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BY EMAIL chambers.hatcher.vp@fwc.gov.au

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Dear Ms Hamberger

AM2016/30 ALPINE RESORTS AWARDS - ORDERS FOR PRODUCTION

We refer to the Application (**Application**) filed in the Fair Work Commission by Harmers Workplace Lawyers on 10 October 2017 and the email from Vice President Hatcher's chambers serving the draft orders (**Draft Orders**) on our offices later the same day.

Our clients oppose the Commission making any of the Orders sought on the grounds outlined below.

1. CATEGORIES OF DOCUMENTS SOUGHT NOT RELEVANT

- 1.1 It is well accepted that the Fair Work Commission will only grant Orders for Production where the documents sought have at least some relevance "to the matters in issue in the litigation". There needs to be some "legitimate forensic purpose" for the production of the documents.¹
- 1.2 The categories of documents sought by the Australian Ski Areas Association (**ASAA**) are identified in paragraph 1 of the Application as follows:
 - (a) documents regarding historical due diligence;
 - (b) documents regarding industrial relations compliance;
 - (c) documents regarding business planning; and
 - (d) documents regarding recent and current financial viability.
- 1.3 It is not apparent how any of the categories of documents sought are relevant to the matters in issue in these proceedings.

¹ For a summary of the relevant principles see *Australian Nursing Federation v Victorian Hospitals' Industrial Association* [2011] FWA 8756 at [13], see also: *Dorajay Pty Limited v Aristocratic Leisure Limited* [2005] FCA 588 at [34]

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The issues in the present case

- 1.4 The question posed by these proceedings is: what is the appropriate scope of the coverage clause in this Award?
- 1.5 To address this question, the Coverage Applicants have presented a case that can be outlined at a high level as follows:
- (a) Firstly, the operation of Alpine Tourism Businesses, as defined in the our clients' submissions dated 13 April 2017 (**Applicants' 13 April Submissions**), are precisely aligned to the factors that gave rise to the creation of a unique Alpine Resorts Award during the Award Modernisation Process, namely:
 - (i) the operations of the businesses are "*seasonal*";
 - (ii) there is considerable fluctuating demand for employee skills and services with peaks during weekends and public holidays;
 - (iii) the businesses are marked by their high level of casual and seasonal employment and flexible hours of work; and
 - (iv) to a slightly lesser extent, the employees of these businesses can be engaged in a wide range of occupational groupings.²
 - (b) Secondly, the AIRC was operating under a mistaken impression regarding the nature of the businesses operating in the alpine areas.³
 - (c) Thirdly, the "*snowsports industry*" identified by the ASAA during the Award Modernisation Process includes more than just the alpine lifting companies.⁴
 - (d) Fourthly, the factors that make the snowsports industry unique (as alleged by the ASAA) are equally shared across alpine lifting companies and Alpine Tourism Businesses. These factors include that:⁵
 - (i) the snowsports industry is highly seasonal in nature - with the vast majority of employees being engaged only during the ski (winter) season;
 - (ii) the ski season only runs for a short period of time, typically from early June to early October, depending on the snow conditions;
 - (iii) the snowsports industry is weather dependent and highly vulnerable to changing climatic conditions;
 - (iv) the snowsports industry experiences a substantial peak in business during the weekends;

² 13 April Submissions at Section F

³ 13 April Submissions at paragraph 9

⁴ 13 April Submissions at paragraph 20

⁵ 13 April Submissions at paragraph 20

- (v) the employees of alpine lifting companies fall within a large range of occupational categories and perform highly specialised work in extreme climatic conditions; and
- (vi) work is often undertaken by snowsports enthusiasts who wish to have the flexibility to work on weekends and ski on weekdays.

1.6 The submissions of the ASAA and relevant union parties are also directed towards the above categories of arguments.

How the documents sought relate to the issues in the present case

1.7 None of the categories of issues identified above have any relationship with the extent to which operators conducted due diligence before opening their businesses nor are they relevant to the profitability or financial viability of the relevant witness operator businesses.

1.8 Further, no argument has been raised in these proceedings that:

- (a) Alpine Tourism Businesses (as defined in the 13 April Submissions) have an incapacity to pay minimum award wages; or
- (b) Alpine Tourism Businesses and the alpine tourism industry require a lower level of regulation in order to achieve necessary improvements in productivity, performance or economic growth.

1.9 In such circumstances, documents which evidence the financial position and due diligence conducted by each of the witnesses in the proceedings are of no relevance to the matters being ventilated before the Commission.

1.10 Contrary to the position advanced by the ASAA, the awareness of Alpine Tourism Businesses of the industrial and competitive environment that they were entering into does not help the Commission determine: *what should be the industry that is regulated by this Award?*

2. ALLEGED DIFFICULTIES IN 'GROWING BUSINESS' OR 'ATTRACTING AND RETAINING SUITABLE EMPLOYEES' BECAUSE OF AWARD COVERAGE

2.1 In support of its Draft Order, the ASAA asserts that a number of witnesses submit that they have difficulty in growing their businesses or attracting employees due to the Award coverage.

2.2 This is not the case.

2.3 In the limited time available, our review indicates that only one witness has stated that the Award coverage was preventing the witness from 'growing' their business or employing further staff. This witness was Ms Narelle Clark.

2.4 To the extent that Ms Clark makes such an assertion, such an assertion reflects upon an obvious consequence of reducing labour costs in a business. Of course:

- (a) a reduction in labour costs can give rise to extra profitability; and

- (b) the extra profit generated from reduced costs can be channelled into various areas – including increasing employment ('employment growth') or increasing business activity ('business growth').
- 2.5 It is not apparent how the production of an overwhelming amount of data regarding the financial records of Ms Clark's business will enable the ASAA to meaningfully test/develop the above two propositions. Indeed, such propositions have been extensively canvassed and subjected to incredibly detailed findings with respect to retail, restaurant and hospitality businesses in the 5-member Full Bench decision of *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (**Penalty Rates Case**). The impact of reduced labour costs on employment growth has also been subject to yearly consideration and findings in the annual wage review.
- 2.6 It would not be an efficient or productive use of the Commission's time for the parties involved in the proceedings to forensically examine significant volumes of commercially sensitive information to determine whether:
- (a) a reduction in labour costs will give rise to extra profit (a matter which should be obvious); or
- (b) a reduction in labour costs can lead to increased employment or other business growth. The Penalty Rates Case has made decisive findings on these matters regarding retail, hospitality and restaurant businesses which can readily be applied to these proceedings.

3. DOCUMENTATION SOUGHT IS OPPRESSIVE

- 3.1 An Order for Production must not be oppressive in the terms of its impact on the recipient. Further it has been held that an Order must not be:
- "...seriously unfairly burdensome, prejudicial or damaging, and productive of serious and unjustified trouble and harassment."*⁶
- 3.2 Even where documentation sought is not necessarily 'oppressive', the granting of an Order for Production is a discretionary matter and the Commission must weigh the burden involved in complying with the summonses against the probative value of the documents in question.⁷
- 3.3 In this case, an extraordinarily substantial number of documents have been sought by the ASAA from each witness to the proceedings.
- 3.4 It is relevant that none of the witnesses are 'parties' to the proceedings, but rather are witnesses who have volunteered their time to assist the Commission with its review of the Award. The witnesses are located in alpine areas and have already been required to travel to capital cities which are between 2 and 4 hours from their homes to give evidence in the proceedings.

⁶ *Australian Nursing Federation v Victorian Hospitals' Industrial Association* [2011] FWA 8756 at [13(m)]

⁷ See *Bengalla Mining Co Pty Ltd v Barclay Mowlem Construction Ltd* [2001] NSWSC 93

- 3.5 To now impose on each witness the task of compiling and producing the inordinate number of documents sought in the Draft Order is extremely prejudicial to these witnesses, particularly given the breadth and commercially sensitive nature of the documentation sought. By way of example only, the level of intrusion caused by producing:
- (a) all bank statements for 5 years
 - (b) all profit/loss statements for 5 years;
 - (c) all tax returns for 5 years;
 - (d) confidential business plans;
 - (e) confidential marketing plans; and
 - (f) all advice from accountants bookkeepers and associations of employers,
- goes so far as to reach the point of harassment of these witnesses. It certainly has the potential to compromise the witnesses' involvement in these proceedings or in future proceedings of a similar nature.
- 3.6 The burdens identified above substantially outweigh the probative value of the documentation – particularly having regard to the key arguments underlining the Coverage Applicants' case.
- 3.7 The content of the Order aligns with the type of subpoenas his Honour French J (as he then was) cautioned against issuing in *Australian Gas Light Company v ACCC* [2003] FCA 1101 at [8]:

“A wide-ranging subpoena, seeking documents of doubtful relevance at great inconvenience to, or that risk compromising the commercial privacy of, a third party, may not readily attract the grant of leave.”

4. COMMERCIAL SENSITIVITY

- 4.1 The ASAA is made up of and represents the witnesses' direct competitors – alpine lifting companies which conduct the same business operations as the witnesses.
- 4.2 To provide the alpine lifting companies with detailed financial information regarding the revenue, business plans marketing plans and profitability of these witnesses would be grossly prejudicial and unwarranted – especially having regard to the actual issues that are likely to be ventilated in the proceedings.

5. DOCUMENTATION TO BE SOUGHT FROM ASAA MEMBERS

- 5.1 The ASAA contends that, because the Coverage Applicants have submitted that Alpine Tourism Businesses are at a competitive disadvantage when compared with the alpine lifting companies, such a submission warrants the production of the documents sought.
- 5.2 For the reasons already advanced, the Coverage Applicants deny such a contention warrants the granting of the Draft Orders.

- 5.3 However, should (against the opposition of the Coverage Applicants) the Draft Orders be granted, then it must follow that the Coverage Applicants would be entitled to access the very same data from the ASAA members – in order to warrant a clear comparison regarding the impact of the relevant award conditions on the two classes of business. It is the comparison between the two types of businesses that lies at the heart of these proceedings.
- 5.4 To date, the Coverage Applicants have not sought such documentation in order to facilitate the fair and efficient conduct of the proceedings.
- 5.5 However, if the Draft Orders are granted, the Coverage Applicants would be unfairly prejudiced if similar orders were not made in respect of the alpine lifting companies. The Coverage Applicants accordingly put the parties on notice that they will seek Orders in similar terms if the Draft Orders are granted.
- 5.6 Whilst the Coverage Applicants feel compelled to adopt such a course of action if the Draft Orders are granted, it is inevitable that this course of action will likely give rise to further disputation in the proceedings and represents another reason why the efficient conduct of the proceedings warrants denying the granting of the Draft Orders.

Should you have any queries in relation to the above, please do not hesitate to contact Luis Izzo on (02) 9458 7640.

Yours sincerely



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