ALPINE RESORTS AWARD 2014 – AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION

SUBMISSIONS ON TECHNICAL/DRAFTING ISSUES

1 Introduction

1.1 This submission, in relation to the technical and drafting issues related to the exposure draft for the *Alpine Resorts Award 2014* ("**Exposure Draft**"), is made by the Australian Ski Areas Association ("**Association**"), pursuant to President Ross' amended directions, dated 6 May 2015.

1.2 The Association sets out below its submission in relation to the technical and drafting issues related to the Exposure Draft.

2 Apprentices – Clause 8.1

2.1 The Association submits that clause 8.1 in the Exposure Draft should be amended so that the phrase "clause 13.4—Apprentices" is replaced with the phrase "clause 13—Minimum wages".

2.2 Clause 8.1 in the Exposure Draft currently provides that:

> Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause 13.4—Apprentices.

2.3 The Association notes that multiple clauses within clause 13—Minimum wages apply to apprentices. For example:

(a) Clause 13.5 provides that all percentages prescribed within clause 13 (which includes minimum rates for apprentices) will be calculated to the nearest 10 cents.

(b) Clause 13.6 governs the minimum rates for adult apprentices in certain circumstances.

(c) Clause 13.7 governs the treatment of school based apprentices.

2.4 The amendment proposed by the Association is consistent with clause 12.1 in the *Alpine Resorts Award 2010*, which provides that:

> Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause 16—Minimum hourly rates.

2.5 This proposed variation is set out in detail at **Schedule 1** of this submission.

3 Further matters

3.1 The Association relies on its previous submissions made during the Commission's four yearly review of modern awards. These submissions are attached to this submission at annexures **A**, **B** and **C**.

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

Harmers Workplace Lawyers

15 July 2015

Schedule 1

Alpine Resorts Award 2014

Amendments to Exposure Draft as published at 8 December 2014

Proposed by the Australian Ski Areas Association

1. **Clause 8.1 — Apprentices**

Amend clause 8.1, in accordance with the amendments shown in mark up below:

Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause 13—Minimum wages~~13.4 — Apprentices~~.

"A"

AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION SUBMISSIONS ON THE EXPOSURE DRAFT FOR THE ALPINE RESORTS AWARD 2014

1 Introduction

1.1 These submissions on the exposure draft for the proposed *Alpine Resorts Award 2014* ("**Exposure Draft**") are made by the Australian Ski Areas Association ("**Association**"), pursuant to President Ross' directions, issued 8 December 2014.

1.2 The Association has reviewed the Exposure Draft and sets out below its submissions in relation to the variations that it seeks, its submissions in response to certain issues raised by other interested parties and its response to the comments left by the Fair Work Commission ("**Commission**") in the Exposure Draft.

1.3 The Association notes that it presses for changes to the Exposure Draft regarding part-time work and certain certification levels in Schedule B of the Exposure Draft. A summary of these requested variations are set out in Harmers Workplace Lawyers' letter to President Ross, dated 22 October 2014. Annexed and marked "**A**" is a copy of that letter.

1.4 The Association contends that the submissions in that letter provide a basis for the alteration of the Exposure Draft, however, it provides more fulsome and additional submissions below.

1.5 Precise variations sought through the Exposure Draft are set out at **Schedule 1** of these submissions.

1.6 The Association contends that the variations that it seeks strike an appropriate balance between the components of the Modern Awards objectives set out in Section 134 of the *Fair Work Act 2009* (Cth) ("**Act**").

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

2 Part-time employment and ordinary hours of work

2.1 The Association requests that clauses 6.4(a)(ii) and 10.3 of the Exposure Draft are amended so that part-time employees are characterised as employees who are "engaged to work an average of at least eight and no more that 38 hours per week over a work cycle of four weeks", rather than a maximum of 35 hours per week over a work cycle of four weeks, which clauses 6.4(a)(ii) and 10.3 of the Exposure Draft currently provide.

2.2 This requested variation is made to rectify the four hour discrepancy between full-time and part-time employment that currently exists in the Exposure Draft, since full-time employees are characterised as employees who are engaged to work 38 ordinary hours per week, whilst part-time employees are characterised as employees who are engaged to work at least eight and less than 35 hours per week.

2.3 The Association notes that the characterisation of part-time employment in clauses 6.4(a)(ii) and 10.3 of the Exposure Draft, in respect to the maximum hours worked by a part-time employee, are inconsistent with the characterisation of part-time employment in clause 7.4 of the Exposure Draft, in the same respect, which currently provides that "a part-time seasonal employee is a seasonal employee who is engaged to work less than *38* ordinary hours per week (or an average of less that *38* ordinary hours over the anticipated length of their employment)" [emphasis added].

2.4 The Association further notes that the characterisation of a part-time employee as an employee who is "engaged to work an average of at least eight and no more that 35 hours per week over a work cycle of four weeks" is not reflected in the following pre-modernisation snowsports industry awards:

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

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

(c) NSW *Ski Tube (State) Award* (now a PCSA) ("**NSW Skitube Award**"),

(together the "**NSW Ski Awards**"),

which the Association contends, along with the Victorian *Alpine Resorts (Australian Workers Union) Award 2001* ("**Victorian (AWU) Award**"), were the primary industrial instruments in the snowsports industry prior to the award modernisation process and are the instruments that properly form the basis of the Award. Annexed and marked "**B**", "**C**", "**D**" and "**E**" respectively are copies of these industrial instruments.

2.5 The Association similarly held this contention during the award modernisation process. See paragraphs 3.3 to 3.18 of the Association's written submissions to the Australian Industrial Relations Commission ("**AIRC**") on 6 March 2009 ("**March 2009 Submissions**") and paragraphs 3.1 to 3.4 of the Association's 8 April 2009 submissions ("**April 2009 Submissions**"). Annexed and marked "**F**" and "**G**" respectively are copies of these submissions.

2.6 Also during the award modernisation process, the Association, in its Draft Alpine Resorts (General) Award 2010 ("**Association AMOD Award**"), supported the characterisation of a part-time employee as an employee "engaged to work less than 38 ordinary hours" per week.[1] However, in the Australian Workers' Union's ("**AWU**") Draft Alpine Resorts (General) Award 2010 ("**AWU AMOD Award**"),

[1] See clause 11.3 of the Association AMOD Award.

the AWU requested a variation to the Association AMOD Award, to the effect that a part-time employee was characterised as an employee engaged for at least 8 and no more than 35 hours per week, which was based on clause 16.1.2 of the Victorian (AWU) Award.[2] Annexed and marked "**H**" and "**I**" respectively are copies of these industrial instruments.

2.7 Notably, in both the Victorian (AWU) Award and the AWU AMOD Award, there also exists a four hour discrepancy between full-time and part-time employment, as full-time employees in these awards are characterised as employees who are engaged to work 38 ordinary hours per week.[3]

2.8 The Association further notes that a part-time seasonal employee, in the AWU AMOD Award, is characterised as an employee engaged to work less than 38 ordinary hours per week.[4]

2.9 It is the Association's submission that the characterisation of a part-time employee in clauses 6.4(a)(ii) and 10.3 of the Exposure Draft, as an employee "engaged to work an average of at least eight and no more that 35 hours per week over a work cycle of four weeks", is a mistake, which has been carried over from a mistake in the Victorian (AWU) Award. The Association submits that this mistake should be amended during this review process.

3 Equivalency table at Schedule B of the Exposure Draft

3.1 The second variation to the Exposure Draft requested by the Association is the variation of "Schedule B – Equivalency of Snowsports Qualifications" of the Exposure Draft. The Association seeks this variation due to the recent name changes of certification levels by the Australian Professional Snowsports Instructors.

3.2 Pursuant to Justice Ross' comments during the Group 2 Conference on 2 December 2014, that the Association is encouraged to obtain consent from the parties for this requested variation, given that changes in certification levels should be a formality, the Association wrote to the interested parties in this matter on 22 January 2015, seeking consent for this variation. A copy of one such letter is annexed and marked "**J**".

3.3 The Association notes that since sending its letter it has been in correspondence with some of the parties (including the AWU) regarding this requested variation and that it will notify the Commission if it obtains such consent.

3.4 The Association notes that Schedule C of the *Alpine Resorts Award 2010* appears as Schedule B in the Exposure Draft.

3.5 These requested variations are set out in **Schedule 1** of these submissions.

[2] See clauses 11.3 and 28.1 of the AWU AMOD Award.
[3] See clause 16.1.1 of the Victorian (AWU) Award and clauses 11.2 and 28.1 of the AWU AMOD Award.
[4] See clause 12.3 in the AWU AMOD Award.

4 Overtime and ordinary hours of work and rostering

4.1 The Association has reviewed the AWU's proposed variations to clauses 25.2 and 22.1 of the *Alpine Resorts Award 2010*, regarding the payment of overtime for casual employees. In the AWU's proposal, it submits that clause 25.2 of the *Alpine Resorts Award 2010* appears to conflict with clause 22.1 of the same award, as clause 25.2 excludes casual employees from the benefit of overtime, whilst clause 22.1 states that all employees (the clause is silent on whether or not it applies to full-time, part-time and/or casual employees) can work a maximum of 10 hours per day.

4.2 It is the Association's view that clause 25.2 of the *Alpine Resorts Award 2010* clearly excludes casual employees from overtime penalty rates, in that it expressly provides that "an employee, other than a casual employee or a Snowsports Instructor, must be paid overtime rates". Moreover, clause 10.5 of the *Alpine Resorts Award 2010* states that casual loading compensates casual employees for, *inter alia*, "other entitlements from which they are excluded by the terms of this award and the NES", which the Association submits, includes overtime.

4.3 Notably, in the Victorian (AWU) Award (which is one of the pre-modernisation snowsports industry awards that appropriately forms the basis of the Award) and the AWU AMOD Award, the clause concerning maximum daily ordinary hours states "the maximum daily ordinary hours of full-time and part-time employees will be 10 hours per day excluding meal breaks".[5] Casual employees are expressly excluded from the characterisation of maximum daily hours.

4.4 Notwithstanding the above, the Association responds to specific matters raised by the AWU in its outline of variations, filed with the Commission on 25 November 2014 ("**AWU Outline of Variations**"). The Association notes, however, that whilst drafting these submissions it remained unaware of the full extent of the AWU's submissions, only that it relies on a certain subsection within 134 of the Act and certain entitlements within the NSW Ski Industry Award and the *Victorian Alpine Resorts Award 1999* (VIC) ("**VAR Award**").

4.5 Firstly, in respect to section 134 of the Act, the Association notes that the Modern Award objectives in 134 of the Act, in addition to the subsection quoted in the AWU Outline of Variations, also includes the following considerations:

- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[5] See clause 16.2 of the Victorian (AWU) Award and clause 28.1 of the AWU AMOD Award.

4.6 It is the Association's submission that the variation sought by the AWU distorts the balance that the Award presently achieves, in respect to casual employees.

4.7 In respect to the instruments relied upon in the AWU Outline of Variations, the Association firstly notes that its contention, as it was during the award modernisation process (see paragraphs 3.3 to 3.21 of the Association's March 2009 Submissions, and paragraphs 2.4 to 2.21 of the Association's April 2009 Submissions, which are attached to these submissions), is that the following pre-modernisation snowsports industry awards properly form the basis of the Award:

(a) Victorian (AWU) Award;

(b) NSW Ski Industry Award;

(c) NSW Ski Instructors Award; and

(d) NSW Skitube Award.

(together the "**Snowsports Industry Awards**").

4.8 Against this background, the Association notes that the unique nature of the snowsports industry (in that it is an industry that is greatly seasonal in nature, highly vulnerable to changing weather conditions, experiences a substantial peak in business during the weekend and whose work is often undertaken by snowsports enthusiasts who wish to have the flexibility to work on weekends (when it is busiest) and ski on weekdays) is reflected in the Snowsports Industry Awards.

4.9 It is therefore significant that casual employees are excluded from overtime entitlements within the Victorian (AWU) Award. Moreover, it is the Association's contention that there is no express entitlement to overtime for casual employees under the Ski Industry Award, which is contrary to the contention in the AWU Outline of Variations.

4.10 Further, the Association notes that there is no express entitlement to overtime for casual employees under the NSW Ski Instructors Award and the NSW Skitube Award.

4.11 In respect to the VAR Award, it is the Association's contention that this award 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.

4.12 The Association made extensive submissions regarding the unsuitability of the VAR Award as a benchmark for the Award. These submissions can be found at paragraphs 3.1 to 3.4 of the April 2009 Submissions. The April 2009 Submissions are attached at annexure "**G**" to these submissions.

4.13 The Association notes that clauses 25.2 and 22.1 of the *Alpine Resorts Award 2010* appear as clauses 17.2 and 10.1 respectively in the Exposure Draft.

4.14 It is the Association's submission that the Exposure Draft, in its current form, is sufficiently clear in respect to clauses 17.2 and 10.1 (clauses 25.2 and 22.1 respectively in the *Alpine Resorts Award 2010*). Therefore, no variation is necessary.

4.15 The Association notes, however, that if the Commission find that there is conflict between clauses 17.2 and 10.1 of the Exposure Draft, its submission is that clause 10.1 should be amended so that it applies only to full-time and part-time employees, and not casual employees, in the same manner as the example in paragraph 4.3 above.

4.16 The Association reserves its right to make further submissions regarding the AWU's proposed variations to the Award.

5 Payment for work performed on public holidays

5.1 The Association has reviewed the Fair Work Ombudsman's identification of issues with the *Alpine Resorts Award 2010*. The FWO submitted that clause 25.1 of the *Alpine Resorts Award 2010* is unclear, as it is unclear as to whether the rate of double time and a half, which casual employees are paid for work performed on public holidays, is calculated as:

(a) 250% of the base rate of pay (with no further casual loading payable); or

(b) 250% of the base rate of pay plus the 25% casual loading; or

(c) 250% of the casually loaded rate of pay.

5.2 The Association notes that clause 25.1 of the *Alpine Resorts Award 2010* appears as clause 17.1 in the Exposure Draft.

5.3 The Association submits that clause 17.1 of the Exposure Draft clearly provides that the rate of double time and a half is to be paid on the base rate of pay, in place of the casual loading of 25%, and not in addition to the casual loading of 25%, as clause 17.1(b) expressly provides that "in the case of casual employees this rate includes the casual loading of 25%".

5.4 It is therefore the Association's submission that the Exposure Draft, in its current form, is sufficiently clear in respect to clause 17.1. Therefore, no variation is necessary.

5.5 The Association reserves its right to make further submissions regarding this perceived issue with the Award.

6 Seasonal Employees

6.1 The Association requests that the phrase "plus the loading in clause 7.5" is removed from clause 7.6 of the Exposure Draft, as it creates uncertainty as to the actual rate of pay that seasonal employees are entitled to receive.

6.2 Clause 7.6 of the Exposure Draft provides that "seasonal employees will be paid the hourly rate applicable to their classification as set out in clause 13—Minimum wages plus the loading in clause 7.5".

6.3 Relevantly, the minimum hourly rate provided for seasonal employees in clause 13—Minimum wages already includes an 8.33% loading on the minimum hourly rate for each classification.

6.4 The inclusion of the phrase "plus the loading in clause 7.5" in clause 7.6 of the Exposure draft invites an argument that casual employees are entitled to receive an 8.33% loading on top of the minimum seasonal hourly rate provided for in clause 13—Minimum wages, which already includes an 8.33% loading.

6.5 This is contrary to operation of seasonal employment in the *Alpine Resorts Award 2010*. The Association notes that clause 7.6 of the Exposure Draft reflects clause 11.8 of the *Alpine Resorts Award 2010*, which provides that "seasonal employees will be paid the hourly rate applicable to their classification as set out in clause 16—Minimum hourly rates".

7 Apprentices

7.1 The Association requests that clause 8.1 in the Exposure Draft is amended so that the phrase "clause 13.4—Apprentices" is replaced with the phrase "clause 13—Minimum wages", as this is consistent with clause 12.1 in the *Alpine Resorts Award 2010*.

7.2 The Association notes that clause 12.1 of the *Alpine Resorts Award 2010* appears as clause 8.1 in the Exposure Draft.

8 Coverage of the Award

8.1 The Association notes that Falls Creek and Mount Hotham Chamber of Commerce have made submissions on the Exposure Draft ("**Falls Creek and MHCC Submissions**"). The substance of the Falls Creek and MHCC Submissions is that the coverage of the Award is extended beyond employers who operate an alpine resort, whose business, among other things, includes alpine lifting.

8.2 It is the Association's submission that the coverage of the Award should not be varied and that the Falls Creek and MHCC Submissions should not be considered during this process.

8.3 Falls Creek and Mount Hotham Chamber of Commerce had the opportunity to raise this matter in accordance with the timetable set by Justice Ross for the Group 2 Awards in the Award Stage, however, it failed to do so. The Association's comments in this regard reflect those of Justice Ross during the 2 December 2014 conference for the Group 2 Awards.

8.4 The Association notes that the requested variation that forms the substance of the Falls Creek and MHCC Submissions was the subject of an application to the Commission made by Falls Creek Oversnow Pty Ltd and DPSI General Pty Ltd on 23 May 2014. That application was withdrawn by Falls Creek Oversnow Pty Ltd

and DPSI General Pty Ltd following substantial written and oral argument in the proceedings. The Association relies on its written (in particular its outline of submissions dated 24 June 2014) and oral submissions during the proceedings in support of its objection to the Falls Creek and MHCC Submissions.

8.5 A copy of the Association's outline of submissions dated 24 June 2014 is annexed and marked "**K**".

8.6 The Association reserves its right to make further submissions regarding its objection to the Falls Creek and MHCC Submissions in the next round of submissions on the Exposure Draft.

9 Response to comments left by the Commission in the Exposure Draft

Provisions that do not apply to casual employees

9.1 At clause 6.5 of the Exposure Draft, the Commission asked the parties to provide a list of provisions that do not apply to casual employees.

9.2 It is the Association's view that the following provisions do not apply to casual employees:

(a) 7 - Seasonal employment;

(b) 8 - Apprentices;

(c) 10 - Ordinary hours worked;

(d) 11.3 - Rostered days off;

(e) 13.4 - Apprentices;

(f) 15.3(a) - Meal allowance;

(g) 17.2 - Overtime;

(h) 18 - Annual leave;

(i) 19 - Personal/carer's leave and compassionate leave, save for the third bullet point in clause 19.1 regarding unpaid compassionate leave;

(j) 22 - Community service leave, only in respect to the entitlement to paid leave for jury service;

(k) 23 - Termination of employment;

(l) 24 - Redundancy;

(m) 25 - Consultation, so far as it relates to redundancy;

(n) D.2 - Expense related allowances, only in respect to meal allowances;

(o) D.3.1(b) - Adjustment of expense related allowances, only in respect to meal allowances;

(p) Schedule E - National training wage; and

(q) Schedule G - School-based apprentices.

Ordinary Hours of Work

9.3 At clause 10.1 of the Exposure Draft, the Commission asked the parties whether "any five days of the week" should be changed to "any five days from Monday to Sunday" or "Monday to Friday" and whether these days need to be consecutive.

9.4 It is the Association's submission that clause 10.1 of the Exposure Draft should not be changed.

9.5 In this regard, the Association notes that clause 10.1 of the Exposure Draft, as it stands, is consistent with the Snowsports Industry Awards, which the Association submits, as it did during the award modernisation process, are the pre-modernisation snowsports industry awards that appropriately form the basis of the Award.

9.6 The terms and conditions within these pre-modernisation snowsports industry awards were negotiated against the unique nature of the snowsports industry, which was concisely summarised by his Honour Justice Watson, when in 1989 the NSW Ski Industry Award was formed. In deliberating the terms and conditions within the Ski Industry Award, his Honour took into account:

(a) the seasonal nature of the industry – with the majority of employees being engaged only during the ski season (which runs from early June to early October, depending on the snow conditions);

(b) the amount of work depending on the snow conditions on any particular day;

(c) that weekends are the busiest times at the resorts; and

(d) that the work is often undertaken by snowsports enthusiasts who wish to have the flexibility to work on weekends (when it is busiest) and ski on weekdays.

9.7 These considerations are relevant throughout the snowsports industry and remain relevant today.

9.8 Against this background, the Association submits that clause 10.1 should not be changed to "any five days from Monday to Sunday" or "Monday to Friday", nor should it be changed so that the five in seven days that employees are required to work are consecutive days.

9.9 Such an amendment would result in a significant increase in costs to the Alpine Resorts (as defined in the Award) and a reduction in the flexibility of working

arrangements, which is a necessary component with the unique nature of the snowsports industry.

9.10 In this context, the Association submits that an amendment causing such an increase in costs and a reduction in the flexibility of working arrangements in the snowsports industry is against the Modern Awards objectives set out in Section 134 of the Act.

9.11 The Association reserves the right to make further submissions in this regard, in the face of submissions by other interested parties to amend clause 10.1 of the Exposure Draft, and otherwise.

Annual leave

9.12 At clause 18.1 of the Exposure Draft, the Commission asked the parties whether a provision regarding the rate of pay on annual leave should be inserted.

9.13 It is the Association's view that such an addition is unnecessary, as the rate of pay on annual leave is made sufficiently clear within the Act.

Requirement to take annual leave

9.14 At clause 18.2 of the Exposure Draft, the Commission asked the parties whether a provision should be inserted in clause 18 to clarify seasonal employees' entitlement to annual leave.

9.15 It is the Association's view that clause 18, as it stands, is sufficiently clear, however, the Association reserves its right to make further submissions in response to any suggested variation in this regard.

Coverage

9.16 At E.3.3 of the Exposure Draft, the Commission asked the parties to identify "any training program which applies to the same occupation and achieves essentially the same training outcome as an existing apprenticeship in an award as at 25 June 1997" that they consider should not be covered by Schedule E.

9.17 The Association makes no comments in this regard, however, it reserves its right to make further submissions in response to any suggested variation in this regard.

Allocation of traineeships to wage allocation

9.18 At E.7 of the Exposure Draft, the Commission has asked the parties to review the packages listed to ensure the lists are complete and up-to-date.

9.19 The Association makes no comments in this regard, however, it reserves its right to make further submissions in response to any suggested variation in this regard.

10 Request for certain variations to be referred back to the Group 2 Awards Stage concerning the Alpine Resorts Award 2010

10.1 The Association notes that at the 2 December 2014 Group 2 Conference, President Ross referred the variations proposed by the AWU regarding casual employees (see paragraph 4 above), by the FWO regarding casual employees (see paragraph 5 above) and by the Association regarding part-time employees (see paragraph 2 above) ("**Referred Variations**"), to the Full Bench dealing with common issues concerning part-time and casual employees.

10.2 In accordance with the President's directions, the Association participated in the Full Bench's proceedings dealing with common issues concerning part-time and casual employees, however, the Association respectfully requests that the Referred Variations are referred back to the Group 2 Award Stage, concerning the *Alpine Resorts Award* 2010.

10.3 The primary justification for this request is the unique nature of the snowsports industry and its industrial regulation, which requires the Referred Variations to be considered in isolation from the other awards being considered by the Full Bench and with full contemplation of the unique nature of the snowsports industry.

10.4 The unique nature of the snowsports industry, and its industrial regulation, was deliberated extensively before the AIRC during the award modernisation process, and is summarised at paragraph 9.6 and 9.7 above. The Association reiterates the unique nature of the snowsports industry, in that it is an industry that is greatly seasonal in nature, highly vulnerable to changing weather conditions, experiences a substantial peak in business during the weekend and whose work is often undertaken by snowsports enthusiasts who wish to have the flexibility to work on weekends (when it is busiest) and ski on weekdays.

10.5 The relevant pre-modernisation industrial instruments in the snowsports industry, which form the basis of the Award, each contain unique conditions and flexibilities (including, for example, clauses relating to the payment of penalty rates, any five in seven work arrangements and that contain specific provisions for seasonal employees), which have been negotiated over a number of years against the unique nature of the snowsports industry. A summary of the industrial regulation of the snowsports industry is set out at paragraphs 3.3 to 3.21 of the Association's March 2009 Submissions, and paragraphs 2.4 to 2.21 of the Association's April 2009 Submissions. These submissions are attached at annexures "**F**" and "**G**" respectively.

10.6 The broad range of classifications that exist within the Award, which are otherwise uncommon in other awards, further evidences the unique nature of the snowsports industry and its industrial regulation. Notably, the classifications in the Award cover roles that otherwise may have fallen within other occupations and industries, but which are appropriately included in the Award, as it enables the Alpine Resorts (as defined in the Award) to utilise their employees across their resorts efficiently and commercially, particularly during times of poor weather conditions.[6]

[6] See paragraphs 2.8 to 2.11 of the April 2009 Submissions

10.7 Against this background, the Association respectfully requests that the Commission refers the Referred Variations back to the Group 2 Award Stage, concerning the *Alpine Resorts Award* 2010.

10.8 Such an adjustment will provide the Association with greater opportunity to participate in the four yearly review process, particularly given the Association's discrete involvement.

10.9 The Association respectfully submits that the requirement for the Association to be involved in the Full Bench's proceedings dealing with common issues concerning part-time and casual employees will be a costly exercise for the Association, and is a process with which the Association will have minimal involvement.

11 Further matters

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

Harmers Workplace Lawyers

30 January 2015

Schedule 1

Alpine Resorts Award 2014

Amendments to Exposure Draft as published at 8 December 2014

Proposed by the Australian Ski Areas Association

1. Clause 6.4(a)(ii) — Part-time employment

Delete clause 6.4(a)(ii), insert instead:

(ii) is engaged to work an average of at least eight and no more that 38 hours per week over a work cycle of four weeks

2. Clause 7.6 — Seasonal employees

Delete clause 7.6, insert instead:

Seasonal employees will be paid the hourly rate applicable to their classification as set out in clause 13—Minimum wages.

3. Clause 8.1 — Apprentices

Delete clause 8.1, insert instead:

Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause 13—Minimum wages.

4. Clause 10.3 — Ordinary hours of work

Delete clause 10.3, insert instead:

The ordinary hours of part-time employees will average at least eight and no more than 38 hours per week over a maximum work cycle of four weeks.

5. Clause 6.5(b)(iii) — Casual Loading

At clause 6.5(b)(iii), insert:

(a) 7 - Seasonal employment;

(b) 8 - Apprentices;

(c) 10 - Ordinary hours worked;

(d) 11.3 - Rostered days off;

(e) 13.4 - Apprentices;

(f) 15.3(a) - Meal allowance;

(g) 17.2 - Overtime;

(h) 18 - Annual leave;

(i) 19 - Personal/carer's leave and compassionate leave, save for the third bullet point in clause 19.1 regarding unpaid compassionate leave;

(j) 22 - Community service leave, only in respect to the entitlement to paid leave for jury service;

(k) 23 - Termination of employment;

(l) 24 - Redundancy;

(m) 25 - Consultation, so far as it relates to redundancy;

(n) D.2 - Expense related allowances, only in respect to meal allowances;

(o) D.3.1(b) - Adjustment of expense related allowances, only in respect to meal allowances;

(p) Schedule E - National training wage; and

(q) Schedule G - School-based apprentices.

6. Schedule B — Equivalency of Snowsports Qualifications

Amend the table at Schedule B, in accordance with the amendments shown in mark up below:

Table 1 Country	**Association Certification Level**
Australia	APSI (Ski & SB) ~~Instructor Training Course/Recruitment Clinic~~Level 1
Austria	ÖSSV (Ski & SB) Anwärter
Canada	CSIA (Ski) CSIA Level 1 CASI (SB) CASI Level 1 CSCF (Coaching) Entry Level (1)
Korea	KSIA (Ski & SB) Level 1
New Zealand	NZSIA (Ski) SBINZ ~~&~~ (SB) Level 1 ~~C.S.I~~
~~Poland~~	~~SITN-PZN Children's Level~~
Switzerland	SSSA (Ski & SB) Kinderlehrer (Child Tutor)
United Kingdom	BASI (Ski) ~~Alpine~~ Level 1 – Dry Slope Specific BASI (SB) ~~SB~~ Level 1 – Dry Slope Specific
USA	PSIA (Ski) ~~PSIA~~ Level 1 AASI (SB) ~~AASI~~ Level 1

Table 2 Country	**Association Certification Level**
Australia	APSI (Ski & SB) ~~APSI~~ Level 1 ~~(or equivalent certification prior to 2011 being Australia APSI (Ski & SB) Children's Certificate)~~
Canada	CSCF (Coaching) Level 1 Advanced Certification
USA	PSIA (Ski) AASI (SB) Level 1 plus PSIA children's specialist 1

Table 3 Country	**Association Certification Level**
Australia	APSI (Ski & SB) ~~APSI~~ Level 2 ~~(or equivalent certification prior to 2011 being Australia APSI (Ski & SB) APSI Level 1)~~
Austria	ÖSSV (Ski & SB) Landeslehrer 1 (Aufnahmspruefung) ~~Anwärter~~
Canada	CSIA (Ski) ~~CSIA~~ Level 2 CASI (SB) ~~CASI~~ Level 2 CSCF (Coaching) Development Level (2)
Czech Republic	APUL (Ski & SB) APUL C
Japan	SIA (Ski & SB) IT I (Bronze Medal)
Korea	KSIA (Ski & SB) Level 2
Netherlands	NVVS (Ski & SB) A-Diploma
New Zealand	NZSIA (Ski) SBINZ (~~&~~ SB) ~~Stage One~~ Level 2
~~Poland~~	~~SITN-PZN Level Basic~~
Slovakia	SAPUL (Ski & SB) C Qualification
Slovenia	~~SIAS~~ ZUTS (Ski & SB) Level 1
Switzerland	SSSA (Ski & SB) Stufe 1
United Kingdom	BASI (Ski) ~~Alpine L~~ Level 2 BASI (SB) ~~SB~~ Level 2
USA	AASI (SB) ~~AASI~~ Level 2 plus children's specialist 1 PSIA (Ski) ~~PSIA~~ Level 2 plus children's specialist 1

Table 4 Country	**Association Certification Level**
Australia	APSI (Ski & SB) ~~APSI~~ Level 3 ~~(or equivalent certification prior to 2011 being Australia APSI (Ski & SB) APSI Level 2)~~
Austria	ÖSSV (Ski & SB) Landesschilehrer (completed) or Landeslehrer 2
Canada	CSIA (Ski) ~~CSIA~~ Level 3 CASI (SB) ~~CASI~~ Level 3 CSCF (Coaching) Performance Level (3)
Czech Republic	APUL (Ski & SB) APUL B
Japan	SIA (Ski & SB) IT II (Silver Medal)
Italy	AMSI (Ski & SB) Maestro di Sci / Snowboard
Korea	KSIA (Ski & SB) Level 3
New Zealand	NZSIA (Ski & SB) Level 3
Netherlands	NVVS (Ski & SB) B-Diploma
~~Poland~~	~~SITN-PZN Assistant PZN~~
Slovakia	SAPUL (Ski & SB) B Qualification
Slovenia	~~SIAS~~ ZUTS (Ski & SB) Level 2
Switzerland	SSSA (Ski & SB) Stufe 2
United Kingdom	BASI (Ski) ~~Ski Teacher~~ Level 3 BASI (SB) ~~SB Teacher~~ Level 3
USA	PSIA (Ski) ~~PSIA~~ AASI (SB) Level 2~~3~~ plus PSIA children's specialist 2

	~~AASI~~ PSIA (~~SB~~Ski) AASI (SB) Level 3 USSA (Coaching) Level 200 State Coach

Table 5 Country	**Association Certification Level**
Australia	APSI (Ski & SB) ~~APSI~~ Level 4 ~~(or equivalent certification prior to 2011 being Australia APSI (Ski & SB) APSI Level 3)~~
Austria	ÖSSV (Ski & SB) Staatlich geprüfter Schilehrer
Canada	CSIA (Ski) ~~CSIA Level 4~~CASI (SB) ~~CASI~~CSIA Level 4 CSCF (Coaching) Program Director (4)
Czech Republic	APUL (Ski & SB) APUL A
Italy	AMSI (Ski & SB) Maestro di Sci/Snowboard (Gold Level)
Japan	SIA (Ski & SB) IT III (Gold Medal)
Netherlands	NVVS (Ski & SB) C-Diploma
New Zealand	NZSIA (Ski & SB) ~~Stage Two~~Level 3 plus Trainer
~~Poland~~	~~SITN PZN PZN ISIA~~
Slovakia	SAPUL (Ski & SB) A Qualification
Slovenia	~~SIAS~~ ZUTS (Ski & SB) Level 3
Sweden	ESS (Ski & SB) Examinerad Svensk Skidlarare (Level 3)
Switzerland	SSSA (Ski & SB) Stufe 3 (ISIA)
United Kingdom	BASI (Ski & SB) ~~(Ski)~~ Level 4 ISTD BASI (Ski Coach) ~~Diploma~~ Level 4 Coach IVSI
USA	PSIA (Ski) ~~PSIA~~ AASI (SB) Level 3 ~~USA AASI (SB) AASI~~ISIA plus Trainer Cert (Education Staff, i.e. DCL, TA) ~~Trainer~~

"B"

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

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AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION SUBMISSIONS ON THE DRAFT DETERMINATION REGARDING SEASONAL EMPLOYMENT IN THE ALPINE RESORTS AWARD 2010

1 Introduction

1.1 These submissions on the Draft Determination regarding seasonal employment in clause 11.5 of the *Alpine Resorts Award 2010* ("**Award**") ("**Draft Determination**") are made by the Australian Ski Areas Association ("**Association**").

1.2 The Association has reviewed the Draft Determination and notes that it is its submission that the current clause 11.5 of the Award (7.5 in the exposure draft of the *Alpine Resorts Award 2014*) is not inconsistent with section 87(1) of the *Fair Work Act 2009* (Cth) ("**FW Act**"), concerning the entitlement to annual leave, but, rather, is ancillary or incidental to the operation of the NES annual leave entitlement and is therefore permitted by section 55(4) of the FW Act.

1.3 The Association makes its submissions on the following bases:

(a) the instant case is distinguishable from *Canavan Building Pty Ltd* [2014] FWCFB 3202 ("***Canavan***") in that it relates to pre-payment of an inevitable payout of annual leave pro rata on termination of employment at the end of a 10 to 16 week season and in no way discourages or prevents the taking of actual "paid annual leave";

(b) the unique nature of the snowsports industry and its industrial regulation;

(c) the unique nature of seasonal employment in the snowsports industry;

(d) that the Full Bench in Canavan, in its analysis of the entitlement to annual leave, considered the historical context of annual leave. It then follows as relevant that the *Annual Holidays Act 1944* (NSW) ("**Annual Holidays Act**") contains a provision that allows for superior arrangements. The *Ski Industry (State) Award* (a Preserved Collective State Agreement ("**PCSA**")) ("**NSW Ski Industry Award**"), one of the pre-modernisation industrial instruments that forms the basis of the Award, has historically permitted the payment of a loaded pay rate in place of the entitlement to paid annual leave; and,

(e) that the arrangement in clause 11.5 of the Award, in respect to annual leave, in the circumstances, is a superior arrangement to that in Division 3 of Part 2-1 of the FW Act, in that it causes numerous relative benefits for employees.

1.4 The Association sets out its submissions below.

2 Relevant provisions of the Award

2.1 The Award provides for the pre-payment of annual leave for seasonal employees, by way of an 8.33% loading on the applicable hourly rate, instead of annual leave. This is provided for in clause 11.5 of the Award, as follows:

> The hourly rate of seasonal employees will include an 8.33% loading of the applicable hourly rate instead of annual leave.

2.2 The loading paid to seasonal employees in clause 11.5 of the Award does not replace any other benefit that full-time or part-time employees are otherwise entitled to receive under the Award or the National Employment Standards within FW Act ("**NES**").

2.3 A seasonal employee is defined in clause 3.1 of the Award as an "employee engaged to perform work for the duration of a specified season".

2.4 The Association notes that seasonal employees are in the vast majority of cases engaged for the ski season, which runs for approximately 10 to 16 weeks, from early June to early October, depending on the snow conditions. There are small numbers of instances of staff being engaged for the summer season, however, similarly, these engagements are for discrete periods of a fixed term nature.

3 Relevant provisions of the FW Act

3.1 Division 3 of Part 2-1 of the FW Act governs the interaction between the NES, modern awards and enterprise agreements. Relevantly, section 55 of the FW Act provides that:

> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.
>
> .....
>
> *Ancillary and supplementary terms may be included*
>
> (4) A modern award or enterprise agreement may also include the following kinds of terms:
>
> (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
>
> (b) terms that supplement the National Employment Standards;
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

NES provisions of the FW Act concerning annual leave

3.2 The statutory entitlement to annual leave is set out in Division 6 of Part 2-2 of the FW Act. Section 87(1) of the FW Act identifies the entitlement to annual leave:

(1) For each year of service with his or her employer, an employee is entitled to:

(a) 4 weeks of paid annual leave; or

...

3.3 Section 87(2) of the FW Act identifies the way in which annual leave accrues:

(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

3.4 Section 88 of the FW Act sets out the circumstances in which annual leave can be taken:

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

3.5 Section 90 of the FW Act sets out the method of payment of annual leave:

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

4 Canavan Building Pty Ltd

4.1 The decision of the Full Bench of the Commission on 23 December 2014, which considered, *inter alia*, alleged inconsistencies with the NES, found, at [84], that clause 11.5 of the Award is inconsistent with section 87(1) of the FW Act, relying on *Canavan* as authority on the issue.

4.2 *Canavan* concerned an application for approval of the *Canavan Building Pty Ltd Enterprise Agreement 2013* ("**Agreement**"). In *Canavan*, the Full Bench considered whether a clause within the Agreement that provided for annual leave to be paid for as loading within an employee's hourly rate of pay was in breach of the NES provisions of the FW Act regarding annual leave.

4.3 After extensive consideration of whether such a clause in the Agreement provided for the pre-payment of annual leave or whether the pre-payment amounted to the cashing out of annual leave, which would then require the cashing out provisions in sections 92 and 93 of the FW Act to be complied with, the Full Bench, after it found that there was a requisite temporal connection between the taking of annual leave and the payment of such leave,[1] held, at [56], that:

> ... the scheme of "pre-payment" of annual leave in the Agreement constitutes cashing out of annual leave in a manner inconsistent with s.93, with the result that the prohibition in s.92 is excluded. Once it is understood that "*paid annual leave*" means annual leave accompanied by pay when it is taken, then the prohibition in s.92 must be understood as prohibiting the making of a payment which would lead to the employee forgoing his or her entitlement to later take annual leave *with pay* (unless such cashing out is authorised by s.93 or s.94).

5 Distinguishment from *Canavan*

5.1 With respect to the Full Bench, it is the Association's submission that the instant case is distinguishable from *Canavan* and, accordingly, that *Canavan* should not be authority on this issue.

5.2 In this regard, the Association notes that:

(a) seasonal employees are defined in the Award as an "employee engaged to perform work for the duration of a specified season";

[1] *Canavan* [41]-[52].

(b) the snowsports industry is highly seasonal in nature – with the vast majority of employees being engaged only during the ski (winter) season;

(c) the vast majority of seasonal employees in the snowsports industry are employed only during the ski season;

(d) the ski season typically runs from early June to early October, depending on the snow conditions;

(e) the ski season is a relatively short, busy and intense trading period and is generally not conducive for seasonal employees to take annual leave;

(f) approximately less that two percent of seasonal employees are employed during the summer season;

(g) the limited number of seasonal employees employed during the summer season are also employed for a fixed period of approximately 10 to 16 weeks;

(h) seasonal employees employed during the summer season are employed to carry out work on fixed projects, where they would otherwise be employed on a casual basis, foregoing entitlements that they receive as seasonal employees;

(i) seasonal employees' employment terminates at the end of each season for which they are employed;

(j) the seasonal employees do not achieve sufficient service to generate a right to take paid annual leave during the season;

(k) the annual leave loading in the rate of pay is therefore an early payment of an inevitable requirement to pay out annual leave pro rata under section 90(2) of the FW Act;

(l) the annual leave loading in the rate of pay is not in this context a cashing out of a right to take actual paid annual leave nor does it provide any disincentive to the taking of paid annual leave;

(m) approximately over 95 percent of the revenue generated by the employers operating alpine resorts, who are the employers covered by the Award, is generated during the ski season; and

(n) seasonal employees do not receive an entitlement to take annual leave without pay, as was the case within the Agreement in *Canavan*.

5.3 Against this background, the Association submits that it would not be unreasonable for an employer operating an alpine resort to refuse to agree to a request by a seasonal employee to take paid annual leave during a season, which employers are permitted to do pursuant to section 88(2) of the FW Act.

5.4 It therefore follows that in circumstances where employers operating alpine resorts are able to refuse to agree to a request by a seasonal employee to take paid annual

leave during a season, which will occur, clause 11.5 of the Award does not constitute the cashing out of annual leave, but, rather, is the pre-payment of a payment that employees will inevitably receive upon the termination of their employment, pursuant to section 90(2) of the FW Act.

5.5 In this way, it is the Association's submission that the entitlement to annual leave provided for in clause 11.5 of the Award is ancillary or incidental to the operation of the NES annual leave entitlement and is therefore permitted by section 55(4) of the FW Act.

5.6 The Association further notes that one of the concerns of the Full Bench in *Canavan* was that "if pre-payment of annual leave was permissible under the Act, that would include the capacity to pre-pay for annual leave for any number of years in the future at the commencement of employment or at some other time, regardless of whether such leave was ever taken or not.... Such a consequence is so far removed from the ordinarily-understood concept of "*paid annual leave*" that it cannot have been intended by the legislature".[2] The Association submits that, given the compressed and limited nature of seasonal employment, such a concern is not applicable to the instant case.

5.7 The Full Bench in *Canavan* also referred to a foundational arbitral decision concerning annual leave, which, in consideration of annual leave, referred to an entitlement to "an adequate period of respite, without loss of income".[3] The Association submits that, given the compressed and limited nature of seasonal employment, such a consideration is not applicable in the instant case.

6 Industrial Background

6.1 The Association notes that the Full Bench in *Canavan*, in its analysis of the entitlement to annual leave, considered the historical context of annual leave – "the historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2."[4]

6.2 In this regard, the Association notes that the Annual Holidays Act allowed superior arrangements for annual holidays or annual leave in an award, agreement or contract of employment to apply to workers covered by those instruments in place of sections 3, 4 and 4A in the Annual Holidays Act, which governed annual leave entitlements. Relevantly, section 5 of the Annual Holidays Act provides:

> (1) The following provisions shall apply in every case where provision is made by an award, agreement or contract of employment for annual holidays or annual leave for any worker:
>
> (a) where the worker is entitled under such provision to any benefit that is more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall not apply to the worker,

[2] *Canavan* [54].
[3] *Metal Trades Annual Leave Case* (1945) 55 CAR 595 at 597.
[4] *Canavan* [46].

> (b) where the worker is entitled under any such provision to any benefit that is not more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall apply to the worker and no benefit shall be allowed to the worker under that provision in respect of any period of employment after the commencement of this Act in the case of a benefit not more favourable than that provided by section 3 or section 4 or, after the commencement of the *Annual Holidays (Amendment) Act 1967* , in the case of a benefit not more favourable than that provided by section 4A.

6.3 Against this background, the Association submits that a loading on the applicable hourly rate of seasonal employees in place of the entitlement to annual leave is beneficial to employees for the following reasons:

(a) the 8.33% loading that seasonal employees currently receive in place of paid annual leave is financially superior to a payment for annual leave that a seasonal employee would accrue progressively during their seasonal employment and then be paid as a lump sum upon termination of their employment, as a lump sum payment will be taxed at that employee's marginal tax rate, rather than as income across the employment term, which may fall below the tax free threshold;

(b) overtime is paid on the seasonally loaded rate;

(c) seasonal employees have more cash in hand throughout the season for which they are employed; and

(d) the 8.33% loading is more generous and financially beneficial to seasonal employees than the accrual of four weeks leave. Four weeks leave accrued across 52 weeks of the year is a percentage application of 7.69%, whereas the 8.33% loading is made on the assumption that four weeks is effectively an extra month of pay, hence a $1/12^{th}$ increase.

6.4 For employers operating alpine resorts, the de-loading of annual leave from seasonal employment rates will create issues for returning seasonal employees, who in some resorts can make up to 60% of total seasonal staff. Returning staff will be hesitant to accept a lower hourly rate of pay upon their return to seasonal employment and in some cases have already been issued contracts under the Award, with loaded rates for the upcoming 2015 ski season.

6.5 Relevantly, the NSW Ski Industry Award, which is one of the pre-modernisation industrial instruments that forms the basis of the Award, [5] permits the payment of a loaded pay rate in place of the entitlement to paid annual leave.

6.6 In this regard, the Association notes that in the decision of his Honour Justice Watson in the Industrial Commission of New South Wales on 31 July 1989, in respect to Matter Nos 100 of 1987 and 609 of 1988, in which reasons were given for the making of the NSW Ski Industry Award, his Honour observed that:

[5] See paragraphs 3.3 to 3.21 of the Association's written submissions to the Australian Industrial Relations Commission on 6 March 2009 and paragraphs 2.4 to 2.21 of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009.

> The composite rate for daily hire is 1/5th of the weekly rate without any added loading except for the added annual leave component.

6.7 Daily hire in the NSW Ski Industry Award is equivalent to seasonal employment in the Award.

6.8 The Association further notes that a seven member panel of the Commission considered the Award during the award modernisation process in 2010 and during that process no inconsistency was found between clause 11.5 of the Award and section 87(1) of the FW Act.

7 Inconsistency between clause 11.5 and section 90(1)

7.1 A further issue raised by the Full Bench in *Canavan* was that the payment of annual leave on a progressive basis, in advance, rather than when annual leave is taken, may result in an inconsistency with the payment obligation in section 90(1) of the FW Act, if an employee is paid an earlier and lower rate of pay than the rate of pay applicable at the time leave is taken.[6]

7.2 The Full Bench of the Commission, however, concluded that this impediment to approval could be overcome by an undertaking in appropriate terms.[7]

7.3 The Association accepts there being potential for an inconsistency between the current clause 11.5 of the Award and section 90(2) of the FW Act in this regard, if a seasonal employee is paid an earlier and lower rate of pay for annual leave prior to any Award indexation, which normally occurs in July, than the rate of pay applicable at the termination of the seasonal employees' employment, and the pre indexation component of annual leave is not outweighed by post indexation loading payments, including overtime. To avoid this potential outcome, the Association would be prepared to accept a variation to the Award, for a top up payment at the end of seasonal employment designed to ensure that no employee is worse off than they would be under section 90(2) of the FW Act.

7.4 Should the Commission wish to include such a clause in the Award, the Association proposes the following:

> *Should a seasonal employee's payment for annual leave, under clause 11.5 of the Award, result in a seasonal employee being worse off than they would be under section 90(2) of the Act, that seasonal employee will receive a top up payment at the end of the seasonal employment in the amount of any shortfall.*

7.5 In considering this decision the Commission is asked to consider paragraph 6.3(d) of these submissions and the more favourable conditions being applied to staff throughout the contract term in comparison to if such employees were on de-loaded rates and were accumulating annual leave.

7.6 The Association notes, however, that such an occurrence is unlikely to affect the few seasonal employees who are employed during the summer season, since the

[6] *Canavan* [38].
[7] *Canavan* [40].

summer season does not intersect the Award indexation that normally occurs in July.

8 Further matters

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

Harmers Workplace Lawyers

13 February 2015