ALPINE RESORTS AWARD 2014 – AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION

OUTLINE OF SUBMISSIONS IN REPLY

1 Introduction

1.1 This outline of submissions in reply to the substantive variations sought 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 ("**Directions**").

1.2 In this outline of submissions in reply, the Association collectively refers to the Exposure Draft and the *Alpine Resorts Award 2010* ("**Current Award**") as the "**Award**".

2 Australian Workers' Union – Annual Leave Loading Submission

2.1 The Association refers to the submissions made by the Australian Workers' Union ("**AWU**"), regarding annual leave loading, dated 15 July 2015 ("**15 July AWU Submission**").

2.2 The AWU filed submissions in respect of the same claim, annual leave loading, on 28 January 2015. The Association replied to those submissions on 4 March 2015 ("**4 March ASAA Submission**"). A copy of the 4 March ASAA Submission is attached and marked **"A"**.

2.3 In reply to the 15 July AWU Submission, the Association relies on its 4 March ASAA Submission.

2.4 However, the Association makes the following additional submissions in reply to certain matters raised in the 15 July AWU Submission.

2.5 The Association notes that the AWU refers to annual leave loading as a "national standard". Whilst majority of modern awards contain annual leave loading, the Association reiterates that the characteristics that underpin the entitlement to annual leave loading are not present in the snowsports industry. In this regard, the Association notes the following:

(a) A vast majority of employees covered by the Award are employed as casual and seasonal employees.

(b) Under the Current Award, seasonal employees receive an 8.33% loading in respect of annual leave.

Even if this loading is removed, and seasonal employees are able to take paid annual leave (which the Association maintains is matter that should be properly considered by the Fair Work Commission with evidence), seasonal employees are unlikely to take annual leave during their

employment, given the limited period and the nature of seasonal employment. It is more likely that seasonal employees will receive a payment in respect of accrued (but untaken) annual leave upon the termination of their employment.

(c) Given the high level of casual employment within the snowsports industry and the flexibility in the employment of Snowsports Instructors (whether employed on a permanent or casual basis), the amount of overtime hours worked by employees covered by the Award are minimal.

(d) The Award does not provide for the payment of penalty rates.

(e) Limited allowances are paid to employees covered by the Award.

(f) Annual leave loading is not a minimum standard of employment within the *Fair Work Act 2009* (Cth).

2.6 Given the above, employees covered by the Award are highly unlikely to be financially disadvantaged by the taking of annual leave if they do not receive annual leave loading. Therefore, in the snowsports industry, the payment of annual leave loading would be akin to a "bonus" or "extraneous" payment, rather than a "compensatory" payment.

2.7 At paragraphs 33 and 34 of the 15 July AWU Submission, the AWU submits that seasonal employees are likely to be financially disadvantaged as a result of receiving annual leave instead of an 8.33% loading, primarily because the 8.33% loading is paid on all hours, whereas annual leave will only accrue on ordinary hours.

2.8 The Association submits that any such disadvantage will be minimal, given the majority of seasonal employees covered by the Award work little or no overtime hours. For example, in the 2014/2015 financial year only 29% of seasonal employees at Perisher Blue Pty Ltd ("**Perisher**") (the largest Alpine Resort) received a payment in respect of overtime worked. Majority of Perisher's seasonal employees did not work any overtime hours.

2.9 In any event, annual leave loading should not be included in the Award to compensate for lost earnings as a result of a separate decision regarding the payment of seasonal loading, to which the AWU did not object.

2.10 With respect to paragraphs 42 and 43 of the 15 July AWU Submission, the terms and conditions of employment within the Award should be considered in full view of the historical context applicable to the Award, rather than its terms and conditions as compared to other modern awards.

2.11 In view of the above, the Association notes the Full Bench of the Fair Work Commission's observation of the Fair Work Commission's 4 yearly review of modern awards, at paragraph [60] of its 26 March 2014 Decision.[1] Relevantly, the Full Bench observed:

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

> The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

2.12 With reference to the Association's 4 March ASAA Submission, and these submissions, the Association submits that the AWU's proposed changes to the Award, regarding annual leave loading, are significant.

2.13 Therefore, it cannot be determined with little formality, as submitted by the AWU. Instead, it would require a "*submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*".[2] The Association notes paragraph 61 of the 15 July AWU Submission, where the AWU notes that it does not intend to file any additional evidentiary material.

2.14 The Association submits that with appropriate evidence it will be clear that the theoretical construct for annual leave loading does not apply in the snowsports industry.

2.15 The Association further notes the decision of the Full Bench of the Fair Work Commission during the 2012 modern awards review, regarding, *inter alia*, a claim by the AWU to insert annual leave loading into the Current Award ("**2012 Full Bench Decision**").[3] In the 2012 Full Bench Decision the majority declined to make the variations sought by the AWU.[4]

2.16 The Association submits that the AWU has not identified cogent reasons as to why the 2012 Full Bench Decision should not be followed.

2.17 In the event that the Fair Work Commission find that annual leave loading should be inserted into the Award (which, in view of the above, the Association respectfully submits should not occur), any decision as to whether or not annual leave loading should be payable on the payment of annual leave on termination should be considered by the Full Bench dealing with annual leave common issues, so as to ensure consistency with any decision of that Full Bench.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, 60.
[3] *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266.
[4] Ibid, 107.

2.18 The Association reserves its right to make further submissions in reply to the matters raised in the 15 July AWU Submission.

3 Mount Hotham Resort Management Board – Coverage Submission

3.1 The Association refers to the submissions made by the Mount Hotham Alpine Resort Management Board ("**Board**"), regarding coverage, dated 15 July 2015 ("**15 July Board Submission**").

3.2 The Board filed submissions in respect of the same claim, coverage, on 27 February 2015. The Association replied to those submissions in its 4 March ASAA Submission.

3.3 In reply to the 15 July Board Submission, the Association relies on its 4 March ASAA Submission.

3.4 However, the Association makes the following additional submissions in reply to certain matters raised in the 15 July Board Submission.

3.5 The Association reserves its right in relation the Board's submission that it is a constitutional corporation and therefore not covered by a State reference public sector modern award or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

3.6 However, the Association submits that even if it is the case that the Board is not covered by a State reference public sector modern award or a State reference public sector transitional award, the industrial regulation of the alpine resort management industry (within which the Board operates), including the Victorian Alpine Resorts Award 1999 (Vic), is distinct from that of the snowsports industry and the Award.

3.7 The Association made extensive submissions in this regard during the award modernisation process for the forming of the Current Award. In particular, it refers to the following paragraph of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009:

> [3.3] The ASAA does not support the contention that the [Victorian Alpine Resorts Award 1999 (Vic) ("**VAR Award**")] is the primary award for the Snowsports Industry, and further says that the VAR Award should not be inserted as a Schedule to the Draft Award, nor in fact be considered at all when reviewing the Draft Award, for the following key reasons:
>
> (a) The VAR Award only applies to employees of "Alpine Management Boards" established under the *Alpine Resorts (Management) Act 1997* (Vic) ("**ARM Act**").
>
> (b) Alpine Management Boards ("**ARMBs**") are closely aligned with the Victorian Public Service. Part 4 of the ARM Act imparts a number attributes and authorities to, and obligations on, ARMBs, including the following:

(i) that, in carrying out its functions and powers, each ARMB acts on behalf of the Crown; and

(ii) that each ARMB must comply with any direction or guidelines issued by the Minister on the performance, discharge or exercise by the ARMB of its functions, duties or powers – with may include directions to the ARMB to expend or apply revenue of the ARMB for any purpose.

(c) Consistent with the above, the Alpine Resorts 2020 Strategy issued by the Department of Sustainability and Environment in 2004 states as follows: "The alpine resorts are owned by the Crown and managed for and on half of all Victorians to grow the common wealth of Victoria by the optimal management of the Crown Asset" (at p 34). The ARMBs are responsible for achieving that objective.

(d) In contrast to the VAR Award, the [Alpine Resorts (Australian Workers Union) Award 2001 ("**Victorian (AWU) Award**")] applies only to the companies that operate the resorts and provide alpine lifting for snowsports activities, being commercial entities.

(e) Historically, therefore, the VAR Award and the Victorian (AWU) Award have been dealt with separately, with hearings in relation to the VAR Award being dealt with at different times from hearings in relation to the Victorian (AWU) Award.

(f) Further, the significant difference in the objectives of ARMBs as compared to the commercial entities covered by the Victorian (AWU) Award has resulted in a number of specific terms, conditions and flexibilities being negotiated between the AWU and those commercial entities, and incorporated into the Victorian (AWU) Award.

(g) Those specifically negotiated terms are not reflected in the VAR Award, and to benchmark the Draft Award against the VAR Award, would result in a significant detriment being suffered by the commercial entities covered by the Victorian (AWU) Award and NSW Snowsports Awards.

(h) In this context, we draw the AIRC's attention to the following statistics (which are approximate employee numbers) for the resorts identified in response to the AWU's submission that the VAR Award is the primary award for the industry:

ARMB	Summer	Winter
Falls Creek	45	170
Mount Buller	30	50
Mount Hotham	42	85
Total	***118***	***305***

Commercial Entity	Summer	Winter
Falls Creek	50	400
Mount Buller	100	760
Mountain Hotham	48	442
Perisher	180	1200
Selwyn	6	120
Thredbo	125	678
Total	***509***	***3600***

(i) It is readily apparent even from reviewing the above employee numbers, even though it does not include all resorts in NSW or Victoria, that the VAR Award is clearly not the primary award for the alpine industry.

3.8 A copy of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009 is attached and marked **"B"**.

3.9 Given the significant difference in employee numbers of the commercial entities and the ARMBs, and their industrial regulation (the commercial entities being covered by the Victorian (AWU) Award and the NSW Snowsports Awards (Ski Industry (State) Award, Ski Instructors (State) Award and NSW Ski Tube (State) Award) and the ARMBs by the VAR Award), it is clear that the industrial regulation of the Board is distinct from that of the Alpine Resorts, as currently covered by the Award.

3.10 The Australian Industrial Relations Commission recognised that the VAR Award was not the primary pre-modernisation award for the snowsports industry and did not benchmark the terms and conditions contained within the Current Award against those contained in the VAR Award.

3.11 The Association further refers to the Board's application to the Fair Work Commission, *inter alia*, for the creation of a State public sector modern enterprise award, dated 11 December 2013 ("**11 December Application**"). A copy of the 11 December Application is attached and marked **"C"**.

3.12 In the 11 December Application the Board submitted that:

> … the Commissioner was in error in finding that the ski lifts "operate under a contract controlled by the applicant". The RMB in both Falls Creek and Mount. Hotham agrees to lease the land to the Ski Company. The Ski Company alone is responsible for the construction, maintenance, and operation of the lifts. The ski company alone sells and receives the benefit from lift passes. The RMB is not connected with this aspect of the operation. If we were to extend the scope of this decision we would find

that all manner of businesses and organizations operating at Mount Hotham would have to be considered to be involved in lifting operations. Such businesses would include, restaurants, cafes, ski hire outlets, bars and lodges supermarkets and coffee shops. Each of these has a lease with the RMB in exactly the same way as has the Ski Company. Each of these separate businesses are in no way controlled by the RMB.

On this basis we submit that the Mount Hotham RMB is excluded from the coverage of the Alpine Modern Award 2010., in its 11 December Application, nominating that the industry within which it operated was the Alpine Resort Management industry.

3.13 Further, in the 11 December Application the Board identified the alpine resort management industry as the industry within which it operated.

3.14 The Association reserves its right to make further submissions in reply to the matters raised in the 15 July Board Submission.

4 Further matters

4.1 The Association refers to correspondence from Australian Business Lawyers & Advisors Pty Limited ("**ABL**"), dated 17 July 2015. In that correspondence, ABL noted that its clients, Thredbo Chamber of Commerce and the Perisher Resorts Chamber of Commerce, were pursuing a substantive variation to the Award and that it intended on filing a written outline of submissions in respect to those variations shortly. The Association is not aware of any such submission having been filed and reserves its right to make submissions in reply to any such submission.

4.2 The Association notes previous submissions that have been filed with respect to technical/drafting issues and substantive variations regarding the Award, but which have not been raised in accordance with the Directions. The Association reserves its right to make submissions in reply to any such submission.

4.3 The Association reserves its right to object to any submissions made outside the timetable set by the Directions and reserves its rights generally.

4.4 The Association relies on its previous submissions made during the Fair Work Commission's four yearly review of modern awards. Copies of those submissions are attached and marked **"A"**, **"D"**, "**E"**, **"F"** and **"G"**.

Harmers Workplace Lawyers

21 August 2015

"A"

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:

<u>2. Clause 6.5(b)(i)</u>

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

"B"

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SUBMISSIONS BY HARMERS WORKPLACE LAWYERS

ON BEHALF OF THE

AUSTRALIAN SKI AREAS ASSOCIATION

IN RELATION TO THE

ALPINE RESORTS MODERN AWARD

8 APRIL 2009

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1 Introduction

1.1 We refer to the public consultation held on 18 March 2009, before his Honour Senior Deputy Richards in relation to the award modernisation process for the Tourism Industry, into which grouping the Snowsports Industry has been included.

1.2 We also refer to our submissions dated 6 March 2008, on behalf of the Australian Ski Areas Association ("**ASAA**"), in relation to the creation of a draft *Alpine Resorts Modern Award*, with which was enclosed the ASAA's proposed draft of that Award ("**ASAA Draft Award**").

1.3 Since that date, the following submissions have been made in relation to the ASAA's Draft Award:

(a) on 18 March 2009 during the public consultation, the Liquor Hospitality and Miscellaneous Workers Union ("**LHWU**") submitted that there should in fact be no specific award made for the Snowsports Industry, as the occupations falling under that award are largely encompassed by other industries, and also suggested that the Snowsports Industry could be covered by the Media, Entertainment and Arts Alliance ("**MEAAs**") draft *Amusement, Events and Recreation Award* 2010 ("**MEAA Draft Amusement Award**");

(b) on 18 March 2009, the Australian Workers Union ("**AWU**") lodged written submissions with the Australian Industrial Relations Commission ("**AIRC**") supporting the making of an award for the Snowsports Industry, however disagreeing with the ASAA's submissions as to which awards the ASAA Draft Award should be benchmarked against; and

(c) on 26 March 2009, the AWU lodged further submissions with the AIRC regarding the award for the Snowsports Industry, with which was enclosed the AWU's proposed draft of that Award ("**AWU Draft Award**").

1.4 While we have written to both the LHWU and AWU advising that we wish to meet to discuss their submissions and confer on the issues raised, we have received no response to that offer from either union. However, on 7 April 2009 we received a copy of written submissions that we understand the LHWU will be providing to the AIRC in relation to the ASAA's Draft Award. These further submissions were prepared by us, on behalf of the ASAA, prior to receipt of those LHWU submissions. Therefore, after the ASAA has had a further opportunity to review and consider the LHWU's submissions, and while the ASAA considers these submissions already respond to the primary submission of the LHWU that there should not be a specific Alpine Resorts Modern Award (or that its coverage should be limited), if the ASAA deems it necessary, we propose to provide the Commission with a specific response from the ASAA to the written submissions of the LHWU.

1.5 In this context, we set out below, on behalf of the ASAA, further submissions regarding the creation of a modern award for the Snowsports Industry.

2 Response to Submissions of the LHWU

2.1 The ASAA strongly disagrees with the LHWU's submission that there should be no specific award for the Snowsports Industry.

2.2 In outlining the ASAA's reasons for this below, we note, in any event, that:

(a) the AWU, being the main union with members covered by the Snowsports Industry, supports the creation of a modern award for the Snowsports Industry;

(b) the LHWU's coverage only extends, in terms of employees in the Snowsports Industry, to those in hospitality or childcare roles; and

(c) notwithstanding the LHWU's limited coverage, we provide submissions below as to the broader objection made by the LHWU in respect to other classifications of employees.

2.3 Given the unique nature of the Snowsports Industry, the award applying to the industry needs to have tailored terms and conditions to cater to the unique nature of the industry, including ensuring a number of flexibilities in the employment arrangement which are in the interests of both employers and employees.

2.4 These tailored terms and conditions have been negotiated, over a number of years, primarily with the Australian Workers Union (both state and federal branches) and are reflected in the terms of the:

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

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

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

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

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

2.5 The tailored terms and conditions are now reflected in the ASAA's Draft Award.

2.6 The ASAA's Draft Award is consistent with the objects of Award Modernisation, as outlined in section 576A of the *Workplace Relations Act* – in particular it:

(a) is simple to understand and easy to apply, and reduces the regulatory burden that would otherwise apply to employers that operate Alpine Resorts – if the LHWU's submission were to be accepted, the Alpine Resorts would have in excess of 15 different awards they would have to apply to their workforce; and

(b) it promotes flexible work practices and so contributes to the efficient and productive performance of work.

2.7 Prior to the introduction of the Snowsports Industry Awards, the Snowsports Industry was largely award-free. Further, even though some occupations were, or were potentially, covered by other awards it was agreed with the AWU to be appropriate to include those occupations within the Snowsports Industry Awards.

Victorian Alpine Award

2.8 The Victorian (AWU) Award currently covers a range of classifications, which are listed in our submissions of 6 March, and which do not fall within other awards. However, there are also classifications that cover roles that otherwise may fall within other "occupations" or "industries", including:

(a) shop or retail employees;

(b) clerical employees; and

(c) mechanical employees.

2.9 It was considered appropriate to include such employees in the Victorian (AWU) Award, given the unique nature of the Snowsports Industry and the tailored terms and conditions therefore required.

NSW Snowsports Awards

2.10 The NSW Ski Industry Award, Ski Instructors Award and Skitube Award (together the "**NSW Snowsports Awards**") currently cover employees classified as Ski Instructors; Lift Operators; Lift Attendants; Parking Attendants; Ski Patrol; Ticket Sellers; Courtesy Staff; Snow Groomer Operators; Snow Makers; Drivers; Resort Workers; Trail Crew; Ski Outlet Staff; and Train Drivers.

2.11 The majority of these roles are unique to the Snowsports Industry. However, there are also employees in a range of roles that would otherwise fall within other "occupations" or "industries", including:

(a) shop and retail employees;

(b) clerical employees; and

(c) transport industry.

2.12 Prior to the NSW Ski Industry Award being made in 1989, the employment of employees to be covered by the NSW Ski Industry Award was regarded as being largely award-free.

2.13 For a long period, prior to the introduction of the NSW Ski Industry Award, the primary mode of regulation in the industry was by way of unregistered agreements between the AWU and the various Alpine Resorts.

2.14 On making the NSW Ski Industry Award, the clear intention was to create what was in effect an "island" of uniform award coverage by way of an award to cover the whole alpine resort area.

2.15 As part of this, while it was generally agreed that the employees to be subject to the NSW Ski Industry Award were award free, numerous exemptions were sought in relation to other awards potentially capable of application. In this respect, it was noted in the decision of Watson J of 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, that (emphasis added):

> "...various discussions have occurred between the AWU and other unions which have resolved differences. In certain cases, exemption orders from other awards have been made in Matter No.312 of 1989, on the basis of agreements recorded in correspondence exhibited or in transcript. **That there are any parallels in other awards, is an aspect which in general is disputed by the employers, a view now accepted by the AWU. Under the agreement since reached with the employers, the AWU has joined in submitting that the work is essentially award free** although the exemptions sought in Matter No.312 of 1989 were pressed to avoid the possibility of confusion as to obligations for the seasonal employment for which a separate ski industry award has been claimed".

2.16 On 25 July 1989, Watson J (Matter No. 312 of 1989) granted exemptions to the:

(a) *General Construction & Maintenance, Civil & Mechanical Engineering & c (State) Award;*

(b) *Landscape Gardeners & c of Building & General Construction and Maintenance, Civil & Mechanical Engineering & c (State) Award;*

(c) *Golf Club Employees (Country) Award;*

(d) *Transport Industry (State) Award;*

(e) *Transport Industry Motor Bus Drivers & Conductors (State) Award;*

(f) *Transport Industry Retail Industry (State) Award;*

(g) *Miscellaneous Workers Kindergartens & Child Care Centres & c. (State) Award;*

(h) *Miscellaneous Gardeners & c (State) Award;*

(i) *Miscellaneous Workers General Service (State) Award; and*

(j) *Parking Attendants, Motor Car Washers & c (State) Award.*

2.17 On 26 July 1989, Watson J made further orders to grant the employer respondents to the *Ski Industry Award* exemption from the:

(a) *Plant Operators on Construction (State) Award; and*

(b) *Engine Drivers & c General (State) Award.*

2.18 The exemptions took effect from the first pay period commencing on or after 20 July 1989.

2.19 It should be emphasised that the starting point was that an agreement was reached in 1989 that employees to be covered by the NSW Ski Industry Award were in fact largely award free. Exemptions were sought only in abundant caution.

2.20 We also note that the Shop, Distributive and Allied Employees Association, in proceedings before Hungerford J on 22 June 1990 (Matter No 495 of 1990) (being an application by the AWU for variation regarding an increase to all wage rates and all work or wage related allowances for the Ski Industry (State) Award), indicated they had a "happy relationship in the Ski Industry Award and [were] keen to preserve that". [Page 20]

2.21 In light of the above exemptions, the classification of "resort worker" in the NSW State Award is broad, and is utilised by certain alpine resorts in NSW to cover a range of occupations/roles not specifically listed, including childcare workers and hospitality employees.

Requirement for Tailored Terms and Conditions

2.22 It was the unique nature of the Snowsports Industry that was considered when the NSW Ski Industry Award was first made by his Honour Justice Watson in 1989 based on the first principles for awards, which 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.

2.23 Such considerations remain relevant today.

Increase of Costs to Employers

2.24 If the Snowsports Industry was no longer covered by a specific award, but rather if Alpine Resorts were required to provide terms and conditions outlined in over 15 different awards, there would be a significant increase in costs for the Alpine Resorts.

Summary of Response to LHWU

2.25 For the above reasons, the ASAA submits that:

(a) the AIRC should make, as part of the award modernisation process, a modern award for the Snowsports Industry; and

(b) that Award should cover all occupation types that are engaged to perform work in the Snowsports Industry and who are employed by Alpine Resorts.

2.26 If the LHWU seeks changes to the ASAA's Draft Award in respect to terms and conditions for hospitality or childcare workers, the ASAA is prepared to review and consider any such changes requested.

3 Response to Submissions of the Australian Workers Union

3.1 In the AWU's submissions of 18 March 2009, the AWU contend that the *Victorian Alpine Resort Award* ("**VAR Award**") is the primary award for the Snowsports Industry.

3.2 In the AWU's submissions of 26 March 2009, the AWU contends that the VAR Award should appear, in its entirety, as a Schedule to the modern award ultimately made for the Snowsports Industry, as per the AWU's Draft Award.

Status of Victorian Alpine Resorts Award

3.3 The ASAA does not support the contention that the VAR Award is the primary award for the Snowsports Industry, and further says that the VAR Award should not be inserted as a Schedule to the Draft Award, nor in fact be considered at all when reviewing the Draft Award, for the following key reasons:

(a) The VAR Award only applies to employees of "Alpine Management Boards" established under the *Alpine Resorts (Management) Act 1997* (Vic) ("**ARM Act**").

(b) Alpine Management Boards ("**ARMBs**") are closely aligned with the Victorian Public Service. Part 4 of the ARM Act imparts a number attributes and authorities to, and obligations on, ARMBs, including the following:

(i) that, in carrying out its functions and powers, each ARMB acts on behalf of the Crown; and

(ii) that each ARMB must comply with any direction or guidelines issued by the Minister on the performance, discharge or exercise by the ARMB of its functions, duties or powers – with may include directions to the ARMB to expend or apply revenue of the ARMB for any purpose.

(c) Consistent with the above, the Alpine Resorts 2020 Strategy issued by the Department of Sustainability and Environment in 2004 states as follows: "The alpine resorts are owned by the Crown and managed for and on half of all Victorians to grow the common wealth of Victoria by the optimal management of the Crown Asset" (at p 34). The ARMBs are responsible for achieving that objective.

(d) In contrast to the VAR Award, the Victorian (AWU) Award applies only to the companies that operate the resorts and provide alpine lifting for snowsports activities, being commercial entities.

(e) Historically, therefore, the VAR Award and the Victorian (AWU) Award have been dealt with separately, with hearings in relation to the VAR Award being dealt with at different times from hearings in relation to the Victorian (AWU) Award.

(f) Further, the significant difference in the objectives of ARMBs as compared to the commercial entities covered by the Victorian (AWU) Award has resulted in a number of specific terms, conditions and flexibilities being negotiated between the AWU and those commercial entities, and incorporated into the Victorian (AWU) Award.

(g) Those specifically negotiated terms are not reflected in the VAR Award, and to benchmark the Draft Award against the VAR Award, would result in a significant detriment being suffered by the commercial entities covered by the Victorian (AWU) Award and NSW Snowsports Awards.

(h) In this context, we draw the AIRC's attention to the following statistics (which are approximate employee numbers) for the resorts identified in response to the AWU's submission that the VAR Award is the primary award for the industry:

ARMB	Summer	Winter
Falls Creek	45	170
Mount Buller	30	50
Mount Hotham	42	85
Total	***118***	***305***

Commercial Entity	Summer	Winter
Falls Creek	50	400
Mount Buller	100	760
Mountain Hotham	48	442
Perisher	180	1200
Selwyn	6	120
Thredbo	125	678

Commercial Entity	Summer	Winter
Total	*509*	*3600*

(i) It is readily apparent even from reviewing the above employee numbers, even though it does not include all resorts in NSW or Victoria, that the VAR Award is clearly not the primary award for the alpine industry.

3.4 For the above reasons, the ASAA submits that the AIRC should not have regard to the VAR Award when considering the relevant terms and conditions (including rates of pay) to be contained in the Draft Award, nor should the VAR Award be included as a Schedule to the Draft Award. To do so would be imposing terms and conditions of employment on the employers operating the Alpine Resorts none of which are currently subject to the VAR Award.

3.5 We provided a letter to the effect of the above to the AWU.

4 Response to AWU's Draft Award

4.1 By way of general comment, the ASAA submits that if the AIRC were to agree to the variations proposed by the AWU to the ASAA's Draft Award, there would be a significant cost increase to the Alpine Resorts.

4.2 This cost increase would be inconsistent with the objectives of the award modernisation process.

4.3 The ASAA's Draft Award has attempted to provide a balance between the different awards applying to the Alpine Resorts to date. The AWU, in contrast, has identified the most favourable award terms in each of the Snowsports Industry Awards and has sought to include them in the AWU Draft Award. Such an approach is not financially sustainable for the Alpine Resorts.

4.4 Annexure A to these submissions is a table outlining the ASAA's response to, and comments on, certain of the changes sought by the AWU.

4.5 To avoid misinterpretation, we confirm that while the table does not address all changes sought by the AWU, in respect to changes not identified or addressed the ASAA does not support the inclusion of those changes.

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8 April 2009

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ANNEXURE A

ASAA'S RESPONSE TO AWU'S VARIATION TO DRAFT *ALPINE RESORTS (GENERAL) AWARD* 2010

	Summary of AWU's Amendments	ASAA Response
1.	Deleted definition "any five in seven" (clause 3 and connected with the AWU's insertion of winter and summer season definitions in clause 28)	The ASAA does not agree to the deletion of the definition. The ASAA considers the provision in the ASAA Draft Award that ordinary hours may be performed on an "any five in seven" basis all year around is a reasonable compromise between the Victorian (AWU) Award and the NSW Snowsports Awards. While the former provides that ordinary hours, during the winter season, may be performed on any six days in a week; the NSW Ski Industry Award provides that ordinary hours may be performed on any or all days of the week whether during the winter or summer season; and the NSW Skitube Award provides for ordinary hours to be any five in seven all year. In light of the above, the ASAA also considers that the inclusion of a definition of winter season and summer season in the Award, as proposed by the AWU, is not necessary.
2.	Inserted definition of "continuous service" (clause 3)	While a clause to this effect is included in the Victorian (AWU Award), the NSW Snowsports Awards do not include a clause to a similar effect. Therefore, the ASAA does not consider it appropriate to include such a clause in the Draft Award, due to the significant increased cost it would impose on the NSW Alpine Resorts.
3.	Deleted definition "spread of hours" (clause 3)	The ASAA does not object to the deletion of this definition.
4.	Award flexibility – agreed only to the extent this does not depart from standard clause (clause 7)	The ASAA objects to this change, and considers the variation the ASAA seeks to the standard clause is appropriate for the reasons set out in our submissions of 6 March at paragraphs 6.4 to 6.7.
5.	Deleted 8.1(b) second bullet point which stated that an event or change which is a normal incidence of the seasonal nature of operating an alpine resort is not considered a "significant event" (clause	The ASAA objects to this change, and considers the variation the ASAA seeks to the standard clause is appropriate for the reasons set out in our submissions of 6 March at paragraphs 6.8 to 6.9.

	Summary of AWU's Amendments	ASAA Response
	8.1)	
6.	Deleted "snowsports instructors" as an employment category (clause 10.1(d) and 14) and inserted new clause "seasonal employment for snowsport instructors" in relation to guaranteed weekly earnings (end of clause 12)	The ASAA does not agree to the deletion of "snowsports instructors" as a specific category, or the inclusion of the clause guaranteeing snowsports instructors 25 hours per week. The clause is based on the NSW Ski Instructors Award, and there is no equivalent provision in the Victorian (AWU) Award. As such, there would be a significant adverse impact on the Victorian Alpine Resorts if such a clause were to be included in the draft. The amount of work available for Snowsports Instructors varies day-by-day, and throughout the season, depending on the snow conditions and visitor numbers to the Alpine Resorts. Therefore, having a minimum requirement for 25 hours work is not sustainable for the resorts. Further, as Snowsports Instructors are generally only employed during the winter season, being only a period of approximately three months, it is more favourable to Snowsports Instructors to receive a loading in respect to annual leave in their hourly rate of pay. We are also instructed that the majority of Alpine Resorts in Victoria employ Snowsports Instructors on a casual basis, due to the variability in the level of work available for such instructors.
7.	Changed definition of full-time permanent employee to provide for 38 ordinary hours per week averaged over a maximum work cycle of 4 weeks (clause 11.2)	The ASAA does not object to the ordinary hours being averaged over a maximum work cycle of four weeks.
8.	Deleted definition of permanent part-time employee, requested AIRC standard clause be inserted and included a reference that ordinary hours be averaged over a maximum work cycle of 4 weeks (clause 11.3 and clause 14)	The part-time clauses the AIRC has been included in the Modern Awards has varied, as such the ASAA is not certain of which "standard clause" the AWU is referring to. However, the ASAA does not object to the ordinary hours for part-time employees being averaged over a maximum work cycle of four weeks.
9.	Inserted new definition of seasonal employee, including utilising the terminology "winter season" and "summer season" (clause 12.1)	The ASAA objects to the new definition of seasonal employee proposed by the AWU. In particular the definition: (a) only provides for seasonal employees during the "winter season" – while certain Alpine Resorts have seasonal employees in both summer and winter; (b) includes a reference to "suspension" of employment during the summer season – the Alpine Resorts say the employment of seasonal employees is terminated at the end of the season, with

	Summary of AWU's Amendments	ASAA Response
		no guarantee of employment in the following season, and so no reference should be made to the suspension of their employment.
10.	Inserted suspension of employment provisions for seasonal employees (clause 12)	The ASAA objects to the inclusion of a clause regarding "suspension" of the employment of seasonal employees. Such a notion is only included in the Victorian (AWU) Award and not in the NSW Snowsports Awards, and would significantly increase the costs for NSW Alpine Resorts.
11.	Inserted new provision in casual employment clause providing that where a ski instructor is engaged outside of their "contract period" (undefined) they are entitled to their hourly rate and guaranteed a minimum of one hour per day if the employee reports for work when required (clause 13.2)	The ASAA objects to the inclusion of this clause. The ASSA Draft Award does not include the notion of a "contract" period, and provides for Snowsports Instructors to be a unique category paid an hourly rate. However, if the AIRC determines to include a clause regarding minimum engagement for Snowsports Instructors, the ASAA considers that a clause such as the following: "*A Snowsports Instructor is entitled to a minimum of one hour's work (or payment) if the employee reports for, and is provided with, work.*" The reason for this being one hour is because the shortest duration of a snowsports lesson offered to visitors to the Alpine Resorts by Snowsports Instructors is one hour.
12.	Inserted casual conversion clause (in clause 13)	The ASAA objects to the inclusion of a casual conversion clause. Such a clause is not included in the NSW Ski Industry Award or NSW Ski Instructors Award.
13.	Inserted requirement that on each occasion a casual employee is required to attend work the employee is entitled to a minimum payment of 2 hours (in clause 13).	The ASAA objects to such a clause, but would be prepared for a clause to the following effect to be inserted: "*If a casual employee reports for, and is provided with, work the employee will be entitled to a minimum of one hour's work (or payment)*". Under the NSW Ski Industry Award, casual employees are engaged by the hour, and so minimum payment is for one hour.
14.	Inserted definition of irregular casual employee (in clause 13)	As this is connected with the casual conversion clause sought by the AWU, to which the ASAA objects, the ASAA also objects to the inclusion of this definition.
15.	Deleted Junior employees (clause 16 and 21.3)	The ASAA included clause 16 as it considered it advantageous to encouraging youth employment.
16.	Amendment to redundancy clause and requesting AIRC	The ASAA objects to the variation proposed by the AWU. The NSW Ski Industry Award and the Ski Instructors Award do

	Summary of AWU's Amendments	ASAA Response
	standard clause (clause 18)	not have a redundancy clause. The Skitube Award has redundancy provisions which only apply to employers who employ 15 or more employees. The Victorian (AWU) Award has a clause providing for a reduced severance scale for small employers.
17.	Deleting wording "redundancy is not a genuine redundancy if a position ceases to exist due to the seasonal nature of the operations of an Alpine resort" (clause 18.2)	The ASAA does not object to the deletion of this wording in clause 18.
18.	AWU intend to provide a response to the proposed classification structure (clause 21)	The ASAA reserves the right to put on further submissions in response to the AWU's proposing regarding rates. In this context, if the AWU proposes to benchmark rates against the *Victorian Alpine Resorts Award*, the ASAA intends to object to that approach, given the matters address in the main body of these further submission by the ASAA.
19.	AWU do not agree with the Apprentice wage percentage rates (clause 21.2)	The ASAA considers its proposed rates align with, or are more generous than, other Modern Awards. The ASAA's rates are: 1st year – 55%, 2nd year – 65%, 3rd year – 80%, 4th year – 95%. These percentages are replicated in the *Hospitality Industry (General) Award* 2010. The rates in the G*eneral Retail Industry Award 2010* are as follows*:* 1st year – 50%, 2nd year – 60%, 3rd year – 80%, 4th year – 90% - 100%. Rates in the *Telecommunications Services Award* 2010 are also lower than ASAA's proposed rates: 1st year – 42%, 2nd year – 55%, 3rd year – 75%, 4th year – 88%. Rates in the *Electrical, Electronic and Communications Contracting Award* 2010 are also lower than ASAA's proposed rates: 1st year – 40%, 2nd year – 52%, 3rd year – 70%, 4th year – 82%.
20.	Inserted a protective clothing allowance and definition of protective clothing (after clause 22.6)	The ASAA does not object to the inclusion of a protective clothing clause that mirrors that already existing in the Snowsports Industry Awards (which do not provide for an allowance as such), as the majority of Alpine Resorts directly provide employees with such clothing / uniforms.
21.	Inserted a relocation reimbursement (above clause 23)	The Victorian (AWU) Award does not impose and obligation on Victorian Alpine Resorts to provide a similar allowance to Snowsports Instructors. As such the ASAA does not consider it appropriate to include such a clause.

	Summary of AWU's Amendments	ASAA Response
22.	Inserted wording at mixed functions and dual-role employment clause (clause 24.2) and deleted dual role employment (clause 24.3)	The ASAA objects to this change, and maintains its request for inclusion of a clause for dual role employment for the reasons set out in our submissions of 6 March at paragraphs 6.21 to 6.23.
23.	Deleted annualised salary arrangements (clause 26) (AWU consider this a matter for enterprise bargaining)	The ASAA maintains that the inclusion of such a clause is appropriate, and says that it should not be a matter for enterprise bargaining.
24.	Inserted in superannuation fund clause the words "monthly" (clause 27.4)	The ASAA objects to this insertion, as not all Alpine Resorts currently pay superannuation monthly but rather but it quarterly in accordance with legislative requirements.
25.	Inserted in superannuation fund clause an additional superannuation fund (clause 27.4)	The ASAA does not object to the inclusion.
26.	Deleted ordinary hours of work (clause 28.1) and inserted a new ordinary hours of work clause	The ASAA rejects the deletion of clause 28.1, and the insertion of the AWU's clause.
27.	Inserted new clause stating maximum daily ordinary hours of 10 hours (below clause 28.1)	Given the volume of work in the winter season, the ASAA suggests that ordinary hours be 12 hours per day.
28.	Inserted new clause Rostered Days Off (below clause 28.1)	The ASAA objects to the insertion of this clause.
29.	Inserted new clause Notice and Rostered Days Off (below clause 28.1)	The ASAA objects to the insertion of this clause.
30.	Inserted new clause Rostered Days Off – substitute days (below clause 28.1)	The ASAA objects to the insertion of this clause.
31.	Inserted new clause – make up time (below clause 28.1)	The ASAA objects to the insertion of this clause.
32.	Deleted breaks (clause 30) inserted substitute wording	The ASAA objections to the AWU's deletion, and new clause. The clause proposed by the AWU would impose significant additional costs on the Alpine Resorts. The ASAA considers its clause to be appropriate as certain roles – such as ski school instructions looking after children – while they have a break, do not leave the children unattended, and as

	Summary of AWU's Amendments	ASAA Response
		such this clause would provide those employees with an additional payment.
33.	Deleted clause regarding breaks for employees on annualised salary arrangements (clause 30.6)	The ASAA objects to this deletion, given it considers an annualised salary arrangement clause should be retained in the Draft Award.
34.	Deleted clause regarding penalty rates for employees on annualised salary arrangements (clause 31.1)	The ASAA objects to this deletion, given it considers an annualised salary arrangement clause should be retained in the Draft Award.
35.	Deleted clause allowing negotiation regarding penalty payments or time off for public holidays (clause 31.2(d))	The ASAA objects to this deletion. The clause proposed by the ASAA is appropriate given the flexibilities required in the industry, and the ASAA considers that removing the flexibility will be less beneficial to employees.
36.	Deleted transitional arrangements re casual loading (clause 31.3(a))	The ASAA objects to this deletion. There would be significant cost implications for NSW Alpine Resorts if they were required to implement a casual loading of 25% immediately, when their casual loading percentage is currently 15%. As such, transitional arrangements are required to provide for a graduated increase from the 15% to 25% loading as proposed in the ASAA's Draft Award.
37.	Deleted clause 32.1 (application of clause (overtime)), 32.2 (Entitlement to overtime rates), 32.3 (Overtime rates), 32.4 (reasonable overtime) and inserted new provisions for overtime	The ASAA objects to the deletion of clause 32.1 – those exclusions are required, given other clauses and loaded hourly rates in the Award. The ASAA is happy for the clause proposed by the AWU regarding "reasonable overtime" to be included. The ASAA objections to the deletion of clause 32.3 and 32.3. Clause 9.1 of the NSW Ski Industry Award provides that the first two hours of overtime per week are paid at ordinary time; and all overtime thereafter is at the rate of time and one half. This is mirrored in proposed clauses 32.3 and 33.3 of the ASAA's Draft Award. This was with the AWU in or about 1991, and has been included in the NSW Ski Industry Award since that time. To vary the clause, as now requested by the AWU, would impose a significant increase cost on NSW Alpine Resorts.
38.	Inserted new clause rest periods (below clause 32)	Due to the seasonal nature of employment in the Snowsports Industry, there can be short periods of intense work where a small number of employees do not have a minimum 10 hour break between shifts – for example, the periods of time when conditions are optimal for snowmaking can be limited and so, when the optimal conditions arise, employees may be required to work a longer shift. As a result, the ASAA does not agree to the

	Summary of AWU's Amendments	ASAA Response
		inclusion of this clause.
39.	Deleted seasonal employees as an exclusion from the annual leave clause 33.2(b)	The ASAA objects to this deletion, and notes that due to the short period for which seasonal employees are employed it is more favourable for their hourly rate to be higher (as proposed under the ASAA's Draft Award) and incorporate a loading for annual leave, as reflected in the ASAA's Draft Award.
40.	Deleted cashing out of annual leave (clause 33.4)	The ASAA inserted this clause for the benefit of employees.
41.	Inserted new personal/carer's leave and compassionate leave clause for casual employees (clause 34.2(b) and clause 34.4)	The ASAA considers that the clause in its Draft Award aligns with the clauses the AIRC is including in Modern Awards, so does not consider the change proposed by the AWU is necessary and so presses for its clause to be maintained.
42.	Deleted stand down arrangements (clause 38)	The ASAA objects to the deletion of this clause. Clause 11 of the NSW Ski Industry Award provides for stand down/stand by arrangements.
43.	Deleted Supported Wage System (Schedule B)	The ASAA says it only included this schedule, as the AIRC was including it in its Modern Awards.
44.	Deleted Equivalency of Snowsports Qualifications (Schedule C)	The ASAA objects to the deletion of this schedule. It is critical to determine appropriate rates of pay, and recognition, of qualifications and experience of Snowsports Instructors – so is in the interests of Snowsports Instructors
45.	Deleted Transitional Provisions – Casual Loadings (Schedule D)	The ASAA objects to the deletion of this clause, for the reasons outlined earlier.
46.	Insertion of the *Victorian Alpine Resorts Award*, as Part 7 0 to apply only to employees of an Alpine Resort Management Board in Victoria until 31 December 2004.	The ASAA objects to the inclusion of this Award in the Draft Award, for the reasons outlined in the main body of our submissions.

"C"

Form F1 Application (No specific form provided)
(Subrule 6.3, Fair Work Australia Rules 2010)

IN FAIR WORK AUSTRALIA

FWA use only
FWA Matter No.:

APPLICATION (NO SPECIFIC FORM PROVIDED)

Applicant

Name: Mount Hotham Alpine Resort Management Board (MHARMB)

Address: PO Box 188
Suburb: BRIGHT **State:** VIC **Postcode:** 3741
If the Applicant is a company or organisation:
Contact person: Ms. Jenny Molloy **ABN:**
Contact details for the Applicant or contact person (if one is specified):
Telephone: 03 5759 3550 **Mobile:** 0411 136 440
Fax: **Email:** jmolloy@Mounthotham.com.au

Applicant's representative (if any)

Name: Rose & Barton
ABN: [*If applicable*] 28 330 774 887
Address: 6 Alcheringa Court
Suburb: GISBORNE **State:** VIC **Postcode:** 3437
Contact person: Colin Rose
Telephone: 03 5428 3002 **Mobile:** 0418 513 814
Fax: **Email:** colrose@negotiation.net.au

Respondent(s)

Name: AWU Victoria
ABN: [*If known*]
Address: 685 Spencer St
Suburb: West Melbourne **State:** V **Postcode:** 3003
Contact person: [*If known*] J.P. Blanchard
Telephone: 03 8327 0888 **Mobile:**
Fax: 03 8327 0899 **Email:** john.paul.blanchard@awu.net.au

The Applicant applies, pursuant to the provision(s) in part 1, for the order or relief set out in part 2 on the grounds specified in part 5.

1. **Provision(s) under which application is made:**
FWA Transitional Provisions & Consequential Amendments Act 2009 Sch 6A item 4.

2. **Order or relief sought:**
The variation, modernisation or termination of the (State reference) Victorian Alpine Resorts Award 1999 (AT 802224) insofar as it applies to Mount Hotham Alpine Resort Management Board and staff.

The creation of a State public sector modern enterprise award in the terms set out in Attachment 1

3. **What is the industry of the employer?**

Alpine Resort Management

4. **Relevant industrial instrument(s) (if any):**
Victorian Alpine Resorts Award 1999 (AT 802224) (to be automatically terminated on the making of a new modern award or on the 31 December 2013).

Alpine Resorts Award 2010 (MA000092)

Grounds:

1) Div 2 (4) allows the FWA to make a modern award to replace enterprise instruments.

2) The Mount Hotham Resort Management Board is covered by the enterprise agreement and this application is made prior to 31 December 2013 in accordance with Div 2 (4) (3) (b).

3) The modern award objective is to provide terms and conditions tailored to reflect employment arrangements that have been developed in this enterprise. There is at the moment no modern award which is so tailored.
4) The attached draft includes coverage terms for both the employer and the employees and employee organisations.

5) The other Victorian Alpine resorts to which this award may apply namely Falls Creek, Mount Buller and Mount Stirling, Alpine Resort Management Boards were invited to join this application and declined to do so. Mount Baw Baw Resort Management Board operates ski lifts and has elected to be covered by the Alpine Resorts Award 2010. Lake Mountain resort management board has privatised its entire operation and therefore its coverage is yet to be determined.

6) The draft attached covers all the categories of staff both seasonal and full-time you are likely to work for the Mount Hotham's Resort Management Board. This is in contrast to the Victorian Alpine resorts award 1999 which restricted its coverage to outdoor workers and some tradesmen. For the last 10 years Mount Hotham has been creating enterprise bargaining agreements which include all staff other than the CEO. This is in line with the Victorian government's policy and corresponds to the notion that we are all one team.

Victorian government's industrial policy requires that all staff not under contract are covered by some sort of enterprise agreement.

7) Division 2 (b) 8 of the act requires that a modern award must not be expressed to include employees who have not been traditionally regulated by such an award. In this particular case it is argued that the clerical technical and professional staff of the resort could have been covered by the State administrative agency awards, and therefore this class of staff, with its historical connection to the State public service can be regarded as have being traditionally represented by an award. The Alpine Resorts Commission Award 1986 (ODN C No. 00655 of 1986) [Print G3800 [A0338]] was terminated in 1997 when the Alpine Resorts Commission was abolished and its staff ceased to be public servants.

Main Terms Varied:

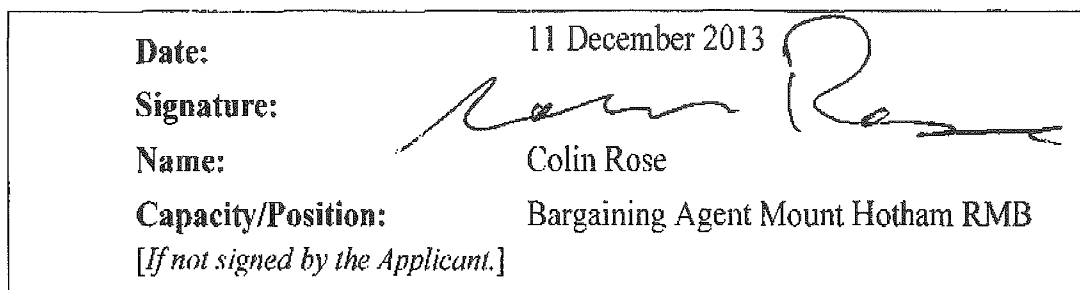
Coverage, the employment categories have been updated to include clerical professional and technical staff.

Hours of duty, the resort management board operates all year round in contrast to the ski companies which substantially closed down in the green season. The resort management board employs two distinct sorts of staff that is core staff who work either full or part-time but are ongoing and seasonal staff who are normally employed for about 17 weeks as casual employees to cover the requirements of the white season. In the white season the resort management board has staff working over a 24 hour span seven days per week. In the green season the resort management board is normally open between 8 AM and 6 PM on weekdays however some events can vary this requirement. In order to comply with the national employment standards regarding working hours the work is arranged so that a person averages no more than 38 hours per week and no more than 7.6 hours per day or shift. The draft award is framed to continue current practice.

Allowances, the old award provided for on-the-job allowances which were administratively difficult to handle, difficult to document, and difficult to pay. From the first enterprise agreement all allowances were rolled into one called the ARAPA (Alpine resorts all-purpose allowance) this allowance was then rolled into the normal wage rates. In respect of allowances which continue, such as travelling allowance, these matters were provided for in the enterprise agreement so as all staff would work under the same conditions and receive the same allowance for the same disability.

Why not the Alpine Resorts Award 2009 Since the Fair work Act was introduced in 2009 and modern awards were created in particular the Alpine Resorts Award 2009, the Resort management Boards in Victoria have had a problem aligning their staff with the staff of the Private Ski Companies for whom the who the Alpine Resorts Award 2009 was created. The Full Bench of FWC in making the award was not presented with any evidence from the Resort Management Boards, the evidence was presented by the various Ski Companies represented by Australian Ski Areas Association (ASAA) and Mr M Harmer solicitor. This evidence included some factual errors.

A copy of an annotated transcript is attached (Attachment 2) which helps with the background to this matter.



Date: 11 December 2013

Signature:

Name: Colin Rose

Capacity/Position: Bargaining Agent Mount Hotham RMB

[*If not signed by the Applicant.*]

Service requirements

This application must be served on the named Respondent(s) as soon as practicable after the application is lodged with FWA.
This application must also be served on other persons as directed by FWA if and when such direction(s) are given.
Note: Rules 9 and 10 deal with service

ATTACHMENT 1

This matter was addressed by Commissioner Roe in Falls Creek Resort Management EBA Hearing (AG2010/8399)

> *COMMISSIONER ROE: The first matter which must be established is the relevant Award. As outlined in Paragraph 5 above there is no doubt that the relevant Award for the purpose of the no disadvantage test and the previous Agreement was the Victorian Alpine Resorts Award 1999 (1999 Award). The Modern Award which is applicable is identified on Fair Work Online as the State Government Agencies Administration Award 2010. The Alpine Resorts Award 2010 is also clearly a Modern Award which must be considered. The Applicant submits that if a Modern Award applies it is the Miscellaneous Award 2010. The AWU suggests that the State Government Agencies Administration Award 2010 may have application.*
>
> *In the creation of the Alpine Resorts Award 2010 submissions were received from the AWU and from Australian Ski Areas Association. The AWU in that process argued that the Victorian Alpine Resorts Award 1999 [1] should be seen as a benchmark whereas the Australian Ski Areas Association[2] argued that the Victorian Alpine Resorts Award 1999 should not be within the coverage of the Modern Award because of its linkage to the Victorian Public Sector. The submission of the Australian Ski Areas Association was that at the three main Victorian Ski Resorts there were 118 employees in summer rising to 305 employees in winter of the Alpine Resorts Boards which operated under the 1999 Award whereas there were 198 employees in summer rising to 1602 employees in winter employed at those three resorts by the private companies. The AWU submitted a draft of the Award which included a Part 7 which effectively preserved the conditions for the Victorian Alpine Resorts Management Boards who were covered by the 1999 Award for the next five years.*
>
> *The exposure draft of the Award was issued by the Full Bench in May 2009. In the statement in respect of this[3] the Full Bench determined "The draft Alpine Resorts Award 2010 covers the seasonal snowsports industry in particular, though it will also have application to alpine resorts that operate over the summer season.... We have also decided not to make any special provision in relation to alpine resorts management boards."[4]*
>
> *In my view this is a clear reference to the AWU submission for a separate schedule to the Award to cover the conditions for the Victorian Alpine Resorts Award. I do not read it as a decision to exclude the alpine resorts management boards from the coverage of the Modern Award. The whole approach of the Full*

[1] Submissions 18 and 26 March 2009.
[2] Submission 8 April 2009.
[3] May 22 2009, Print 52009.
[4] Paragraphs 220 and 222.

Bench was to ensure that the whole of an industry (or in some cases occupations) should be covered by a Modern Award and generally the Full Bench was reluctant to grant exceptions pressed by various parties. In the decision of the Full Bench on the Stage 3 Modernisation of 4 September 2009 there was no further comment concerning the coverage of the Award.(emphasis added)

The Applicant in these proceedings argued that the Alpine Resorts Award 2010 could not cover the Applicant for two main reasons; firstly because the Applicant is not a trading corporation and secondly because the coverage of the Award is restricted to employers "who operate an alpine resort" which is defined as "an establishment whose business amongst other things, includes alpine lifting".[5] I will deal with the first ground later but the meaning of the second ground was to some extent canvassed by the President in the proceedings which created the Modern Award (emphasis added).

Extract from the decision for the Full Bench Stage 3 Modernisation of 4 September 2009

"JUSTICE GIUDICE: Mr Harmer, I wonder if you have any submission to make about the issue raised as to the coverage of the Award, in particular the definition of alpine resort.

MR HARMER: The definition is satisfactory to the Australian Ski Areas Association, your Honour. The resort operators measure their productivity and market share by reference to ski lift hours or trips and all of the alpine resorts operate ski lifts and it would appear to be a significant distinguishing feature compared to other employers in the region of which there obviously are some. The unique circumstances we face and I apologise if this is not directly in response to your question, your Honour, but in response to comments made by some of the unions, we cannot emphasise too much how much the exigencies of the weather can devastate our business and how much poor weather in terms of lack of snow and the reporting of it can reduce demand for our product to such a significant extent as to render the resorts non-viable in some seasons.

JUSTICE GIUDICE: Yes, Mr Harmer, I was particularly interested in the definition and the submission that was made about the requirement that the resort include alpine lifting. The suggestion seemed to have been made that there would be other

[5] Clauses 3.1 and 4.1 of the *Alpine Resorts Award 2010*.

resorts that don't include alpine lifting which would be covered by other Awards and that was the issue that I was interested in your submission on.

MR HARMER: In our respectful submission, your Honour, there would be no alpine resorts involved in the ski industry as we understand it that does not involve ski lifts, so I am unable to assist with the nature of any resort operating in the ski areas that would fall into that category. There are, of course, your Honour, for example in Jindabyne there are operations that might be described as resorts in terms of accommodation and things of that nature which some other facilities, but they do not operate in the ski area and do not fall under the intended coverage of the exposure draft.

JUSTICE GIUDICE: And with the exception of lifting, do those resorts or other establishments provide the same or similar services to the public as the resorts covered by this Award.

MR HARMER: The example I just used, your Honour, was talking about lower areas of altitude, so they're not operating in the precise region, they're not as heavily impacted by snow and they're not providing any of the services associated with skiing that we are dealing with, in our respectful submission, your Honour.

JUSTICE GIUDICE: Thank you."[6]

COMMISSIONER ROE: [54"]I think that the words of the President make it clear that the term establishment in this Award should not be read so narrowly as to imply that the employer must operate the ski lifts directly itself for the employer to come within the scope of the Award. Rather the term is to describe the nature of the resort and to exclude those where there are not operating ski lifts. In this case there was undisputed evidence that the Falls Creek resort

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[6] Transcript of 30 June 2009 Award Modernisation Full Bench.

COMMISSIONER ROE: includes many ski lifts and that the ski lifts are operated under a contract controlled by the Applicant. A separate company is contracted to operate the lifts. The Falls Creek Alpine Resort is an establishment whose business amongst other things includes alpine lifting and the employer the Falls Creek Alpine Resort Management Board is clearly an employer who along with others operates the Falls Creek Alpine Resort. It is clear that the Falls Creek Alpine Resort Management Board is the principal employer at the Resort and has by Statute been given the responsibility for the management and operation of the alpine resort which includes alpine lifting.

I am therefore satisfied that if the Applicant is a trading corporation then its outdoor workforce is covered by the Alpine Resorts Award 2010. The reference Award for transitional purposes is the 1999 Award. I did consider the applicability of the State Government Agencies Administration Award 2010. That Award only applies to employees in the classifications defined in that Award. The classifications are restricted to administrative, technical and professional employees. None of the outdoor workers could properly fit these definitions."

We submit that the Commissioner was in error in finding that the ski lifts "operate under a contract controlled by the applicant". The RMB in both Falls Creek and Mount. Hotham agrees to lease the land to the Ski Company. The Ski Company alone is responsible for the construction, maintenance, and operation of the lifts. The ski company alone sells and receives the benefit from lift passes. The RMB is not connected with this aspect of the operation. If we were to extend the scope of this decision we would find that all manner of businesses and organizations operating at Mount Hotham would have to be considered to be involved in lifting operations. Such businesses would include, restaurants, cafes, ski hire outlets, bars and lodges supermarkets and coffee shops. Each of these has a lease with the RMB in exactly the same way as has the Ski Company. Each of these separate businesses are in no way controlled by the RMB.

On this basis we submit that the Mount Hotham RMB is excluded from the coverage of the Alpine Modern Award 2010.

We submit that the State Reference Public Sector Modern Award is an even worse fit for the staff of Mount Hotham RMB. Mount Hotham RMB has a relatively small permanent staff who work all year round (about 20-24 people. In the snow about 60-100 season seasonal staff are hired as casuals and predominantly work outside. None of these staff fit comfortably into the job descriptions in the SAA award. Some of the permanent staff do fit, but there working environment is so different from any other agency as to render direct comparison misleading.

The nature of employment in an Alpine resort in winter and summer seasons calls for staff who are willing, flexible and multi-skilled. Clerical staff may have to drive busses, staff may find themselves in a fire fighting party for weeks on end, Snow clearers may operate chain saws, snowmobiles and heavy plant. Office staff may have to help in search and rescue. All are subject to adverse weather, blizzard, whiteout and road ice.

We submit that the Alpine Resorts Award 2010 will need a substantial revision to provide a better fit for RMB staff and we are currently looking at ways to do that in conjunction with the AWU and Ski companies.

ATTACHMENT 2

AP802224CRV - Victorian Alpine Resorts Award 1999

7. COVERAGE OF AWARD

7.1 Subject to the exceptions and limitations hereinafter contained, this award shall apply to the Australian Workers' Union and to the Falls Creek, Mount Buller, Mount Hotham, Mount Stirling, Lake Mountain, and Mount Baw Baw Alpine Resort Management Boards in respect of the employment by such employers of all employees whether members of the Australian Workers' Union or not in work done in or in connection with the following:

7.1.1 The construction, alteration, repair and maintenance of roads, freeways, causeways, civil engineering works, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks, tunnels, water and sewerage works, conduits and all concrete work and preparation incidental thereto;

7.1.2 Forestry;

7.1.3 Land clearing and preparation;

7.1.4 Soil conservation;

7.1.5 Vermin and noxious weed control and eradication;

7.1.6 General labouring work, including but not limited to the work of ticket sellers, Carpark attendants and ski patrollers.

7.2 Subject to the exceptions and exemptions hereinafter contained, this award shall apply to the Falls Creek, Mount Buller, Mount Hotham, Mount Stirling, Lake Mountain, and Mount Baw Baw Alpine Resort Management Boards in respect of the employment by such employers of all employees in work done in or in connection with the following:

7.2.1 Mechanical engineering;

7.2.2 Smithing;

7.2.3 Boilermaking and erection and repairing;

7.2.4 Steel fabrication, construction and erection and repairing;

7.2.5 Welding;

7.2.6 Sheet metal working;

7.2.7 Agricultural implement making and repairing;

7.2.8 Metal machining;

7.2.9 Ironworking;

7.2.10 Making, assembling, repairing and maintenance of vehicles;

7.2.11 Generation and distribution of electric energy;

7.2.12 Sorting, packing, despatching, distribution and transport in connection with any of the foregoing.

7.3 Subject to the exceptions and modifications hereinafter contained, this award shall apply to The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and to the Falls Creek, Mount Buller, Mount Hotham, Mount Stirling, Lake Mountain, and Mount Baw Baw Alpine Resort Management Boards in respect of the employment by such employers of all employees whether members of the union or not who are employed in executing any plumbing, gasfitting, pipefitting or domestic engineering work whether prefabricated or not, or who execute any work in or in connection with:

7.3.1 sheet lead, galvanised iron or other classes of sheet metal or any other materials which supersede the materials usually fixed by plumbers;

7.3.2 lead, wrought, case or sheet iron, copper, brass or other classes of pipework;

7.3.3 water (hot or cold), steam, gas, air, vacuum, air-conditioning, heating or ventilating appliances, fittings, services or installations [including fire services and sprinklers];

7.3.4 house, sanitary, chemical or general plumbing or drainage.

7.4 The scope of the award excludes persons who may be employed as officers or employees in the Victorian Public Service under the terms of the *Public Sector Management and Employment Act 1998.*

ATTACHMENT 3

Draft Modern Award:

Victorian Alpine Resort Management Award 2014

Table of Contents
(deleted)

Part 1—Application and Operation

1. Title

This award is the Victorian Alpine Resort Management Award 2014

2. Commencement and transitional

2.1 This award commences on 1 January 2014.

2.2 The monetary obligations imposed on employers by this award may be absorbed into over award payments. Nothing in this award requires an employer to maintain or increase any over award payment.

3. Definitions and interpretation

3.1 In this award, unless the contrary intention appears:

Act means the *Fair Work Act 2009* (Cth) as amended.

award-based transitional instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

Alpine resort Management board means an establishment created by the ***Alpine Resorts (Management) Act** 1997 **Act** No. 89 (Victoria) as amended.*

applicable hourly rate means the relevant rate for the classification the employee is working under as set out in clause **double time** means double the applicable hourly rate

employee means a national system employee as defined in sections 13 and 30C of the Act

employer means a national system employer as defined in sections 14 and 30D of the Act

enterprise award-based instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

junior employee means an employee who is less than 19 years old

NES means the National Employment Standards as contained in sections 59 to 131 of the *Fair Work Act 2009* (Cth) as amended.

rostered day off (RDO) means any day on which an employee, by virtue of the employee's roster, is not rostered to attend for rostered hours of work and does not include non-working days

seasonal employee means an employee engaged to perform work for the duration of a specified season

shiftworker means an employee who:

- is employed by an employer which has shifts continuously rostered 24 hours a day for seven days a week; and
- is regularly rostered to work those shifts; and
- regularly works on Sundays and public holidays

standard rate means the minimum hourly rate for a Band Level 2 (seasonal) in clause 14.1

time and a half means one and a half times the applicable hourly rate

3.2 Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

4. Coverage

4.1 This enterprise award covers employers throughout Victoria who manage an alpine resort under the terms of the Alpine Resorts Management Act as amended (Vic) and who are not covered by the Alpine Resorts Modern Award 2010 and their employees in the classifications within 0 to the exclusion of any other modern award.

4.2 The award does not cover an employee excluded from award coverage by the Act.

4.3 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

5. Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a notice board which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

6. The National Employment Standards and this award

The NES and this award contain the minimum conditions of employment for employees covered by this award.

7. Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

- **(a)** arrangements for when work is performed;
- **(b)** overtime rates;
- **(c)** penalty rates;
- **(d)** allowances; and
- **(e)** leave loading.

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress.

7.3 The agreement between the employer and the individual employee must:

- **(a)** be confined to a variation in the application of one or more of the terms listed in clause 7.1; and
- **(b)** result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 The agreement between the employer and the individual employee must also:

- **(a)** be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;
- **(b)** state each term of this award that the employer and the individual employee have agreed to vary;
- **(c)** detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving four week's notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

7.9 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

Part 2—Consultation and Dispute Resolution

8. Consultation regarding major workplace change

8.1 Employer to notify

(a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.

(b) **Significant effects** include termination of employment; major changes in the composition, operation or size of the employer's workforce or in

the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that:

(i) an event or change which is a normal incidence of the seasonal nature of operating an alpine resort will not be considered a significant effect; and

(ii) where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

8.2 Employer to discuss change

(a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.

(c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.

9. Dispute resolution

9.1 In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.

9.2 If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to Fair Work Australia.

9.3 The parties may agree on the process to be utilised by Fair Work Australia including mediation, conciliation and consent arbitration.

9.4 Where the matter in dispute remains unresolved, Fair Work Australia may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

9.5 An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

9.6 While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

Part 3—Types of Employment and Termination of Employment

10. Types of employment

10.1 Employees under this award will be employed in one of the following categories:

(a) full-time;

(b) part-time;

(c) casual (normal or irregular) (see 10.5.(c))

(d) seasonal (see 11.0)

(e) core staff (ongoing staff occupying established positions)

(f) These terms are not mutually exclusive

10.2 At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, or part-time and casual, seasonal or core staff.

10.3 Full-time employment

A full-time employee is engaged to work 38 ordinary hours per week (or an average of 38 ordinary hours per week over a maximum work cycle of four weeks).

10.4 Part-time employment

(a) A part-time employee will be paid the hourly rate applicable to their classification as set out in clause 14.1 for the hours worked in any week.

(b) A part-time employee is engaged to work an average of at least eight and no more than 35 hours per week over a work cycle of four weeks.

(c) Part-time employees are entitled on a pro rata basis to equivalent pay and conditions to those of full-time employees.

(d) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the number of hours to be worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

10.5 Casual employment

(a) A casual employee is an employee engaged as such in any classification in this award and must be paid a casual loading of 25%. This loading is paid as compensation for annual leave, paid personal/carer's leave, paid compassionate leave, notice of termination, redundancy benefits and the other entitlements from which they are excluded by the terms of this award and the NES.

(b) Casual conversion

(i) A casual employee, other than an irregular casual employee as defined in clause 10.5(c), who has been engaged by a particular employer for a continuous sequence of periods of employment under this award during a period of 12 months will thereafter have the right to elect to have their contract of employment converted to full-time employment or part-time employment if the employment is to continue beyond the conversion process.

(ii) Every employer of such an employee will give the employee notice in writing of the provisions of this clause within four

weeks of the employee having attained such period of 12 months. The employee retains their right of election under this clause if the employer fails to comply with this paragraph.

(iii) Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time employment or part-time employment will be deemed to have elected against any such conversion.

(iv) Any casual employee who has a right to elect under clause 10.5(b)(i), upon receiving notice under clause 10.5(b)(ii) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer will consent to or refuse the election but must not unreasonably so refuse. Any dispute about a refusal of an election to convert a contract of employment will be dealt with as far as practicable with expedition through the dispute settlement procedure.

(v) Once a casual employee has elected to become and has been converted to a full-time employee or a part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(vi) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 10.5(b)(iv), the employer and employee in accordance with this subclause, and subject to clause 10.5(b)(iv), will discuss and agree upon:

- which form of employment the employee will convert to, that is, full-time or part-time; and
- if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 10.4(d).

Following such agreement being reached, the employee will convert to full-time or part-time employment.

(vii) Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed upon between the employer and employee.

(viii) Where, in accordance with clause 10.5(b)(iv) an employer refuses an election to convert, the reasons for doing so will be

fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(ix) Any dispute about the arrangements to apply to an employee converting from casual employment to full-time or part-time employment will be dealt with as far as practicable with expedition through the dispute settlement procedure.

An employee must not be engaged and re-engaged to avoid any obligation under this award

(c) Irregular casual

An **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis. The provisions of clause 10.5(b) do not apply to irregular casual employees.

10.6 Minimum engagement

(a) An employer when engaging a person for casual employment must inform the employee then and there that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed and the classification level, the actual or likely number of hours required, and the relevant rate of pay.

(b) On each occasion a casual employee is required to attend work the employee is entitled to payment for a minimum of two hours' work.

(c) In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum hours.

11. Seasonal employment

11.1 An employer may employ seasonal employees in any classification in this award.

11.2 A seasonal employee may be engaged on either a full-time or part-time basis.

11.3 A full-time seasonal employee is a seasonal employee who is engaged to work 38 ordinary hours (or an average of 38 ordinary hours over the anticipated length of their employment) per week.

11.4 A part-time seasonal employee is a seasonal employee who is engaged to work less than 38 ordinary hours (or an average of less than 38 ordinary hours over the anticipated length of their employment) per week.

11.5 In the event of adverse climatic conditions a seasonal employee may have their anticipated period of seasonal employment reduced.

11.6 The employer will advise each seasonal employee either in writing or verbally prior to the end of the season when that employee's employment will be terminated.

11.7 Seasonal employees will be paid the hourly rate applicable to their classification as set out in clause

11.8 Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause.

11.9 An apprentice under the age of 18 years must not, without their consent, be required to work overtime or shiftwork.

11.10 An apprentice will be engaged for a minimum of four hours per shift.

12. Termination of employment

12.1 Notice of termination is provided for in the NES.

12.2 Notice of termination by an employee

The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

12.3 Job search entitlement

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.

13. Redundancy

13.1 Redundancy pay is provided for in the NES.

13.2 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

13.3 Employee leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

13.4 Job search entitlement

(a) An employee given notice of termination in circumstances of redundancy must be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient.

(c) This entitlement applies instead of clause 12.3.

Part 4—Minimum Wages and Related Matters

14. Classifications

The definitions of the classification levels in clause 14.1, are contained in 0.

14.1 General

BAND	MINIMUM ANNUAL RATE $	MINIMUM HOURLY RATE $	Typical skill levels (Guide Only)
1	34,000	17.20	Unskilled Labourer, Trainee
2	40,000	20.24	Resort Service officers
3	47,000	23.78	Ski Patroller Jnr, Admin Assistant
4	53,000	27.04	Skilled Workers, Drivers, Admin officers, Patrollers
5	59,000	29.85	Senior

			Tradesmen, Supervisors, Admin Officers, Snow Clearers and groomers
6	67,000	33.90	Senior Supervisors Technical officers

7	**84,000 Annualised TRP**	**Flexibility arrangement may apply**	**Senior Managers, Professionals, Technical Specialist**
8	111,000 Annualised TRP	Flexibility arrangement may apply	Senior Resort Managers Professionals

rates for adult employees other than an apprentices are set out in the following table.

14.2 Junior employees

(a) The minimum wages for junior employees are the following percentages of the minimum hourly rate prescribed for the appropriate adult classification:

Age	%
17 years and under	70
18 years	80

(b) Junior employees working in roles that undertake liquor service must be paid at the relevant adult minimum wage.

(c) An employer may at any time demand the production of a birth certificate or other satisfactory proof for the purpose of ascertaining the correct age of an employee. If a birth certificate is required, the cost of it must be borne by the employer.

(d) No employee under the age of 18 years will be required to work more than 10 hours in a shift.

14.3 Apprentices

An apprentice will be paid the following percentage of the minimum wage for the appropriate adult classification:

Year	%
First year	55
Second year	65
Third year	80
Fourth year	95

14.4 All percentages prescribed in this clause will be calculated to the nearest 10 cents. Any broken part of 10 cents in the result being less than five cents will be disregarded and five cents and over will go to the higher 10 cents.

14.5 National training wage

See **Error! Reference source not found.**

14.6 Supported wage system

See Schedule D

15. Allowances

15.1 Meal allowance

An employee required to work overtime for more than two hours per shift without being notified on the previous day or earlier must either be supplied with a meal by the employer or paid an allowance of $12.

15.2 Boot allowance

Where the employee is directed to wear specific outdoor footwear as part of their employment and this footwear is not supplied by the employer the employee will be paid an allowance of $0.16 for each hour worked. This does not include items such as black shoes for service staff.

15.3 Equipment allowance

Where an employee is required to provide ski/board equipment as part of their employment, and this equipment is not supplied by the employer, the employee will be paid an allowance of $0.33 for each hour worked. An employee entitled to the equipment allowance will be entitled to this instead of the boot allowance.

15.4 Protective clothing reimbursement

(a) The employer must provide all employees who are outdoor workers, including Ski Patrollers, with appropriate wet weather and protective clothing free of charge, or must reimburse the employee the cost of purchasing such clothing.

(b) Where protective clothing, uniforms and/or other tools and equipment are supplied without cost to the employee, or the cost of which has been reimbursed to the employee, it will remain the property of the employer and will be returned by the employee to the employer when requested on termination of the employee's employment. Loss due to any cause or damage through misuse by the employee will be charged against the employee's wages. A deduction at a reasonable rate may be made by the employer, provided that no deduction will be made for reasonable wear and tear.

16. Higher duties, dual-role employment and multi-hiring arrangement

16.1 Higher duties

An employee up to the level of a Band level 5 engaged on any one day or shift for a time exceeding two hours in the aggregate on work carrying a higher rate than their ordinary classification will be paid the higher rate for such day or shift. If so engaged for two hours or less in the aggregate on any one day or shift, the employee will be paid the higher rate for the time so worked. Where this clause applies, clauses 16.2 and 16.3 do not apply.

16.2 Dual-role employment

(a) Due to the unique nature of most positions under this award, in that they are generally only available during the declared ski season employees may be offered dual-role employment (where operational requirements allow) in which the employee may have two distinct roles.

(b) In these circumstances any offer of employment will set out the terms and conditions for each role and these will be mutually agreed between the two parties prior to the commencement of this type of employment.

(c) Where this clause applies, clause 16.1 does not apply.

16.3 Multi-hiring arrangement

(a) As an alternative, or in addition to, dual-role employment, an employee may by agreement be engaged on a multi-hiring arrangement.

(b) If an employer and an employee enter into a multi-hiring arrangement, the parties must agree on the primary role of the employee.

(c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within 0 that they are qualified for, provided that:

(i) any non-primary role is to be undertaken, and paid for, on a casual basis; and

(ii) any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role.

(iii) Where this clause applies, clause 16.1 does not apply.

17. Payment of wages

An employer may pay an employee their wages either weekly, fortnightly or monthly by payment into the employee's nominated bank account by electronic funds transfer, without cost to the employee.

18. Superannuation

18.1 Superannuation legislation

(a) Superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, any superannuation fund nominated in the award covering the employee applies.

(b) The rights and obligations in these clauses supplement those in superannuation legislation.

18.2 Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

18.3 Voluntary employee contributions

(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause 18.2.

(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month

following the giving of three months' written notice to their employer.

(c) The employer must pay the amount authorised under clauses 18.3(a) or (b) no later than 28 days after the end of the month in which the deduction authorised under clauses 18.3(a) or (b) was made.

18.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 18.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 18.2 and pay the amount authorised under clauses 18.3(a) or (b) to one of the following superannuation funds:

(a) HOSTPLUS;

(b) Australian Super;

(c) Asset Super; or

(d) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund.

Part 5—Hours of Work and Related Matters

19. Ordinary hours of work and rostering

19.1 Ordinary hours may be worked on an any five days of the week with a maximum of 10 hours per day.

19.2 The ordinary hours of full-time employees will average 38 per week over a maximum work cycle of 26 weeks.

19.3 The ordinary hours of part-time employees will average at least eight and no more than 30 per week over a maximum work cycle of 26 weeks.

19.4 Rostered days off

(a) This subclause only applies to full-time employees other than seasonal employees.

(b) **Notice**

(i) An employer will give at least one week's notice of a rostered day off.

(ii) An employee may agree to a lesser period of notice than that specified in clause 19.4(b)(i).

(c) Substitute days

(i) An employer may require an employee to work on the employee's rostered day off in the event of an emergency.

(ii) In the circumstances addressed by clause 19.4(c)(i), the employee will be paid time and a half for all time worked on the rostered day off and will be granted another rostered day off.

19.5 Make-up time

Notwithstanding provisions elsewhere in this award, the employer and the majority of employees at an enterprise may agree to establish a system of make-up time provided that:

(a) An employee may elect, with the consent of the employer, to work make-up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in this award.

(b) An employee on shiftwork may elect, with the consent of their employer, to work make-up time under which the employee takes time off ordinary hours and works those hours at a later time, at the shiftwork rate which would have been applicable to the hours taken off.

20. Rostering

20.1 The employer may prepare a roster showing the name of each employee and their days of work and starting and finishing times and post it on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes it more accessible.

20.2 The roster will be alterable:

(a) at any time by mutual consent; and

(b) by the employer on the day prior to when the rostered shift was originally scheduled to be worked, or where notice is unable to be given of the roster change on the previous day, with as much notice as is reasonably practicable in the circumstances.

21. Breaks

21.1 If an employee, including a casual employee, is required to work for five or more hours in a day they must be given an unpaid meal break of no less than 30 minutes.

21.2 The break must be given no earlier than one hour after starting work and no later than six hours after starting work.

21.3 Where operational requirements do not allow time for an unpaid meal break in accordance with clause 21.1, the employee will be given a paid meal break of 20 minutes.

21.4 If the unpaid meal break is rostered to be taken after five hours of starting work, the employee must be given an additional 20 minute paid meal break. The employer must allow the employee to take this additional meal break no earlier than two hours after starting work and no later than five hours after starting work.

21.5 If an employee is not given a meal break in accordance with clauses 21.1 or 21.4 the employer must pay the employee overtime rates from the end of six hours until either the meal break is given or the shift ends.

21.6 An employee is entitled to receive an additional 30 minute unpaid meal break for each additional five hours worked by them in a day. The taking of any additional meal breaks is to be as per clauses 21.4 and 21.5 above.

22. Penalty rates

22.1 Payment for work performed on public holidays

All time worked on a public holiday other than the Queen's Birthday must be paid for at the rate of double time and a half for the hours worked. or a day off in lieu plus time and a half for the holiday worked. In the case of casual employees this rate includes the casual loading of 25%.

22.2 Overtime

An employee, must be paid overtime rates for:

(a) any hours in excess of the ordinary hours per week in accordance with Clause 22.2, or

(b) any hours in excess of 10 per day, excluding meal breaks; or

(c) any hours in excess of an average of 38 per week over the length of the cycle. The cycle will be determined by agreement but will not exceed two 26 week cycles in one calendar year.

22.3 The minimum overtime rates are as follows:

(a) time and a half for the first two hours; and

(b) double time thereafter.

Part 6—Leave and Public Holidays

23. Annual leave

23.1 Annual leave is provided for in the NES.

23.2 **Paid leave in advance of accrued entitlement**

An employer may allow an employee to take annual leave either wholly or partly in advance before the leave has accrued. Where paid leave has been granted to an employee in excess of the employee's accrued entitlement, and the employee subsequently leaves or is discharged from the service of the employer before completing the required amount of service to account for the leave provided in advance, the employer is entitled to deduct the amount of leave in advance still owing from any remuneration payable to the employee upon termination of employment.

23.3 **Requirement to take leave notwithstanding terms of the NES**

An employer may require an employee to take annual leave by giving at least four weeks' notice in the following circumstances:

(a) as part of a close-down of its operations; or

(b) where more than 30 days' leave is accrued.

24. Personal/carer's leave and compassionate leave

Personal/carer's leave and compassionate leave are provided for in the NES.

25. Community service leave

Community service leave is provided for in the NES.

26. Public holidays

26.1 Public holidays are provided for in the NES.

26.2 **Substitution of public holidays by agreement**

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday in substitution of any of the days prescribed in s.115 of the Act.

26.3 A permanent or seasonal employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day.

Schedule A—Transitional Provisions

A.1 General

A.1.1 The provisions of this schedule deal with minimum obligations only.

A.1.2 The provisions of this schedule are to be applied:

(a) when there is a difference, in money or percentage terms, between a provision in a relevant transitional minimum wage instrument (including the transitional default casual loading), award-based transitional instrument or preserved collective State agreement on the one hand and an equivalent provision in this award on the other;

(b) when a loading or penalty in a relevant transitional minimum wage instrument, award-based transitional instrument or preserved collective State agreement has no equivalent provision in this award;

(c) when a loading or penalty in this award has no equivalent provision in a relevant transitional minimum wage instrument, award-based transitional instrument or preserved collective State agreement; or

(d) when there is a loading or penalty in this award but there is no relevant transitional minimum wage instrument, award-based transitional instrument or preserved collective State agreement.

27. Position Standards

The following pay bands are based on job complexity and levels of responsibility, accountability and authority. For the purpose of clarity, the pay bands are usually increased by the same percentage or quantum as a general pay variation.

27.1 Pay Bands

The rates in Band 7B must not exceed the GSERP limit as amended from time to time.

27.2 Training level

Training Level is the level at which staff are undergoing training prior to being deemed competent to undertake their substantive role at the appropriate Band Level, excluding those who are being trained in Plant Operators role. It is also the rate to be paid to staff while attending orientation or induction programs.

The maximum period of time on which an employee may be engaged at the Training Level is seven weeks.

27.3 Band Level 1

Band Level 1 means an employee who is engaged in a role that requires no previous experience, some on-the-job training and who works under supervision in roles including:

Carparking duties

Outdoor and Indoor Assistant roles including Race Event Workers, Snowsports Assistants, Painters whose roles are primarily focused on specific labouring tasks

General unskilled labour tasks

Housekeeping duties assisting under supervision in the servicing of resort property and cleaning thereof
Laundry duties assisting in laundry service

27.4 Band Level 2
Band Level 2 means an employee who is engaged in a role that requires some previous relevant experience or qualifications, detailed on-the-job training for the specific employers requirements and work under supervision.
The following roles are examples:
A person involved in the coordination and instruction of other staff involved in Carparking operations
Municipal Services (garbage collection etc.)
Ticket Checkers, Uniform Room Attendants and Mountain Awareness staff
Housekeeping involved in the servicing and cleaning of resort property
An employee who is engaged in reception/reservations duties including night auditing, telephonist, receptionist, cashier, information services, portering or reservations.
Laundry duties involved in laundry production duties such as machine operation

27.5 Band Level 3
Band Level 3 means an employee who is engaged in a role that requires significant previous experience in the field in which they are to be employed or who will be involved in roles that require specialist training by the employer.
The following roles are examples:
An employee involved in Mountain operation roles such as Assistant Ski Patrol and Trail Crew
Trades Assistants in Electrical, Mechanical, Fitting & Machinery, Automotive, Machine operators, Building disciplines including (but not limited to) Electrical Assistants, Track Maintenance Assistants, Fitters and Machinists, Carpentry Assistants and Leading Hand Labourers
Storeperson or a person with forklift qualifications and who is engaged as such
Food Service & Bar staff who supervise staff of a lower grade and who work without supervision
A Kitchen attendant who has the responsibility for the supervision, training and coordination of kitchen attendants of a lower grade
An employee in a Housekeeping, Porter or Laundry role who has the appropriate level of training and who is employed to supervise employees of a lower grade

27.6 Band 4 - Resort Services Officer
Positions at this level usually can work alone or under limited direction. They have relevant experience combined with a broad knowledge of the organisation's functions and activities and a sound knowledge of the major activity performed within the work area. This is the first level where trade and tertiary qualifications may be required or desirable.
Positions with supervisory responsibilities may undertake some complex operational work and may assist with, or review, the work undertaken by subordinates or team members.

Problems faced may be complex yet broadly similar to past problems. Solutions generally can be found in experience, precedents, or in rules, regulations, guidelines, procedures and instructions, though these may require some interpretation and application of judgement. There is scope for exercising initiative in the application of established work practices and procedures.
Decisions made or delegations exercised at this level may have an impact on the Board's operations (e.g. on financial resources), but are normally of limited procedural or administrative importance.
Positions with supervisory responsibilities may be involved in working with staff to develop work performance, planning and co-ordinating tasks and workflow perhaps across a number of areas or activities. Work may involve the use of complex tools or specialised mechanical equipment or keyboard or computer skills to perform supervisory, clerical or other operational duties either alone or as part of a team.

27.7 Band 5 - Resort Services Officer

Positions at this level usually work under general direction within clear guidelines and established work practices and priorities, in functions, which require the application of knowledge, skills and techniques appropriate to the work area.
Work at this level requires a sound knowledge of program, activity policy or service aspects of work performed within a functional element or a number of work areas. The work may cover a range of tasks associated with program, activity or service delivery to clients or other interested parties or administrative support to senior officers. Positions at this level are found in a wide variety of operating environments.

The work is usually performed under general direction. Tasks may include a professional, trade, technical input. Decisions taken or delegations exercised at this level may have an impact on agency operations, but they are of limited strategic significance.
Positions at this level may have supervisory responsibilities over staff operating a wide range of equipment or undertaking a variety of tasks in the area of responsibility which may include planning and co-ordinating work across a number of work areas or activities.
Staff in supervisory position would be expected to facilitate a participative decision making process and participate in decision making on issues relating to their work area.
In some cases the difficult aspects of the work in an area will be undertaken by a position at this level with responsibility for supervising staff at lower levels doing work of a similar but less difficult nature. The extent to which staff with supervisory duties become involved in the operational work of an area will depend on such factors as priorities, the complexity of the work and the number of staff supervised.
Position providing administrative support to more senior staff may be classified in this level provided the complexity of the operational or administrative tasks performed is comparable to tasks typical of this level.

27.8 Band 6 - Senior Resort Services Officer

Positions at this level work under general direction in relation to established priority task methodology and work practices to achieve results in line with the corporate goals of the organisation.
The work may include preparing preliminary papers, drafting complex correspondence for more senior staff, and undertaking tasks of a specialist or detailed nature. Assistance in the preparation of procedural guidelines, providing or interpreting information for clients or other interested parties; exercising specific

process responsibilities, and overseeing and co-ordinating the work of subordinate staff.
Work is performed under general direction as to work priorities and may be of a professional, project, procedural or processing nature or a combination of these.
Directions exercised over positions this level may be less direct than at lower levels and is usually related to task methodologies and work practices. Staff would be expected to set priorities and to monitor workflow in the area of responsibility.
Independent action may be exercised at this level, for example, developing local procedures, management strategies and guidelines. Operating guidelines, procedures or resource allocation will usually be determined by senior management.
Any decisions taken or delegations exercised would be limited by the application of rules, regulations, guidelines or procedures. While the decisions may have a minor impact on the organisations resources they are of limited management significance.
The extent of supervisory responsibility would depend on the operational work of the area and factors such as work priorities, complexity of the work and the number of subordinate staff.

27.9 Band 7 - Resort Managers and Professionals

Positions at this level undertake various functions, under a wide range of conditions, to achieve a result in line with the corporate goals of the organisation. Management of a program or activity may be a feature of the work undertaken at this level.
Immediate subordinate positions may include staff in technical or professional structures, in which case supervision relates to administrative purposes only.
Positions at this level are found in a variety of operating environments and structural arrangements. The primary function may be:
Managing the operations of a discrete organisational element, program or activity; or
Supervising the operations of an organisational element; or
Accept responsibility for priorities and work practices, providing administrative support to a particular program, activity or administrative function; or
Providing subject matter expertise or policy advice, including professional advice, across a range of programs or activities undertaken by the organisation.
Positions at this level may undertake the preparation of papers; investigate and present information with recommendations for decision by more senior staff; draft responses to complex correspondence; undertake task of technical nature.
Undertake liaison and co-ordination within and across functions including representing the organisation at meetings, conferences and seminars; oversee and co-ordinate the work of other staff assisting with these tasks.
Work is usually performed under limited direction as to work priorities and the detailed conduct of the task. Tasks may require professional knowledge, and may involve some co-ordination within or across organisational functions.
Direction exercised over positions at this level includes, depending on the functional role of the position, the provision of advice, guidance and/or direction in relation to a project, detailed processing, or other work practices.
Independent action may be exercised within constraints set by senior management. Senior management may determine the operating guidelines, procedures or resource allocation.
Any decision taken or delegation exercised tends to be governed by the application of the organisation's rules, regulations or operating instructions or procedures. While such decisions may impact on the organisations operations and resources, they are usually limited to the specific work area involved.

Supervisory responsibilities would usually depend on the role of the position in the organisation. Staff at this level would be expected to set and achieve priorities, monitor workflow and/or manage staffing resources to meet objectives.

27.10 Band 8 - Senior Resort Managers

Positions at this level work under general direction usually manage and are responsible for the operations of an organisational element, undertake a management function or provide administrative or professional support to a particular program, activity or service to achieve a result in line with the corporate goals of the organisation.

In some circumstances the supervisor or subordinates may be, or include, staff in technical or professional structures. Immediate subordinate positions may include staff in technical or professional structures, in which case supervision is generally for administrative purpose only.

The work includes undertaking tasks related to the management or the administration of a program or activity, service delivery or corporate support functions, project work, policy development; and preparation or co-ordination of research papers. It includes provision of submission on policy, professional or program issues, or administrative matters and provision of advice including policy, administrative or professional advice.

Liaison with other elements of the organisation, other government agencies, State and local authorities or community organisations is usually a feature. It also includes the preparation, or overseeing the preparation of, correspondence and replies to parliamentary questions, ministerial representations and other briefing material; and representing the organisation at meetings, conferences or seminars.

Work is undertaken at this level with direction usually limited to strategic work priorities and the general conduct of the task. The tasks undertaken may be of a complex or specific nature encompassing a major area of the organisations operations.

Positions at this level may have independence of action including the use and allocation of resources within the constraints determined by the CEO.

Decisions taken or delegations exercised at this level may have major impact on the day to day operations of the work area. The impact of such decision to the organisations operations is likely to be limited to the work area or function in which the position is located.

Delegations exercised may, depending on the role and function of the position, involve making determinations, instigating another course of action, or reviewing previous decision.

Supervisory responsibilities may be an important function of a position at this level, but this can vary widely depending on factors such as work area, location, priorities, work load, operational deadlines and the availability of staff resources to assist.

This agreement also covers employees engaged to fulfil management responsibilities or technical specialists. The nature of the engagement is more outcome focused, rather than process driven. This clause shall apply to all appointments in Band 8 and at the discretion of the employer selected roles in Band 7.

This agreement recognises the need for the employer to achieve flexibility in the terms and conditions of members of the management team. To accommodate this "Agreement Variation" clause Schedule 2 is inserted which allows certain individual arrangements for the management team to operate to the exclusion of some specific terms of the Agreement.

Such arrangements must not on balance result in a reduction in the overall terms and conditions of the employees compared with the standard agreement entitlements.

—Supported Wage System

A.2 This schedule defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award.

A.3 In this schedule:

approved assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system

assessment instrument means the tool provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system

disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991* (Cth), as amended from time to time, or any successor to that scheme

relevant minimum wage means the minimum wage prescribed in this award for the class of work for which an employee is engaged

supported wage system (SWS) means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au

SWS wage assessment agreement means the document in the form required by the Department of Education, Employment and Workplace Relations that records the employee's productive capacity and agreed wage rate

A.4 Eligibility criteria

A.4.1 Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

A.4.2 This schedule does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their employment.

A.5 Supported wage rates

A.5.1 Employees to whom this schedule applies will be paid the applicable percentage of the relevant minimum wage according to the following schedule:

Assessed capacity (clause A.6)	Relevant minimum wage
%	%
10	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

A.5.2 Provided that the minimum amount payable must be not less than $69 per week.

A.5.3 Where an employee's assessed capacity is 10%, they must receive a high degree of assistance and support.

A.6 Assessment of capacity

A.6.1 For the purpose of establishing the percentage of the relevant minimum wage, the productive capacity of the employee will be assessed in accordance with the Supported Wage System by an approved assessor, having consulted the employer and employee and, if the employee so desires, a union which the employee is eligible to join.

A.6.2 All assessments made under this schedule must be documented in an SWS wage assessment agreement, and retained by the employer as a time and wages record in accordance with the Act.

A.7 Lodgement of SWS wage assessment agreement

A.7.1 All SWS wage assessment agreements under the conditions of this schedule, including the appropriate percentage of the relevant minimum wage to be paid to the employee, must be lodged by the employer with Fair Work Australia.

A.7.2 All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment. Where a union which has an interest in the award is not a party to the assessment, the assessment will be referred by Fair Work Australia to the union by certified mail and the agreement will take effect unless an objection is notified to Fair Work Australia within 10 working days.

A.8 Review of assessment

The assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review. The process of

review must be in accordance with the procedures for assessing capacity under the supported wage system.

A.9 Other terms and conditions of employment

Where an assessment has been made, the applicable percentage will apply to the relevant minimum wage only. Employees covered by the provisions of this schedule will be entitled to the same terms and conditions of employment as other workers covered by this award on a pro rata basis.

A.10 Workplace adjustment

An employer wishing to employ a person under the provisions of this schedule must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

A.11 Trial period

A.11.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this schedule for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

A.11.2 During that trial period the assessment of capacity will be undertaken and the percentage of the relevant minimum wage for a continuing employment relationship will be determined.

A.11.3 The minimum amount payable to the employee during the trial period must be no less than $100 per week.

A.11.4 Work trials should include induction or training as appropriate to the job being trialled.

A.11.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause A.6.

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.

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[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) Landes~~schi~~lehrer (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~~

"E"

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~~.

"F"

ALPINE RESORTS AWARD 2014 – AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION OUTLINE OF SUBMISSIONS

SUBSTANTIVE VARIATIONS

1 Introduction

1.1 This outline of submissions, in relation to the substantive variations sought 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 outline of submissions in relation to the substantive variations to the Exposure Draft that it wishes to press.

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

2 Equivalency table

2.1 The Association wishes to press its proposed variation to Schedule B of the Exposure Draft, due to the recent name change of certification levels by the Australian Professional Snowsports Instructors. Please see at annexure **A** of this submission a copy of a letter and equivalency table provided by the Australian Professional Snowsports Instructors.

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

2.3 The Association notes that it has had discussions with the Australian Workers' Union regarding this proposed variation. Both parties have indicated that a consent position is likely to be achieved.

2.4 Subject to a consent position being achieved, the Association anticipates that it will prepare and file a statement in support of this proposed variation.

3 Airfare reimbursement

3.1 The Association submits that the applicable consumer price index figure for the airfare reimbursement at clause D.3.1(b) of the Exposure Draft should amended so that the applicable consumer price index figure for the airfare allowance is the *"international holiday travel and accommodation sub-group"*.

3.2 The Association notes that the airfare reimbursement within the Exposure Draft is paid in respect of airfares from the Northern Hemisphere to Australia.

3.3 The airfare reimbursement is set out at clause 15.3(e) of the Exposure Draft, as follows:

Airfare reimbursement

(i) Snowsports Instructors, who are in Category A, B or C as set out in Schedule A, are entitled to an airfare reimbursement of up to $799.00 where they are:

- engaged overseas in the Northern Hemisphere in the preceding season as part of an exchange program or working as a full-time instructor for a full season at a snowsports school in the Northern Hemisphere approved by prior arrangement with the school director; or
- engaged overseas in the Northern Hemisphere in the preceding season and enter Australia as temporary non-residents.

(ii) In order to qualify for an airfare reimbursement the employee will be required to:

- prove that a minimum of eight weeks has been worked on a full-time basis at an approved snowsports school in the Northern Hemisphere; and
- produce the original airline ticket in order to prove that the expense has been incurred.

3.4 Subject to a consent position being achieved, the Association anticipates that it will prepare and file a statement in support of this proposed variation.

4 Seasonal employment

4.1 The Association refers to the matters in relation to the Award which are before the Full Bench considering alleged NES inconsistencies and, in particular, the finding of the Full Bench that there is an inconsistency between section 87 of the *Fair Work Act 2009* (Cth) and clause 11.5 of the Current Award.

4.2 The Association notes that the seasonal loading in clause 11.5 of the Current Award is a payment that is made in respect of annual leave, by way of a pre-payment of a payment that employees would inevitably receive upon the termination of their employment. The 8.33% seasonal loading within the Current Award is not paid in respect of any other benefit.

4.3 Against this background, the Association submits that if the Commission removes from the Exposure Draft the ability to pre-pay annual leave, allowing a seasonal employee to take annual leave, seasonal employees should be paid the minimum hourly rate applicable to their classification, with no seasonal loading.

4.4 Accordingly, the Association proposes the following variations to the Exposure Draft:

(a) The words "plus the loading in clause 7.5" are removed from clause 7.6.

(b) The "minimum seasonal hourly rate" column is deleted from clause 13.1 and the footnote is consequently removed.

(c) The "minimum seasonal hourly rate" column is deleted from clause 13.2 and the footnote is consequently removed.

(d) Clause C.1.4 is removed.

(e) Clause C.1.5 is removed.

(f) The "snowsports instructor seasonal hourly rate" column is deleted from clause C.2.1 and the footnote is consequently removed.

(g) The sewerage treatment plant allowance in clause 15.2 is amended to reflect any amendment to the definition of "standard rate" in Schedule H.

(h) The reference to the "standard rate" in clause D.1 is amended to reflect any amendment to the definition of "standard rate" in Schedule H.

(i) The definition of "standard rate" in Schedule H is amended to mean the minimum hourly rate for a Resort Worker Level 2 in clause 13.1.

4.5 These proposed variations are set out in detail at **Schedule 1** of this submission.

4.6 The Association anticipates that it will prepare and file a statement in support of these proposed variations.

4.7 The Association submits that if the proposed variations at 4.4(a) to 4.4(f) above are not effected, and the Commission removes from the Exposure Draft the pre-payment of annual leave, seasonal employees will receive compensation in respect of annual leave, by way of an increased minimum pay rate, in addition to the entitlement to annual leave and a payment in respect of any accrued (but untaken) annual leave upon the termination of their seasonal employment.

4.8 The Association refers to its previous submissions, correspondence to the Commission and comments during the conference before Commissioner Bissett, regarding this matter. The Association proposes that the de-loading of seasonal employment occurs between the 2015 and 2016 ski seasons, when the matters can be resolved with minimum disruption to employment contracts between the Alpine Resorts and its seasonal employees, noting a vast majority (80-90%, depending on the Alpine Resort) of seasonal employees are engaged during the ski season (generally between early June to early October, depending on the snow conditions).

5 Specially constituted Full-Bench

5.1 The Association submits that all claims in respect of the Exposure Draft, with the exception of the matters that are currently before the Full Bench considering Casual

and Part-Time Employment, should be dealt with by a separate and specific Full Bench.

5.2 The basis for this submission, in summary, is as follows:

(a) the Award is unique, in that it derives predominantly from the Ski Industry (State) Award, which was a consent award;

(b) the flexibilities in the Award, which do not appear in other modern awards;

(c) the unique nature of the snowsports industry;

(d) the significant costs incurred by the Alpine Resorts in order to operate alpine lifting facilities, including the significant capital and operational costs required to install and operate alpine lifts and snowmaking facilities;

(e) it would be efficient to have all matters concerning the Award dealt with by the same separate and special Full Bench, particularly given consequential amendments may also be required to be made; and

(f) it is likely that a separate and specific Full Bench will already be required to consider the coverage issues that have been raised in the Award, and such a Full Bench will have a full appreciation of the above matters.

6 Further matters

6.1 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 **B**, **C** and **D**.

6.2 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. 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) Landes~~schi~~lehrer (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~~

2. D.3.1(b) — Airfare reimbursement

Amend the table at clause D.3.1(b), in accordance with the amendments shown in mark up below:

Allowance	Applicable Consumer Price Index figure
Meal allowance	Take away and fast foods sub-group
Boot and equipment allowances	Clothing and footwear group
Airfare reimbursement	~~Domestic~~ International holiday travel and accommodation sub-group

3. 7.6 — Seasonal employees

Amend clause 7.6, in accordance with the amendments shown in mark up below:

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~~.

4. 13.1 — Alpine resort workers

Amend the table at clause 13.1, in accordance with the amendments shown in mark up below:

Classification	Minimum hourly rate $	~~Minimum seasonal hourly rate[1] $~~	Casual hourly rate $
Training	16.86	~~18.26~~	21.08
Resort Worker Level 1	17.36	~~18.80~~	21.70
Resort Worker Level 2	18.03	~~19.53~~	22.54
Resort Worker Level 3	18.64	~~20.19~~	23.30
Resort Worker Level 4	19.63	~~21.27~~	24.54
Resort Worker Level 5	20.26	~~21.95~~	25.33
Resort Worker Level 6	20.88	~~22.62~~	26.10
Resort Worker Level 7	21.43	~~23.22~~	26.79
~~[1]Minimum seasonal hourly rate is based on the minimum hourly rate and includes a loading of 8.33% of the minimum rate in accordance with clause 7.5.~~			

5. 13.2 — Snowsports instructors

Amend the table at clause 13.2, in accordance with the amendments shown in mark up below:

Classification	Minimum hourly rate $	~~Minimum seasonal hourly rate[1] $~~	Casual hourly rate $
Instructor Category A	26.86	~~29.10~~	33.58
Instructor Category B	24.15	~~26.16~~	30.19
Instructor Category C	21.47	~~23.26~~	26.84
Instructor Category D	18.77	~~20.33~~	23.46
Instructor Category E	17.87	~~19.36~~	22.34
~~[1]Minimum seasonal hourly rate is based on the minimum hourly rate and includes a loading of 8.33% of the minimum rate in accordance with clause 7.5.~~			

6. C.1.4 — Full-time and part-time seasonal employees—ordinary and penalty rates

Delete the table at clause C.1.4.

7. C.1.5 — Full-time and part-time seasonal employees—overtime rates

Delete the table at clause C.1.5.

8. C.2.1 — Full-time and part-time snowsports instructors

Amend the table at clause C.2.1, in accordance with the amendments shown in mark up below:

Classification	**Snowsports Instructor hourly rate**	~~**Snowsports Instructor Seasonal hourly rate1**~~
$	$	
Instructor Category A	26.86	~~29.10~~
Instructor Category B	24.15	~~26.16~~
Instructor Category C	21.47	~~23.26~~
Instructor Category D	18.77	~~20.33~~
Instructor Category E	17.87	~~19.36~~
~~1**Minimum seasonal hourly rate** is based on the minimum hourly rate and includes a loading of 8.33% of the minimum rate in accordance with clause 7.5~~		

9. 15.2(a) — Sewerage treatment plant allowance

Amend clause 15.2(a), in accordance with the amendments shown in mark up below:

Employees will be paid an allowance of **$8.**~~79~~11 for each shift they are engaged in work at a designated sewerage treatment plant.

10. D.1 — Wage related allowances

Amend clause D.1, in accordance with the amendments shown in mark up below:

The wage related allowances in clause 15.2 of this award are based on the standard rate as defined in Schedule H as the minimum ~~seasonal~~ hourly rate for a Resort Worker Level 2 ~~(seasonal)~~ in clause 13.1 = 18.03~~19.53~~

Allowance	**Clause**	**% of standard rate $18.03~~19.53~~**	**$ per shift**
Sewerage treatment plant allowance	15.2(a)	45.0	8.~~79~~11

11. Schedule H — Definitions

Amend schedule H, in accordance with the amendments shown in mark up below:

standard rate means the minimum ~~seasonal~~ hourly rate for a Resort Worker Level 2 ~~(seasonal)~~ in clause 13.1

"G"

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 1/12th 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