

**STRONGER
TOGETHER**

NATIONAL OFFICE

Level 10, 377-383 Sussex Street Sydney NSW 2000

T: (02) 8005 3333 F: (02) 8005 3300

E: members@awu.net.au W: www.awu.net.au

Members Hotline: 1300 885 653

Daniel Walton National Secretary



ABN 28 853 022 982

IN THE FAIR WORK COMMISSION

AM2014/198 – ALPINE RESORTS AWARD

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

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION

COVERAGE CLAIMS

Lodged by: Roushan Walsh
The Australian Workers' Union, National Office
Address for service: Level 10, 377-383 Sussex
Street, Sydney NSW 2000

Date of document: 31 July 2017
Telephone: (02) 8005 3333
Fax: (02) 8005 3300
Email: roushan.walsh@nat.awu.net.au

BACKGROUND

1. These submissions of The Australian Workers' Union (**AWU**) are made pursuant to the Directions of Vice President Hatcher on 22 June 2017 in the matter AM2016/30. Specifically, these submissions are made in response to claims to vary the coverage of the *Alpine Resorts Award 2010* ('**Award**' or '**Alpine Award**') – being 'issue 4' in the Directions of the Vice President on 24 November 2016 in this matter.

COVERAGE CLAIMS

2. The following parties have sought variations to the coverage of the Alpine Award:
 - 2.1. Australian Business Industrial and New South Wales Business Chamber (**ABI**);
 - 2.2. Australian Hotels Association (**AHA**);
 - 2.3. Mount Hotham Alpine Resorts Management Board (**MHRMB** or '**the Board**').
3. The Shop Distributive and Allied Employee's Association (**SDA**) and the Australian Ski Areas Association (**ASAA**) oppose all proposed variations to the coverage of the Alpine Award. The AWU supports the submissions of the SDA and ASAA insofar as these organisations oppose the proposals of ABI and the AHA. However, in regards to the MHRMB, The AWU is supportive of the Board's application.
4. The AWU understands the coverage applications form two distinct groups:
 - 4.1. ABI and the AHA seek to dramatically vary the coverage of the Award to apply in workplaces that are otherwise governed by more appropriate industry awards; and
 - 4.2. MHRMB seek to vary the coverage clause of the Award to reflect the status quo – being the intended coverage of the Award.
5. Given the breadth of material already filed in response to ABI and the AHA, these submissions of The AWU are directed to supplementing that material rather than duplicating it. In this respect, these submissions do not address the differences between companies that invest in alpine lifting facilities and those that do not. The ASSA in particular have comprehensively provided material on this point of which The AWU is supportive.

AWARD COVERAGE PROVISIONS

6. Clauses 3 and 4 of the Award, provide as follows:

3. Definitions and interpretation

3.1 *In this award, unless the contrary intention appears:*

...

alpine resort means an establishment whose business, among other things, includes alpine lifting

4. Coverage

4.1 *This industry award covers employers throughout Australia who operate an alpine resort and their employees in the classifications within Schedule B—Classification Definitions to the exclusion of any other modern award.*

7. The definition of 'alpine resort' is linked to the operation of alpine lifts. Interpreted together, clauses 3.1 and 4.1 exclude award coverage of employers that operate an alpine resort but not alpine lifts.

FORM OF VARIATIONS SOUGHT

AHA and ABI

8. The AHA¹ and ABI² seek different variations to clauses 3.1 and 4.1 cited above, with both variations having the effect of increasing the number of industries covered by the Alpine Award – based on the proximity of a business to an alpine resort.
9. The AHA and ABI both seek to vary coverage of the Award to include accommodation, functions/conferences, restaurant/food and beverage, the sale by retail and/or hire of alpine equipment, and general retail businesses provided such businesses operate:
 - 9.1. (per the AHA) within a 10 kilometre radius of: the Thredbo Village LPO; the Perisher Valley LPO; the Charlotte Pass Village; the Mount Buller LPO; the Falls Creek LPO; the Mount Hotham Alpine Resort; and Mount Selwyn, Wilsons Valley/Sawpit Creek, Bogong Alpine Village, Dinner Plain Alpine Village, Mount Stirling, Mount Baw Baw Village, Cradle Mountain and Ben Lomond; and
 - 9.2. (per ABI) within a 2 kilometre radius of the locations cited above, but excluding Wilsons Valley/Sawpit Creek, Dinner Plain Alpine Village and Cradle Mountain.

¹ See Australian Hotels Association 30 November 2016 Draft Determination, at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201630-sub-aha-301116.pdf>

² See Australian Business Industrial and New South Wales Business Chamber 30 November 2016 Draft Determination, at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201630-sub-abiandors-301116.pdf>

MHRMB

10. The MHRMB seek to amend the definitions and coverage clauses to include coverage of “any establishment which has statutory responsibility for [the] management and operation of an alpine resort, whether or not that establishment operates an alpine lift.”³

LEGISLATIVE FRAMEWORK AND SUMMARY OF AWU POSITION

11. In exercising its powers in the four-yearly review the Fair Work Commission must ensure that the awards together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account the matters listed in s 134(1)(a) – (h) of the *Fair Work Act 2009* (Cth) (**‘the FW Act’**). This is the modern awards objective.
12. 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’ and the need for a ‘stable’ modern award system requires the formulation of a merit case supported by submissions addressing the legislative provisions with the addition of probative evidence.⁴
13. ABI and the AHA have not shown that the retail and hospitality awards do not provide a fair and relevant safety net of terms and conditions. To expand the coverage of the Alpine Award would be contrary to the modern awards objective and in particular:
 - 10.1 the relative living standards and the needs of the low paid;⁵ and
 - 10.2 the need to provide additional remuneration for employees working overtime⁶ and on weekends and public holidays.⁷
14. The coverage and creation of the Alpine Award was carefully considered during award modernisation by a five-member bench. To depart from the intended application of the award requires a significant shift in understanding. ABI and the AHA have not shown there are ‘cogent reasons’ to do so.
15. The application of the MHRMB is significantly different. The variation sought will clarify that employees working for resort management boards in classifications set out in the Alpine Award are correctly accessing and applying the Award, and

³ See Mount Hotham Resort Management Board 30 November 2016 Draft Determination, at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201630-sub-mthothamresort-301116.pdf>

⁴ *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 178 at [23] and [60].

⁵ See *Fair Work Act 2009* (Cth), section 134 (1) (a).

⁶ *Ibid*, section 134 (1) (da) (i).

⁷ *Ibid*, section 134 (1) (da) (iii).

in the case of resort management boards that do not operate alpine lifts – the variation will ensure the Alpine Award appropriately applies. The AWU supports the application and understands the Alpine Award is already applied without contest by resort management boards, at least in Victoria.

APPLICATIONS OF THE AUSTRALIAN HOTELS ASSOCIATION AND AUSTRALIAN BUSINESS INDUSTRIAL AND NEW SOUTH WALES BUSINESS CHAMBER

16. The proposals of the AHA and ABI can be dealt with together to the extent that the Alpine Award was never intended to operate in the broad manner contemplated by either variation. The coverage of the Alpine Award is intentionally narrow and intended only for the operators of alpine lifting facilities (with the exception of resort management boards as above).

Alpine Award inferior to currently applicable industry awards

17. The variations are clearly seeking to reduce award conditions for employees employed by businesses that operate in alpine areas but do not operate an alpine resort with alpine lifting facilities.

18. These businesses are more appropriately covered by other modern awards such as the *General Retail Industry Award 2010 (Retail Award)* the *Hospitality Industry (General) Award 2010 (Hospitality Award)* the *Fast Food Industry Award 2010 (Fast Food Award)*, the *Restaurant Industry Award 2010 (Restaurant Award)* and potentially, the *Hair and Beauty Industry Award 2010 (Hair and Beauty Award)*.

19. A comparison of some of the key award conditions in the Alpine versus the industry awards cited above are set out in the table below. Provisions that are superior to those provided in the Alpine Award are marked up in red. We have not included the Retail Award as the SDA submitted a comparison on 11 May 2017.

20. We have however, for completeness, included the Hair and Beauty Award as it is not clear whether the proposed variations, which refer to 'general retail businesses' would capture hair and beauty salons.

Table: Comparison of Alpine, Hospitality, Restaurant, Fast Food and Hair and Beauty Industry Awards

Provision	Alpine	Hospitality	Restaurant	Fast Food	Hair and Beauty
Base rate	\$18.22	\$18.21	\$18.21	\$19.44	\$19.44
Saturday penalty	-	125%	125%	125%	133%

Sunday penalty	-	175%	150%	150%	200%
Public holiday	250%	250% min 4 hrs pay / casuals 2hrs	250% min 4 hrs pay / casuals 2hrs	250%	250%
Morning work (Mon-Fri)	-	115% (midnight - 7am)	115% (midnight - 7am)	115% (after midnight)	-
Evening work (Mon-Fri)	-	110% (7pm - midnight)	110% (10pm - midnight)	110% (9pm - midnight)	-
TOIL	TOIL at equivalent time rate	TOIL at equivalent time rate	TOIL at overtime rate	TOIL at overtime rate	TOIL at overtime rate
Overtime	150% (2hrs) and 200% thereafter (Mon-Sun)	150% (2hrs) and 200% thereafter (Mon-Fri) 200% (Midnight Fri - midnight Sun)	150% (2hrs) and 200% thereafter (Mon-Fri) 175% (2hrs) and 200% thereafter (midnight Fri - midnight Sat) 200% (midnight Sat - midnight Sun)	150% (2hrs) and 200% thereafter (Mon-Fri) 200% (Sun)	150% (2hrs) and 200% thereafter (Mon-Sat) 200% (Sun)
Allowances	Meal \$12.57		Meal \$12.57 Split shift 0.5% Special clothing and laundering 'costs'	Meal \$12.51 Cold work 1.3% p.h. + 2% for cold chamber work Special clothing 'cost' and laundering – \$6.25 p.w. or \$1.25 per shift for casuals	Meal \$17.85 First aid 1.3% Tool \$8.80 p.w. Special clothing 'cost'

Provisions under review in Alpine proceedings

	Alpine	Hospitality	Restaurant	Fast Food	Hair and Beauty
Annual leave	Awaiting final decision (Seasonal loading of 8.33% currently in lieu of annual leave)	Yes	Yes	Yes	Yes
Annual leave loading	Awaiting decision (ASAA/AWU package)	Yes	Yes	Yes	Yes
Overtime for casuals	Awaiting decision (ASAA/AWU package)	Yes (start date subject to a further determination) – confirmed in the <i>Casual and Part-time Decision</i> [2017] FWCFB 3541	Yes (start date subject to a further determination) – confirmed in the <i>Casual and Part-time Decision</i> [2017] FWCFB 3541	Yes	Yes 150% (all-up rate Mon-Sat), 200% all-up rate Sun)

21. The above Table is based on the award provisions prior to the recent Penalty Rates Decision⁸ phased in from July 2017⁹ to reduce Sunday penalties (in

⁸ 4 Yearly review of modern awards – Penalty Rates [2017] FWCFB 1001.

Hospitality and Fast Food) by 25% respectively (although no change for hospitality casuals) and public holiday penalties will be reduced by 25% (in Hospitality, Fast Food and Restaurant awards). We also acknowledge that the early and late span for morning and evening loadings was also adjusted in that Decision. Restaurant workers lost a penalty hour for morning work and fast food workers lost a penalty hour for evening work. Even taking into account these reductions, the Alpine Award clearly offers inferior conditions to every applicable industry award contained in the prepared Table.

22. The effect of the variations sought is to remove the long-established industrial conditions for retail and hospitality workers. The most alarming implication of the variations if granted, would be the complete removal of the currently applicable weekend, morning and evening penalty rates. Given the great majority of the work performed for the employers seeking change is performed during penalty hours – the effect of such proposals would be drastic and at odds with the modern awards objective. We refer for example, to the Statement of Mr Brett Anthony Williams filed by ABI¹⁰ who states ‘Saturdays and Sundays are not “weekends” for anyone in the ski/snow industry – everyone has to be working those days’.

Application of the modern awards objective

23. Each consideration set out at s 134(1) of the FW Act is set out below.

(a) relative living standards and the needs of the low paid

24. Retail and hospitality employees are already low paid workers. Only with significant access to supplementary penalties are employees able to make a reasonable wage.
25. In determining the meaning of ‘low paid’ the Expert Panel in the 2015-16 Annual Wage Review (AWR) at [359] state:

There is broad acceptance of the proposition that the two-thirds of median (adult) ordinary time earnings constitutes a reasonable basis for identifying the low paid. As in past AWRs, we accept that adult award-reliant employees who receive a rate of pay that (as a full-time equivalent) is below two-thirds of median (adult) ordinary time earnings are an appropriate and practical benchmark for identifying who is low paid...

26. Using this formula, the Panel in the most recent AWR provide an estimate based on the available ABS 2016 data – that two thirds of the median weekly earnings for a full-time equivalent adult sits **between \$833.33 and \$917.33**.¹¹

⁹ 4 yearly review of modern awards – Penalty Rates – Transitional Arrangements [2017] FWCFB 3001.

¹⁰ Statement of Brett Anthony Williams 21 March 2017 at [30].

¹¹ Annual Wage Review [2017] FWCFB 3500 at [370].

27. On this criteria, all full time employees working under the Hospitality Award receiving only ordinary time earnings fall within the low paid range (the maximum Level 6 rate is \$882.80 per week), with those classified at Level 1 through to 4 falling below the lower bound (the Level 4 rate is \$809.10 per week). Similarly, under the Retail Award, rates paid for Levels 1 to 7 fall within the low paid range, with Levels 1 to 4 falling below the lower bound (the Level 4 rate is \$809.10).
28. We have prepared an example roster and calculated applicable rates for a mid-level Hospitality Award classification to demonstrate the importance of penalty rates in this industry. The following calculation is prepared on the basis of a Level 3 employee rostered evenly across a 5-day roster including Saturday and Sunday with weeknight penalties applying to 4 hours of each weekday shift (10% of the standard hourly rate per hour worked after 7pm and before midnight).¹² The final rate is calculated on the basis of the current Sunday penalty rate of 170% however this will fall to 150% by 1 July 2019 taking into account the Penalty Rates Decision.¹³
29. Using the above roster, which incorporates weekend and night penalties, the hypothetical weekly wage of a full time Level 3 hospitality employee, would be **\$938.02**. This is only just above the Expert Panels prescribed \$917.33 (upper bound). The calculation is as follows:
- | | |
|------------------------|-------------------------------------|
| 3 weekdays: | 22.8 hours X \$20.21 = \$460.79 |
| + Weeknight penalties: | 12 hours X \$2.13 = \$25.55 |
| + Saturday: | 7.6 hours X \$20.21 X 125% = 192.00 |
| + Sunday: | 7.6 hours X \$20.21 X 170% = 259.69 |
30. Similar to the ordinary time earnings of hospitality and retail workers, all Alpine Resort Workers also fall within the low paid range (the maximum Level 7 rate is \$883.12) with all Resort Workers classified at Level 1 through to 4 falling below the lower bound of the estimated range (the Level 4 rate is 808.64 per week).
31. The effect of the AHA and ABI variations on our example hospitality employee would be to apply the Alpine Resort Worker Level 3 rate, **resulting in a wage cut of \$169.66 per week**. This is incredibly harsh.
32. In summary, given most of the award covered employees subject to the proposed variations are characterised as 'low paid', the impact of further reducing their rate of pay is significant. The needs of the low paid must be given great weight.

(b) the need to encourage collective bargaining

33. If the applicant employers require greater flexibility, we submit this is an appropriate goal for enterprise bargaining, subject of course to the better off overall test.

¹² *Hospitality Industry (General) Award 2010*, clause 32.3(a).

¹³ *4 Yearly review of modern awards – Penalty Rates [2017] FWCFB 1001*.

34. Removing the safety net provided by the currently applicable industry awards discourages employers from collective bargaining as they are able to access labour at some of the lowest wage rates and at the ordinary wage rates over any 5 days of the week – with all the flexibility already achieved. This is an excessive benefit and will discourage collective bargaining.

(c) the need to promote social inclusion through increased workforce participation

35. This appears to be a neutral factor.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

36. As above at paragraphs 33 and 34 in relation to section 134(1)(b).

(da) the need to provide additional remuneration for:

- (i) employees working overtime; or
- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts;

37. This is obviously a very strong factor in support of our proposed variations.

38. As stated previously, the most alarming effect of the variations sought by ABI and the AHA is to deprive retail and hospitality workers of any additional remuneration for working early and late shifts or for working weekends. This is at direct odds with the principles set out at subsections (ii) and (iii) above.

(e) the principle of equal remuneration for work of equal or comparable value

39. This appears to be a neutral factor.

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

40. Of course, the applications of ABI and the AHA if granted will reduce labour costs and increase the profit margin for employers. However, the impact of denying the applications is neutral. The rates currently applicable to retail and hospitality workers are already low and reflect the long-standing employment arrangement for retail and hospitality businesses.

41. There is no regulatory burden on employers to simply continue to apply the relevant industry awards. The opposite is true should the applications be granted.

(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

42. To unearth the well-established industry wages and conditions and apply the Alpine Award which was intended to have very narrow application is at odds with the concept of 'stability'. The applications are rather extreme taking into account the broader landscape. The Alpine Award is an exception to the otherwise applicable industry awards and is intended only for alpine resorts with the requisite character – being an alpine resort that operates an alpine lift.

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

43. This appears to be a neutral factor.

APPLICATION BY THE MOUNT HOTHAM RESORT MANAGEMENT BOARD

44. The MHRMB submit that it is currently covered by the *State Government Agencies Administration Award 2010* ((now simply titled the *State Government Agencies Award 2010 (SGA Award)*) on the basis that it is a state public sector body that is established under a law and/or for a public purpose.¹⁴ The MHRMB also submit that although the Alpine Award does not cover the work performed for the Board, the Alpine Award is the best fit taking into account the majority of the work performed for the Board and the classifications contained in the Alpine Award.¹⁵

45. The MHRMB's proposed variation¹⁶ retains the distinction between a resort that operates alpine lifts and one that does not, while specifically ensuring coverage of resort management boards such as the MHRMB (regardless of the operation of alpine lifts.)

Summary of AWU position

46. To clarify our position, The AWU are supportive of the MHRMB's application – having previously indicated we are not necessarily opposed to the variation sought. The AWU originally questioned whether the variation is *necessary* to achieve the modern awards objective given the Alpine Award is already applied in practice, including in successful applications to register enterprise agreements.¹⁷

¹⁴ MHRMB 31 March 2017 Submission, paragraph 6.

¹⁵ Ibid, paragraph 7.

¹⁶ See MHRMB 30 November 2016 Draft Determination, at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201630-sub-mthothamresort-301116.pdf>

¹⁷ See AWU 21 August 2015 Submission in AM2014/198 at [12] to [14].

Award modernisation

47. The Award Modernisation Full Bench released a Statement together with a draft Alpine Resorts Award in May 2009. That Statement at paragraphs [219] and [222] appear as follows (our emphasis at underlined):

***219]** The draft Alpine Resorts Award 2010 covers the seasonal snowsports industry in particular, though it will also have application to alpine resorts that operate over the summer season...*

***[222]** ... We have also decided not to make any special provision in relation to alpine resorts management boards. We have provisionally decided to include employees who perform hospitality and childcare duties...*

48. Nothing more was said in regards to resort management boards when the Stage 3 Modernisation Decision was released on 4 September 2009. The AWU consider that the passage underlined refers to the rejection of the AWU proposal to include a discrete (Part 7) governing Victorian alpine resort management board employees.¹⁸

49. In this respect and further (at underlined), we agree with the consideration given by Commissioner Roe in *Falls Creek Resort Management* [2010] FWA 2847 in regards to the same passage above:

***[52]** In my view this is a clear reference to the AWU submission for a separate schedule to the Award to cover the conditions for the Victorian Alpine Resorts Award. I do not read it as a decision to exclude the alpine resorts management boards from the coverage of the Modern Award. The whole approach of the Full Bench was to ensure that the whole of an industry (or in some cases occupations) should be covered by a Modern Award and generally the Full Bench was reluctant to grant exceptions pressed by various parties...*

50. The Award Modernisation Full Bench appear to have intended to create (without the need for a separate schedule) a comprehensive award to cover resorts including those run by alpine management boards.

Applicable awards

51. The AWU agree that both the Alpine Award and the SGA Award are the most appropriate instruments to cover the work in question. We use the example of the last two registered agreements covering the Mt Baw Baw Resort Management Board and The AWU, where:

51.1. the 2010 Agreement was underpinned by the Alpine Award for the classifications set out under the agreement, and for classifications with an

¹⁸ See AWU 26 March 2009 Submission at [10] to [12].

administrative, technical professional or historical basis – the SGA Award directly applied,¹⁹ and

- 51.2. the classifications under the current 2014 Agreement are underpinned by both awards.²⁰
52. The AWU also has a recent agreement with the Resort Management Board at Falls Creek that is underpinned exclusively by the Alpine Award as it only applies to outdoor work.²¹
53. Further, in spite of the MHRMB's submissions that the Alpine Award doesn't apply, the Board's current Agreement is underpinned by a range of awards including the Alpine Award, the SGA Award, the *Miscellaneous Award 2010* and the *Victorian Alpine Resorts Award 1999* (we note the Victorian Award has been terminated).²²
54. The remaining Victorian sites are on agreements underpinned by the *Victorian Alpine Resorts Award 1999* (at Lake Mountain)²³ and the *Victorian State Government Agencies Award 2015* (at Mount Buller and Mount Stirling).²⁴ Given that the *Victorian Alpine Resorts Award 1999* has been terminated, The AWU understand the Victorian State Government Agencies Award 2015 would apply to the 'resort classifications' in the case where an applicant is not held to be a trading corporation.
55. Commissioner Roe has previously determined the *Alpine Resorts Award 2010* covers the Falls Creek Resort Management Board subject to them being a trading corporation.²⁵ The Commissioner summarised the award landscape and position of parties at paragraph [5] of that Decision:

[5] *The Award which would have applied to employees had the 2006 Agreement not been in place would have been the Victorian Alpine Resorts Award 1999. In recognition of the relationship to the Victorian State Government, the industrial arrangements for the workers under the Falls Creek Alpine Resort Management Board have traditionally been different from those applicable to private sector workers in alpine resorts. The Modern Award which is applicable is identified on Fair Work Online as the State Government Agencies Administration Award 2010. The AWU submits that this is the applicable Modern Award. The Applicant submits that if a Modern Award is found to apply then the relevant Modern Award is the Miscellaneous Award 2010. Both the Applicant and the AWU agree that if the Applicant is*

¹⁹ [AG2012/4748] *Mt Baw Baw Resort Management Board Enterprise Agreement 2010*.

²⁰ [AG2014/9135] *Mt Baw Baw Resort Management Board Enterprise Agreement 2014*.

²¹ [AG2016/5460] *Falls Creek Alpine Resort Management Board Enterprise Agreement 2016*.

²² [AG2013/2416] *Mount Hotham Resort Management Board Enterprise Agreement 2013*.

²³ [AG2005/5819] *Lake Mountain Alpine Resort Enterprise Agreement 2005*.

²⁴ [AG2016/6273] *Mount Buller and Mount Stirling Alpine Resort Management (RMB) Enterprise Agreement 2015-2019*.

²⁵ *Falls Creek Resort Management* [2010] FWA 2847 at [54] and [55].

not a trading corporation then the Victorian Alpine Resorts Award 1999 is the relevant award and there is no relevant Modern Award.

56. The Commissioner goes on to consider the contractual arrangements at Falls Creek in regards to the operation of ski lifts and ultimately determines the Alpine Award applies (note, the Commissioner at [54] is referring to award modernisation transcript):

[54] I think that the words of the President make it clear that the term establishment in this Award should not be read so narrowly as to imply that the employer must operate the ski lifts directly itself for the employer to come within the scope of the Award. Rather the term is to describe the nature of the resort and to exclude those where there are not operating ski lifts. In this case there was undisputed evidence that the Falls Creek resort includes many ski lifts and that the ski lifts are operated under a contract controlled by the Applicant. A separate company is contracted to operate the lifts. The Falls Creek Alpine Resort is an establishment whose business amongst other things includes alpine lifting and the employer the Falls Creek Alpine Resort Management Board Board is clearly an employer who along with others operates the Falls Creek Alpine Resort. It is clear that the Falls Creek Alpine Resort Management Board Board is the principal employer at the Resort and has by Statute been given the responsibility for the management and operation of the alpine resort which includes alpine lifting.

[55] I am therefore satisfied that if the Applicant is a trading corporation then its outdoor workforce is covered by the Alpine Resorts Award 2010. The reference Award for transitional purposes is the 1999 Award. I did consider the applicability of the State Government Agencies Administration Award 2010. That Award only applies to employees in the classifications defined in that Award. The classifications are restricted to administrative, technical and professional employees. None of the outdoor workers could properly fit these definitions.

[56] In the event that the Applicant is not a trading corporation then they are excluded from the Alpine Resorts Award 2010 because clause 4.5 states "The Award does not cover employees who are covered by a State reference public sector Modern Award, or an Enterprise instrument (within the meaning of the Fair Work (Transitional provisions and consequential amendments Act 2009 (Cth)), or employers in relation to those employees."

57. It is arguable therefore, that the Alpine Award already applies to resort management boards subject to their status as a trading corporation and subject to their direct or indirect control of alpine lifting facilities. Given that, at least to The AWU's knowledge, there is at least one alpine resort at Lake Mountain where the management board have never operated alpine lifts, the proposed variation is necessary to ensure the Alpine Award can be utilised for the relevant work in that region.

58. We note that the Commissioner, having considered the trading activity of the Falls Creek Management Board was 'inclined to the view' that they were a trading corporation, but did not give a final decision as the Commissioner needed only to

satisfy himself in relation to the FW Act section 193 better off over all test (BOOT) – where the applicant had failed to pass the BOOT on either outcome.²⁶

SUMMARY OF APPLICATIONS AND RESPONSE

59. As set out in these submissions, The AWU understands the coverage applications form two distinct groups.

60. The applications of ABI and the AHA seek to dramatically vary the coverage of the Award to apply in workplaces that are otherwise governed by more appropriate industry awards and would ultimately have the effect of severely cutting the take-home pay of already low-paid workers. These applications in our submission do not establish that the current awards fail to provide a fair and relevant safety net of terms and conditions. Further, given the coverage provisions are clearly intended to exclude the applicant businesses, ABI and the AHA were required to establish ‘cogent reasons’ to depart from the considerations and decision of the Award Modernisation Full Bench. The AWU submits this burden was not discharged.

61. The MHRMB application can be dealt with more easily as the application does not appear to be at odds with the intentions of the Award Modernisation Full Bench. Further, the proposed change will in many cases simply affirm the current practices of resort management boards and the Union alike. The AWU understand the Alpine Award in fact already applies to those resort management boards that operate ski lifts.

The Australian Workers’ Union

31 July 2017

²⁶ *Falls Creek Resort Management* [2010] FWA 2847, paragraphs [66] and [67].