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**IN THE FAIR WORK COMMISSION**

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

**Section 156 – Fair Work Act 2009 – 4 yearly review of modern awards**

**SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION**

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## BACKGROUND

1. On 27 August 2018, a Full Bench of the Fair Work Commission (**Commission**) published the *Alpine Resorts Award 2010 – substantive issues concerning coverage* Decision<sup>1</sup> (**2018 Decision**).
2. On 21 September 2018, the Full Bench published a Statement inviting parties to provide submissions concerning the variations proposed in the 2018 Decision to the *Alpine Resorts Award 2010* (**Alpine Award**) and the *State Government Agencies Award 2010* (**SGA Award**).
3. On 19 September 2018, The Australian Ski Areas Association (**ASAA**), filed submissions opposing the provisional view of the Full Bench to vary the coverage clause of the Alpine Award.<sup>2</sup> This opposition appeared to be based on an argument that the provisional view of the Full Bench had the effect of restricting the coverage of the Alpine Award and additionally an argument that the Full Bench had not afforded the ASAA procedural fairness in arriving at its provisional view.
4. On 12 October 2018, the Australian Workers' Union (**AWU**) filed submissions in support of the provisional view of the Full Bench to vary the coverage clause of the Alpine Award and expressed no opposition to the other amendments proposed by the Full Bench in its provisional view. The AWU agreed with the Full Bench that the then-current coverage clause was defective and required amendment.
5. On 14 May 2019, a Full Bench of the Commission published a further Decision regarding the coverage of the Alpine Award, the *4 Yearly Review of Modern Awards – Alpine Resorts Award 2010*<sup>3</sup> (**2019 Decision**). In this decision, the Full Bench considered that there was merit in a proposition that employees who perform work that is *directly related* to the operation of an alpine resort but are not physically located at the alpine resort itself should not be excluded from the coverage of the Alpine Award.<sup>4</sup>
6. The 2019 Decision had draft determinations attached, with the major variation to the provisional view of the Full Bench in the 2018 Decision being the insertion of the words, *or in direct connection with the operation of* into the coverage clause of

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<sup>1</sup> [2018] FWCFB 4984

<sup>2</sup> *Alpine Resorts Award 2010*, cl. 4.1

<sup>3</sup> [2019] FWCFB 3347

<sup>4</sup> *Ibid* at [5]

the Alpine Award to cover those employees of alpine resorts who are not physically located at the alpine resort but nevertheless perform work that is *directly connected* to the operation of the resort.

7. On 10 July 2019, the ASAA filed submissions opposing the amended draft determination provided by the Commission in the 2019 Decision. The ASAA submission provided two 'variation options' for the coverage clause of the Alpine Award that the ASAA proposed the Commission adopt in place of the draft determination attached to the 2019 Decision.

8. The submissions of the AWU are below.

## **SUBMISSIONS**

9. As stated above, the AWU supported and still supports the variation to clause 4.1 of the Alpine Award on the terms as proposed by the Full Bench in paragraph [80] of the 2018 Decision. The AWU considers the proposed variation to be warranted to preserve the coverage of the Alpine Award to alpine resorts, which we believe is the intended coverage of the award. This remains the preferred outcome to this matter for the AWU.

10. Notwithstanding the above, the AWU may not oppose the variation to the coverage clause proposed by the Full Bench in paragraph [6] of the 2019 Decision on the basis that the term *direct connection with the operation of* is applied conservatively, so as not to provide a vehicle for the practical expansion of the award's coverage.

11. Any increase in the coverage of the Alpine Award beyond employees employed at alpine resorts and directly in connection with the operation of alpine resorts is objectionable and unjustified and has the real potential to create a slippery slope by which the coverage of the award continues to be extended further outside of the intended application of the award.

12. Any application to vary the coverage clause of the Alpine Award that results in potential additional coverage of the award must be treated by the Commission with extreme caution.

13. As discussed in the 2018 Decision, the Alpine Award provides a number of employer-friendly conditions, not least of all the absence of any penalty rates for work performed on weekends. In these proceedings, the AWU and other parties have noted that when compared to the awards that would otherwise apply – the

*General Retail Industry Award*, the *Hospitality Industry (General) Award*, and the *General Retail Industry Award* to name a few – the Alpine Award for many classifications is generally inferior.

14. Due to this obvious advantage to any employer in asserting that a part or parts of its operation rightly belongs within the coverage of the Alpine Award, the proposed justifications offered by such employers (or group of employers, as it may be) as to why the Alpine Award applies must be entirely convincing not only in their own right, but when considered against the potential cost savings for an employer in applying the terms of the Alpine Award to its workforce, and additionally the potential significant reductions in take home pay.
15. The AWU understands that the effect of the variations to the coverage clause of the Alpine Award proposed by the ASAA in its latest submission to expand the scope of the Alpine Award to far beyond employees employed at or in direct connection with the operation of an alpine resort, and importantly provide the award coverage in a manner that the Full Bench in the 2018 Decision considered to be a defect in need of correction.<sup>5</sup>
16. As such, and consistent with our previous submissions resisting any proposed practical expansion to the coverage of what was intended to be an award with an extremely limited scope, the AWU strongly opposes the variations to the coverage clause of the Alpine Award proposed by the ASAA.

### **ASAA Submissions**

17. The ASAA submissions dated 4 June 2019 and 10 July 2019 (**ASAA submissions**) in response to the draft determinations proposed by the Full Bench in the 2019 Decision (**Draft Determinations**) are unconvincing. The AWU submissions in reply to the ASAA submissions are as follows.
18. The ASAA claims that the Draft Determinations imposes a geographical limitation on the coverage of the Alpine Award<sup>6</sup> despite the Full Bench proposing the Draft Determination in response to its positive response to the proposition that a person may be performing work directly in connection with the operation of an alpine resort whilst not being physically located at the alpine resort.<sup>7</sup> The Full Bench clearly

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<sup>5</sup> [2018] FWCFB 4984 at [78]

<sup>6</sup> ASAA Submission 4 June 2019, 4.1(a)

<sup>7</sup> [2019] FWCFB 3347 at [5]

states that the determinative factor in regard to coverage is a direct connection, as opposed to a mere connection.<sup>8</sup> There is no geographical imposition in the Draft Determination. It would appear that the ASAA has focused solely on the example provided by the Full Bench in demonstrating an example of *direct* and *mere* connection instead of the substance of the clause.

19. The submission of the ASAA that the Draft Determination contains a bias toward customer patronage<sup>9</sup> appears to also have been made in response to a single example offered by the Full Bench in the 2019 Decision to illustrate the concept of *direct* and *mere* connection. The submission of the ASAA that customer patronage is a general determinative factor on the basis of this single illustrative example is therefore inaccurate and of little practical use for this matter.
20. The ASAA has also attempted to draw what it believes to be *direct* connections between the operations of alpine resorts and other ventures or enterprises that the ASAA ostensibly assumes would fall outside of the coverage clause as amended by the Draft Determination. We assume that this is done in an attempt to convince the Commission that such ventures or enterprises are indeed directly connected to the operation of an alpine resort.
21. The AWU submits that this attempt by ASAA is not made out; the connections established in these submissions are at best tenuous:
  - 21.1. a package deal between enterprises is not determinative or even indicative of correct award coverage;<sup>10</sup>
  - 21.2. the application of the Alpine Award determined by geography<sup>11</sup> has been expressly rejected by the Commission, and the ASAA also opposes such a criterion in these submissions. Additionally, the AWU would not consider it at all unlikely for a person to rent equipment from one sports store and travel to different resorts to use that gear – it seems more impractical (and likely more expensive) to us to rent different equipment at each resort rather than continue to use the same equipment for the entire trip; and

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<sup>8</sup> Ibid.

<sup>9</sup> ASAA Submission 4 June 2019, 4.1(b)

<sup>10</sup> Ibid, 4.15(a)

<sup>11</sup> Ibid, 4.15(b)

- 21.3. the provision of services to a workforce is likewise not determinative or necessary influential in the determination of award coverage.<sup>12</sup>
22. Regarding the ASAA submission that the Draft Determination creates an ambiguity,<sup>13</sup> the AWU submits that the provisional view of the Full Bench in the 2018 Decision is certainly clearer and more preferable in general. The concept of *in direct connection with the operation of the alpine resort* however, is not as unwieldy a concept as the ASAA contend it to be.
23. Insofar as the Full Bench undertakes to expound the concept for the benefit of the ASAA, the AWU submits that a conservative application is necessary.
24. The ASAA also maintains that a relevant consideration in varying the coverage clause of the Alpine Award in the manner it proposes is that alpine resorts have not sought to apply the award to any enterprises that the resorts do not consider to have any connection to the resort's core activities.<sup>14</sup> This is of very little value, if at all to the matter. Award coverage is not and should never be dependent on the election of an employer to apply that award.
25. The necessary implication of this submission by the ASAA is that its member resorts currently have or have had the option to make such an election, which is both worrying and reason for the coverage of the award to be amended to obviate this possibility.
26. The ASAA has also pointed to interference with business prerogative as a ground to amend the Alpine Award coverage in the terms it has proposed and not in terms as proposed by the Draft Determination.<sup>15</sup> Business prerogative is not a relevant consideration for the setting of a coverage clause of a modern award and as such this submission is of little use.
27. Finally, the ASAA relies on its alleged 'qualifications' to the coverage clause in its two proposals to render unnecessary the *direct connection* criterion of the Draft Determination.<sup>16</sup>
28. The AWU submits that the alleged 'qualifications' can not at all be considered actual qualifications to the expansive coverage permitted by the coverage clause

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<sup>12</sup> Ibid, 4.15(c)

<sup>13</sup> Ibid, 4.17

<sup>14</sup> ASAA Submission 10 July 2019, 2.1(e)

<sup>15</sup> Ibid, 2.1(f)(iii)

<sup>16</sup> Ibid, 2.1(f)(iv)

of the Alpine Award prior to the 2018 Decision. For clarity, the AWU considers that the coverage clauses proposed by the ASAA permit expansive coverage to employers to indeed employ those people who have no direct connection with the operation of the alpine resort, including those who may be completely removed from the operation, such as those selling tickets in Cairns, as was offered during the hearing for this matter.

29. Adopting either of the ASAA-proposed coverage clauses would be entirely inconsistent with the decisions already made by this Full Bench of the Commission in relation to the actual and intended coverage for the Alpine Award as it would result in a practical expansion of the award's coverage. The AWU remains strongly opposed to such an outcome.

## **CONCLUSION**

30. The AWU is strongly opposed to the ASAA proposals regarding the coverage clause of the Alpine Award.

31. The ASAA has not provided a merit argument or the amount of evidence required to allow the Commission to determine that it is necessary for the coverage clause of the Alpine Award to be amended in the terms that the ASAA has proposed.

32. The AWU remains supportive of the provisional view of the Full Bench in the 2018 Decision and urges the Commission to retain this view going forward.

33. The Alpine Award is comparatively inferior to many of the alternative applicable awards for most types of work performed by enterprises that may have some connection with the operation of an alpine resort such as hospitality and retail.

34. The immediate financial advantage to members of ASAA of a determination in favour of expanding the coverage of the Alpine Award must be explicitly and consistently kept in mind by the Commission in coming to a determination on this application by the ASAA.

35. This is especially so in the absence of a number of compelling reasons to make such amendments. The AWU submits that no such reasons have been offered by the ASAA.

36. The AWU submits that the sole or at least primary motivator for the ASAA to pursue the amendments it does in this matter is to secure a financial benefit at the expense

of employees. For that reason, the amendments as proposed by the ASAA must be rejected.

37. If the Commission is not minded to retain its provisional view as expressed in the 2018 Decision, the AWU may not be opposed to the proposed Draft Determination on the basis of the words *or in direct connection with the operation of* being interpreted conservatively and elaborated as such in any subsequent decision in this matter.

38. The AWU will appreciate the opportunity to provide submissions on any further provisional views made by the Full Bench, unless as a result of these proceedings the Full Bench reverts to its provisional view as expressed in the 2018 Decision.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'ZD', with a long horizontal flourish extending to the right.

Zachary Duncalfe  
**NATIONAL LEGAL OFFICER**  
**The Australian Workers' Union**