

Our ref: MDH:DHB:CFN:20141371

Please reply to: Sydney Office

8 March 2018

Vice President Hatcher  
Fair Work Commission  
11 Exhibition Street  
MELBOURNE VIC 3000

**Email to: [chambers.hatcher.vp@fwc.gov.au](mailto:chambers.hatcher.vp@fwc.gov.au)**

Dear Vice President Hatcher

## **AM2016/30 – ALPINE RESORTS AWARD 2010: CLARIFICATION REQUEST**

### **1 Relevant background**

1.1 During the recent Full Bench hearing in relation to the Four Yearly Review of the *Alpine Resorts Award 2010* (“**Award**”), the Fair Work Commission (“**Commission**”) was asked to determine two tranches of issues:

- (a) whether coverage of the Award should be expanded; and
- (b) whether the Award should be varied consistent with the consent position (“**Consent Position**”) reached between the Australian Ski Areas Association (“**ASAA**”) and the Australian Workers Union (“**AWU**”) to:
  - (i) remove seasonal loading;
  - (ii) include annual leave loading; and
  - (iii) include overtime penalties for casual employees, which would be inclusive of the casual loading.

- 1.2 On 30 October 2017, being the first day of the Full Bench hearing, the ASAA requested the Commission rule on the variations sought in the Consent Position as a matter of urgency, notwithstanding that it may reserve on the question of coverage<sup>1</sup>.
- 1.3 To facilitate the ASAA's request, the ASAA was asked to file a consolidated Draft Determination giving effect to all the necessary variations sought by the ASAA and the AWU<sup>2</sup>. Accordingly, on 29 November 2017, the ASAA lodged its consolidated Draft Determination with the Commission reflecting the variations sought in accordance with the Consent Position.
- 1.4 However, on 8 December 2017, the AWU filed submissions in response to the ASAA's consolidated Draft Determination and sought – for the first time and contrary to the Consent Position – that the casual loading be paid *in addition* to overtime rates for casual employees<sup>3</sup>.
- 1.5 On 13 December 2017, the ASAA filed submissions in reply objecting to the AWU's claim, and requested the Commission uphold the terms of the Consent Position, namely that “*the overtime penalty rates would be **inclusive of the 25% casual loading***” (emphasis added)<sup>4</sup>.
- 1.6 On 22 December 2017, the Commission made a determination (“**Determination**”) varying the Award. The Determination was consistent with the substantive variations sought in the Consent Position (referred to in paragraph 1(b) above), however, the Commission did not expressly confirm whether casual overtime rates should be calculated so as to include or exclude the casual loading.
- 1.7 The ASAA understood that, notwithstanding the making of the Determination, the Commission would publish reasons for its decision in respect of the Consent Position variations, including the issue of the calculation of casual overtime rates, in due course. In the meantime it has, however, recently come to the attention of the ASAA that the Fair Work Ombudsman's online “Pay Guide” and “Pay Calculator” are calculating casual overtime rates in a manner which is contrary to the Consent Position. Specifically, these tools suggest casuals are entitled to receive *both* the casual loading and the applicable overtime rate simultaneously.
- 1.8 The ASAA respectfully requests the Commission urgently resolve the present uncertainty regarding the calculation of overtime rates for casual employees under the Award by bringing forward its decision on this specific issue. This clarification is essential for the ASAA's members, the AWU, and casual employees who are – or who soon will be – covered by the Award because:
  - (a) the ASAA's members currently engage casual employees who are affected by the Fair Work Commission's decision;
  - (b) the ASAA's members are currently recruiting for the 2018 winter snow-season;

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<sup>1</sup> Transcript of Proceedings 30 October 2017, PN141 to PN142.

<sup>2</sup> Transcript of Proceedings 31 October 2017, PN1892 to PN142.

<sup>3</sup> Submissions of the Australian Workers Union, dated 8 December 2017, [9].

<sup>4</sup> Submissions of the Australian Ski Areas Association dated 13 December 2017, [2].

- (c) the ASAA's members are attempting to finalise their budgets for the 2018 winter snow-season;
- (d) the ASAA's members are currently planning rosters and determining the final composition of their respective workforces; and
- (e) employees and employers will be relying on the Fair Work Ombudsman's online tools, and could thereby find themselves in breach of the Award.

## 2 Casual overtime rates considered in the Casual Bench

2.1 To avoid any doubt, it is the ASAA's position (as set out in its written submissions dated 21 December 2016 and 13 December 2017) that the casual loading should *not* be paid in addition to overtime penalty rates.

2.2 This issue of the interaction between casual loadings and overtime rates was recently considered by the Casual Bench as part of the Four Yearly Review proceedings in relation to the *Hospitality Industry (General) Award 2010*, *Registered and Licensed Clubs Award 2010*, and the *Restaurant Industry Award 2010*. In decision [2017] FWCFB 6181, the Commission ultimately rejected United Voice's attempts to vary its original position and have the casual loading paid in addition to overtime penalties. The relevant paragraph of that decision is as follows (emphasis added):

*[3] The main issue in contention concerned whether the overtime penalty rates to be introduced for casual employees in each award should be payable in addition to the casual loading. United Voice, in its draft determination, sought that the casual loading should be payable in addition, but the various employer interests took the position that United Voice had initially applied, and run its case on the basis that, overtime penalty rates would be inclusive of the casual loading. We accept, as ultimately did United Voice, that our decision had proceeded on the basis of the application and case advanced by United Voice. Accordingly, the variation to be made to the awards to extend overtime penalty rates to casual employees will provide that those penalty rates will be payable inclusive of the casual loading. We emphasise that this does not represent any decision of principle about this issue, which may be revisited at a future time upon application.*

2.3 While we acknowledge that the above decision "*does not represent any decision of principle*" in relation to this issue, the ASAA submits that the same logic justifying the above decision equally applies to casuals covered by the *Alpine Resorts Award*. Specifically, the ASAA and the AWU both advanced a case during these proceedings that "*the overtime penalty rates would be inclusive of the 25% casual loading*". The AWU did not attempt to resile from this position until approximately one month following the conclusion of the Full Bench hearing convened to determine this issue (amongst others). Moreover, we note that in the AWU's submissions lodged on 8 December 2017, the union stated "*The AWU accepts that it reached agreement with ASAA, and the Full Bench is entitled to hold The AWU to this agreement*"<sup>5</sup>.

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<sup>5</sup> Submissions of the Australian Workers Union, dated 8 December 2017, [7].

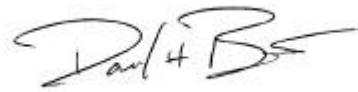
- 2.4 In light of the above, the ASAA has taken the liberty of preparing a Clarifying Draft Determination reflecting its position that the casual loading should *not* be paid *in addition* to overtime rates for casual employees. A copy of this Clarifying Draft Determination is **enclosed** with this correspondence.
- 2.5 While the ASAA of course welcomes any responses to this correspondence from the AWU – or any other interested party involved in these proceedings – we are instructed to once again respectfully emphasise that time is now of the essence.

Yours faithfully

**HARMERS WORKPLACE LAWYERS**



**Michael Harmer**



**David Bates**

Encl.

# DRAFT DETERMINATION

*Fair Work Act 2009* (Cth)

s.156 – 4 yearly review of modern awards

**4 yearly review of modern awards – Alpine Resorts Award 2010 (AM2016/30)**

**ALPINE RESORTS AWARD 2010**

Tourism industry

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT DEAN  
COMMISSIONER RIORDAN

SYDNEY, XX 2018

*4 yearly review of modern awards – casual overtime*

A. Pursuant to s.156 of the *Fair Work Act 2009*, the above award is varied as follows:

1. By inserting a new clause 25.4 as follows:

**25.4** The overtime rates for casual employees include the casual loading.

2. By renumbering clause 25.4 accordingly.

B. This determination comes into operation from \_\_\_\_\_. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after \_\_\_\_\_.