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 ("**Vice President Hatcher's Orders**").

2. These submissions are in reply to the submissions filed by the Shop, Distributive and Allied Employees Association ("**SDA**") regarding the Application to Dismiss, in accordance with order 3 of Vice President Hatcher's Orders.

3. On 18 February 2020, the SDA made an application to the Fair Work Commission ("**FWC**") seeking that the *Alpine Resorts Award 2020* ("**Alpine Award**") coverage be varied ("**Principal Application**").

4. The variation sought by the SDA is the insertion of the following sentence at the conclusion of clause 4.1 of the Alpine Award:

   "*The Award does not cover employees covered by the following awards:*

   The General Retail Industry Award 2010

   The Fast Food Industry Award 2010

   The Hair and Beauty Industry Award 2010"[1]

5. On 24 July 2020 the SDA filed submissions in support of its Principal Application ("**SDA July Submissions**").

6. On 19 August 2020 the ASAA made an application opposing the variation and seeking to have the SDA's Principal Application dismissed pursuant to section 587(1)(c) of the *Fair Work Act*.

7. On 28 September 2020 the ASAA filed submissions in reply to the SDA's Principal Application dated 18 February 2020 and in support of the ASAA's Application to Dismiss dated 19 August 2020, in accordance with order 1 of Vice President Hatcher's Orders.

8. On 26 October 2020 the SDA filed its outline of submissions in reply to the ASAA's outline of submissions regarding the Principal Application and the Application to Dismiss in accordance with order 2 of Vice President Hatcher's Orders ("**SDA October Submissions**").

[1] Paragraph 3 of the Submissions of the SDA dated 24 July 2020 "**SDA July Submissions**")

9. The ASAA now makes its submissions in reply to the SDA October Submissions regarding the Application to Dismiss in accordance with Order 3 of Vice President Hatcher's Orders.

Key Propositions

10. These submissions contain the following key propositions:

    a) The SDA bears the onus to establish the necessary precondition to the exercise of the FWC's discretion under section 157(1).

    b) That precondition is that the variation is necessary to achieve the modern awards objective.

    c) The SDA has advanced no argument nor has it provided any evidence on which the FWC can reach the necessary state of satisfaction.

    d) Nothing in the SDA October Submissions alters that position.

    e) The Principal Application has no prospects of success.

    f) The Principal Application should be dismissed pursuant to section 587(1)(c) of the *Fair Work Act*.

Application to Dismiss

11. At paragraphs [6] and [7] of the SDA October Submissions, the SDA mischaracterise the basis for the ASAA's Application to Dismiss.

12. The basis of the ASAA's Application to Dismiss is that the Principal Application has no prospects of success.

13. The Principal Application has no prospect of success because it is incapable of meeting the statutory test set out in section 157(1) of the *Fair Work Act*.

14. The statutory test set out in section 157(1) is that the FWC must be satisfied that making the determination to vary the award is necessary to achieve the modern awards objective.

15. The modern awards objective is defined in section 134 of the *Fair Work Act.*

16. The modern awards objective involves attention to the nine factors set out in section 134(1)(a) to (h), which in combination inform the assessment of whether the modern award in question, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.

17. Those nine factors involve a balancing of interests in relation to a range of parameters and are not restricted to rates of remuneration.

18. The FWC's state of satisfaction that the variation is necessary to achieve the modern awards objective is a necessary pre-condition to the exercise of its discretion under section 157(1) which the SDA bears the onus to establish.[2]

19. The relevant state of satisfaction must be formed on the material before the FWC.[3]

[2] *Shop, Distributive and Allied Employees Association v National Retail Association* (No2) [2012] FCA 480 at [30] and [35] and *Application by Truss* [2013] FWC 5126 at [14]

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

20. The SDA has put forward no material which is capable of discharging that onus and establishing that precondition.

21. The absence of material put forward by the SDA includes:

    a) the lack of any cogent reasons as to why the Alpine Award with its current coverage provisions, rates of pay, and other terms and conditions specifically tailored to its industry, which have been considered by the Full Bench of the FWC to have met the modern awards objective, following the award modernisation process and the subsequent four-yearly reviews, should now be considered not to meet that objective;

    b) the lack of evidence to support any of the assertions made in relation to factors listed in section 134(1).

The Relevance of the History of the Award

22. At paragraphs [21], [7] and [9] the SDA mischaracterise the ASAA's submissions in relation to the relevance of history and the need for the demonstration of a material change.

23. The ASAA do not argue that the history of the Alpine Award should be given weight for its own sake.

24. The history of the Alpine Award should be given weight because that history demonstrates that the matrix of terms and conditions, including the coverage provisions, in the current Alpine Award, have not been arrived at arbitrarily or accidentally but as a result of careful consideration, and after hearing the views of interested parties including the SDA.

25. It is not correct to assert, as the SDA does at paragraphs [22]-[23] and [35] of the SDA October Submissions, that neither the Australian Industrial Relations Commission ("**AIRC**") nor the FWC have considered the issues raised by the SDA in its Principal Application.

26. More significantly, the Principal Application fails to engage with the rationale for the existing structure of the Alpine Award.

27. The question of coverage of the Alpine Award has been comprehensively considered and addressed during the award modernisation process and subsequent reviews of the award, a process in which the SDA has been actively involved. [4]

28. The AIRC and the Full Bench of the FWC have consistently rejected calls for fragmented award coverage of alpine resorts.

29. The Alpine Award was first made on 4 September 2009 in stage 3 of the Award Modernisation Process, specifically, as part of the "tourism industry" (matter AM2008/59). During that process, numerous submissions were advanced by interested parties in relation to the content of the Alpine Award, including in relation to its proposed coverage of retail, hospitality, fast food, childcare and hair and beauty employees. For example:

    a) During a hearing before Senior Deputy President Richards on 18 March 2009 the Liquor, Hospitality and Miscellaneous Union ("**LHMU**"), now United Voice, made oral submissions that there should be no *Alpine Resorts Award* created as part of the Award Modernisation. The LHMU submitted that hospitality and childcare workers (amongst others) were more appropriately covered by specific awards covering those industries.[5]

[4] *Alpine Resorts Award* [2009] AIRCFB 450 at [213]; *Award Modernisation* [2009] AIRCFB 82; *Alpine Resorts Award 2010* [2018] FWFB 4984 at [57] and [64]

[5] Transcript at PN102 to 107

b) In written submissions dated 9 April 2009, the LHMU again argued that there should be no stand-alone *Alpine Resorts Award*, however if one was created it should only cover roles specific to the alpine industry (eg snow groomer, lift attendant, etc.). The LHMU said that hospitality should more appropriately be covered by the *Hospitality Industry (General) Award 2010*.[6]

c) In written submissions dated 12 June 2009, 29 June 2009 and 10 July 2009, the Australian Services Union ("**ASU**") opposed the coverage by the Alpine Award of hospitality, childcare and municipal services employees.[7]

d) The SDA, for its part, made submissions as part of this process advocating the removal of service workers from the Alpine Award[8] and for wage rates to be adjusted upward in line with equivalent Modern Awards.[9]

30. In its formulation of the Alpine Award, after considering the submissions described above, the Full Bench of 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.[10] The Full Bench of the AIRC did determine that some of the pay rates in the Alpine Award would need to be adjusted to be "*better aligned*" with other relevant modern awards, in particular those applying in the hospitality industry. The Full Bench also altered the levels of a limited number of hospitality classifications. For example, "hospitality supervisor" was moved from Resort Worker level 5 to Resort Worker Level 6 and "qualified chef (who is also a supervisor)" was moved from Resort Worker Level 6 to Resort Worker Level 7.[11]

31. During the subsequent 4-yearly review of the Alpine Award the Full Bench of the FWC focussed specifically on the nature of the coverage clause in the Alpine Award and its underlying rationale. Findings made by the Full Bench of the FWC in this regard are set out at paragraph [125] of the submissions filed by the ASAA on 28 September 2020.

32. As part of its reasoning in refusing to alter the coverage of the Alpine Award, the Full bench of the FWC said only two years ago in *Alpine Resorts Award 2010* [2018] FWCFB 4984 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*

[6] See LHMU submissions dated 9 April 2009 at [1] and [3]
[7] See ASU submissions dated 12 June 2009 at [7]-[9]; LHMU submissions dated 29 June 2009 at [2(c)], and LHMU submissions dated 10 July 2009 at [5]
[8] PN3653 of the transcript of consultation proceedings on 30 June 2009
[9] SDA submissions dated 12 June 2009 at [2]
[10] See *Award Modernisation* [2009] AIRCFB 826 at [263]
[11] *Award Modernisation* [2009] AIRCFB 826 at [264]

> *award, alpine resorts would be covered by a wide range of different modern awards which would no doubt be productive of complexity and inefficiency.*"

33. The rejection of fragmented award coverage has uniformly been on the basis of the integrated nature of alpine resort functioning and the recognition of the need 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 of revenue; and maximise employees' earning potential.

34. The underlying rationale for the structure of the Alpine Award has been carefully considered and remains valid. In those circumstances, logic together with precedent dictates that if a determination is to be made varying the fundamental architecture of the award the SDA must provide material justifying the unravelling of that architecture, considerations which were extant but unappreciated or not fully appreciated on a prior review, evidence which demonstrates that the award has not operated in practice in the manner 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.[12]

35. At paragraph [15] of the SDA October Submissions the SDA attempt to portray the Full Bench in its decisions in *4-Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23] and *Application to vary the Real Estate Industry Award* [2020] FWCFB 3946 at [56] as endorsing a class of variations, to which the variation sought in the Principal Application belongs, which are "*self evident*" in nature and do not need to be supported by evidence. Reading those decisions, it is clear that only variations which would involve insignificant changes would fit within that class. Given what has been said already about the rationale for a stand-alone industry award and the specifically tailored provisions in the Alpine Award, the variation sought in the Principal Application would rent asunder the fabric of the award and could not be described as insignificant.

36. At paragraph [23] of the *4-Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 the Full Bench said: "*We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, 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.*"

37. The Full Bench in *Application to vary the Real Estate Industry Award* [2020] FWCFB 3946 said at [56]: "*It is also the case that where variations are not self-evident, an applicant seeking a change, must adduce probative evidence to support the contention that the variations are necessary to achieve the modern awards objective.*"

38. As noted at paragraph [81] of submissions filed by the ASAA on 28 September 2020, in *Security Services Industry Award* [2015] FWCFB 620 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*

[12] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [34]; and *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [90]

the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change."

39. The SDA has provided no such material, no such cogent reasoning and no such evidence.

40. The SDA has made bare assertions about the rates of pay applicable under the *General Industry Awards* in comparison to those under the Alpine Award.

41. Such bare assertions are insufficient to allow the FWC to reach the state of satisfaction that the variation is necessary to achieve the modern awards objective which is the required precondition to the exercise of its discretion under section 157(1).

42. For this reason, the Principal Application has no prospects of success.

The Rationale for a Stand-Alone Industry-Based *Alpine Resorts Award* Remains Current

43. At [37] of the SDA October Submissions the SDA notes that one of the main justifications for the creation of the Alpine Award was the need to transfer staff between on-slope and off-slope roles due to adverse weather conditions. The ASAA accepts that transferability of staff was, and remains, a key component of the Alpine Award.

44. At [38] of the SDA October Submissions the SDA goes on to mistakenly assert that transferability of staff is "*completely irrelevant*" outside the winter season (i.e. because there are no similar extremes of weather during summer) and for approximately eight months of the year this core component of the Alpine Award falls away.

45. Contrary to what the SDA submits, dual-role employment is relevant during both the winter and summer seasons and is not solely utilised by the alpine resorts during the winter season. By way of illustration, the language of clause 20.2(a) of the Alpine Award expressly contemplates an employee having one role during the winter season and a different role during the summer season:

"*20.2 Dual-role employment*

(a) Due to the unique nature of most positions under this award, in that they are generally only available during that part of the year when alpine lifting is being provided, employees may be offered dual-role employment (where operational requirements allow) in which the employee may have 2 distinct roles."

46. The dual-role employment clause in the Alpine Award critically enables an employee and his or her employer to enter into an agreement whereby:

a) the employee will perform a certain role during periods of good weather during the winter season (eg. lift operator) and a different role if the weather becomes adverse and prohibits ski lift operations (eg. shop assistant); or

b) the employee will perform a certain role during the winter season that is connected with the alpine resorts' core functions (eg. lift operator) and a different role during the summer season when that core function is no longer possible (eg. shop assistant).

47. There is no mechanism for dual-role employment in any of the General Industry Awards.

48. The SDA further mistakenly asserts at [39] of the SDA October Submissions that the utilisation of the dual-role employment clause during the summer season has not been explored by the AIRC. That assertion is not borne out by the award history.

49. On 6 March 2009, during Award Modernisation (in matter AM2008/59), the ASAA filed a draft of the proposed *Alpine Resorts Award* for the consideration of the interested parties and the AIRC. That draft award contained a dual-role employment clause that was identical to clause 20.2(a) in the current version of the Alpine Award.

50. On 6 March 2009, the ASAA filed submissions in matter AM2008/59 in support of its proposed *Alpine Resorts Award*, which included the following justification for the dual-role employment clause in the award:

> *6.22 As a number of the positions in the Draft Award are only available during the part of the year when alpine lifting is being provided, both the ASAA and certain employees, wish to have the flexibility to have "dual-role employment". Under such an arrangement, by way of example, an employee may be engaged as a qualified Ski Patroller (Resort Worker Level 6) during that period of the year when alpine lifting is being provided, and a qualified Fitness Instructor with lifeguard qualifications (Resort Worker Level 4) outside of that period.*
>
> *6.23 Clause 24.3 is designed to facilitate an Alpine Resort and an employee entering into an employment arrangement of that nature.*

51. It is clear from the extract above that the rationale for the dual-role employment clause was fully explained during Award Modernisation. It is also clear that the AIRC accepted the ASAA's rationale for the dual-role employment clause when it created the Alpine Award in September 2009.

52. On 26 March 2009, the AWU filed submissions in matter AM2008/59 that proposed wholesale changes to the ASAA's proposed dual-role employment clause. No other submissions or objections were received from any of the other interested parties (including the SDA) regarding the content or rationale behind that clause.

53. On 12 June 2009, the ASAA filed further submissions in matter AM2008/59 that objected to the exclusion of hospitality and childcare classifications from the proposed Alpine Award. In that submission, inter alia, the ASAA highlighted the impact that exclusion would have on employability at the alpine resorts in that:

> *2.6 Not including hospitality and childcare workers in the Alpine Resorts Award would also result in practical limitations on the ability of employees to gain work at Alpine Resorts through "dual role" employment, or to be engaged under a multi-hiring arrangement (as per clause 19 of the Exposure Draft).*

54. Ultimately, the AIRC adopted the dual-role employment clause proposed by the ASAA. That clause continues to be extremely relevant for the ASAA's operations both during winter and summer.

55. However, it is also important to keep in mind that summer operations make up a very small percentage of the alpine resorts' total revenue and staff levels and, for that reason, the transferability of staff during the winter season is of far greater significance for the alpine resorts. The substantial difference between the winter and summer operations of the alpine resorts was made clear both during Award Modernisation and during the 4-yearly review of modern awards.

56. In submissions filed on 8 April 2009 in matter AM2008/59, the ASAA provided statistics on the number of summer and winter employees engaged by the alpine resorts[13]. Those statistics indicated that, on average, the alpine resorts employed 86% of their total yearly workforce during the winter season (with one resort employing 95% of their total yearly staff during the winter season). When one takes into account that the vast majority of those employees would have been engaged during the summer months to perform maintenance work, it is very likely that the total number of employees performing retail, fast food, and hair and beauty roles during the summer months was statistically insignificant.

57. As part of the 4-yearly review of the Alpine Award the ASAA filed a witness statement of Gavin Girling dated 21 December 2016 (matter AM2014/198). In that witness statement Mr Girling gave the following uncontested evidence about the nature and extent of the alpine resorts' summer operations:

    a) The extent of summer operations varies between alpine resorts;[14]

    b) A number of alpine resorts effectively close all revenue generating operations during the summer season and only conduct maintenance work;[15]

    c) On average, the alpine resorts generate 97% of their total revenue in the winter season, of which on average 64% of that revenue is derived from ski-lifting related activities;[16] and

    d) The vast majority of employees of the alpine resorts are employed during the winter season. Mr Girling gave an example that 90% of staff at Perisher were employed solely for the winter season.[17]

58. The Full Bench of the Fair Work Commission accepted the highly seasonal nature of the alpine resorts' businesses and that they earn most of their revenue during the winter months.[18]

59. At paragraph 48 of the SDA October Submissions the ASAA is criticised for not identifying any of the enterprise agreements that are currently in operation across the alpine resorts. The ASAA notes that the following enterprise agreements are currently in operation:

    a) Perisher Trades Enterprise Agreement 2018;

    b) Australian Alpine Enterprises Pty Limited and Trade Maintenance Enterprise Agreement 2019;

    c) Mount Hotham and Falls Creek Enterprise Agreement 2018;

    d) Buller Ski and Snowboard Enterprise Agreement 2016;

    e) Buller Ski Lifts Mountain Operations Enterprise Agreement 2018;

    f) Buller Ski Lifts Pty Ltd Maintenance Employees Enterprise Agreement 2019; and

    g) Kosciuszko Thredbo Engineering Trades Enterprise Agreement 2016.

The Relevance of the Status of the Employer

60. At paragraph [17] and again at paragraph [33] of the SDA October Submissions the SDA seek to reduce the issue of the nature of the business in which the work is performed to one of the

[13] At [3.3(h)]
[14] Witness statement of Gavin Girling at [3.13]
[15] Ibid at [3.13]
[16] Ibid at [3.19]
[17] Ibid at [8.8]
[18] *Alpine Resorts Award 2010 - substantive issues concerning coverage* [2018] FWCFB 4984 at [57(3)

"*status of the employer*" and to focus only on the "*nature of the work*" done in a narrow occupational sense, in isolation, divorced from the commercial operation of which that occupation is part.

61. It was the commercial operation of the business as a whole to which the Full Bench had regard in its assessment of the award in *Alpine Resorts Award 2010* [2018] FWCFB 4984.

62. The Full Bench recognised the distinct nature of the alpine resorts operations, as one which involved an integrated business performing a diverse range of functions in a highly seasonal and weather dependent environment in which the facilitation of staff performing a range of different functions outside their primary occupational grouping was a key component.

63. In this context, the alteration of coverage provisions of the Alpine Award would remove both the employer and the employee's access to dual role and multi-hire arrangements which optimise the employees' transferability and thus earning potential.

64. The coverage provisions form an essential element of the framework of the Alpine Award as it was envisaged that it would operate in a particular commercial setting, and as it in fact does operate in that setting.

The Extraction of Particular Terms from Awards which Have Been Found to Meet the Modern Awards Objective

65. At paragraphs [17] and [19] of the SDA October Submissions, the SDA revisit the argument made at paragraphs [23] and [24] of the SDA July Submissions to the effect that the consequence of the FWC approving the *General Industry Award* as meeting the modern awards objective is that the rates of pay and applicable penalties in the *General Industry Award* have achieved the status of a necessary component which other awards must contain in order to meet the modern awards objective. In the SDA October Submissions this proposition is described at paragraph [17] as self-evident in nature and not contingent on evidence.

66. The flaw of this argument is its failure to appreciate that the modern awards objective is an obligation to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions taking into account the considerations set out in section 134(1)(a)-(h). The assessment that might be made in relation to that combination of considerations will necessarily be sensitive to the particular industrial environment in which that award is to operate and will take into account how all the terms of the award operate as a whole. Section 134 does not call for an individuated assessment of award terms such that each component of the award is assessed in isolation.

67. As noted at paragraph [29] of the submissions filed by the ASAA on 28 September 2020, the Full Bench has previously stated in respect of the modern awards objective that the outcome of the application of the competing considerations in section 134(1) to employers and employees with diverse characteristics may result in different outcomes between different modern awards[19] and that no one set of provisions in a particular award 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.*"[20]

68. These principles were applied by Commissioner Bissett in *Application by Chapman* [2019] FWC 4415 in refusing to vary the *Corrections and Detention (Private Sector) Award 2010* to include an additional set of pay rates to recognise that the work performed by some of the employees

[19] *Preliminary Jurisdiction Decision* [2014] FWCFB 1788 at [33]
[20] *Preliminary Jurisdiction Decision* [2014] FWCFB 1788 at [34]

to whom the award applied was the same as work which was paid at a higher rate under the *Security Services Industry Award 2010*. The applicant in this case submitted that the variation was necessary to provide equality in pay for work which was essentially the same. Commissioner Bissett concluded that disparity in pay between similar work was not grounds for variation. Commissioner Bissett said at [23]: "*A much more rigorous application that engages with those matters under s134 of the FW Act and which provides probative evidence of the issues to be addressed under s134 of the FW Act is required.*" Commissioner Bissett said at paragraph [21]: "*beyond the Applicant's anecdotal experience there is no objective evidence that the matters and concerns she raises do, in fact, exist.*"

Conclusion

69. At paragraph [12] of the SDA October Submissions the SDA assert that the repeal of the FWC's 4-yearly review power does not alter the interpretation of the power in section 157(1). The ASAA do not dispute this proposition, but it should be emphasised that neither does the repeal of the FWC's 4-yearly review result in a loosening of the established tests for award variations under section 157 such as to create an environment where the SDA can reagitate issues which have only been recently determined by making applications for variation under section 157 without meeting those established tests.

HARMERS WORKPLACE LAWYERS

9 November 2020