

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 [2019] FWCFB 3347 (“**2019 Decision**”), which was handed down by the Full Bench in these proceedings on 14 May 2019.

1.2 In submissions dated 19 September 2018 (“**2018 Submissions**”), the Association proposed a variation to clause 4.1 of the *Alpine Resorts Award 2010* (“**Award**”) such that it would read as follows (proposed changes to the original clause in bold and underline):

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.

(hereafter, “**Association’s Original Variation**”).

1.3 In the 2019 Decision, the Full Bench instead has determined, as a draft, the following variation to clause 4.1 (changes to the original clause in bold):

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

(hereafter, “**Draft Variation**”).

1.4 Relevantly, and additionally, the Full Bench has also determined that the definition of ‘*Alpine Resort*’ in clause 3 of the Award be varied to read (changes from the original clause wording in italics and in bold):

alpine resort means a resort *which includes, among other things, an alpine lift*.

1.5 The Full Bench has not adopted the Association’s Original Variation in its terms at least. On its face, the point of difference between Association’s Original Variation and the Draft Variation appears to be the quality of the connection, in that there needs to be a closer

connection (by reference to “direct”) between the activity and the alpine resort operation than it is considered arises from the terms of the Association’s Original Variation.

- 1.6 The Association accepts in substance that there should be a close connection between an alpine resort’s employees’ employed activities and its (integrated) operation as recognised by the Full Bench and covered by the Award. The issue from the perspective of the Association is, therefore, not simply about the additional wording in the Draft Variation that emphasises this position, but in the treatment of when this connection is established.
- 1.7 For the reasons outlined below, the Association respectfully opposes the Draft Variation. Further, the Association seeks a process be implemented by which the Association, and other interested parties, can work with the Full Bench to refine clause 4.1 such it could reasonably accommodate the alpine resorts’ integrated operations in feeder towns that have a substantive connection with their core function, while respecting the legitimate concerns of the Full Bench as to the proper scope of Award coverage (see further section 5 below).

2 CONTEXT

- 2.1 The Full Bench has found, consistent with the Association’s previous submissions, that alpine resorts covered by the Award are integrated businesses with diverse range of activities and functions. The Full Bench has stated¹:

(2) Alpine resorts are a different kind of employer to relevant alpine businesses and other snowsports businesses. They operate large integrated businesses which involve a highly diverse range of functions and permit staff, to some degree, to perform different functions dependent on exigencies such as the weather. The core element of their business is the operation of ski slopes, which requires the performance of functions such as ski patrols, snow-making, lift maintenance and operation, ski instruction and various administrative and safety responsibilities. To the extent that they engage in the provision of food, hospitality, accommodation and retail services, it is ancillary to this core function. Alpine resorts may engage in these functions not in order to establish separate profit sources but to provide an essential or significant service to users of the core business function. 53 It is clear that the establishment of the *Alpine Award* was made in recognition of the fact that alpine resorts needed to have persons “... employed in a wide range of occupational groupings...”. But for this award, alpine resorts would be covered by a wide range of different modern awards which would no doubt be productive of complexity and inefficiency. Relevant alpine businesses do not, on the evidence, have any of these fundamental characteristics.

- 2.2 Importantly, an alpine resort’s “operation of ski slopes” (hereafter referred to as “core activities” or “on-slope activities”) is a primary, but not only, function of its business operation as covered by the Award.² In this regard, an alpine lift is the “essential definitional feature” of an alpine resort.³

¹ [2018] FWCFB 4984 at[64(2)] (the “2018 Decision”).

² *Ibid.*

³ *Ibid* at [80].

- 2.3 Other accepted (ancillary) functions of alpine resorts, such as provision of food, hospitality, accommodation and retail services, (hereafter referred to as “off-slope activities”) support the core activities.⁴ Indeed, the proposed variation to the definition of “alpine resorts” (see [1.4] above) reflects this position.

3 THE 2019 DECISION

- 3.1 In the 2019 Decision the Full Bench has indicated that the Award should not exclude those persons who perform work “*directly connected to the operation of an alpine resort*” but may not be physically located at an alpine resort.
- 3.2 The Full Bench has referred to an example of employed persons of an alpine resort selling alpine lift tickets in Jindabyne, a “feeder town”, as being covered by the Award.⁵ On one reading of [5] of 2019 Decision, these employees would be covered by the Award simply because they have historically been so covered. It would follow that this is a form of “direct connection” necessary to establish coverage with the Award.
- 3.3 Alternatively, when this activity is juxtaposed with other stated activities, it may be that this activity is covered by the Award primarily because of the “direct connection” with the alpine resort’s core activities, being the operation of the ski slopes (i.e. on-slope activities), noting the type of activity being undertaken.
- 3.4 The Full Bench also seems to be of the view that employees working at an accommodation facility in Jindabyne operated by an alpine resort in the Snowy Mountains (i.e. undertaking off-slope activities) would not have sufficiently direct connection to the alpine resort to be covered by the Award. This position is to be distinguished from accommodation operated by an alpine resort that is located at the resort, which seemingly would be covered by the Award.

4 SUBMISSIONS AGAINST THE DRAFT VARIATION

- 4.1 In summary, the Association opposes the Draft Variation for the following reasons:
- (a) there is a focus on geographical limitation in coverage over off-slope activities (“**Geographical Limitation**”);
 - (b) the assessment of “direct connection” is biased towards customer patronage over other legitimate factors (“**Customer Patronage Bias**”);
 - (c) even accepting that “direct connection” should be based primarily on customer patronage, the application of this term should cover activities that the Full Bench appear to consider would be excluded from coverage (“**Customer Patronage Established**”); and
 - (d) there is a lack of clarity as to what would constitute “direct connection” (“**Ambiguity**”).

⁴ Ibid at [64(2)].

⁵ The 2019 Decision at [5].

A. Geographical limitation

- 4.2 In 2018 Decision, the Full Bench raised issue with the coverage clause enabling (by way of example) the Award to apply to a hotel purchased by an alpine resort located “entirely outside of that alpine resort”.⁶ The proposed variation in the decision sought to address this “unintended consequence” simply by way of a geographical limitation (“...*employed at the alpine resort*...”). This was, however, a provisional variation, pending any submissions from the parties on point.
- 4.3 The Full Bench has since indicated in its 2019 Decision that those persons who perform work “*directly connected to the operation of an alpine resort*” but may not be physically located at an alpine resort, should not be excluded from coverage of the Award. In so indicating, we understand that it is now intended that:
- (a) the location of the activity undertaken by the alpine resort employee is no longer determinative of coverage; and
 - (b) the focus is (at least in respect of the contentious off-slope activities) arguably the “connection” (which in light of (a) and as a matter of construction would appear to be other than geographical and instead business/operational) between the activity in question and the alpine resort’s core activities.
- 4.4 The focus on a business or operational “connection” over “geography” is a position wholly embraced by the Association, and one we submit is consistent with the Full Bench’s earlier findings as to the nature of alpine resort’s complex operation and integrated business (see [2.1] above). The Association’s Original Variation has similarly sought to disavow coverage which is simply tied to geography.
- 4.5 However, having regard to the manner in which the Full Bench has contextualised what constitutes *directly connected to the operation of an alpine resort* (see [3.2] – [3.4] above), it is observed that there is at best a presumption against coverage and at worst an outright exclusion from coverage in respect of any alpine resort’s **off-slope** activities that are geographically situated **outside** an alpine resort in the Snowy Mountains. Alternatively, there is a presumption in favour of off-slope activities situated within the alpine resort.
- 4.6 Taking these examples as guidance, as the parties ought to do, it appears that despite the wording in the Draft Variation, there may be an inadvertent reversion to a focus on “geography” over “connection” in establishing coverage over off-slope activities.
- 4.7 For completeness, we note that there is little but location to distinguish between off-slope enterprises in feeder towns and off-slope enterprises that exist in geographic proximity to the alpine resorts’ core activities in that “they have the same elements of winter seasonality and susceptibility to the effects of weather and snow conditions”.⁷ In these circumstances, exclusion from coverage is unreasonable where alpine resorts’ face geographical restrictions on the extent to which they can locate their ancillary operations in geographic proximity to their core of on-slope activities.

⁶ The 2018 Decision at [78].

⁷ Ibid at [64(3)].

- 4.8 Furthermore, a geographical limitation would likely unduly hinder an alpine resort's core or on-slope operations. That is, restrict the extent of the legitimate ancillary functions and measures that an alpine resort could rely upon.
- 4.9 By way of example, in NSW the National Parks and Wildlife Service manages alpine resort areas in accordance with the "Kosciuszko National Park Plan of Management" ("**Plan of Management**"), which is prepared in accordance with the requirements in section 72 of the *National Parks and Wildlife Act 1974* (NSW) ("**National Parks Act**"). The Plan of Management caps the total bed numbers at Perisher, Thredbo, Charlotte Pass and Selwyn Snow Resort⁸, which limits the number of people that can stay overnight in each resort area. Currently, the number of beds must not exceed:
- (a) 4937 in the Perisher resort area;
 - (b) 4810 in the Thredbo resort area;
 - (c) 607 in the Charlotte Pass resort area; and
 - (d) 50 in the Selwyn resort area.
- 4.10 Therefore, in order for the above alpine resorts to expand their accommodation offering, and thereby "provide an essential or significant service to users of their core business function", it is necessary for these resorts to extend their integrated operations into feeder towns.

B. Customer Patronage Bias

- 4.11 Alternatively, and with respect equally objectionable from the perspective of the Association, to the extent that "connection" is in fact determinative of coverage over off-slope activities under the Draft Variation, it appears that there is an undue focus on customer patronage over other factors in establishing the requisite "direct connection".
- 4.12 Taking the example of an accommodation facility located in Jindabyne that is run by an alpine resort and would not have the requisite "direct connection" with the alpine resort's core activities because the "*guests at the accommodation facility may intend to access a different alpine resort or perhaps may be staying there for an entirely different purpose*"⁹; in effect, the Full Bench appear to be saying that customer patronage is the sole or otherwise paramount factor when considering whether a "direct connection" exists for the purposes of the proposed coverage clause.
- 4.13 The Association respectfully submits that that customer patronage should not be determinative of (or even necessarily the paramount consideration of) whether an employee is employed in "direct connection" with the operations of an alpine resort. Such an approach does not entirely reflect the complex and interconnected operations of an alpine resort, that have historically existed under the auspices of the Award and we submit have been recently recognised by the Full Bench as being covered by the Award.¹⁰ For example,

⁸ Department of Environment and Conservation (NSW), *Kosciuszko National Park Plan of Management*, 1-74137-9369/OEH20140319, p 171.

⁹ The 2019 Decision at [5].

¹⁰ See the 2018 Decision, in particular [64(2)].

Perisher launders all of its snow sports hire clothing and hotel linen from its in resort operations at a central laundry at The Station in Jindabyne where linen from The Station is also laundered.

- 4.14 A significant factor to be considered in respect of direct connection is the ability of an alpine resort to transfer employees within different parts of its operation. In this regard, we submit, in accordance with the 2018 Decision, the Award allows the alpine resorts the flexibility to employ staff across a wide range of ancillary functions and to transfer employees between those functions in response to exigencies such as weather, customer demand, and staff absences.¹¹ For example, all of Perisher’s snowsports hire staff are principally engaged at Perisher Valley but rotate through other work locations, including two hire operations in Jindabyne, on a shift by shift basis or across a roster cycle. The core function and purpose of these employees’ employment is not altered simply because they intermittently perform their work in a feeder town.

C. Customer Patronage Established

- 4.15 Even if customer patronage is the sole or paramount consideration in assessing “direct connection”, which is not accepted, the Association submits that alpine resorts’ off-slope enterprises have in many respects a sufficient degree of customer connection with their core activities, which would meet the criteria of the Full Bench’s Draft Variation clause. We submit that the matters that may establish direct connection include:
- (a) the alpine resorts offer package deals and discounts that allow customers of off-slope enterprises in feeder towns to bundle their ticketing, snowsports hire, snowsports lessons and accommodation. Such deals link the alpine resorts’ off-slope enterprises with their core activities;
 - (b) the location of off-slope enterprises can be geographically linked to a specific alpine resort. For example, Mount Buller Sports has a store located in Mansfield, Victoria, the feeder town for the Mount Buller Alpine Resort. This store is approximately 49km from Mount Buller Alpine Resort, 229km from Mount Hotham Alpine Resort and 237km from Falls Creek Alpine Resort. It would be highly unlikely and impractical for a person to rent snowsports equipment from this Mount Buller Sports store with the intention of visiting anywhere but Mount Buller Alpine Resort;
 - (c) a number of the alpine resorts’ off-slope hotels provide accommodation to both guests and resort workers. For example, during the winter snowsports season nearly 200 of Perisher’s resort workers live at The Station in Jindabyne and travel up to resort for work each day (depending on the location of their shifts). The Station does not just provide accommodation to these resort staff, but also food and beverages, entertainment services, and hosts employee events, conferences and training. Therefore, the employees that work at The Station are not just providing services to guests but also to resort workers that are primarily engaged to perform tasks on the mountain; and

¹¹ See for instance the 2018 Decision, in particular [64(2)].

- (d) many of the alpine resorts' off-slope enterprises provide multiple products and services from the same location that connect customers with the alpine resorts' core function. For example, at Rays Ski Shop in Myrtleford (which is owned and operated by Australian Alpine Enterprises Pty Limited, the parent company of Falls Creek Resort and Mount Hotham Resort) staff facilitate snowsports rentals, lift ticket sales, resort entry pass sales, and snowsports lessons at Falls Creek Resort and Mount Hotham Resort.

4.16 The above matters do not appear to have been considered by the Full Bench in its 2019 Decision, and we submit may well alter the apparent presumption against off-slope enterprises located outside alpine resorts being covered by the Award (see further [4.5] above).

D. Ambiguity

4.17 As the Full Bench noted in the 2018 Decision, the Modern Awards Objectives require that the Fair Work Commission ensure the modern awards system is "simple" and "easy to understand".¹² Having regard to this requirement, the Association respectfully submits that, as it presently stands, the Draft Variation in light of the Full Bench's associated reasoning creates ambiguity as to which off-slope enterprises/activities in feeder towns have the necessary connection with the alpine resorts' core activities/on-slope activities such as to be covered by the Award.

5 PROCESS TOWARDS A REFINED DEFINITION OF CLAUSE 4.1

5.1 The Association respectfully applies to the Full Bench to implement a process by which it, and other interested parties, can file further evidence and submissions with a view to developing a refined definition of coverage that seeks to accommodate the alpine resorts' integrated operations in feeder towns that have a substantive connection with their core function, while respecting the legitimate concerns of the Full Bench as to the proper scope of Award coverage.

5.2 The elements of the process the Association respectfully seek the Full Bench to implement would involve:

- (a) The Association would like the opportunity to properly survey, collate, and assess evidence from all of the alpine resorts in Australia as to the nature and extent of their off-slope operations in feeder towns and the extent to which these operations are said to be integral to their core function. The Association's submissions have been informed by some such information, however, we consider that it would be beneficial to undertake a more comprehensive review which in turn would better assist the Association in putting forward, and we would submit ultimately the Full Bench in determining, an appropriate coverage clause;
- (b) Following the Association's survey and assessment, the Association be given an opportunity to file submissions and evidence in respect of a proposed varied

¹² The 2018 Decision at [77]; *Fair Work Act 2009* (Cth) s 134(g).

coverage clause. It would be envisaged that other interested parties be also given an opportunity to file evidence and submissions.

- (c) It would also be envisaged that the Association would put forward a proposed variation of clause 4.1 as part of its submissions to the Full Bench.

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