**ALPINE RESORTS AWARD 2014 – AM2016/30**

**FOUR YEARLY REVIEW OF MODERN AWARDS**

**AUSTRALIAN SKI AREAS ASSOCIATION**

**OUTLINE OF SUBMISSIONS**

## 1 INTRODUCTION

1.1 These submissions are made on behalf of the Australian Ski Areas Association ("**Association**") in response to decision [2018] FWCFB 4984 ("**Decision**"), which was handed down by the Full Bench in these proceedings on 27 August 2018.

## 2 PROVISIONAL VIEW TO AMEND THE COVERAGE CLAUSE IN THE *ALPINE RESORTS AWARD 2010*

### *The Full Bench's proposed coverage clause*

2.1 In the Decision, the Full Bench expressed the provisional view that clause 4.1 of the *Alpine Resorts Award 2010* ("**Award**") should be amended to restrict Award coverage to only those employees "*employed at [an] alpine resort*"[1]. The reasons given for proposing to vary clause 4.1 in those terms were set out in the Decision as follows:

> [78] Doing this presents an opportunity to correct one other defect in the coverage provisions of the *Alpine Award* which became apparent in the proceedings before us. As it currently stands, clause 4.1 provides that an employer which operates an alpine resort, as defined in clause 3, is covered by the *Alpine Award* in respect of *any* employee who falls within the award's classifications, whether they are actually employed at the alpine resort or not. For example, if the operator of an alpine resort purchases a hotel which is located entirely outside of that alpine resort, clause 4.1 would permit the application of the *Alpine Award*, which contains a large range of classifications covering hospitality functions, to the hotel's employees merely because of the fact that the employer was the operator of an alpine resort. That is clearly not what was intended by the Full Bench in making the *Alpine Award*, and would not conform to the modern awards objective. We do not suggest that the evidence before us demonstrates that this has actually occurred, but nonetheless it should not be permitted to occur. The general industry award which would otherwise operate in that situation would be the award providing the appropriate coverage.

[1] The Decision at [80].

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2.2 The Association respectfully opposes the Full Bench's proposed amendment to clause 4.1 of the Award as currently drafted, and the associated restriction in Award coverage. The Association believes that the extreme examples which arose in passing in the case (such as the hotels in Cairns or operations at Jamberoo on the south coast of New South Wales) can be dealt with through alternative drafting, without impacting the integrated operations of the resorts in close connection and proximity, such as ticket selling or other services, via staff rotation in feeder towns. The fact that the Full Bench did not consider that it had evidence of the intended coverage mischief occurring is suggestive of the fact that the Full Bench did not intend to circumscribe such connected integrated operations.

2.3 The Association opposes the currently proposed coverage limitation, as suggested by the Full Bench, for the following reasons:

(a) the phrase "*employed at the alpine resort*" arguably imposes a geographical element to Award coverage and, therefore, creates a level of ambiguity and uncertainty as to the exact boundaries of an "alpine resort" for the purposes of determining Award coverage. The Association submits this would be inconsistent with the Modern Awards Objectives that the modern award system be "simple", "easy to understand", and "stable"[2];

(b) the Association's members have integrated operations, such as those that provide guest as well as customer services, which are located "off-slope" in "feeder towns" in close geographic proximity to the snowfields. While these operations account for a relatively small percentage of the Association's members' total revenue, they nonetheless "*provide an essential or significant service to users of the core business function*", being alpine lifting[3]. If these operations were no longer covered by the Award, it follows that some of the Association's members would become covered by a number of different modern awards, which would inevitably increase "regulatory burden"[4];

(c) many of the Association's members transfer staff between "on-slope" and "off-slope" operations as needed during periods of adverse snow and weather conditions. The importance of the flexibility provided by clause 19 of the Award in allowing such transfers has been historically recognised in previous industrial instruments applying to the Association's members[5]. The need for such flexibilities was a key consideration of the Australian Industrial Relations Commission ("**AIRC**") when it created the Award[6]. By separating Award coverage from the location of work, the Association's members are able to efficiently and flexibly transfer staff between on-slope and off-slope operations. This "*promotes flexible modern work practices and the efficient and productive performance of work*"[7];

[2] *Fair Work Act* s 138(g).
[3] The Decision at [64].
[4] *Fair Work Act* s 138(f).
[5] The Associations Outline of Submissions dated 21 December 2018 at [5.1] to [5.2].
[6] *Statement* [2009] AIRCFB 450 at [219].
[7] *Fair Work Act* s 138(d).

(d) the Full Bench of the AIRC was not concerned with the location of work when defining the current coverage clause in the Award. Indeed, if it had been the AIRC's intention to introduce a geographic limitation to coverage under the Award, the Association submits the AIRC would have set out its reasons for doing so during the award modernisation process[8]. Instead, the Full Bench simply tied Award coverage to those entities that operate an alpine lift, being the Association's members;

(e) Harmers Workplace Lawyers ("**Harmers**") is instructed that the Association apprehends that, without further clarification, certain employees currently covered by the Award may become award-free if clause 4.1 is amended in the terms proposed by the Full Bench. Consistent with section 163 of the *Fair Work Act*, the Full Bench:

> …must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

The extent to which the Association's apprehension is well founded will be a matter for further evidence, which is discussed in more detail below; and

(f) a proper substantive reading of the Award and its primary purpose, under the major and substantive character test[9], would not permit the extreme examples apprehended by the Full Bench.

2.4 For the above reasons, the Association's first preference is that no amendments are made to the coverage clause in the Award. However, as an alternative to ease any concerns the Full Bench may have about the potential misapplication of the Award, the Association proposes the following amended coverage clause:

> *4.1 This industry award covers employers throughout Australia who operate an alpine resort and their employees* ***employed at, or in connection with, the alpine resort*** *in the classifications within Schedule B – Classification Definitions to the exclusion of any other.*

2.5 As a Full Bench of the Commission held in *4 yearly review of modern awards - Horticulture Award 2010* [2017] FWCFB 6037 in relation to a proposed variation to the coverage clause in the *Horticulture Award 2010*: "*The words 'in connection with' do not, on their plain and ordinary meaning, impose a restriction on where the activities are undertaken*"[10].

2.6 The Association's proposed amendments would mandate that there be a clear connection between the employees' employment and the alpine resort itself. The Association submits

[8] *Horticulture Award 2010* [2017] FWCFB 6037 at [55].
[9] *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123; *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Limited - PR956868* [2005] AIRC 622.
[10] *Horticulture Award 2010* [2017] FWCFB 6037 at [156].

that such an amendment would prevent, for example, the operator of an alpine resort purchasing a hotel in Cairns and applying the Award to that hotel's employees. In that example, the employees would not be covered by the Award because they would not be "*employed at*" or "*in connection with*" the alpine resort.

***Request to file further evidence in relation to the Full Bench's proposed coverage clause***

2.7 The Association is concerned by the Full Bench's specific proposal to restrict Award coverage to only those "*employed at [an] alpine resort*". The Association submits that this is the first occasion on which a possible restriction of coverage has been proposed in the course of these proceedings. This possibility was not addressed in any of the submissions or evidence filed to date by any of the interested parties to these proceedings, including the Association.

2.8 On 10 October 2016, a Full Bench of the Fair Work Commission ("**Commission**") handed down a decision remitting the following coverage issues to the Full Bench in these proceedings for hearing and determination (our emphasis)[11]:

(a) whether Award coverage should be *extended* to businesses that operate within close geographic proximity to an Alpine Resort, but which do not meet the current definition of Alpine Resort in the Award as they do not operate an establishment that "*includes alpine lifting*"; and

(b) whether Award coverage should be *extended* to alpine resort management boards, which have statutory responsibilities for the management and operation of alpine resorts in Victoria but do not necessarily operate alpine lifts,

(together, the "**Coverage Applications**").

2.9 It was only in relation to the Coverage Applications that the interested parties advanced submissions and evidence at the Full Bench hearing that took place between 30 October 2018 and 2 November 2018 ("**Hearing**"). While the Association responded to a small number of questions during the Hearing regarding the extent of *some*, but not all, of its members' operations in "feeder towns"[12], those responses were necessarily brief, by no means exhaustive, and did not address any of the issues set out in paragraph 2.2 above. Furthermore, no indication appears to have been given by the Full Bench that it was considering restricting coverage based on the Association's responses.

2.10 To the extent that the "primary applicants" raised geographic restrictions on their own proposed expanded coverage of the Award, that application was properly rejected by the Full Bench on a range of grounds. Outside of the rejected application for expanded coverage of the Award, at no stage did evidence or submissions in the matter extend to the isolated contraction of the scope of the Award to "*persons employed at [an] alpine resort*". Indeed, the Association's written and oral evidence in response to the "primary applicants" in regard to the coverage issue had closed when such questions arose and when the

[11] *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254 at [17].

[12] Transcript of Hearing on 31 October 2017 at PN1175 to PN1180, PN1756 to PN1766; Transcript of Hearing on 1 November 2017 at PN2935 to PN2941, PN2954 to PN2955.

"primary applicants" started shifting the geographic scope of their own application during the Hearing.

2.11 The Association acknowledges the comments made by the Full Bench in *Four yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 ("**Penalty Rates Decision**") that, in conducting the 4 Yearly Review, the Commission is "*not constrained by the terms of a particular application*" and is "*not required to make a decision in the terms applied for*"[13]. However, the Full Bench qualified that observation by then expressly noting that its broad power to "*vary a modern award in whatever terms it considers appropriate*" is "*subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578 [of the Fair Work Act 2009 (Cth) ("**Fair Work Act**")]*"[14].

2.12 The term "*procedural fairness*", in the context of administrative decision making, has been equated with an obligation to accord "*natural justice*"[15] or "*judicial fairness*"[16]. While the Commission must perform its functions and exercise its powers in a manner that is "f*air and just*"[17], there are no strict statutory rules which dictate the requirements of "*natural justice*", "*procedural fairness*" or "*judicial fairness*" in proceedings before the Commission. It is, however, well-established that what is required will depend on the individual facts and circumstances of each case, and will be determined by such things as the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting[18].

2.13 In *R v Moore, In re; Ex parte the State of Victoria* (1977) 140 CLR 92, Gibbs J set out the nature of the Australian Conciliation and Arbitration Commission's obligation to provide "*natural justice*" in the following terms (emphasis added):

> The members of the Commission are bound to act in accordance with the rules of natural justice: *Reg. v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at p. 552. **They must therefore afford any party to a dispute a proper opportunity to be heard before making any order that affects him**. Indeed it is inherent in the very notion of arbitration that there shall be a hearing of the disputants, and a procedure which produced an award without a proper hearing would be outside the constitutional power: *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at pp. 384-385."[19]

2.14 Similarly, in *Allesch v Maunz* (2000) 203 CLR 172, Kirby J held that it is a requirement of procedural fairness that a party be given the opportunity to provide evidence about a matter that may adversely affect its interests:

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[13] Penalty Rates Decision at [110].
[14] Ibid.
[15] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2005) 141 IR 438 at 455.
16 *Allen v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 at [22].
[17] *Fair Work Act* s 577(a).
[18] *Kioa v West; sub nom Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 584 to 585.
[19] *R v Moore, In re; Ex parte the State of Victoria* (1977) 140 CLR 92 at 101 to 102; Endorsed in *Galintel Rolling Mills Pty Ltd T/A The Graham Group* [2011] FWAFB 6772 at [27].

> [35] It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable requirement of justice". It is a rule of natural justice or "procedural fairness". [20]

2.15 In *Re Australian Railways Union and Others; Ex parte Public Transport Corporation* (1993) 117 ALR 17, the High Court determined that the AIRC had not afforded procedural fairness in the performance of its functions because it granted relief that was not sought by any of the parties before it, and had not provided the parties with an adequate opportunity to call evidence regarding that relief. The relevant sections of the decision are as follows (emphasis added):

> It is clear that the relief granted by the Commission in the form of the Victorian Public Transport (Post-Indenture Retrenchment) Award was not the relief sought by any of the parties to the application which was before it. The unions sought an interim award to preserve the status quo generally. The PTC opposed the application. The relief granted was a final award extending only to the apprentices. Of course, in making an order or award the Commission was not confined to relief claimed by the parties. Section 120 of the Act provides:
>
> > *In making an award or order, the Commission is not restricted to the specific relief claimed by the parties to the industrial dispute concerned, or to the demands made by the parties in the course of the industrial dispute, but may include in the award or order anything which the Commission considers necessary or expedient for the purpose of preventing or settling the industrial dispute or preventing further industrial disputes.2*
>
> **But the wide scope given to the Commission in determining the relief which it will give does not absolve it from an obligation to observe the rules of procedural fairness in exercising its arbitral function**. In *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* this court pointed out that it was well settled that the Conciliation and Arbitration Commission was bound to act judicially and that the Commission, as its successor, is bound to do likewise. The court went on to point out that **one aspect of the duty to act judicially is the duty to hear a party and to allow him or her a reasonable opportunity to present his or her case and, coupled with that duty, is the duty to consider the case put**. And in *Re Media, Entertainment and Arts Alliance;Ex parte Hoyts Corp Pty Ltd* the court said that the Commission has a duty in considering an application to afford a party a reasonable opportunity to allow his or her case to be put.
>
> Of course, what is reasonable will depend upon the circumstances of the case. In this instance, the parties were given an adequate opportunity to call evidence and put submissions, but that evidence and those submissions were directed to

[20] *Allesch v Maunz* (2000) 203 CLR 172; endorsed in *Viavattene v Health Care Australia* [2013] FWCFB 2532 at [37].

> the issue of whether an interim award should be made and, if so, whether it should include the apprentices. [21]

2.16 In *Four yearly review of modern awards* [2014] FWCFB 1788 ("**Preliminary Issues Decision**"), the Full Bench held that where a "*significant change*" is proposed to an award (emphasis added):

> …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.[22]

2.17 Consequently, by proposing – for the first time – to amend clause 4.1 of the Award to restrict coverage to only those "*employed at [an] alpine resort*" without first obtaining "probative evidence" and submissions from the Association, the Association respectfully submits the Full Bench has denied it the opportunity to properly address an issue in respect of which the Full Bench made findings which are adverse to its interests. The Association submits this is procedurally unfair and does not accord with the Commission's obligations to perform its functions and exercise its powers in a manner that is "*fair and just*"[23].

2.18 If the Full Bench is neither minded to maintain the current coverage clause in the Award for the reasons set out in paragraph 2.2 above, nor willing to insert the Association's proposed amended coverage clause into the Award, the Association requests the opportunity to file further evidence in relation to the Full Bench's Decision. Such evidence will address the following, non-exhaustive, issues:

(a) the extent of the Association's members "*off-slope*" operations;

(b) the extent to which the operations referred to in (a) above *"provide an essential or significant service to users of the core business function"*;

(c) the extent to which maintaining the status-quo of Award coverage is necessary for the flexible allocation of staff between "*on slope*" and "*off slope*" operations;

(d) the likely "*regulatory burden*" that will result from the Full Bench's proposed coverage clause; and

(e) the extent to which "*off slope*" operations, potentially considered to be other than at an alpine resort, operate as an integrated component of the alpine resort, including via potential transfer of employees between the specific "*on slope*" and "*off slope*" operations in question, and/or the utilisation of classifications that are integral to the core Award.

2.19 Should the Full Bench be minded to grant the Association's request, the Association would be happy to discuss a proposed timetable for the filing of evidence with the Full Bench.

2.20 The Association submits that there would be little prejudice to either the other interested parties or the Commission if it were afforded the opportunity to file additional evidence in

[21] *Re Australian Railways Union and Others; Ex parte Public Transport Corporation* (1993) 117 ALR 17 at 23 to 24.
[22] Preliminary Issues Decision at [23].
[23] *Fair Work Act* s 577(a).

relation to the Commission's proposed coverage clause. Indeed, the 2018 winter snowsports season is expected to conclude in New South Wales and Victoria in early October 2018, at which point the Association's members will significantly curtail their operations and staff numbers will drop dramatically as per the standard seasonal cycle. Operations will not cycle up again until about May 2019, and next year's winter snowsports season will not commence until about June 2019.

2.21 The Association emphasises that such further evidence, and the opportunity to make further submissions, would only be necessary if the Full Bench was not minded to leave coverage as is currently stated under the Award, or to adopt the alternative drafting put forward by the Association in these submissions.

## 3 CALCULATION OF CASUAL OVERTIME

3.1 On 8 March 2018 and 15 May 2018, the Association wrote to the Full Bench and respectfully requested that it provide reasons for its determination on 22 December 2017 in these proceedings ("**Determination**"). The Association hoped that the Full Bench's reasons would clarify the correct method of calculating casual overtime rates in the Award. While the Association did not receive responses to its correspondence, it anticipated the Full Bench would address the Association's request in its Decision. The Decision was, however, silent on this issue.

3.2 While the Association acknowledges that the Decision does not provide an opportunity for interested parties to further comment on the Determination and the new casual overtime provisions in the Award, the Association submits it is of fundamental importance that the correct method of calculating casual overtime in the Award be clarified by the Full Bench as a matter of urgency. This issue is a pressing concern for the Association and casual employees covered by the Award, and the lack of certainty is harmful to the interests of all parties concerned.

***Relevant timeline of the casual overtime issue in these proceedings***

3.3 As set out in the Association's previous submissions filed in these proceedings[24], on 16 October 2015, the Association and the Australian Workers Union ("**AWU**") entered into a consent position regarding a package of proposed changes to the Award to be put forward as part of these proceedings ("**Consent Position**"). Relevantly, the Consent Position proposed that the following substantive variation be made to the Award:

(a) the application of casual overtime penalty rate provisions to all casual employees, with the exception of snow-sport instructors, on the basis that the penalty rates would be inclusive of the casual loading, and would be applicable only for work performed in excess of 10 hours per day or 38 hours per week over a maximum work cycle of 4 weeks ("**Overtime Variation**").

3.4 The terms of the Overtime Variation were clearly expressed in that the AWU and the Association sought the casual loading ***not*** be paid *in addition* to overtime rates for casual employees.

[24] The Associations Outline of Submissions dated 21 December 2018 at [2.1] to [2.6].

3.5 On 21 December 2016, and in advance of the timeframe proscribed in the Full Bench's Directions[25], the Association filed its written submissions and evidence in chief in support of, *inter alia*, the Overtime Variation being made to the Award. These submissions reflected the terms of the Consent Position, including in relation to the Overtime Variation (emphasis added):

> *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.*

3.6 The AWU did not similarly file submissions in relation to the Overtime Variation within the timeframe ordered by the Commission, being on or before 13 January 2017[26]. Moreover, the AWU did not communicate to the Association that it wished to deviate from the terms of the Consent Position, or that it objected to the Association's submissions regarding the Overtime Variation.

3.7 On 22 June 2017, the Commission made orders directing the AWU to file any further submissions it sought to rely upon at the Hearing by 24 July 2017[27].

3.8 On 5 July 2017, a Full Bench of the Commission handed down *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 ("**Casual Overtime Decision**"), in which findings were made about the variation of a number of general awards to include overtime for casual employees.

3.9 The AWU subsequently filed its further submissions on 1 August 2017, however, these submissions contained no reference to the Overtime Variation nor the Casual Overtime Decision.

3.10 At the Hearing, the Association (represented by Harmers) appeared before the Commission, and made oral submissions and lead evidence in relation to, *inter alia*, the Overtime Variation. The AWU did not lead evidence or make substantive submissions during the Hearing in relation to the Overtime Issue.

3.11 Relevantly, during the Hearing, Vice President Hatcher commented, in relation to the Consent Position, that "*The parties are going to persuade us to accept an agreed position, as I understand it*"[28]. The Association tendered the AWU's proposed variation on casual overtime at a point in time when the AWU was supposedly supporting the Consent Position[29]. Thus, the specific drafting of the casual overtime clause was put forward to the Full Bench with the specific consent package meaning and with the full endorsement of the AWU.

[25] Directions dated 24 November 2016.
[26] Ibid.
[27] Directions dated 22 June 2017.
[28] Transcript of the Hearing on 30 October 2017 at PN77.
[29] Transcript of Hearing on 31 October 2017 at PN1788.

3.12 On 29 November 2017, and as directed by the Commission, the Association lodged with the Commission a consolidated Draft Determination which duly-incorporated the Overtime Variation. The Association believed this consolidated Draft Determination accurately reflected the Consent Position, including in relation to the Overtime Variation. This was because it intended the AWU drafting put forward with the endorsement of the AWU to reflect the Consent Position.

3.13 On 8 December 2017, the AWU filed supplementary submissions 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.

3.14 On 13 December 2017, the Association filed written submissions in reply objecting to the AWU's attempted deviation from the Consent Position after the close of all other evidence and submissions in the matter. The Association further submitted the AWU should be held to the terms of the Consent Position.

3.15 On 22 December 2017, the Commission issued the Determination varying the Award. The Determination was consistent with the Overtime Variation sought in the Consent Position, however, the Commission did not expressly state whether casual overtime rates should be calculated so as to include or exclude the casual loading. The adoption of the Consent Position wording at a time when the AWU purported to have made a last-minute departure from that Consent position thus introduced ambiguity in the Award, and a lack of resolution of the last minute AWU change induced a clash of the parties to the Award.

3.16 On 8 March 2018, the Association lodged written submissions with the Commission in relation to the Overtime Variation, and requested that the Commission clarify its position as a matter of urgency. These submissions enclosed a further Draft Determination which aimed to clarify that the casual loading not be paid *in addition* to overtime rates for casual employees, consistent with the Consent Position.

3.17 On 13 March 2018, the AWU lodged reply submissions objecting to the Association's request for clarification from the Commission.

3.18 Absent a response from the Commission, the Association lodged further written submissions with the Commission on 15 May 2018, which again requested the Commission clarify its position in relation to the Overtime Variation as a matter of urgency.

***The Commission's obligation to provide reasons for its decisions***

3.19 Section 601(2) of the *Fair Work Act* holds that the Commission "*may give written reasons for any decisions that it makes*". Further guidance as to the Commission's discretion to provide written reasons pursuant to section 601(2) of the *Fair Work Act* is obtained from the *Explanatory Memorandum to the Fair Work Bill 2008* as follows (emphasis added):

> 2310. Subclause 601(2) provides that FWA may give written reasons for any decision that it makes. **It is expected that FWA will provide written reasons for all decisions of significance**. An example where a written decision may not be necessary is a procedural decision.

3.20 In *Edwards v Justice Giudice* [1999] FCA 1836 ("**Edwards**"), a majority of the Full Federal Court found that the AIRC was under an obligation to give reasons for its decision regarding an unfair dismissal claim, particularly where the case was "*strongly contested*" and of "*significant consequence*"[30]. Marshal J set out the obligation as follows:

> [44] In a seriously contested case before a tribunal which is required to afford procedural fairness and act judicially, an arbitrator is obliged to disclose the steps involved in the reasoning which leads to a particular result. There does not appear to be any obligation expressed in the Act to require a member of the Commission to give adequate reasons for a decision. It does not thereby follow, however, that in some cases such as strongly contested ones where a final order of significant consequence may be made that full reasons should not be given.

3.21 The Association respectfully submits that the Decision to vary the Award to provide for overtime penalties to be paid to casual employees is a "*decision of significance*" or of "*significant consequence*", which warrants written reasons, for the following reasons:

(a) there is a high degree of casualisation in the snowsports industry and, therefore, the Overtime Variation has an impact on the terms and conditions of a large number of employees;

(b) without further clarity employers in the snowsports industry could find themselves in breach of the Award with regard to the payment of casual overtime; and

(c) employers, employees and the AWU are encountering difficulties in enterprise agreement negotiations due to the lack of certainty as to the terms in the underpinning instrument, being the Award. For example, Falls Creek Ski Lifts Pty Ltd, Mount Hotham Skiing Company Pty Ltd and the AWU have recently been engaged in a protracted bargaining dispute regarding this issue.

3.22 The Association was extremely appreciative that the Full Bench went to considerable lengths to issue its Determination in time for the commencement of the 2018 season. The Association would further appreciate the Full Bench clarifying the meaning of the casual overtime clause given its historical context as a significant issue, and the importance of industrial parties adhering to industrial agreements.

**Harmers Workplace Lawyers**

**19 September 2018**

[30] Endorsed in *Barach v University of New South Wales* [2010] FWAFB 3307 at [16]; *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080 at [6]-[7]; *Lyndoch Living Inc v Bolden* [2014] FWCFB 5969 at [44]; and *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413 at [30].