

IN THE FAIR WORK COMMISSION

AM 2016/30

4 YEARLY REVIEW OF MODERN AWARDS – ALPINE RESORTS AWARD 2010

SUBMISSIONS IN REPLY

**ON BEHALF OF ABI, NSWBC AND
THREDBO CHAMBER OF COMMERCE**

8 August 2017

Australian Business Lawyers & Advisors

Level 10, 140 Arthur Street

NORTH SYDNEY NSW 2060



AUSTRALIAN BUSINESS
Lawyers & Advisors

A. INTRODUCTION

1. BACKGROUND

- 1.1 On 22 June 2017, the Fair Work Commission made directions that Australian Business Industrial, the New South Wales Business Chamber and the Thredbo Chamber of Commerce (collectively, **the Coverage Applicants**) file submissions in reply in this matter.
- 1.2 The Coverage Applicants were directed to file these further submissions by 5:00pm, Monday 31 July 2017. This was later extended for one week to 5:00pm Monday 7 August 2017.
- 1.3 These submissions are filed in response to the following submissions in reply previously filed in this matter, namely:
- (a) Australian Ski Areas Association (**ASAA**) submissions, dated 11 May 2017 (**the ASAA May Submissions**);
 - (b) Shop Distributive and Allied Employees' Association (**SDA**) submissions, dated 11 May 2017 (**the SDA May Submissions**); and
 - (c) The Australian Workers' Union (**AWU**) submissions, dated 31 July 2017 (**the AWU July Submissions**).

2. ASAA MAY SUBMISSIONS

The Primary Purpose of the Alpine Resorts Award 2010 (Alpine Resorts Award)

- 2.1 The ASAA submits that the Coverage Applicants' argument regarding the appropriate coverage of the Alpine Resorts Award is "*misguided*" and contend that the Alpine Resorts Award was "*never intended to regulate alpine tourism generally*" but instead was made to "*regulate alpine resorts and their employees in the 'snowsports industry'*".¹
- 2.2 In support of this argument, the ASAA engages in a curious method of argument whereby it quotes its own historical submissions in support of what it stated should be the primary purpose of the Alpine Resorts Award.²
- 2.3 However, the primary purpose of the Alpine Resorts Award is *not* determined by reference to what the ASAA says it should be.

¹ Submissions of the Australian Ski Areas Association, dated 11 May 2017, [2.2].

² *Ibid* [2.3].

- 2.4 The primary purpose of the Alpine Resorts Award is to be determined by reference to what the Fair Work Commission (and the former Australian Industrial Relations Commission (**AIRC**)) has stated in its statements and decisions regarding the Alpine Resorts Award.
- 2.5 We cannot assume that the reason the AIRC made a stand-alone award for alpine lifting companies was because the AIRC accepted all of the arguments put forward by the ASAA during the award modernisation process. The AIRC did not state that it accepted all of the ASAA's arguments during that process.
- 2.6 Indeed, as has been outlined in the Coverage Applicant's April Submissions, none of the published reasons from the award modernisation process applicable to the creation of the Alpine Resorts Award refer to the alpine resorts' substantial capital investment in maintaining and operating alpine lifting operations as a reason supporting the creation of a stand-alone award for alpine lifting operators (**Alpine Lifting Companies**).
- 2.7 For example (and as discussed in the Coverage Applicants' April Submissions), in the AIRC Statement of 22 May 2009³ the Full Bench noted three factors that influenced the determination of the coverage of the Alpine Resorts Award. These three factors are as follows:
- (a) employees are engaged in a wide range of occupational groupings;
 - (b) there is considerable fluctuating demand for employee skills and services with peaks during weekends and public holidays; and
 - (c) the industry is marked by a high level of casual and seasonal employment and flexible hours of work.⁴
- 2.8 On top of these factors:
- (a) in its Decision of 4 September 2009,⁵ the Full Bench of the AIRC stated that it had taken into account:
 - “the seasonal nature of the operations covered by the award”*; and
 - (b) it appears that the weather conditions affecting alpine areas influenced the AIRC's decision making, given the following remarks by his Honour Justice Giudice to a representative for the SDA during the award modernisation hearing on 30 June 2009:

³ *Award Modernisation* [2009] AIRCFB 450.

⁴ [2009] AIRCFB 450, [219].

⁵ *Award Modernisation* [2009] AIRCFB 826.

“You don’t think there should be any concession for the weather?”⁶

- 2.9 All of these factors identified by the AIRC as relevant to creating a stand-alone Alpine Resorts Award also apply to those employers who operate retail, restaurant and hospitality businesses either within or immediately adjacent to an alpine resort (hereinafter referred to as **Alpine Tourism Businesses**).
- 2.10 Importantly, there was no mention of the significant investments made by Alpine Lifting Companies in either the AIRC Full Bench’s decision or its Statement in respect of the Alpine Resorts Award. This is never referenced by the AIRC as a reason justifying the making of a stand-alone award.
- 2.11 This is not surprising given that many industries rely on substantial capital investment by employers, without providing concessional award terms in response to such investment. By way of example, the mining, manufacturing, oil refining, stevedoring and marine towage industries (to name a few) all require substantial employer capital investment. The Coverage Applicants are unaware of any submission or decision being made during the award modernisation process which determined to lower the award safety net for employees in these industries on account of the investments made by their employers.
- 2.12 Accordingly, there does not appear to be any proper basis upon which the ASAA can assert that the primary purpose of the Award is to balance the exigencies of the snowsports industry as they relate to the capital investments made by the Alpine Lifting Companies.

Relevance of pre-reform awards

- 2.13 The ASAA also relies upon the coverage of certain pre-reform awards in support of its claim that the Alpine Resorts Award should only cover Alpine Lifting Companies.
- 2.14 However, historical decisions regarding the purpose of pre-reform awards in 1989 are not necessarily relevant in circumstances where the economic and commercial operations of the alpine resort regions changed significantly over the 18 years to 2009.
- 2.15 By way of example, since 1989, Alpine Lifting Companies have expanded their traditional alpine lifting operations and purchased other businesses located in the resort towns that were previously operated by private operators.⁷ This has had the effect that an Alpine Tourism Business is now much more likely to be in business immediately adjacent to and in

⁶ PN 3661, Transcript 30 June 2009 - See Annexure Z to the Girling Statement

⁷ See the examples raised in the witness statements of Sandra Connor at [66] to [67], Gregg Quinn at [40] to [47], and Ian Foster at [52] to [59].

competition with similar types of business that are owned and operated by an Alpine Lifting Company.

2.16 In any event, when it came to determine the coverage of the Alpine Resorts Award, the AIRC Statements and Decisions did not reference historical pre-reform award coverage as the basis for creating a stand-alone Alpine Resorts Award. Rather (and as previously indicated), the 22 May 2009 and 4 September 2009 Statements by the AIRC which explained the creation of the Alpine Resorts Award refer to only three factors influencing the creation of a stand-alone Alpine Resorts Award, namely:

- (a) employees are engaged in a wide range of occupational groupings;
- (b) there is considerable fluctuating demand for employee skills and services with peaks during weekends and public holidays; and
- (c) the industry is marked by a high level of casual and seasonal employment and flexible hours of work.⁸

Consideration given to the presence of other employers in alpine resort areas

2.17 The Coverage Applicants maintain that the exchange between the ASAA and Justice Giudice on 30 June 2009 (identified at section 9 of the Coverage Applicants 13 April 2017 Submissions) did have the capacity to mislead the Commission about the nature of establishments operating in the alpine region.

2.18 As previously identified, the Coverage Applicants do not assert that the ASAA representative *intentionally* misled the Commission. Nonetheless, upon a review of the entire transcript outlined at paragraph 9.4 of the Coverage Applicants' 13 April 2017 Submissions, it is apparent that:

- (a) a narrow coverage clause had been proposed by the ASAA;
- (b) Justice Giudice was specifically drawing attention to the narrow drafting proposed by the ASAA and, in particular, the proposed clause's focus on alpine lifting as a pre-requisite to being considered an alpine resort;
- (c) Justice Giudice was specifically asking whether there were "*other establishments*" in the region providing similar services to the resorts, aside from alpine lifting; and
- (d) in response, the ASAA indicated that there were no such other establishments that were as affected by snow or operating in the "*precise region*." This is simply not

⁸ [2009] AIRCFB 450, [219].

correct. Clearly, there are numerous retail, restaurant and hospitality businesses operating within the alpine region, both within the alpine resorts and immediately adjacent to the alpine resorts, which provide the same services as the Alpine Lifting Companies, with the sole exception that these businesses do not provide alpine lifting services.

- 2.19 The ASAA May Submissions have identified other submissions made by the SDA during the award modernisation hearing on 30 June 2009 (**the June 2009 Hearing**) which may have addressed any inadvertent misrepresentations made by the ASAA.
- 2.20 Whilst the SDA submissions during the June 2009 Hearing *might possibly* have rectified the unintentional misrepresentations made by the ASAA, we cannot conclude that the SDA's submissions had the actual effect of rectifying any such unintentional misrepresentation as:
- (a) there is an absence of clear commentary on this point in the AIRC statements regarding the making of the Alpine Resorts Award; and
 - (b) the factors the AIRC identified as supporting the making of the Alpine Resorts Award are equally applicable to Alpine Tourism Businesses. The AIRC's reasoning drew no distinction between Alpine Lifting Companies and Alpine Tourism Businesses.

3. SDA MAY SUBMISSIONS

- 3.1 The SDA May Submissions raise the following main points in opposition to the Coverage Applicants' claim:
- (a) that the Alpine Resorts Award was made *"in acknowledgement of the unique nature of the operations of resorts that includes lifting operations, especially in regard to the capital expenditure in the construction and maintenance of lifting infrastructure combined with the vagaries of the weather"*;⁹
 - (b) that the *General Retail Industry Award 2010 (the Retail Award)*, the *Fast Food Industry Award 2010 (the Fast Food Award)* and the *Hair and Beauty Industry Award 2010 (the Hair and Beauty Award)* are the appropriate awards to cover workers and provide a fairer safety net;¹⁰ and
 - (c) the application to vary coverage of the Alpine Resorts Award is an *"attempt to avoid the superior terms and conditions of existing awards that currently and*

⁹ Submissions of the SDA dated 11 May 2017, [14].

¹⁰ Ibid [10].

appropriately cover workers” working in retail, hospitality and fast food and that workers would receive a decrease in pay rates.¹¹

Lifting Operations

3.2 In response to the SDA’s submission that the Alpine Resorts Award was made in acknowledgement of an alpine resort’s lifting operations, particularly in regard to the capital expenditure in the construction and maintenance of lifting infrastructure combined with the vagaries of the weather, we refer to our submissions made at paragraphs 2.6 to 2.10 above, and in paragraphs 8.5 to 8.8 and paragraphs 10.1 and 10.2 of the Coverage Applicants’ 13 April 2017 Submissions.

Fair safety net and superior terms and conditions

3.3 In response to the SDA’s submissions that other Awards provide a “*fairer*” safety net, we note that the AIRC determined in 2009 that the appropriate and fair safety net for workers in alpine regions (including workers engaging in hospitality, retail and restaurant services) is that which is set by the Alpine Resorts Award (notwithstanding the protest of the SDA).

3.4 In 2009, the AIRC deemed it acceptable and appropriate to apply the pay rates and conditions set by the Alpine Resorts Award to that hospitality, retail and restaurant work conducted by Alpine Lifting Companies for the reasons explained in its Statement of 22 May 2009¹² and in its Decision of 4 September 2009¹³.

3.5 Yet, the employees of Alpine Tourism Businesses are employed to perform work which is of an identical nature, type and classification, to the work performed by employees of the Alpine Lifting Companies, which are covered by the Alpine Resorts Award.

3.6 By way of example:

(a) How is an employee working in retail at George’s Ski Hire at Mt Buller (privately owned and operated and covered by the Retail Award) performing work that is any different to an employee working at Chalet Boutique (owned and operated by Buller Ski Lifts Pty Ltd and covered by the Alpine Resorts Award)?

(b) Likewise, how is an employee working in hospitality at The Lantern Apartments at Thredbo (privately owned and operated and covered by *Hospitality Industry (General) Award 2010 (the Hospitality Award)*) performing work that is any different to an employee working at Thredbo Apartment Management or the

¹¹ Ibid [27] and [39].

¹² [2009] AIRCFB 450, [219].

¹³ [2009] AIRCFB 826, [263].

Thredbo Alpine Hotel (owned and operated by Kosciusko Thredbo Pty Ltd and covered by the Alpine Resorts Award)?

- 3.7 The type of work and duties performed by the employees are no different. The difference in coverage arises because of only one element of an employer's business operations, namely the ownership and operation of an alpine lift.
- 3.8 The Coverage Applicants acknowledge that the change in coverage would mean that workers may receive a decrease in pay rates. However, the Commission has already determined that the Alpine Resorts Award provides an appropriate safety net for employees in alpine regions performing retail, hospitality and restaurant services.
- 3.9 The SDA does not explain why it is appropriate that the safety net for one group of employees in the alpine tourism industry is different to the safety net for another group of employees performing exactly the same work, also in the alpine tourism industry. Indeed, it was the SDA who made the point in 2009 that both sets of employees should be governed by the same instruments.¹⁴

4. THE AWU JULY SUBMISSIONS

- 4.1 The main point advanced by the AWU July Submissions in opposition to the Coverage Applicants' claim is that the that workers would receive inferior conditions and a decrease in pay rates including the removal of the current weekend, morning and evening penalty rates.¹⁵
- 4.2 The AWU submit that the workers affected by the Coverage Applicants' claim are already low paid and any resulting wage cut for these workers would be "*incredibly harsh*".¹⁶
- 4.3 As discussed above in response to the SDA May Submissions, we acknowledge that the Coverage Applicants' claim, if accepted, will result in employees of Alpine Tourism Businesses being employed pursuant to the terms and conditions of employment in the Alpine Resorts Award, which may be less generous than the other commonly used awards, including the Hospitality Award and the Retail Award.
- 4.4 However, the AIRC determined the terms and conditions in the Alpine Resorts Award as fair and relevant having regard to the nature of the work performed, seasonal and climatic factors, and the unique nature of the 'snowsports industry'. In particular, the omission of

¹⁴ Although, the SDA wanted alpine resort employees to be covered by the Retail, Hospitality and Restaurant Awards - see PN 3653ff, Transcript 30 June 2009 - Annexure Z to the Girling Statement

¹⁵ Submissions of the AWU dated 31 July 2017, [21] and [22].

¹⁶ Ibid [31].

penalty rates from the Alpine Resorts Award reflects the fact that employees working in alpine areas generally prefer to work on weekends and ski/snowboard during the week¹⁷ - rendering the traditional justification for imposing penalty rates inapplicable to both the Alpine Lifting Companies and the Alpine Tourism Businesses.

4.5 The extension of the Alpine Resorts Award terms and conditions to retail and hospitality employees of Alpine Tourism Businesses will not have any significant detrimental impact on employees. This is because the employees working for Alpine Tourism Businesses are a different breed of employee to those ordinarily engaged in retail, hospitality or restaurant businesses elsewhere in Australia. Alpine Tourism Business employees are snowsports enthusiasts who, amongst other things:

- (a) are predominately engaged for the duration of a short winter season;¹⁸
- (b) predominately spend their non-working time on the ski slopes engaging in snow sports activities;
- (c) prefer to work weekends instead of weekdays in order to avoid the tourist congestion associated with weekends;¹⁹ and
- (d) ultimately, see a “*powder day*” or “*bluebird day*” as far more important than any weekend day.²⁰

4.6 The rationale behind the imposition of weekend penalties was recently confirmed by the Full Bench of the Fair Work Commission 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 at the times that the penalty rates operate, but rather to compensate employees for the “*disutility*” associated with working on weekends.

4.7 As will be seen in the evidence tendered in these proceedings, for employees of Alpine Tourism Businesses, there is no disutility associated with weekend work. On the contrary, there is greater disutility associated with weekday work, when employees miss out on enjoying ski slopes that are less crowded with shorter lift queues.

4.8 In such circumstances, the transition of Alpine Tourism Business employees to the Alpine Resorts Award should be seen as removing from their employment conditions a ‘windfall gain’ associated with unwarranted penalty rates, as opposed to causing detriment to such employees.

¹⁷ See paragraph 13.5 of the Coverage Applicants 13 April 2017 Submissions

¹⁸ See section 14 of the Coverage Applicants 13 April 2017 Submissions

¹⁹ See paragraph 13.5 of the Coverage Applicants 13 April 2017 Submissions

²⁰ Ibid

- 4.9 Of course, to the extent that the Commission is concerned about the impact of any coverage changes on Alpine Tourism Business employees, transitional measures could be adopted to ameliorate the impact of any coverage changes. Given the seasonal nature of the engagement of most employees, commencing new coverage (or a category of new terms and conditions) at the beginning of a specified season would be a logical way in which to transition in new conditions.
- 4.10 To the extent that the AWU submissions refer to the modern awards objective in section 134(1), in response we refer to the table set out at paragraph 31.1 of the Coverage Applicants' April Submissions.

Filed on behalf of the Coverage Applicants by:

AUSTRALIAN BUSINESS LAWYERS & ADVISORS PTY LIMITED

Luis Izzo
Director
(02) 9458 7640
luis.izzo@ablawyers.com.au

Kyle Scott
Senior Associate
(02) 4989 1010
kyle.scott@ablawyers.com.au

8 August 2017