In the Fair Work Commission

At Sydney

Application under section 157(1)(a) for variation of a modern award

Alpine Resorts Award 2020

Matter No: AM 2020/4

Applicant: Shop, Distributive and Allied Employees' Association

Respondent: Australian Ski Areas Association

Submission by the Australian Ski Areas Association

Introduction

1. These submissions by the Australian Ski Areas Association ("**ASAA**") are filed pursuant to the orders made by Vice President Hatcher on 28 August 2020.

2. These submissions are in support of the application dated 19 August 2020 for summary dismissal of proceedings AM2020/4 made pursuant to section 587(1)(c) of the *Fair Work Act 2009* ("**Application to Dismiss**") and in response to the application dated 18 February 2020 by the Shop, Distributive and Allied Employees Association ("**SDA**") for a determination under section 157(1)(a) of the *Fair Work Act 2009* (Cth) ("**FW Act**") varying the *Alpine Resorts Award* 2020 ("**Principal Application**").

Key Propositions

3. These submissions contain the following key propositions:

    a) The Fair Work Commission should exercise its discretion to dismiss the Principal Application pursuant to section 587(1)(c) of the FW Act on the basis that it has no reasonable prospects of success because the SDA have presented no material on which the Fair Work Commission can be satisfied that the variation applied for is necessary to achieve the modern awards objective.

    b) The history of the *Alpine Resorts Award* has involved careful consideration of its coverage provisions and the nature of the alpine resorts industry in tailoring the award in its current form.

    c) The SDA have presented no cogent reasons which might justify a departure from the previous Full Bench decisions which form part of the history. The SDA have not identified a significant change in circumstances which warrants a different outcome; have not provided evidence which demonstrates that the *Alpine Resorts Award* has not operated in practice in a way intended by the Full Bench in its earlier decisions or that a matter critical to the proper operation of the award was not raised before the Full Bench and consequently not considered, or that the Full Bench made a patently demonstrable error.

Application to Dismiss

4. The ASAA submits that the Fair Work Commission should exercise its discretion to dismiss the Principal Application pursuant to section 587(1)(c) of the FW Act because it has no reasonable prospects of success. The foundations for certain of the submissions of the ASAA in support of

summary dismissal, are elaborated upon in the section responding to the Principal Application below.

5. The conclusion that an application has no reasonable prospect of success may be reached in circumstances, for example, where an application is manifestly untenable or is groundless or is so lacking in merit or substance as to be not reasonably arguable.[1] While these examples do not provide an exhaustive description of the circumstances when an application has no reasonable prospect of success[2], it is the ASAA's submission that they are an apt description of the Principal Application. Full expression to the phrase "no reasonable prospect of success" must be given. [3]

6. In *Applicant v Respondent* [2010] FWA 1765, Deputy President McCarthy held that the approach to deciding whether an application should be dismissed on the basis that it had no reasonable prospects of success should be similar to the approach that the Federal Court has taken in applying section 31A of the *Federal Court Act 1976*.

7. Importantly, DP McCarthy observed that the role of the Fair Work Commission is to, inter alia, "*consider the pleadings and the evidence with a critical eye in order to see whether the Respondent party has evidence of sufficient quality and weight to be able to succeed at trial*". DP McCarthy further noted "*the real question in every case is not so much whether there is any issue that could arguably go to trial but rather whether there is any issue that should be permitted to go to trial*". Subsequent Fair Work Commission decisions have agreed with DP McCarthy's reasoning.[4]

8. The Fair Work Commission cannot assess the Principal Application with the necessary critical eye because the SDA have not put forward evidence of sufficient quality and weight. It follows that there is no issue in the Principal Application that should be permitted to go to trial.

9. The SDA has not brought any evidence of any kind in support of the Principal Application.

10. The Fair Work Commission may make a determination to vary a modern award if it is satisfied that making the determination is necessary to achieve the modern awards objective, having regard to the particular considerations identified in section 134(1) of the FW Act.

11. The SDA bear the onus of presenting material on which the Fair Work Commission can be satisfied that the variation applied for is necessary to achieve the modern awards objective. The SDA has presented no such material.

12. The SDA has made bare assertions in relation to considerations relevant to determining whether the award meets the modern awards objective in section 134 of the FW Act, and have provided no evidence to support the assertions made.

13. The Fair Work Commission, in its previous decisions concerning applications for variations to modern awards, has expressed the need for:

    a) detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes;[5]

[1] *Baker v Salva Resources Pty Ltd* [2011] FWAFB 4014
[2] *Shaw v Australia and New Zealand Banking Group Limited* [2014] FWC 3408
[3] Ibid
[4] *Bray v Corporation of the Synod of the Diocese of Brisbane* [2013] FWC 7805 at [30], *Laurie v KTI Management Company Pty Ltd* [2014] FWC 8213 at [15], *Dowie v Brookwater Realty Pty Ltd* [2014] FWC 531 at [67] and *Ridwan Ridwan v Coles Supermarkets Australia Pty Ltd* [2018] FWC 452
[5] *Security Services Industry Award 2010* [2015] FWCFB 620

b) probative evidence properly directed to demonstrating the facts supporting the proposed variation;[6]

c) probative evidence of the issues to be addressed under section 134 of the FW Act; and[7]

d) sound and balanced reasoning supporting the proposed variation.[8]

14. The Fair Work Commission cannot be satisfied that the variation sought is necessary to achieve the modern awards objective on the basis of the material provided in the Principal Application and the Principal Application should therefore be summarily dismissed.

15. The Principal Application seeks a variation which is a radical departure from the framework of the *Alpine Resorts Award* established by prior Full Benches after extensive process and reflective of the unique nature of the snow sports industry to which it applies.

16. The SDA mischaracterise the rationale for the structure of the *Alpine Resorts Award* in a manner which has no basis in the Alpine Award history.

17. The SDA must establish cogent reasons, supported by probative evidence, to establish the necessity for a change to the fundamental framework of the *Alpine Resorts Award*.

18. The SDA have failed to engage with the rationale for the existing structure of the *Alpine Resorts Award* and have no reasonable prospect, in the circumstances, of establishing the necessary cogent reasons.

19. The Principal Application, informed by the SDA Submissions, taken at its highest is principally based on an asserted "anomalous" position such that the *Alpine Resorts Award* provides for "*considerably inferior safety net terms and conditions of employment*" for employees covered by the *Alpine Resorts Award* who would otherwise be covered by the *General Industry Award*.

20. The differential conditions which exist between potentially applicable modern awards was addressed during the creation of the *Alpine Resorts Award* in the award modernisation process, and substantially enshrined through the recent 4-yearly review. It is a situation which has been supported for a decade with previous Full Benches carefully addressing the interplay of the *Alpine Resorts Award* and the surrounding modern awards.

21. In circumstances where the variation sought in the Principal Application would cut across fundamental aspects of the purpose and scope of the *Alpine Resorts Award* determined over an extensive review process, the Principal Application does not demonstrate that there has been any material change in circumstances or any change at all since the Full Bench considered and determined the terms (including coverage) of the *Alpine Resorts Award* during the recently completed comprehensive 4-yearly review.

22. In these circumstances, the absence of a material change, justifying a departure from the previous Full Bench decisions makes the Principal Application manifestly untenable and groundless.

23. In addition, if bare assertions concerning long standing award arrangements are sufficient to trigger a fundamental further review of a modern award, particularly in the absence of probative evidence of the case for change, cogent reasons or a material change in circumstances, then the spirit and intent of the *Fair Work Amendment (Repeal of 4-Yearly Reviews and Other Measures) Act 2018* (Cth[h]) will be frustrated.

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[6] *4-Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788

[7] *Application by Chapman* [2019] FWC 4415 at [23]

[8] *Security Services Industry Award 2010* [2015] FWFB 620

The Principal Application

24. The SDA have sought, pursuant to the Principal Application, a determination under section 157(1)(a) of the FW Act varying clause 4.1 of the *Alpine Resorts Award* 2020, which deals with the coverage of the award, to remove certain employees from its coverage.

25. The employees sought to be removed are those who perform work in classifications covered by the *General Retail Industry Award 2010*, the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010*, together described as the "*General Industry Awards*".

26. The SDA support the proposed variation in their submissions (the "**SDA Submissions**") primarily on the basis that the *Alpine Resorts Award* has lower minimum rates of pay and applicable penalties for employees who would otherwise be covered by the *General Industry Awards* (at paragraphs [14], [21] and [23] of the SDA Submissions), which is said to result in the *Alpine Resorts Award* not meeting the modern awards objective. The SDA's reasoning (as set out at paragraphs [23] and [24] of the SDA Submissions) is that the effect of the Commission approving the *General Industry Awards* as meeting the modern awards objective, is to give the rates of pay and applicable penalties in those awards the status of a necessary component which other awards must contain in order to meet the modern awards objective.

27. The SDA Submissions do not address the fact that the *Alpine Resorts Award,* with its current coverage provisions, rates of pay and applicable penalties, has also been considered by the Full Bench of the Fair Work Commission to have met the modern awards objective following the award modernisation process and the subsequent four yearly reviews.

28. It has never been the case that once an award meets the modern awards objective, each of its provisions considered in isolation, are individually given the status of necessary components which other awards must have in order to meet the modern awards objective.

29. In the *Preliminary Jurisdiction* [2014] FWCFB 1788 decision, the Full Bench of the Commission stated in respect of the modern awards objective:

> "[33]…*The need to balance the competing considerations in s134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*
>
> [34] *Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.*"

30. The Commission is entitled to conclude that the Full Bench, when making the *Alpine Resorts Award,* determined that the coverage provisions as stipulated in the Award were appropriate and met the modern awards objective, in the context of the terms and conditions of that award as an integrated whole, and the work environment in which that award operates.

31. The SDA concede that the issue of coverage by the *Alpine Resorts Award* of retail workers, fast food workers and hair and beauty workers was ventilated during the award modernisation process and four yearly reviews of the award (at paragraphs [16]-[17] of the SDA Submissions).

32. The SDA do not point to any change in circumstances such as would make the previously expressed conclusion of the Full Bench of the Fair Work Commission that the *Alpine Resorts Award* met the modern awards objective, no longer hold true, to any error on the part of the

Full Bench of the Fair Work Commission, nor to any considerations which were extant but unappreciated or not fully appreciated on a prior review of the *Alpine Resorts Award*.

33. The SDA describe the basis for the present pay differential between the *Alpine Resorts Award* and the *General Industry Awards* as being a "privileged" position granted to alpine resorts operators because of the capital costs associated with operating an alpine ski lift and the seasonality of their enterprise (at paragraphs [5], [15], [22] and [25] of the SDA Submissions).

34. The history of the *Alpine Resorts Awards* does not include a "privileged" position being granted to alpine resorts operators because of the capital costs associated with operating an alpine ski lift. In *Alpine Resorts Award 2010* [2018] FWCFB 4984, it was noted at [37] that the AIRC Full Bench decisions in the award modernisation process which led to the making of the *Alpine Resorts Award* showed that the AIRC did not take into account the capital investments of resorts in ski lifting equipment. The Full Bench noted at [80] that the existence of an alpine ski lift was a definitional feature of an alpine resort. The alpine ski lift had to do with the substantial character of the business. Capital costs was not a factor.

35. According to the SDA, the pay differential has always been unfair and has always been understood and maintained by them to be unfair (at paragraphs [4], [16], [17], [21] and [22] of the SDA Submissions).

36. As an underlying principle, the SDA assert that workers performing similar tasks ought to receive the same terms and conditions regardless of the identity of their employer and the environment in which the employee normally performs the work (at paragraphs [5] and [15] of the SDA Submissions).

37. In *Integrated Trolley Management Pty Limited* [2010] FWA 3317, Vice President Watson made the point at [2] that the coverage clauses of modern industry awards describe the industry of the employers covered by them and generally contain classifications for all relevant award covered employees employed by such employers. Vice President Watson expressed the view at [11] that "*The terms of awards are best considered by reference to the circumstances of the employment in the context of the employer's business and businesses of a similar nature – not by seeking to modify the coverage clauses of awards in order to bring about changes in terms and conditions of employment.*"

38. The provisions of the *Alpine Resorts Award 2020* have been arrived at as an integration of factors particular to the relevant industry.

39. The SDA Submissions make some factual assertions in relation to the factors to be taken into account in determining whether an award, together with the *National Employment Standards*, provide a fair and relevant minimum safety net of terms and conditions for the purposes of section 134(1) of the FW Act at paragraphs [29] to [56] of the SDA Submissions.

40. The SDA's analysis of the application of section 134, as evidenced in particular by its reference to the observations of the Full Federal Court in *Shop, Distributive and Allied Employees' Association v The Australian Industry Group* (2017) 253 FCR 368 at paragraph [20] of the SDA Submissions, fails to appreciate the pivotal distinction between an application for a variation to a modern award as part of a four yearly review, such as that being considered by the Full Court of the Federal Court in *Shop, Distributive and Allied Employees' Association v The Australian Industry Group* (2017) 253 FCR 368, and an application for a determination under section 157(1)(a), which the SDA now make. Where an interested party applied for a variation to a modern award as part of the four yearly review, the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the modern awards objective, see *Journalist's Published Media Award* [2019] FWCFB 7603 at [7]. The SDA do not address the mandatory precondition which it must

establish before the Fair Work Commission can exercise its discretion under section 157(1) or adduce any evidence on the basis of which the relevant state of satisfaction could be reached.

The Legislative Framework

41. Section 157(1)(a) relevantly provides that:

> *(1) the Fair Work Commission may:*
>
> *(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award, …*
>
> *if the Fair Work Commission is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.*

42. Since the SDA seek to vary the *Alpine Resorts Award* 2020 to remove certain employees from its coverage, it is also necessary to consider section 163(1) of the FW Act.

43. Section 163(1) provides:

> *"Special rule about reducing coverage*
>
> *(1) The FWC 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.*"

44. Vice President Hatcher, Deputy President Dean and Commissioner Riordan said in *Alpine Resorts Award* 2010 [2018] FWCFB 4984 at [55] that section 163(1) constituted a prohibition upon variation to a modern award removing employers and their employees from the coverage of a modern award unless the additional criterion of appropriateness of the transfer of coverage from one award to another was satisfied.

The Operation of Section 157 by which the Fair Work Commission may vary modern awards if necessary to achieve the modern awards objective

45. It is useful to consider where section 157 sits in the statutory scheme for the making and varying of modern awards.

46. In the last decade, there has been a legislatively mandated systemic review of awards, together with parallel provisions for variation outside that framework.

47. Following the initial award modernisation process under Part 10A of the *Workplace Relations Act*, the Full Bench of the Australian Industrial Relations Commission set out its general approach to subsequent applications to vary those awards filed in the period to 31 December 2009. The Full Bench said that:

> "*Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration.*"[9]

[9] *Award Modernisation Statement - re variations to modern awards* [2009] AIRCFB 645 at [3]

48. The cycle of four yearly reviews provided for in the former section 156 of the FW Act involved a re-examination of the award with a view to correction or improvement.[10] In this re-evaluation process there existed generally held propositions about what a proponent for variation needed to demonstrate before the Commission would vary a modern award under section 156(1)(b)(i).

49. The case for change in the context of a four yearly review had a lower threshold to meet than is required when a determination is sought pursuant to section 157.

50. Under the formerly operative four yearly review of awards provided for in section 156 of the FW Act, a substantive case for change was required and the more significant the change the more detailed the case needed to be.[11].

51. In considering a proposal for variation as part of a four yearly review, the strength of the case required by the proponent for variation increased with the significance of the change, in terms of its impact on employers and employees and the extent to which the variation would effect a substantive alteration to the integrated matrix of rights, duties and obligations achieved in the Modern Award.

52. In addition, where the substance of the variation sought had already been dealt with by the Commission as part of the award modernisation process under Part 10A of the *Workplace Relations Act* or subsequent reviews of the award, the applicant was required to show that there were cogent reasons for departing from previous Full Bench decisions, such as a significant change in circumstances which warranted a different outcome.[12]

53. Where a determination to vary a modern award is sought pursuant to section 157 of the FW Act a mandatory pre-condition exists such that that the Fair Work Commission must reach a state of satisfaction that the variation is necessary to achieve the modern awards objective, before exercising its discretion to make the variation.

Mandatory Precondition which the SDA must establish

54. The Fair Work Commission's state of satisfaction that the variation is necessary to achieve the modern awards objective is a pre-condition to the exercise of its discretion under section 157(1).[13]

55. An Applicant for a variation to a modern award will bear the onus of establishing the need to vary the Award to meet the modern awards objective.[14]

56. The mandatory statutory requirement displaces general merit considerations in an application of this type[15], and requires more than that the variation be justified in a general sense[16].

57. A distinction is drawn, in cases considering applications under section 157, between variations which are necessary and those which are desirable. The variations which are to be made are only those which are necessary.[17]

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[10] *Shop, Distributive and Allied Employees' Association v The Australian Industry Group* [2017] FCAFC 161
[11] *Security Services Industry Award* [2015] FWCFB 620 at [8]
[12] *4-Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001.
[13] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [30] and [35]
[14] *Application by Truss* [2013] FWC 5126 at [14]
[15] *National Retail Association Ltd* [2010] FWA 5068 at [15]
[16] *Integrated Trolley Management Pty Limited* [2010] FWA 3317 at [10]
[17] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [46]

58. The test of necessity is a demanding standard.

59. In *Shop, Distributive and Allied Employees' Association* [2010] FWA 3413 at [13], Vice President Watson expressed the view that the requirement that the variation is necessary to achieve the modern awards objective involves more than a finding that the variation is consistent with the objective. In Vice President Watson's view, it must be demonstrated that the objective is not able to be achieved unless the variation is made.[18]

60. The relevant state of satisfaction must be formed on the material before the Fair Work Commission.[19]

61. In *Victorian Employer's Chamber of Commerce and Industry* [2012] FWAFB 6913, the Full Bench of Fair Work Australia referred to its previous decision in *National Retail Association Limited* (2010) 199 IR 258 where it had upheld a decision of Vice President Watson in which Vice President Watson had rejected an application under section 157(1) on the basis that there was insufficient evidence to establish that the variation sought was necessary to achieve the modern awards objective.

62. The Full Bench considered that this was also the case in relation to the variation sought by the Victorian Employer's Chamber of Commerce and Industry under section 157 to vary the *Clerks Award* to provide for shorter periods of minimum engagement. At [14] the Full Bench said "*The Tribunal nevertheless requires evidence (or uncontested submission – R v Commonwealth Conciliation and Arbitration Commission and Others, Ex parte the Melbourne and Metropolitan Tramways Board [1965] HCA 50; (1965) 113 CLR 228 at 243 (per Barwick CJ) and 252 (per Menzies J)) sufficient to allow it to make any jurisdictional findings that condition the exercise of power sought in the originating application.*"

63. In *Victorian Employer's Chamber of Commerce and Industry* [2012] FWAFB 6913, VECCI, unlike the SDA in the Principal Application, had provided some witness statements and some statistical data produced by the Bureau of Statistics in support of its proposed variation. The Full Bench noted that the Award Modernisation Full Bench which made the *Clerks Award* 2010 must be taken to have been satisfied that the existing minimum hours provisions were an appropriate part of the safety net and satisfied the modern awards objective, and that this view was confirmed on the review of the award. The Full Bench concluded at [19] that:

> "*We are not satisfied that the evidence brought by VECCI is anywhere near sufficient to establish the jurisdictional precondition in s157(1) that the variation that it seeks to the Clerks Award 2010 is "necessary to achieve the modern awards objective" (as distinct from, say, an arguably desirable adjustment considered in the light of contemporary circumstances). In those circumstances, we are obliged to dismiss the application and do so.*"

64. Apart from bare assertions unsupported by evidence, the SDA have provided no evidence or other material from which the Commission can reach the necessary state of satisfaction which is the precondition to the exercise of its discretion under section 157(1).

[18] *Shop, Distributive and Allied Employees' Association* [2010] FWA 3413 at [13] and *Integrated Trolley Management Pty Limited* [2010] FWA 3317 at [10]

[19] *Shop, Distributive and Allied Employees' Association v National Retail Association (No2)* [2012] FCA 480 at [30]

The Making of the Modern Award and the Consideration of its Coverage by the Full Bench of the Fair Work Commission

65. The context of the Award and the circumstances of its making are highly relevant to an application for variation under section 157.[20]

66. The *Alpine Resorts Award* was made in the course of the award modernisation process regulated by Part 10A of the former *Workplace Relations Act 1996* (Cth). That award, like all modern awards made under the award modernisation process, was deemed to be a modern award for the purposes of the FW Act by Item 4 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth).

67. Item 4 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth) has the effect of deeming modern awards made in the award modernisation process to be modern awards under the FW Act, implying legislative acceptance that their terms are consistent with the modern awards objective.

68. In addition to the context of the award and the circumstances of its making as a whole, consideration of the circumstances which led to the current form of the specific provision now sought to be varied is also required. In *National Retail Association Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 at [27], the Full Bench of Fair Work Australia, said of Vice President Watson's decision concerning an application for an award variation under section 157 that:

> "*While the ultimate question was whether he was satisfied that the variation was necessary to achieve the modern awards objective, the positions taken by the parties and the Full Bench in the making of the award were not irrelevant to that question … It was also open to consider whether there had been any change in circumstances since the Full Bench decision.*"

69. This will be particularly so since the issue of coverage was the subject of close attention in the proceedings which led to the making of the current award.

70. The process by which the *Alpine Resorts Award* 2020 was established must be borne in mind. This process involved a balancing exercise between the interests of employers and employees, between the views of the parties making submissions and between the differing elements of the modern awards objective. The outcome is a complex and interactive matrix of rights and duties and obligations prescribed by the Award.

71. In *Alpine Resorts Award 2010* [2018] FWCFB 4984, it was noted at [37] that:

> "*The AIRC Full Bench decisions in the award modernisation process which led to the making of the Alpine Award showed that reliance was placed on the fact that employees were engaged in a wide range of occupational groupings, there was considerable fluctuating demand for employee skills and services with peaks during the weekends and on public holidays, and that the industry was marked by a high level of casual and seasonal employment and flexible hours of work. The AIRC did not take into account the capital investment of resorts in ski lifting equipment*."

72. The Full Bench decision in *Alpine Resorts Awards* 2010 [2018] FWCFB 4984 was a decision as part of the 4 yearly review of the *Alpine Resorts Award* 2010 concerning applications which had been made to alter the coverage of the award such as to extend it to retail and hospitality employees in a wide range of alpine tourism businesses that operated in the immediate vicinity

[20] *Shop, Distributive and Allied Employees' Association* [2010] FWA 3413 at [14] and *National Retail Associations Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 at [7].

of alpine resorts covered by the *Alpine Resorts Award*. The Full Bench rejected the proposed variation.

73. In the course of the decision, the award history was traversed including the rationale for the existing coverage provision as it related to the substantial character of ski lift operations in the snow sports industry. The rationale behind the inclusion of a broad range of classifications in the coverage of the award was noted to enable alpine lifting companies to utilise their employees across their resorts efficiently so that employees could be shifted from alpine lifting and ski slope functions to hospitality and retail functions when required by climate conditions

74. On this occasion, the SDA resisted change to the coverage clause in the award, conceding that the award was "tailored for the unique circumstances of alpine lifting companies."[21]

75. As part of its reasoning in refusing to alter the coverage of the award, the Full Bench said at [64]:

> *"Alpine resorts are a different kind of employer to relevant alpine business and other snow sports 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 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. 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*."

76. As noted in *Falls Creek Resort Management* [2010] FWA 2847 at [52], the approach of the Full Bench was to ensure that the *whole* of an industry should be covered by a modern award. The position reached by the Full Bench of the Fair Work Commission regarding coverage in the Alpine Resorts Awards was the result of reasoned consideration, not mistake or oversight.

77. The Full Bench at [80] decided to vary the coverage provision in clause 4.1 and the definition of "alpine resort" in clause 3, so as to make clear that the award only covered the employees of an employer which operated an alpine resort, when those employees were actually employed at the alpine resort. The reference to an alpine lift was included because the Full Bench considered that the existence of an alpine lift was the essential definitional feature of an alpine resort, not because the operator of the resort was required to operate the alpine lift in order to be covered by the *Alpine Resorts Award*, or because the capital costs associated with operating an alpine ski lift entitled alpine resorts operators a "privileged" position, as alleged by the SDA at paragraphs [5], [15], [22] and [25] of the SDA Submissions.

78. In view of the process already undertaken, there must be a reluctance to depart from the settlement of an issue which goes to the very core of the award as it was first determined in the initial award modernisation hearings, and as confirmed in subsequent four yearly reviews.

79. The assertion in the SDA Submissions that pay rates in other awards are more beneficial and the impact on employers would be minimal fails to engage with the manner in which issues of

[21] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [47]

coverage have been previously carefully considered by the Full Bench and formed an integrated part of the framework of the whole award.

80. As a Full Bench of the Australian Industrial Relation Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)* (2003) 127 IR 205 at [48]:

> "*Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to an issue to be determined in the absence of cogent reasons for not doing so*."

The Need for Cogent Reasons such as a Material Change in Circumstances to Justify Variation where the Coverage Clause has recently been carefully considered by a Full Bench of the Fair Work Commission

81. In *Security Services Industry Award* [2015] FWCFB 620, in the context of a variation sought as part of a four yearly review, the Full Bench of the Commission expressed agreement with the principle that previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so. As an application of this principle in the context of the broader four-yearly review required under section 156, the Full Bench said that the more significant the change sought, in terms of impact or a lengthy history of particular award provisions, the more detailed the case for variation must be. At [8] the Full Bench said:

> "*Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change.*"

82. In the same case, the Full Bench said, again, in the context of a variation sought as part of a four yearly review at [60] that:

> "*Where a significant change is proposed 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.*"

83. The previous decisions of the Full Bench of the Fair Work Commission have accepted that the matrix of terms of the existing *Alpine Resorts Award 2020* including its coverage provisions are consistent with the modern awards objective.

84. The SDA Submissions do not put forward a case for change sufficient to meet the threshold previously required in the context of a four yearly review and do not address or meet the mandatory precondition of necessity required for a determination under section 157.

85. The SDA have presented no evidence that demonstrates any change of circumstances since the most recent 4-yearly review that disturbs that position in such a way that the proposed variation can properly be found to be "*necessary to achieve the modern awards objective*".

86. The SDA have presented no cogent reasons which might justify a departure from the previous Full Bench decisions. The SDA have not identified a significant change in circumstances which warrants a different outcome; have not provided evidence which demonstrates that the *Alpine Resorts Award* has not operated in practice in a way intended by the Full Bench in its earlier decisions or that a matter critical to the proper operation of the award was not raised before the Full Bench and consequently not considered, or that the Full Bench made a patently demonstrable error.

87. The Principal Application appears to be seeking to reargue the issue of coverage which has only recently been determined and on which interested parties have had the opportunity to present their views.

The Position Following the Reform Legislation

88. The requirement for four yearly reviews of awards under section 156 has now been removed as a consequence of the adoption in the *Fair Work Amendment (Repeal of 4-Yearly Reviews and Other Measures) Act 2018* (Cth) of a recommendation to that effect made by the Productivity Commission inquiry into the workplace relations framework. The Productivity Commission considered that the 4-yearly review mechanism was too resource intensive for both the Fair Wok Commission as well as employer and employee organisations taking part in the review.

89. It would be contrary to this objective and the objective of a simple, easy to understand, stable and sustainable modern awards system to allow parties to reagitate issues which have only been recently determined by making applications under section 157.

90. The *Revised Explanatory Memorandum to the Fair Work Amendment (Repeal of 4-Yearly Reviews and Other Measures) Bill 2017* states on pages vii and viii that after the repeal of the requirement to conduct 4-yearly reviews the remaining ability to vary modern awards would continue to require that the Fair Work Commission be satisfied that making the variation is necessary to achieve the modern awards objective. This, it was said, would allow the Fair Work Commission to make a determination where emerging social and economic matters demonstrated that change was necessary.

91. This stated parliamentary intention regarding the continued ability to vary modern awards does not envisage a loosening of the established tests for award variations under section 157 such as would recreate the difficulties which led to the repeal of section 156.

The Considerations to be taken into account According to Section 134

92. The SDA address factors referred to in the modern awards objective at paragraphs [29] to [55] of the SDA Submissions.

93. The *Alpine Resorts Award* with its current coverage provisions, rates of pay and applicable penalties has been considered by the Full Bench of the Fair Work Commission to have met the modern awards objective following the award modernisation process and subsequent 4-yearly reviews.

94. The SDA's approach to addressing the factors referred to in section 134(1)(a)-(h) is to make some bare and subjective assertions, unsupported by evidence in relation to the factors to be considered.

95. In the absence of more rigorous evidence-based material, it is difficult to see why previous Full Bench assessments should be departed from or to engage in a meaningful debate concerning the relevant factors.

96. The following observations are nevertheless made:

97. The modern awards objective is framed as an obligation, imposed on the Fair Work Commission by section 134(1) of the FW Act, to ensure that modern awards, together with the *National Employment Standards*, provide a fair and relevant minimum safety net of terms and conditions, taking into account a range of considerations set out in section 134(1).

98. The Full Bench of the Fair Work Commission has frequently noted that no particular primacy is attached to any of the section 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.[22]

Section 134(1)(a): Relative living standards and the needs of the low paid

99. The *Annual Wage Review 2016-2017* [2017] FWCFB 3500 dealt with the interpretation of section 134(1)(a) at [361]-[362] stating as follows:

> "*The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the Review with those of other groups that are deemed to be relevant and focuses on the comparison between low-paid workers (including NMW and award-reliant workers) and other employed workers, especially non-managerial workers.*
>
> *The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms.*"

100. In *Application to vary the Clerks-Private Sector Award 2020* [2020] FWCFB 3443 at [61], the Full Bench of the Fair Work Commission said at [61] that:

> *"A threshold of two-thirds of median full time wages provides a suitable and operational benchmark for identifying who is low paid within the meaning of section 134(1)(a)."*

101. The SDA have provided no evidence to support its contention that the relevant workers are in fact low paid.

102. In addition, the living standards enjoyed by the relevant employees must take into account the benefits presently provided by alpine resorts for employees covered by the Alpine Resorts Award such as the assistance with the sourcing of cost effective accommodation and meals, discounts on retail and hospitality products and access to the ski fields.

Section 134(1)(b): The need to encourage collective bargaining

103. The industry already has a high level of collective bargaining under the *Alpine Resorts Award*.

Section 134(1)(c): The need to promote social inclusion through increased work force participation

104. The Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 set out its interpretation of s134(1)(c) as follows as [179]:

> "*Section 134(1)(c) requires that we take into account "the need to promote social inclusion through increased workforce participation". The use of the conjunctive "through" makes it clear that in the context of s134(1)(c), social inclusion is a concept to be promoted exclusively "though increased workforce participation", that is obtaining employment is the focus of s134(1)(c).*"

105. Allowing employees to be remuneratively engaged across a variety of roles depending on unpredictable weather conditions would appear consistent with this factor.

[22] *Application to vary the Clerks-Private Sector Award 2020* [2020] FWCFB 3443 at [49]; *Application to vary the General Retail Industry Award 2010* [2020] FWCFB 3427 at [36]; *Shop, Distributive and Allied Employees' Association v The Australian Industry Group* [2017] FCAFC 161 at [33] and *4 Yearly Review of Modern Awards; Preliminary jurisdictional Issues* [2014] FWCFB 1788 at [32].

Section 134(1)(d): The need to promote flexible modern work practices and the efficient and productive performance of work

106. The Full Bench of the Fair Work Commission accepted the evidence presented for the purpose of its decision in *Alpine Resorts Award 2010* [2018] FWCFB 4984 regarding the difference between alpine resorts businesses and other kinds of alpine businesses and snow sports businesses, to whom the *General Industry Award* applied at [64] of the decision. The Full Bench accepted that the differing nature of these businesses justified different award coverage for the reasons given in the decision. The SDA have not provided any new material that would justify departing from this decision.

Section 134(1)(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

107. The Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 set out its interpretation of section 134(1)(da) at [195] and [199] as follows:

> "*Section 134(1)(da) is a relevant consideration. It is not a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). … Section 134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.*"

108. In *4-yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, at [39] the Full Bench confirmed that the purpose of penalty rates is not to deter employment but is aimed at the disutility associated with working at unsociable times.

109. In the particular circumstances of snow sports enthusiasts, there is greater disutility associated with weekend and public holiday work, when ski slopes are less crowded and lift queues are shorter, rendering the traditional justification for imposing penalty rates inapplicable.

Section 134(1)(e): The principle of equal remuneration for work of equal or comparable value

110. This is a neutral factor.

Section 134(1)(f): The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

111. The variation sought would significantly increase employment cost for weekend and evening work. The regulatory burden will be significant as resorts will have to apply up to four different awards for one industry.

Section 134(1)(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

112. The *Alpine Resorts Award* has throughout its history been an industry-based award with its terms and conditions taking into account the particular characteristics of a ski lift operation business. Award coverage is currently simple and unambiguous. The proposed variation would rent asunder that arrangement and replace it with award coverage dependant on occupational grouping, which would lead to complexity and overlap of modern awards with no regard to the substantial character of the industry and its particular needs.

Section 134(1)(h): The likely impact of any exercise of modern award powers on employment, growth, inflation and sustainability, performance and competitiveness of the national economy

113. These factors would clearly be adversely affected by the proposed variation.

History of the Alpine Resorts Award 2020

114. The question of coverage has been comprehensively considered and addressed during the award modernisation process and subsequent reviews of the award.

115. The Fair Work Commission has consistently accepted the integrated nature of alpine resort functioning and rejected calls for fragmented award coverage in the area.

116. The SDA has been actively involved in the proceedings leading up to the creation of the current award and has previously expressed a similar position to the one being pursued in the Principal Application.

117. The pre-modern award history of coverage for ski lift operators in Victoria and New South Wales was based on the substantial character of the business so as to exclude coverage by awards which might otherwise have had application, such as those now advocated by the SDA.

118. The award history demonstrates that it has historically been recognised that the award applying to the snow sports industry and alpine lifting companies needed to have tailored terms and conditions that ensured a number of flexibilities in the employment arrangements which were in the interests of employers and employees. Pre-modern awards contained a broad range of classifications, including those that may otherwise have fallen within other occupations and industries such as retail, clerical, mechanical and transport industry employees. The rationale behind the inclusion of this broad range of classifications was to enable alpine lifting companies to utilise their employees across their resorts effectively and commercially so that, during periods of poor snow and bad weather, employees could be shifted from alpine lifting and ski slope functions to hospitality and retail functions in order to mitigate the loss in revenue; and maximise employees' earning potential.

119. As part of the Award Modernisation Process, the AIRC published an exposure draft of the *Alpine Resorts Award* on 22 May 2009 [2009] AIRCFB 450 at [213]. In doing so, the AIRC accepted the need for a stand-alone award covering alpine resorts and their employees engaged in the snow sports industry.

120. In consultation proceedings on 30 June 2009 before the Full Bench of the Australian Industrial Relations Commission concerning the *Exposure Draft of the Alpine Resorts Award 2010*, Mr J Ryan, appearing for the SDA, said at PN 3653 of the Transcript:

> "*The LHMU submission appears to have hospitality workers and childcare workers removed from the award. The SDA didn't go down the same approach in terms of our written submissions, however, the SDA would be quite comfortable in accepting the removal of the service workers from the award.*"

121. On 4 September 2009, in *Award Modernisation* [2009] AIRCFB 826, the Full Bench of the Australian Industrial Relations Commission handed down its decision in respect of modern awards including the *Alpine Resorts Award*.

122. The Full Bench noted at [263] that the *Alpine Resorts Award* derived from historic awards covering the alpine resorts industry as determined in the Award Modernisation Process.

123. In its formulation of the *Alpine Resorts Award* the AIRC did not accept arguments which had been put in favour of fragmented coverage. The AIRC accepted the integrated nature of the

functioning of alpine resorts and maintained a stand-alone industry-based award. The AIRC took into account the seasonal nature of the operations covered by the award in relation to the types of employment permitted and the conditions which apply to them, including the pay arrangements at [263]. The AIRC also took into account the pay differential with other relevant awards, particularly those applying in the hospitality industry at [264].

124. The Full bench of the Fair Work Commission subsequently handed down three decisions which related to the coverage clause in the *Alpine Resorts Award*: *the Alpine Resorts Award 2010 – substantive issues concerning coverage* [2018] FWCFB 4984; *4-Yearly Review of Modern Awards – Alpine Resorts Award 2010* [2019] FWCFB 3347 and *4-Yearly Review of Modern Awards – Alpine Resorts Award 2010* [2019] FWCFB 5180.

125. As part of those decisions, the Full Bench of the Fair Work Commission made the following relevant findings:

    a) Alpine resorts in New South Wales and Victoria have varying degrees of ancillary operations which could potentially be covered by the *General Industry Awards*.

    b) Alpine resorts employ persons across a large range of functions including a number of specialised on-slope functions and may require employees to perform different functions at different times.

    c) Alpine resorts have highly seasonal businesses which are heavily weather dependent and earn most of their revenue during the winter months.

    d) A large proportion of seasonal casual employees are snow sports enthusiasts who prefer to work weekends so they can ski during the less busy weekdays.[23]

    e) Alpine resorts operate large integrated businesses which involve a highly diverse range of functions which permit staff to perform different functions dependent on exigencies such as the weather.[24]

    f) The core business function of the alpine resorts is the operation of ski slopes, to the extent that they engage in the provision of food, hospitality, accommodation and retail services, it is ancillary to this core function and to provide a service to users of the core business function.[25]

    g) The existence of the *Alpine Resorts Award* as a single award covering this integrated business avoids the complexity and inefficiency which would otherwise ensue.[26]

Conclusion

126. With respect, the Fair Work Commission's discretion to make a determination varying a modern award should not be exercised on the basis of mere assertions of concerns with long standing award arrangements. This is particularly so in the absence of evidence to substantiate those assertions, cogent reasons for the variation sought, demonstration of a material change in circumstances since the issue was last before a Full Bench of the Fair Work Commission or any indication of error underlying previous Full Bench decisions.

127. The previously existing 4-Yearly Review process had accepted constraints on the making of variations to modern awards, variations sought under section 157 have their own precondition. That precondition is that the variation is necessary to achieve the modern awards objective.

[23] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [57]
[24] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [64]
[25] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [64]
[26] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [64]

There is no basis, or no sufficient basis, upon which the Fair Work Commission can be satisfied that the making of a determination to vary the *Alpine Resorts Award* is necessary. The established tests for award variations under section 157 should not be disregarded in a manner which would recreate and build on the difficulties which led to the repeal of section 156.

HARMERS WORKPLACE LAWYERS

28 September 2020