

**From:** Christopher Nowland

**Sent:** Wednesday, 21 December 2016 4:37 PM

**To:** AMOD

**Subject:** Australian Ski Area's Association - 4 Yearly Review of the Alpine Resorts Award 2010 - Matter number AM2014/198

Dear Registry Staff,

We confirm that we act for the Australian Ski Area's Association ("**Association**") in respect to the 4 yearly review of the Alpine Resorts Award 2010 (matter number AM2014/198).

On 23 November 2016 Vice President Hatcher issued directions that the Association file submissions and evidence with respect to

- the proposed changes to the coverage of the Award;
- the removal of the 8.33% loading for seasonal employees;
- the inclusion of annual leave loading for non-casual employees; and
- the application of overtime penalty rates provisions for casual employees.

Please find **attached** the Association's submissions with respect to these issues. These submissions have a number of annexures which will need to be sent over a number of emails due to the size of the files.

Yours faithfully,

Christopher Nowland

## 4 YEARLY REVIEW OF MODERN AWARDS

### ALPINE RESORTS AWARD 2014 – AM2014/198

#### OUTLINE OF SUBMISSIONS BY THE AUSTRALIAN SKI AREAS ASSOCIATION

##### 1 Introduction

- 1.1 These submissions are made by the Australian Ski Areas Association (“**Association**”) with respect to the Alpine Resorts Award 2010 (“**Award**”), pursuant to directions issued by Vice President Hatcher on 23 November 2016, as part of the Fair Work Commission’s (“**Commission**”) 4 yearly review of modern awards.
- 1.2 The Association represents the operators of all ski lifts at all eleven (11) alpine resorts in Australia (“**Alpine Lifting Companies**”) whose businesses form the core of the Australian Alpine and Snowsports Industry.
- 1.3 The Alpine Lifting Companies have coverage under the Award.
- 1.4 The Association sets out below its submissions in relation to the following issues:
  - (a) the proposed changes to the coverage of the Award;
  - (b) the removal of the 8.33% loading for seasonal employees;
  - (c) the inclusion of annual leave loading for non-casual employees; and
  - (d) the application of overtime penalty rates provisions for casual employees.

##### 2 Consent position between the Association and the Australian Workers Union

- 2.1 On 16 October 2015, the Association and the Australian Workers Union (“**AWU**”) entered into a consent position with respect to all outstanding issues regarding the 4 yearly review of the Award, except those concerning certain aspects of coverage and higher duties (“**Consent Position**”). A copy of this Consent Position has been annexed and marked “**A**”.
- 2.2 The Association’s submissions regarding the Consent Position were provided to the chambers of Deputy President Bull on 21 October 2015. Deputy President Bull subsequently issued “A Report to the Full Bench”, dated 7 December 2015, summarising the Consent Position reached between the parties. Annexed and marked “**B**” is a copy of that report.
- 2.3 The Consent Position reached was conditional on the approval of a package of variations and included, inter alia, the following:
  - (a) the Association and the AWU agree to align against the coverage submissions that have been made by the private entities;

- (b) the Association agrees to the inclusion of annual leave loading in the Award, as proposed by the AWU (with annual leave loading also being payable on the payment of accrued annual leave upon termination); and
  - (c) the Association agrees to the AWU's proposed variation entitling casual employees, other than Snowsports Instructors, to a penalty rate for overtime hours worked. The overtime penalty rates will be inclusive of the 25% casual loading. Overtime will only be payable in circumstances of work in excess of ten hours per day or an average of 38 hours per week over a maximum work cycle of four weeks.
- 2.4 The Consent Position has been negotiated pragmatically between the Association and the AWU as a total package. Both parties have made a number of concessions in the interests providing mutual benefits for both employers and employees covered by the Award.
- 2.5 The Association recognises that the Commission is not bound by the Consent Position but submits that it should be given significant weight in these proceedings.
- 2.6 As the Consent Position has been negotiated as a total package, the Association opposes any decision of the Commission whereby only some, or none, of the above proposed variations are made to the Award. The Association and AWUs position on the issues agreed between the parties may change if the 'whole package of variations' is not given effect.

### **3 Coverage of the Award**

- 3.1 As per clause 4.1 of the Award, the coverage of the Award extends to all employers who operate an "Alpine Resort". "Alpine resort" is in turn defined in clause 3 of the Award as "*an establishment whose business, among other things, includes alpine lifting*".
- 3.2 During the 4 yearly review process a number of parties have made submissions the substance of which is that the coverage of the Award should be varied so that it applies to employers operating within alpine resorts, and not just to those operating alpine lifting facilities. These parties include:
- (a) the Mount Hotham Chamber of Commerce;
  - (b) the Falls Creek Chamber of Commerce;
  - (c) the Thredbo Chamber of Commerce;
  - (d) the Perisher Resorts Chamber of Commerce;
  - (e) the Australian Business Industrial and New South Wales Business Chamber (jointly ABI); and
  - (f) the Mount Hotham Alpine Resort Management Board.

- 3.3 Several of these parties have filed draft determinations with the Commission that seek to expand the coverage of the Award. These draft determinations are annexed and marked “C”, “D” and “E”.
- 3.4 The Association opposes any variation to the coverage of the Award and makes its submission of the following basis:
- (a) the unique nature of the snowsports industry, in particular its high level of variability based upon snow and weather, which causes significant variability in trading conditions;
  - (b) the resultant historical flexibilities in the Award, which do not appear in other modern awards but which appeared in awards that previously covered the Alpine Lifting Companies;
  - (c) the significant costs incurred by the Alpine Lifting Companies in order to operate alpine lifting facilities, including the significant capital and operational costs required to install and operate alpine lifts and snowmaking facilities and groom the snow in order for it to be safe for the public, further reinforcing the need for workforce and award flexibility
  - (d) the fact that the coverage of the Award was considered in great detail by a seven-member bench of the then Australian Industrial Relations Commission (“AIRC”) during the award modernisation process;
  - (e) in determining that the scope of the Award be limited to employers who are Alpine Lifting Companies and operate either an alpine resort or within an alpine resort, the AIRC deliberately excluded from the Award employers who do not carry out alpine lifting activities; and
  - (f) modern awards are industry based, rather than geographically based.

#### **4 The unique nature of the snowsports industry**

- 4.1 The Australian snowsports industry has always been, and continues to be, unique in its nature. The factors that underpin this unique nature are outlined in detail in paragraphs 3.1 to 3.26 of the statement of Gavin Girling which has been filed in matter AM2014/198 on behalf of the Association, dated 21 December 2016 (“**Statement of Mr Girling**”). By way of summary these factors include:
- (a) the snowsports industry is highly seasonal in nature - with the vast majority of employees being engaged only during the ski (winter) season;
  - (b) the ski season only runs for a short period of time, typically from early June to early October, depending on the snow conditions;
  - (c) the snowsports industry is weather dependent and highly vulnerable to changing climatic conditions;
  - (d) the snowsports industry experiences a substantial peak in business during the weekends;

- (e) the employees of Alpine Lifting Companies fall within a large range of occupational categories and perform highly specialised work in extreme climatic conditions; and
- (f) work is often undertaken by snowsports enthusiasts who wish to have the flexibility to work on weekends and ski on weekdays.

4.2 In addition to the points made above, a key feature that makes the Alpine Lifting Companies unique is their operation of and reliance upon alpine lifts and snow making facilities, which require the expenditure of significant capital to install, operate and maintain. This was appropriately summarised in paragraph 2.2 of the Association's written submissions to the AIRC on 7 July 2009 in relation to the award modernisation process ("**July 2009 Submissions**"):

Alpine lifting is the key factor that makes Alpine Resorts unique from other businesses operating in alpine areas. It is also a key factor that determines the work levels available for employees. The creation of alpine lifting facilities requires major capital investment, whilst their operation and maintenance in snow conditions requires a unique range of classifications of work. In poor snow conditions, all work across the resorts needs to be able to be flexibly allocated to accommodate reduced work levels.

4.3 Annexed and marked "**F**" is a copy of the July 2009 Submissions.

## **5 History of the Award**

5.1 To cater for the unique nature of the snowsports industry, it has historically been recognised that the award applying to the snowsports industry and Alpine Lifting Companies needs to have tailored terms and conditions that ensure a number of flexibilities in the employment arrangement which are in the interests of both employers and employees.

5.2 These tailored terms and conditions (including, for example, clauses relating to the payment of penalty rates, any five in seven work arrangements and specific provisions for seasonal employees) were negotiated over a number of years against this unique nature, and are reflected in the terms of the pre-modernisation snowsports industry awards, which the Association submits properly form the basis of the Award:

- (a) *Victorian Alpine Resorts (Australian Workers Union) Award 2001*;
- (b) *NSW Ski Industry (State) Award*;
- (c) *NSW Ski Instructors (State) Award*; and
- (d) *NSW Ski Tube (State) Award*.

5.3 A detailed summary of the industrial regulation of the snowsports industry in New South Wales and Victoria prior to 2010 is set out at paragraphs 4.1 to 5.16 of the Statement of Mr Girling, paragraphs 3.3 to 3.21 of the Association's written submissions to the AIRC on 6 March 2009 ("**6 March 2009 Submissions**"), and paragraphs 2.4 to 2.21 of the Association's written submissions to the AIRC dated 8

April 2009 (“**8 April 2009 Submissions**”). The Association relies upon these submissions and copies are annexed and marked “**G**” and “**H**”.

- 5.4 These industrial instruments included a broad range of classifications, including for roles that may have otherwise fallen within other occupations or industries, such as shop or retail employees; clerical employees; mechanical employees; and transport industry employees. These broad classifications, which are otherwise uncommon in other awards, further evidences the unique nature of the snowsports industry and its industrial regulation.
- 5.5 The rationale behind the inclusion of a broad range of classifications was to enable the Alpine Lifting Companies to utilise their employees across their resorts effectively and commercially, especially during times of poor snow and weather conditions.
- 5.6 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 Lifting Companies, as the vast majority of their revenue is generated from the operation of their ski lifting activities. The vast difference in revenue generated by the Alpine Lifting Companies between alpine lifting facilities and non-alpine lifting related activities is detailed in paragraph 3.19 of the statement of Mr Girling. It is clear from these figures that the Alpine Lifting Companies continue to rely on their alpine lifting facilities for the vast majority of their revenue.
- 5.7 While all of the Alpine Lifting Companies operate lifting facilities as well as ancillary businesses such as hotels, shops and restaurants, their major source of revenue is derived from alpine lifting.
- 5.8 Moreover, adverse weather has a disproportionately negative impact on the financial performance of Alpine Lifting Companies when compared with businesses operating within alpine resorts. This disproportionate impact was summarised in the Associations oral submissions in proceedings on 13 June 2014 in relation to an application to the Fair Work Commission to vary the Award (matter number AM2014/189)

[PN49] ... 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).

- 5.9 A copy of the 13 June 2014 Transcript has been annexed and marked “**T**” (“**13 June 2014 Transcript**”).
- 5.10 Accordingly, it has historically been recognised that the Alpine Lifting Companies must have the ability to be flexible with their workforce during poor snow and weather conditions to minimise the devastating financial impact on the resorts in poor weather conditions. This flexibility has been achieved by the Alpine Lifting Companies

transferring their employees between the different businesses operated by the Alpine Lifting Companies. For example, during poor snow or weather conditions when the ski slopes are partially opened or temporarily closed, the Alpine Lifting Companies have traditionally transferred employees working on alpine lifting and the ski slopes to perform roles in their restaurants, hotels or shops, with a view to mitigating the extensive adverse revenue impact of adverse weather conditions.

- 5.11 The considerations relevant to the uniqueness of the snowsports industry were highly relevant to the award modernisation process and the ultimate drafting of the coverage clause of the Award. Those considerations continue to remain relevant today.

## **6 Coverage considered during the Award modernisation process**

- 6.1 Throughout the entire award modernisation process the definition of an Alpine Resort was limited to companies involved in alpine lifting in all drafts of the Award. Annexed and marked “**J**”, “**K**”, “**L**”, are draft versions of the Award released by the AIRC on 22 May 2009, 4 September 2009 and 16 December 2009 respectively.
- 6.2 The issue of distinguishing between Alpine Lifting Companies and businesses that did not operate alpine lifting facilities was the subject of extensive written and oral debate during the award modernisation process. A number of parties involved in the debate prepared written submissions relating to the coverage of the Award. These submissions are annexed and marked “**M**”, “**N**”, “**O**”, “**P**”, “**Q**”, “**R**”, “**S**”, “**T**”, “**U**”, “**V**”, “**W**”, “**X**”, “**Y**”.
- 6.3 Of particular note, the AWU made a number of submissions that the coverage of the Award should be drafted so as to extend to alpine resort management boards (“**ARMBs**”). The AWUs attempts to expand coverage to ARMBs during the award modernisation process is summarised in paragraphs 8.1 to 8.16 of the Statement of Mr Girling.
- 6.4 In 2009 a lengthy hearing was held on the creation of the Award. During this hearing the Association made oral submissions relevant to the issue of the need to limit the scope of the Award to Alpine Lifting Companies only. Annexed and marked “**Z**” is a transcript of the proceedings on 30 June 2009 in relation to the award modernisation process with respect to the tourism industry (“**30 June 2009 Transcript**”).
- 6.5 The uniqueness of the snowsports industry and the relevance of implementing unique terms and conditions in the Award are referred to in paragraphs 3616 to 3619 of the 30 June 2009 Transcript. Furthermore, a summary of the historical aspects relating to coverage issues is referred to in paragraphs 3621 to 3625 of the 30 June 2009 Transcript.
- 6.6 Taking into account the debate on this issue of coverage and the vast majority of materials filed in relation to this issue, the Award as finalised by the AIRC included a clear and unambiguous coverage clause which limited the coverage of the Award to the Alpine Lifting Companies only.
- 6.7 The drafting of the coverage clause therefore deliberately excluded businesses that are not Alpine Lifting Companies and do not operate alpine lifting facilities.

- 6.8 We note that in the *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788, the Full Bench noted at [27] that “previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so”. The Association submits that there are no cogent reasons to overturn the clear decision of the AIRC that led to the creation of the Award.

## **7 Attempts to vary coverage of the Award**

- 7.1 During the 2013 ski season the Fair Work Ombudsman conducted an audit of businesses operating in alpine resorts in New South Wales and Victoria. As a result of that audit the Fair Work Ombudsman discovered that a number of employers operating in alpine resorts were applying the Award despite not operating alpine lifting facilities. Accordingly, many of these businesses were found to be underpaying employees and were ordered to make back payments. See paragraph 9.1 to 9.3 of the Statement of Mr Girling.
- 7.2 Following this audit, on 21 May 2014, an application was made to the Fair Work Commission by DPSI General Pty Ltd and Falls Creek Oversnow Pty Ltd to expand the coverage of the Award from the Alpine Lifting Companies to all businesses operating in alpine resorts (matter number AM2014/189).
- 7.3 That application was withdrawn by Falls Creek Oversnow Pty Ltd and DPSI General Pty Ltd following substantial written and oral argument in the proceedings. In support of the Associations current objection to any expansion of the coverage of the Award, the Association relies on its written submissions dated 24 June 2014 as well its oral submissions made in a hearing on 13 June 2014. These submissions are annexed and marked “AA” and “BB”.

## **8 Submissions to date in the 4 yearly review of the Award**

- 8.1 A number of interested parties have made submissions concerning the coverage of the Award during the 4 yearly review process. The Association does not attempt to respond to these submissions at this time, and will await its opportunity to reply as per the Commissions directions made on 23 November 2016.

## **9 Removal of the 8.33% loading for seasonal employees**

- 9.1 The Award currently 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, as follows:

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

- 9.2 Seasonal loading was originally included in the Award in recognition of the fact that the ski season is a short, busy and intense trading period that is generally not conducive to seasonal employees taking annual leave.
- 9.3 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 (“NES”) within the *Fair Work Act 2009* (Cth).



- 9.4 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”.
- 9.5 The Association notes that seasonal employees are in the vast majority of cases engaged for the ski season, which runs approximately 10 to 16 weeks, from early June to early October, depending on the snow conditions (see paragraph 3.10 of the Statement of Mr Girling).
- 9.6 On 23 December 2014, the Full Bench of the Commission handed down the decision in *4 yearly review of modern awards* [2014] FWCFB 9412 and held at paragraph 85 that the payment of seasonal loading in place of annual leave under the Award was inconsistent with the NES (“**December Decision**”). A copy of this decision has been annexed and marked “CC”.
- 9.7 The Commission subsequently published a draft determination for the removal of seasonal loading (copy annexed and marked “DD”), and on 13 February 2015 the Association filed written submissions with respect to this draft determination disputing any alleged inconsistency in the NES Bench (“**February Submission**”). The Association relies upon these submissions and a copy has been annexed and marked “EE”.
- 9.8 In its February Submission, the Association submitted that apart from there being no technical inconsistency between seasonal loading and section 87(1) of the *Fair Work Act 2009* (Cth) (“**Fair Work Act**”), a loading on the applicable hourly rate of seasonal employees in place of the entitlement to annual leave is more beneficial to employees under the Award. This is for the following reasons:
- (a) the 8.33% seasonal loading is financially superior to a payment for annual leave that a seasonal employee would accrue progressively during their seasonal employment and then be paid as a lump sum upon termination of their employment, as a lump sum payment will be taxed at that employee’s marginal tax rate, rather than as income across the employment term, which may fall below the tax free threshold;
  - (b) overtime is paid on the seasonally loaded rate;
  - (c) seasonal employees have more cash in hand throughout the season for which they are employed; and
  - (d) the 8.33% loading is more generous and financially beneficial to seasonal employees than the accrual of four weeks leave. Four weeks leave accrued across 52 weeks of the year is a percentage application of 7.69%, whereas the 8.33% loading is made on the assumption that four weeks is effectively an extra month of pay, hence a 1/12<sup>th</sup> increase.
- 9.9 The Association further noted that for Alpine Lifting Companies, 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. This will be detrimental to the Alpine Lifting Companies ability to attract experienced staff in a competitive domestic and international market.

- 9.10 The Commission was not persuaded by the Association's submissions and on 8 May 2015 ("**May Decision**") the Full Bench handed down *4 yearly review of modern awards—Alleged NES Inconsistencies* [2015] FWCFB 3023 in which it upheld the December Decision. A copy of this decision has been annexed and marked "**FF**". The Association was inclined to pursue the matter further in the Federal Court but ultimately acquiesced to the Commission's decision.
- 9.11 The Association filed a draft determination for the removal of seasonal loading with the Commission, which is outlined in the schedule to the Consent Position.

#### **Inclusion of annual leave loading for non-casual employees**

- 9.12 The inclusion of annual leave loading in the Award was initially raised by the AWU in a submission dated 28 January 2015 in matter number AM2014/198. The Association replied to those submissions on 4 March 2015. The AWU filed submissions in respect of the same claim, annual leave loading, on 15 July 2015 ("**AWU July 2015 Submission**"), to which the Association again responded on 21 August 2015. Copies of these submissions are annexed and marked "**GG**", "**HH**", "**II**" and "**JJ**".
- 9.13 The Association initially objected to the inclusion of annual leave loading in the Award on the grounds that it would be, inter alia, a "bonus" or "extraneous payment" in circumstances where employees already receive significant loadings and allowances.
- 9.14 However, following the Commission's decision to remove seasonal loading from the Award, the Association reversed its position with respect to annual leave loading as it became clear that employees of the Alpine Lifting Companies would be worse off financially under the Commission's new proposed scheme. It was within this context that the Association entered into an agreement with the AWU as part of the Consent Position that the Association would support the inclusion of annual leave loading in the Award (being payable on the payment of accrued annual leave upon termination) to compensate for the loss of seasonal loading.
- 9.15 The Association relies on the AWUs draft determination with respect to the inclusion of annual leave loading, which is attachment "AWU 1" to the AWU July 2015 Submission.
- 9.16 The Association made oral submissions concerning the present necessity for annual leave loading in the Award during a conference before Vice President Hatcher and Deputy President Bull on 20 June 2016. The need for annual leave loading was appropriately summarised by the Association at paragraph PN233 of the transcript of the 20 June 2016 conference, as follows:

As part of the paring back for the NES, [seasonal] loading has been taken out, the 8.33 per cent, and that is quite a significant loss to employees, so that they will now get a payment at the end of the season which is significantly less than what they were getting along the way through, and to try and redress that so that people didn't actually lose out, we have agreed to annual leave loading on termination, so that even though people still won't take annual leave, if they get their one-thirteenth plus 17.5 per cent, it actually comes to about 9 per cent rather than the 8.33 per cent we were previously paying, so unless people are doing a lot of overtime, they are

actually better off under this new system, so that was a concession we made as part of the package to try and overcome the loss of the seasonal employment, and we acknowledge it is one of the few awards that don't have annual leave loading because of that anomalous history.

- 9.17 Annexed and marked “**KK**” is a transcript of the proceedings on 20 June 2016 (“**20 June 2016 Transcript**”).
- 9.18 A key component of the proposed variation to include annual leave loading in the Award is that the loading is to be paid out on termination. The Association submits that this is necessary to give effect to the purpose of the inclusion of annual leave loading, namely, to alleviate the financial disadvantage seasonal employees will suffer in circumstances where seasonal loading is no longer paid.
- 9.19 With respect to the issue of whether it is appropriate for the Commission to insert a clause in the Award providing for the payment of annual leave loading on termination, the Association refers to the recent decision of *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining And Energy Union* [2015] FCAFC 100. A copy of this decision has been annexed and marked “**LL**”. In that decision, the Full Bench of the Federal Court found that where a modern award provides for the payment of annual leave loading, then it should be paid out on termination in accordance with section 90(2) of the *Fair Work Act 2009* (Cth).
- 9.20 In addition to the practical necessity for the inclusion of annual leave loading in the Award, the Association submits that the inclusion of annual leave loading is not inconsistent with the historical treatment of annual leave loading generally in modern awards. The Award is anomalous in that it is one of only nine modern awards that does not contain provisions dealing with annual leave loading. This anomaly was highlighted in attachment “AWU 2” to the AWU July 2015 Submission, which sets out the treatment of annual leave loading in all modern awards.
- 9.21 The AWU summarised the appropriateness of the Award conforming with annual leave loading national standards in paragraphs 14 to 21 of its July 2015 Submission, as follows:
14. Predecessors to the Commission stated back in 1974 that “a new standard has emerged, namely, a 17 ½ per cent loading”<sup>7</sup> and then in 1975 referred to annual leave loading as “a standard which is accepted by and applied to the community generally” (*Re Pastoral Industry Award*, 1965 162 C.A.R. 621).
  15. These statements arose from arbitrated decisions involving a merit assessment of the relevant claim.
  16. We respectfully agree with the statement of Vice President Watson during the Modern Award Review 2012 that: “The absence of an entitlement to annual leave loading in these awards is unexplained and in my view unfair and unwarranted” (*Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [220])
  17. The fact that annual leave loading has not been included in the Award despite it being identified as a standard condition in Australian industrial relations 40 years ago warrants immediate attention from the Commission.

18. We also note a 4 Yearly Review Full Bench recently stated: “Greater consistency in the provisions governing the taking of annual leave will make the safety net simpler and easier to understand” (*4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [168]).

19. We accept that statement may not have necessarily been intended to extend to the payment of annual leave.

20. However, the consistency of the safety net will clearly be enhanced if annual leave loading is inserted into the few remaining modern awards which do not contain this entitlement.

## **10 The inclusion of overtime penalty rates provisions for casual employees**

- 10.1 The inclusion of overtime penalties for casual employees in the Award was initially raised during the 4 yearly review process by the AWU in submissions dated 25 November 2014 in matter number AM2014/198. A copy of this submissions has been annexed and marked “**MM**”.
- 10.2 As with annual leave loading, the Association initially resisted the inclusion of penalty rates for casual employees in the Award. However, the Association reconsidered its position on the issue as a trade-off for a number of benefits contained in the Consent Position.
- 10.3 As part of the Consent Position, the Association has agreed to the application of overtime penalty rates to casual employees, except snowsport instructors, on the basis that the penalty rates will be inclusive of the casual loading and will be applicable only for work in excess of 10 hours per day or 38 hours per week over a maximum work cycle of 4 weeks.
- 10.4 The Association relies on the AWUs draft determination with respect to the inclusion of overtime penalty rates, which was filed by the AWU on 17 July 2015 in the Casual Bench (matter number AM2014/197). A copy of this draft determination is annexed and marked “**NN**”.
- 10.5 In furtherance of this agreement, on 22 February 2016 the Association made submissions to the Part Time and Casual Bench (matters AM2014/196 and AM2014/197) with respect to the inclusion of casual overtime provisions in the Award. The Association relies upon those submissions and they have been annexed and marked “**OO**”.
- 10.6 Despite extensive submissions to the Part Time and Casual Bench from numerous interested parties, the Commission is yet to express a final opinion on the issue of casual overtime as part of the 4 yearly review.
- 10.7 The Association submits that irrespective of the outcome of proceedings in the Casual Bench, the entitlement to casual overtime penalties in the Award should be viewed contextually as part of a pragmatic package of terms and conditions specific to the unique nature of the snowsports industry.

## **11 The modern award objectives**

- 11.1 The Commission's task when considering the various competing interests outlined in the modern award objectives is to ensure that the modern awards "*provide a fair and relevant minimum safety net of terms and conditions*" (section 134(1) of the Fair Work Act).
- 11.2 The Association submits that the variations sought in the Consent Position satisfy this requirement by ensuring a pragmatic and mutually beneficial package of benefits for both employers and employees covered by the Award.

### ***Section 134(1)(a) - Relative living standards and the needs of the low paid***

- 11.3 Alpine Lifting Companies are characterised by a significant degree of seasonal and casual employment. Many of their employees are award-reliant.
- 11.4 Unless the Commission approves the totality of the variations sought in the Consent Position, the removal of seasonal loading from the Award will financially disadvantage award-reliant seasonal employees under the Award.
- 11.5 The Association notes that a seven-member panel of the AIRC 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 *Fair Work Act 2009* (Cth).
- 11.6 Accordingly, the Commission should rectify this issue and ensure that award-reliant seasonal employees under the Award receive the minimum rate of pay intended by the parties and the AIRC during the award modernisation process.
- 11.7 The Commission also has the opportunity to approve a package of variations that will provide additional benefits to casual employees through the inclusion of overtime penalty rates in the Award. Given the vast majority of low paid employees under the Award are casual employees, the Consent Position satisfies this modern award objective.

### ***Section 134(1)(b) – The need to encourage collective bargaining***

- 11.8 The Association submits that the proposed variations in the Consent Position do not interfere with or harm this objective.

### ***Section 134(c) – The need to promote social inclusion through increased workforce participation***

- 11.9 The Association submits that the proposed variations in the Consent Position do not interfere with or harm this objective.

### ***Section 134(d) – The need to promote flexible modern work practices and the efficient and productive performance of work***

- 11.10 The Association submits that the proposed variations in the Consent Position do not interfere with or harm this objective.

***Section 134(da) The need to provide additional remuneration for employees working overtime; employees working unsocial, irregular or unpredictable hours; employees working on weekends or public holidays; or employees working shifts***

- 11.11 The modern award objectives in section 134(da) were introduced by the Fair Work Amendment Act 2013 (“**Amendment Act**”) and represent a substantial shift in the legislative attitude towards overtime provisions. The Commission is now instructed to pay particular attention to the question as to whether overtime ought to be incorporated into the “fair and relevant minimum safety net of terms and conditions” of a modern award.
- 11.12 The purpose of this amendment is made clear in the Explanatory Memorandum to the Amendment Act, which provides as follows:

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

- 11.13 Casual employees make up a significant percentage of total employees of Alpine Lifting Companies. Accordingly, the application of overtime penalty rates for casual employees will improve the terms and conditions of a significant percentage of employees under the Award.

***Section 134(e) – The principle of equal remuneration for work of equal or comparable value***

- 11.14 The Association submits that the proposed variations in the Consent Position do not interfere with or harm this objective.

***Section 134(f) – The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden***

- 11.15 The Association submits that there will be no adverse impact on productivity and/or employment costs should the Commission approve the substantive variations sought in the Consent Position.
- 11.16 The removal of seasonal loading from the Award naturally reduces direct wage costs for the Associations members but, as detailed above, the Association has agreed to the inclusion of annual leave loading in the Award to compensate for any shortfall in employee remuneration. When this 17.5% leave loading is paid out on termination the employee will in effect be receiving around a 9% total loading over the season rather than the 8.33% loading they currently receive under the Award.
- 11.17 The Association refers to paragraphs 54 and 55 of the AWU July 2015 Submission in which the AWU has broken down this expected improvement in the loading in greater detail. As per the AWUs figures, the cost of annual leave loading to the Association’s members will be minimal.
- 11.18 Furthermore, while a significant number of employees under the Award are engaged on a casual basis, the vast majority do not work overtime throughout the season to a substantial degree. As such, the Association submits that the inclusion of overtime

penalties for casual employees will not have a prohibitive impact on employment costs for Alpine Lifting Companies.

***Section 134(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards***

11.19 As the vast majority of modern awards include provisions for annual leave loading, the Association submits that its inclusion in the Award would contribute to a more consistent and simple modern award system in line with general practices and community standards across the Australian industrial relations landscape.

11.20 As noted by the AWU in their July 2015 Submission (see paragraph 9.20 above):

The 4 Yearly Review Full Bench recently stated: “Greater consistency in the provisions governing the taking of annual leave will make the safety net simpler and easier to understand” (*4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [168]).

***Section 134(h) – The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy***

11.21 The Association refers to paragraphs 3.22 to 3.23 of the Statement of Mr Girling in which the significant contribution that alpine resorts have on the NSW and Victorian economies is outlined in detail.

11.22 As can be seen from this evidence, in 2014 the alpine resorts had a \$1.248 billion impact on the state economy in NSW, and a \$668 million impact on the state economy in Victoria. Combined this represents a \$1,916 billion contribution to the gross domestic product of Australia.

11.23 Furthermore, in 2014, total winter season employment generated by alpine resorts (in full-time equivalent terms) in NSW was 10,600 employees, and in Victoria was 5,967 employees.

11.24 The removal of seasonal loading without the corresponding inclusion of annual leave loading in the Award would have a detrimental impact on the ability of the Associations members to recruit seasonal employees in a competitive domestic and international market.

**Harmers Workplace Lawyers**

**21 December 2016**

## Australian Ski Area's Association

### ANNEXURES

*Alpine Resorts Award 2010*

AM2014/198

AM2016/30

#### Annexures to Submission

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#### Witness statement of Gavin Girling

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