may be held subject to the decision of the casual Full Bench. <i>Agreement is conditional on the approval of the package of variations.</i>
		ASAA		In response to FWO submit rate for public holidays is double time and a half to be paid on base rate, in place of casual loading and not in addition to it. ED does not need to be amended.	Written correspondence received from the ASSA states that the AWU agrees not to press its interpretation of the calculation of public holiday penalty rates for casual employees.
18.	27	Ai Group	.	Paid leave in advance of accrued entitlement Typographical error. The word “in” before “wholly or partly” should be deleted.	Parties agree the word “in” before “wholly or partly” should be deleted from cl.18.2
19.	28	ASAA	18.3	Annual leave <i>Parties are asked whether a provision should be inserted in clause 18 to clarify seasonal employees’ entitlement to annual leave.</i> Not needed, provision, as it stands, sufficiently clear.	Parties agree to leave the exposure draft at cl.18.3 as currently is.
20.	29	AWU	Sch. A.3.1	Classification definitions Apostrophe missing in last line which should state “the specific employers’ requirements”.	Parties agree that the apostrophe be inserted after the letter ‘s’ in the word ‘employers’
21.	30	ASAA	Sch. B	Equivalency of Snowsports Qualifications Seek to vary schedule due to recent change of certification levels by Australian Professional Snowsports Instructors	Parties agree that the draft filed by ASAA filed on 15 July 2015 should be reflected in the ED

22.	31	Ai Group	Shed. C	<p>Summary of Hourly Rates of Pay</p> <p>If clause 7.5 is to be deleted pursuant to decision regarding NES inconsistencies, relevant rates will need reviewed.</p> <p>Oppose AWU's interpretation of current clause 25.1 (at item 26). Submit casual employee is to be paid 250% of minimum hourly rate (no casual loading) rather than 275% of minimum hourly rate. Rates calculated in C.1.3 are therefore correct.</p>	<p>Parties to have further discussions to resolve any additional payments to be made to seasonal employees, in view of annual leave entitlements.</p> <p>Written correspondence received from the ASSA states that they have reached a consent position with the AWU in proposed amendment of table C1.1 at Schedule C in the Exposure Draft.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
23.	32	Ai Group	C.1.4 and C.1.5	<p>Summary of Hourly Rates of Pay</p> <p>Public holiday rates incorrect. Penalty incorrectly compounded on seasonal employee loading.</p>	<p>Parties agree that the separate hourly rate of pay for seasonal employees will be unlikely to exist, given entitlements to annual leave.</p> <p>Written correspondence received from the ASSA states that they have reached a consent position with the AWU in proposed deletion of tables C1.4 and C1.5 of Schedule C in the Exposure Draft.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
24.	33	Ai Group	Schedule H	<p>Definitions</p> <p>In reply to AWU proposal to amend standard rate definition, acknowledge definition may require review and note any change would be substantive. Should Commission determine current clause 11.5 is to be deleted, as proposed in its draft determination, any redefinition should be considered as part of those proceedings.</p>	<p>AWU to file further proposal regarding the wording of the standard rate definition.</p> <p>Written correspondence received from the ASSA states that they have reached a consent position with the AWU in the proposed deletion of the words 'seasonal' where it appears under the definition for 'standard rate'.</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>

25.	34	ASAA	Schedule D-D3.1(b)	<p>Summary of Monetary Allowances Clause should be amended so applicable CPI figure is “international holiday travel and accommodation sub-group”</p>	<p>At the conference, parties agreed to further discuss this issue.</p> <p>Written correspondence received from the ASSA state that it agrees not to press its request for that the applicable index figure for the airfare reimbursement allowance be amended from “domestic holiday travel and accommodation sub-group” to “international holiday ravel”</p> <p><i>Agreement is conditional on the approval of the package of variations.</i></p>
		AWU		<p>Opposed to ASAA proposed variation. Sub-group is based on same data but for “holidays overseas”.</p>	

Issues withdrawn					
Issue no.	Summary of subs. Ref	Party	Clause (Exposure draft)	Summary of issue	Outcome
26.	4	ASAA	6.5	Casual employment Parties are asked to provide a list of provisions that do not apply to casual employees. Following provisions do not apply to casuals: 7—Seasonal employment; 8—Apprentices; 10—... Withdrawn submission at paragraph 9.2 in Sub-30/01/15.	ASAA has withdrawn this submission
		AWU		Point is moot given Decision [2014] FWCFB 9412 issued 23 Dec 2014.	
27.	17	AWU	10.4(b)	Make-up time Provision appears unnecessary (no shift work provisions in award).	AWU has withdrawn this issue
28.	20	AWU	13.3(a)	Minimum wages—Junior employees The reference to employees 19 years and over getting 100% may create ambiguity given the definition of "junior employee" in Schedule H which is "an employee who is less than 19 years old".	AWU has withdrawn this issue
29.	21	Ai Group	13.3(a)	Minimum wages—Junior employees Do not agree with AWU however do not oppose deletion of row.	Ai Group has withdrawn this issue

30.	24	AWU	15.3(d)(ii)	Protective clothing reimbursement Second and third dot points are repetitive and allow too much discretion for an employer. Submit they should be consolidated into one dot point.	AWU has withdrawn this issue
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Issues for further discussions

Issue no.	Summary of subs. Ref	Party	Clause (Exposure draft)	Summary of issue	Outcome
31.	23	AWU	14.2(c) and 14.3(d)	Clause 14.3 should read: "Where clause 14.3 applies, clause 14.1 only applies to work within each role."	Ai group to review wording of AWU with prospect of reaching an agreement with AWU. ASAA agree with AWU regarding proposed variations
		Ai Group		Oppose AWU variations. Amendments would introduce substantive changes including additional employment costs.	
32.	26	AWU	18.1	Filed further material relating to annual leave loading clause. Updated draft determination submitted.	Parties to hold further discussions, with a Full Bench to arbitrate if not resolved Written correspondence received from the ASSA states that it agrees to the inclusion of the annual leave loading in the Award, as proposed by the AWU (with annual leave loading also being payable on the payment of accrued annual leave upon termination) <i>Agreement is conditional on the approval of the package of variations.</i> Ai group to confirm its position in relation to this issue.
		ASAA		Provision unnecessary, rate of pay is sufficiently clear within the Act. Oppose AWU submission.	

		Ai group		<p>Oppose insertion of leave loading.</p> <p>Agree with ASAA, clause should not be amended to specify rate of pay that applies during a period of annual leave.</p>	
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Issues to refer to Full Bench					
Issue no.	Summary of subs. Ref	Party	Clause (Exposure draft)	Summary of issue	Outcome
33.	1	ASAA		<p>Variations referred to part-time & casual Full Bench</p> <p>Request that variations referred to part-time & casual Full Bench are referred back to the Group 2 Award stage.</p>	<p>ASAA seeks a separate Full Bench to deal with all outstanding issues due its nature, and will provide reasons for this request.</p> <p>However, will await outcomes on other relevant Full Bench matters.</p>
34.	2	FC & MHCC	3 and Schedule H	<p>Coverage</p> <p>Amend definition of “alpine resort” to remove requirement for ski lift operations. Coverage to apply equally to employers whether they are involved in ski lifting operations or not.</p>	<p>Other employers not fitting within the definition of alpine resort seek to be covered by the award.</p> <p>This is opposed by ASAA and unions.</p> <p>ASAA request separate Full Bench to deal with this matter.</p>
		ASAA		<p>This type of submission should not be considered during this process. If submission allowed, ASAA submit MHRMB has misunderstand ASAA objection. Rely on reply sub-04/03/15, paragraph 3.7 of ‘Submissions on Application to Vary the Award and submissions at proceedings 13 June 2014. Fact that MHRMB do not operate an alpine lift is the reason why they are and should remain not covered by award. It is the investment in and not operation of alpine lifting facilities that affords an entity and its employee’s coverage of the award.</p>	<p>Written submissions received from the ASSA states that it agrees with the AWU to align against the coverage submissions that have been made by the private entities.</p> <p>ASAA and the AWU free to support or oppose the coverage submission that has been made by the Mount Hotham Resort Management Board.</p>

		MHRM B		ASAA mistaken. MHRMB is statutory authority. Capital investment should not be main factor determining coverage. Varying will not 'open the perennial floodgates'. MHRMB is a constitutional corporation and is therefore not covered by a state reference public sector transitional award.	
		SDA		Oppose variation to coverage clause.	

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