IN THE FAIR WORK COMMISSION
AT SYDNEY

Matter No.:	**AM2020/4**
Applicant:	**Shop Distributive and Allied Employees' Association**
Respondent:	**Australian Ski Areas Association**

OUTLINE OF SUBMISSIONS IN REPLY OF THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

Introduction

1. These submissions are filed pursuant to the orders of Vice President Hatcher made on 28 August 2020.

2. These submissions reply to the submissions of the Australian Ski Areas Association (**ASAA**) dated 28 September 2020 (**ASAA's submissions**) in relation to:

   a. the ASAA's application pursuant to s 587(1)(c) of the *Fair Work Act 2009* (Cth) (**Act**) to dismiss the principal application by the Shop Distributive and Allied Employees' Association (**SDA**) seeking variation to coverage of the Alpine Resorts Award 2020 (**Alpine Resorts Award**); and

   b. the SDA's principal application to vary coverage of the Alpine Resorts Award.

3. In summary, the SDA opposes the ASAA's dismissal application.

4. The SDA also continues to submit that the SDA's principal application to vary coverage of the Alpine Resorts Award should be granted.

Dismissal application

5. The ASAA's dismissal application is made pursuant to s 587(1)(c) of the Act which provides the Commission with a discretion to dismiss an application if it has no reasonable prospects of success.

6. It is asserted by the ASAA that the SDA's variation application ought to be dismissed because it is not accompanied by evidence. It is also submitted by the ASAA that the SDA has not demonstrated a material change in circumstances justifying the variation (see for example, paragraphs [9], [11] and [29] of the ASAA's submissions).

7. The ASAA's application proceeds on a wrong foundation. The success of the SDA's application is not contingent upon the SDA having filed evidence given the nature of the SDA's application. Nor is the SDA required to demonstrate a "material change in circumstances" in order for the Commission to satisfy itself that the proposed variation is necessary for the Alpine Resorts Award to meet the modern awards objective.

8. The ASAA's submissions fail to grapple with the role of the Commission as the arbiter of the modern awards system. Pursuant to that system, the Commission is empowered pursuant to s 157(1) of the Act to vary a modern award on its own initiative or upon application by a party who is permitted to seek a variation under s 158. The only pre-requisites to the Commission exercising its power to vary coverage of the Alpine Resorts Award are that the Commission be satisfied that:

   a. it is necessary to make the variation so that the modern award meets the modern awards objective in s 134(1) of the Act; and

   b. the employers or employees who will no longer be covered by the Alpine Resorts Award will instead be covered by another modern award (other than the miscellaneous award) (see s 163(1) of the Act).

9. The Commission's power in s 157(1) of the Act is not preconditioned on there being a "material change in circumstances" contrary to what is repeatedly asserted by the ASAA in the ASAA submissions (see paragraphs [21], [22], [33], [81 to [87] and [126]).

10. Indeed, the Full Federal Court in *Shop, Distributive and Allied Employees' Association v The Australian Industry Group* (2017) 253 FCR 368 emphatically rejected the proposition that the Commission's 4 yearly review powers were conditioned on a party demonstrating that there had been a material change in circumstances.

11. Indeed, at [34] the Full Federal Court held:

> It should not be readily presumed that Parliament intended to impose constraints upon the achievement of an objective that it has mandated. A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.

12. The SDA submits that the Full Federal Court's reasoning applies equally to the Commission's power in s 157(1) of the Act. There is no import for reading such a gloss into the legislation. Nor does the repeal of the Commission's 4 yearly review power alter the interpretation of the power in s 157(1).

13. The Commission's power in s 157(1) of the Act is simply preconditioned on the Commission reaching a state of satisfaction that it is necessary to vary the modern award in order for it to meet the modern awards objective. It may be obvious to say, but the only mechanism for which a modern award may now be varied is pursuant to the Commission's power in s 157(1) of the Act since there is no longer any 4 yearly review process (except in relation to default fund terms).

14. As for evidence, the SDA submits that the correct position is that in reaching the state of satisfaction required to vary a modern award, it *may* or *may not* be necessary for a party to produce evidence to support the variation application.

15. Whether evidence is required will depend on the nature of the variation which is contemplated. Variations which are "self-evident" in nature do not need to be supported by evidence. This was acknowledged by the Full Bench in its decision in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [23].[1]

16. Indeed, in the 4 yearly review of the Alpine Resorts Award, the Full Bench varied coverage of the award of its own motion to remove the ability for an alpine resort operator to apply the Alpine Resorts Award when an employee may not even be employed at, or in direct connection with, an alpine resort. The Full Bench did this without evidence adduced by any party. It was self-evident to the Full Bench that coverage needed to be varied in that manner in order for the Alpine Resorts Award to meet the modern awards objective. Notably, despite the Full Bench's reasoning at paragraph [78] of the 4 yearly review decision,[2] the ASAA continued to argue against aspects of the Full Bench's proposed variation.[3]

17. The SDA submits that the variation it seeks in this proceeding is also self-evident in nature and not contingent upon evidence. This is because:

    a. the Commission has previously made findings that the *General Retail Industry Award 2010*, *Fast Food Industry Award 2010* and *Hair and Beauty Industry Award 2010* (collectively referred to as the **General Industry Awards**) for retail, fast food and hair and beauty workers meet the modern awards objective for the employers and employees covered;

    b. retail, fast food and hair and beauty workers, presently covered by the Alpine Resorts Award, perform exactly the same work as their counterparts who are covered by the General Industry Awards, yet under the Alpine Resorts Award they receive an inferior safety net of terms and conditions of employment;

    c. there is no justification consistent with the modern awards objective for workers performing identical work across Australia to receive an inferior safety net of terms and conditions of employment pursuant to a modern award because of the status of their employer (in this case, being an alpine lift operator);

    d. the Alpine Resorts Award is plainly not meeting the modern awards objective because of the inferior safety net of terms of conditions of employment for these workers;

    e. the SDA's proposed variation to the Alpine Resorts Award simply seeks to ensure that retail, fast food and hair and beauty workers receive the same minimum safety net of terms and conditions as their counterparts across Australia. It makes no claims, and seeks no

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1 See also *Applications to vary the Applications to vary the Real Estate Industry Award 2020* [2020] FWCFB 3946 (VP Hatcher, DP Asbury and C Spencer), [56].

2 *Alpine Resorts Award 2010 – 4 Yearly Review*[2018] FWCFC 4948.

3 *Alpine Resorts Award 2010 – 4 Yearly Review* [2019] FWCFC 5180, [11].

amendment to the Alpine Resorts Award, for any employee who would not be covered by the General Industry Awards. This is not a case where the variation sought by the SDA would leave the Alpine Resorts Award with no coverage of employees.

18. Notably, during the 4 yearly review, in rejecting the application to expand coverage of the Alpine Resorts Award (strongly resisted by both the SDA and the ASAA), the Full Bench held that it was a relevant and significant element of the analysis to give consideration to whether the General Industry Awards (and some other applicable modern awards) meet the modern awards objective in respect of the employers and employees who would have been affected by the proposed variation to expand coverage and whether the contraction of the coverage of the General Industry Awards was necessary to ensure that they include only such terms as are necessary to meet the modern awards objective.[4]

19. Likewise, the SDA submits that in considering its principal application, the Commission ought to have regard to the previous findings by the Commission that the General Industry Awards meet the modern awards objective.

20. The SDA submits that provision of evidence to accompany its variation application is therefore unnecessary. The Commission is able to reach the requisite state of satisfaction on the basis of submissions. This is not the type of variation application which is contingent upon evidence.

21. The ASAA's submissions fail to grapple with the very nature of the SDA's application. Instead, the ASAA seeks to invite the Commission to reject the SDA's variation largely because of matters of history and on the asserted bases that (1) the Australian Industrial Relations Commission examined the differential conditions which exist between potentially applicable modern awards and the Alpine Resorts Award during the modernisation process and (2) this was "enshrined" by the Full Bench in the 4 yearly review.

22. The SDA rejects that characterisation. It remains the case that neither the Australian Industrial Relations Commission, nor the Full Bench during the 4 yearly review of the Alpine Resorts Award, have considered detailed argument concerning whether the Alpine Resorts Award meets the modern awards objective in respect of retail, fast food and hair and beauty workers who are covered by it.

23. Further, during the 4 yearly review of the Alpine Resorts Award, the arguments of the parties were directed to an application to *expand* coverage. As the Commission may recall, the 4 yearly review hearings were carefully timetabled and proceeded on the basis of variation applications brought by interested parties. The issue of *narrowing* coverage to exclude retail, fast food and hair and beauty workers was not the subject of application by any interested party who appeared at that hearing.

24. In any event, the SDA submits that the Commission ought not be persuaded by the ASAA's submissions. They are tantamount to depriving the Commission of any future role in varying the

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4 *Alpine Resorts Award 2010 – 4 Yearly Review*[2018] FWCFC 4948, [53].

Alpine Resorts Award on the basis of history and given its approval in past proceedings. It would deprive the Commission's variation power in s 157(1) of the Act of any meaningful work.

25. The Commission should reject the ASAA's argument that the SDA's application has no reasonable prospects of success.

26. The success of the SDA's variation application is not reliant upon the SDA having filed any evidence given the nature of its application. Nor is the SDA required to demonstrate any material change of circumstances before the Commission can satisfy itself that it is necessary to vary the Alpine Resorts Award under s 157 of the Act.

27. The SDA relies on its submissions dated 24 July 2020 and the further submissions below in support of its principal application to vary the Alpine Resorts Award.

28. Ultimately, the SDA submits that the Commission ought to reject the ASAA's dismissal application and grant the SDA's variation application.

Reply to the ASAA's general submissions concerning the SDA's principal application

29. Much of the ASAA's submissions from paragraph [24] onward invite the Commission to reject the SDA's application on the basis that the SDA has not filed evidence and on the basis that the SDA has not shown that there is a material change in circumstances to satisfy the Tribunal that the variation is necessary in order for the Alpine Resorts Award to meet the modern awards objective.

30. The SDA refers to and repeats its submissions between paragraphs [9] and [20] above in reply to those submissions. In short, neither are required in light of the nature of the SDA's application or pursuant to the Commission's powers under s 157(1) of the Act.

31. Neither does the SDA:

    a. submit that the variation is merely desirable; or

    b. fail to address why the Alpine Resorts Award does not meet the modern awards objective (demonstrating the necessity for the proposed variation).

32. The SDA submits that the variation is necessary in order for the Alpine Resorts Award to meet the modern awards objective. It is not presently meeting the objective with respect to retail, fast food and hair and beauty workers. These workers perform the same work as their counterparts covered by the General Industry Awards everywhere else in Australia, yet they receive an inferior safety net of terms and conditions compared to their counterparts.

33. Although it may be accepted as a general proposition that the attainment of the modern awards objective may result in different outcomes between different modern awards, the SDA submits that this general proposition does not apply where the nature of the work is exactly the same: retail, fast

food and hair and beauty work is the same work regardless of whether it is performed for an alpine resort operator or whether it is performed for any other employer elsewhere in Australia and including employers who conduct arguably competing businesses in the same geographical location as the alpine resort operators.

34. There is simply no basis which is consistent with the modern awards objective for the safety net of terms and conditions for such workers to be devoid of penalty rates. It remains entirely unexplained in the ASAA's submissions how the Alpine Resorts Award achieves the modern awards objective for these workers, when the safety net is demonstrably inferior to each of the safety nets in the General Industry Awards (which the Commission has held each meet the modern awards objective).

35. A large part of the ASAA's submissions then focuses on matters of history in an attempt to persuade the Commission that the Australian Industrial Relations Commission and the Full Bench in the 4 yearly review hearing has carefully considered the issue raised by the SDA in this application. The SDA submits that neither the Australian Industrial Relations Commission nor the Full Bench have considered in any detail the submissions which the SDA now advances in its principal application for the reasons given between paragraphs [22] and [23] above.

36. The SDA submits that the ASAA merely seeks to invite the Commission to refuse the SDA's application on the basis of history, rather than on the basis of a proper consideration as to whether the Alpine Resorts Award meets the modern awards objective in respect of retail, fast food and hair and beauty workers. The SDA respectfully invites the Commission to reject the ASAA's approach. The ASAA's approach is not consistent with what the Full Federal Court said in in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [34], namely that a modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.

37. One of the main justifications for the Alpine Resorts Award in the past has concerned the exigencies in weather (i.e. unpredictability of snow fall): it has been said that given the unpredictability of weather it is necessary for alpine resort operators to require their workers to routinely switch between on-slope functions and off-slope functions (like retail or fast food).

38. However, what has not been fully explored by the Australian Industrial Relations Commission or the Full Bench in the 4 yearly review is the fact that the Alpine Resorts Award applies not only during the short ski season (for four months), but it applies to workers working for alpine resort operators across the entire year (including the remaining 8 months) (as submitted at paragraph [25] of the SDA's submissions dated 24 July 2020).

39. The SDA submits that this factor is critical. For around 8 months of the year, the need for an alpine resort operator to switch employees between roles is completely irrelevant. Yet, the Alpine Resorts Award continues to apply to such workers.

40. Moreover, it is now apparent in light of the findings of the Full Bench at [57] of the 4 yearly review decision, that the extent to which alpine resort operators actually require workers to switch between on-slope and off-slope functions is "at least limited".

41. In light of these factors, the SDA submits that there can no longer be any justification for maintaining the Alpine Resorts Award for retail, fast food and hair and beauty workers: the majority of them do not perform other work in the classifications which they are employed under the Alpine Resorts Award. They are simply retail, fast food or hair and beauty workers.

42. If workers only perform work covered by the General Industry Awards, it really begs the question as to how the modern awards objective is met for these workers covered by the Alpine Resorts Award. Notably, coverage under the Alpine Resorts Award is unique because clause 4.1 *entirely excludes* the application of any other modern award if the employee is employed in a classification within Schedule A. There is no work for the standard resolution clause, which exists in modern awards (and which is replicated in clause 4.6 of the Alpine Resorts Award), to resolve the question of which modern award applies where an employer is covered by more than one modern award in respect of components of its workforce.

Reply to the submissions directly concerning the modern awards objective

Relative living standards and the needs of the low paid - s 134(1)(a)

43. The SDA submits that the Commission ought to reject any submission by the ASAA that retail, fast food and hair and beauty workers are not low paid workers (see paragraph [101] of the ASAA's submissions).

44. The Commission has previously found, for example, that a substantial proportion of award reliant retail and fast food workers are low paid.[5] The same is necessarily true for a substantial proportion of retail, fast food and hair and beauty workers covered by the Alpine Resorts Award. As identified in the SDA's submissions dated 24 July 2020, the base rate of pay is lower under the Alpine Resorts Award than the base rate of pay under each of the General Industry Awards.

45. Further, the non-award based benefits which the ASAA submits are provided by some alpine resort operators are not a relevant consideration for the purposes of the criterion in s 134(1)(a) of the Act. In any event, the ASAA has not supported this submission with any evidence describing the extent

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5 *Four yearly review of modern awards - Penalty Rates* (2017) 256 IR 1, [1356] and [1656].

to which alpine resort operators actually offer such discounts or incentives, nor how by doing this impacts the relative living standards of their low paid employees.

46. Further, plainly there are low paid employees covered by the Alpine Resorts Award who work for the entire year (including for the 8 month period outside of the ski season) where such incentives or discounts are not applied.

47. The SDA maintains the submissions between paragraph [29] and [32] of its submissions dated 24 July 2020. This criterion should be given significant weight in favour of the variation.

The need to encourage collective bargaining - s 134(1)(b)

48. The ASAA merely asserts that there is a high level of collective bargaining under the Alpine Resorts Award but it does not identify any of the enterprise agreements which presently exist to make good this submission.

49. Regardless, the SDA maintains paragraphs [33] and [34] of its submissions dated 24 July 2020. The proposed variation may encourage further collective bargaining between alpine resort operators and their employees who work in retail, fast food and hair and beauty.

The need to promote social inclusion through increased workforce participation – s 134(1)(c)

50. The ASAA's submission at paragraph [105] of the ASAA's submissions is a curious one and should be rejected. Maintenance of coverage for retail, fast food and hair and beauty workers will not result in any increased workforce participation in the manner described by the ASAA. It is also not applicable for the majority of retail, fast food and hair and beauty workers who do not perform other roles. It also fails to grapple with the Full Bench's finding at paragraph [57] of the 4 yearly review decision.

51. These workers will still be employed by alpine resort operators if they are covered by the General Industry Awards as there will be a demand for their work. It is just that they will be covered by the General Industry Awards instead which will in each case facilitate the promotion of social inclusion through increased workforce participation.

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

52. The ASAA's submissions in respect of this criterion fail to grapple with the Full Bench's finding at paragraph [57] of the 4 yearly review decision. The extent to which alpine resort operators actually require workers to switch between roles is "at least limited".

53. The SDA relies on its submissions between paragraphs [37] and [41] of its submissions dated 24 July 2020. The General Industry Awards provide the flexibility required for alpine resort operators to conduct their business with respect to their retail, fast food and hair and beauty functions, including

through the utilisation of casual staff to assist them to deal with the ebbs and flows brought about because of the weather and by reason of the need to respond to seasonal impacts.

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 = s 134(1)(da)

54. The ASAA's submission at paragraph [109] of the ASAA's submissions that there is no justification for imposing penalty rates for weekend or evening work because workers are "snow sports enthusiasts" who suffer no disutility for working at such times is plainly untenable.

55. The submission is entirely inconsistent with the findings of the Full Bench in the 4 yearly review decision at [62] and [63]. It is untenable to suggest that there is no disutility because some workers might prefer to work on weekends or at night. Plainly, not all workers will have these preferences. As the Full Bench noted at [63], such a submission takes no account of those employees – particularly permanent employees – for whom this is not true. The SDA submits that the ASAA's submission also fails to take into account that for 8 months of the year there is no ski season. The argument about the preferences of "snow sports enthusiasts" suffering no disutility, even on the ASAA's case, can have no applicability for the majority of the year.

56. The SDA maintains paragraphs [42] and [46] of its submissions dated 24 July 2020. The General Industry Awards more appropriately compensate employees who work in retail, fast food and hair and beauty by providing additional remuneration for working unsocial hours and on the weekend. The proposed variation will ensure that additional remuneration is provided to the affected employees working in retail, fast food and hair and beauty, something which is entirely absent under the Alpine Resorts Award.

The principle of equal remuneration for work of equal or comparable value – s 134(1)(e)

57. The SDA relies on paragraphs [47] and [49] of its submissions dated 24 July 2020.

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

58. The ASAA's submission that the variation will *significantly* increase employment costs should be rejected. Although the SDA accepts it is open to the Commission to find that there will be an increase in employment costs if the variation is made, there is no evidence to support that this will result in a significant increase.

59. The argument that there will be a significant impact for the regulatory burden because 4 awards may need to be applied really goes nowhere. Alpine resort operators are fairly sophisticated

employers. Notably, there are employers all over Australia who are required, and who are well able, to apply more than one modern award across their operations in respect of discrete components of their workforces. If particular alpine resort operators prefer a different scenario, they will be incentivised (in the manner expressly contemplated by s 134(1)(b)) to pursue collective bargaining which brings all employees into coverage under a single enterprise agreement.

60. The SDA submits that even if the Commission accepts that there will be an impact on the regulatory burden or employment costs as a result of the variation, the Commission ought to attach minimal weight to these factors in light of the other factors for consideration, including the fact that the relevant workers are low paid and are not compensated at all in terms of penalty rates.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards – s 134(1)(g)

61. The SDA submits that the ASAA's argument that there will be overlap between modern awards if the variation is made should be rejected.

62. To the contrary, if the variation is made, there will no longer be any overlap. The General Industry Awards will apply to the relevant workers. There will not be a situation where two modern awards apply for the same work (1) the Alpine Resorts Award where the employer is an alpine resort operator and (2) the General Industry Awards in relation to all other employers.

63. The SDA otherwise maintains its submissions between paragraphs [52] and [55] of its submissions dated 24 July 2020.

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

64. The ASAA advances no meaningful submission in relation to this criterion.

65. The SDA maintains paragraphs [56] and [57] of its submissions dated 24 July 2020. The consideration invited by s 134(1)(h) cannot in any event be a justification for denying employees who would otherwise be covered by the safety net terms and conditions of the General Industry Awards access to the same minimum terms and conditions of employment.

Conclusion

66. The SDA submits that the Commission ought to:

    a. dismiss the ASAA's application to dismiss; and

    b. grant the SDA's principal application and vary coverage of the Alpine Resorts Award in the manner sought by the SDA. In the alternative, the Commission should at least end the exclusive coverage of the Alpine Resorts Award of workers who could, and should, more

appropriately be covered by other awards in respect of the work performed by the employee in the environment in which the employee normally performs the work. It is anomalous that the Alpine Resorts Award should on its face allow for this contingency (in cl 4.6) but deny any effective operation of that clause (in cl 4.1) (see paragraph [42] above).

Filed on behalf of the SDA by AJ Macken & Co

Dated: 26 October 2020

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