

ALPINE RESORTS AWARD 2014 – AM2016/30
FOUR YEARLY REVIEW OF MODERN AWARDS
AUSTRALIAN SKI AREAS ASSOCIATION
SUPPLEMENTARY OUTLINE OF SUBMISSIONS IN REPLY

1 Introduction

- 1.1 This supplementary outline of submissions in reply is made by the Australian Ski Areas Association (“**Association**”), pursuant to direction 6 of the directions issued by the Commission on 24 November 2016, amended by the Commission on 6 April 2017, and further amended by the Commission on 27 April 2017.
- 1.2 The Association refers to the submissions and evidence filed in the Fair Work Commission (“**Commission**”) on behalf of the Australian Business Industrial, the New South Wales Business Chamber and the Thredbo Chamber of Commerce (“**Coverage Applicants**”) on 13 April 2017 (“**April Submissions**”) seeking to change the coverage of the *Alpine Resorts Award 2010* (“**Award**”).
- 1.3 The Association opposes the Coverage Applicants’ April Submissions and maintains its position with respect to the points raised in its:
- (a) outline of submissions (“**Association’s December 2016 Submission**”) and Gavin Girling’s witness statement, both filed with the Commission on 21 December 2016 (“**Statement of Gavin Girling**”); and
 - (b) outline of submissions in reply, filed with the Commission on 12 April 2017 (“**Association’s April 2017 Submission**”).

2 The primary purpose of the Award

- 2.1 The Coverage Applicants assert that during the award modernisation process the Australian Industrial Relations Commission (“**AIRC**”) did not appear to give any detailed consideration to what the term “snowsports industry” encompassed, or whether the term was “an accurate reflection of the alpine tourism industry”¹, and as such the coverage of the Award was determined on a “mistaken basis”².

¹ Coverage Applicants April Submissions at [6.9].

² Ibid at [17.3].

- 2.2 The Coverage Applicants argument is misguided as the Award was never intended to regulate alpine tourism generally but rather to provide a stand-alone award to regulate alpine resorts and their employees in the “snowsports industry” that engage in alpine lifting activities, and whose businesses form the core of the snowsports industry (“**Alpine Lifting Companies**”).
- 2.3 As made clear in the Association’s April 2017 Submission, the primary purpose of the Award was to balance the unique exigencies of the snowsports industry as they relate to the operations of Alpine Lifting Companies and their employees:
- 2.6 The primary purpose served by the extensive tailored flexibility in the Award and its coverage is to address the unique combination of ski lifting/snowsports related activity being both the major source of revenue, and the predominant activity to which the vast majority of the workforce of Alpine Lifting Companies are allocated, with the need to cope with not only seasonal, but daily significant weather exigencies.
 - 2.7 The Alpine Lifting Companies invest significantly in the installation, maintenance and operation of alpine lifting facilities and derive the majority of their annual revenue from alpine lifting related activities. As such, the Alpine Lifting Companies are disproportionately affected by the adverse weather that often inhibits the operation of these alpine lifting facilities (see paragraphs 3.15 to 3.23 of the Statement of Gavin Girling).
 - 2.8 The unique flexibilities and broad classifications in the Award were, in part, incorporated into the Award to ameliorate the financial impact of adverse weather on the Alpine Lifting Companies by enabling them to transfer staff within operational entities from snowsports related work and to ancillary businesses, such as hotels, shops and restaurants during periods of adverse weather (see paragraphs 5.1 to 5.11 of the Association’s December 2017 Submission).
- 2.4 The disproportionate impact mentioned above that Alpine Lifting Companies face as a consequence of adverse weather was appropriately summarised by the Association in its oral submissions in relation to an application to the Fair Work Commission in 2014 to vary the coverage of the Award (matter number AM2014/189)³:
- [PN49] ... can I just explain this: you can imagine that, say, 60 per cent of the industry is located in New South Wales and the largest resort in the country, for example, is Perisher. Now, a large number of people go to Perisher. They're primarily going to take ski lifts up the mountain and ski. If there is no snow, that massive area of potential revenue is decimated. People who would otherwise be utilising the mountain actually stay in the village and increase business for restaurants, hotels, other aspects of business operations while the resort operator that has made a massive capital investment in building and maintaining those lifts believes (indistinct).

³ Association’s December 2016 Submission at [5.8].

- 2.5 It is this primary purpose that informed the scope of the coverage of the Award, as well as the coverage of the pre-reform industrial instruments that have historically regulated the snowsports industry.
- 2.6 Prior to the creation of the Award the snowsports industry in Australia was primarily regulated by the following pre-reform industrial instruments:
- (a) the *Ski Industry (State) Award* (“**NSW Ski Industry Award**”);
 - (b) the *Ski Instructors (State) Award* (“**NSW Ski Instructors Award**”);
 - (c) the *Perisher Blue Pty Ltd (Ski Tube) State Award* (“**NSW Ski Tube Award**”); and
 - (d) the *Alpine Resorts (Australian Workers Union) Award 2001* (“**Victorian (AWU) Award**”).
- 2.7 The above pre-reform awards were drafted to only cover certain Alpine Lifting Companies, to the exclusion of all other employers that may have been engaged generally in the alpine tourism industry⁴:
- (a) the NSW Ski Industry Award⁵ and the NSW Ski Industry Award⁶ only covered Perisher Blue Pty Limited (“**Perisher Blue**”), Kosciusko Thredbo Pty Limited, Mt Selwyn Snowfields Pty Limited, and Charlotte’s Pass Village Pty Limited;
 - (b) the NSW Ski Tube Award only covered certain employees of Perisher Blue⁷; and
 - (c) the Victorian (AWU) Award only covered MHSC Pty Limited, Falls Creek Ski Lifts Pty Limited, and Mount Hotham Skiing Company Pty Limited⁸.
- 2.8 As part of proceedings for the creation of the NSW Ski Industry Award, Justice Watson conducted site inspections at Jindabyne, Thredbo and Perisher for the purposes of determining the scope of the coverage of the proposed award. Those inspections canvassed all aspects of alpine commerce both associated and un-associated with the Alpine Lifting Companies, such as, inter alia, retail, hospitality, and most importantly alpine lifting operations.
- 2.9 Those site inspections culminated in an extensive coverage hearing before Justice Watson on 25 July 1989 to consider special award exemptions (“**1989 Hearing**”). During the 1989 Hearing, his Honour expressly recognised that the award would not cover retail businesses located in the alpine area that were not associated with those entities identified in paragraph [2.7(a)] above⁹:

⁴ Statement of Gavin Girling at [5.1].

⁵ Annexure K of the Statement of Gavin Girling at clause 25.

⁶ Annexure Q of the Statement of Gavin Girling at clause 20.

⁷ Annexure R of the Statement of Gavin Girling at clause 33.

⁸ Annexure S of the Statement of Gavin Girling at clause 7.

⁹ Annexure M of the Statement of Gavin Girling at page 304.

HIS HONOUR: If the Shop Employees Union are going to be involved for a handful of people who are employed for 16 weeks' maximum during the year by these resort proprietors or some of them, then no doubt they will get an organiser on the job and look into it. **But as I understand it, the scope of the award does not cover the various franchise shops or village shops in the area. The employers are not parties to the award, is that right?**

McARDLE: **The industry of the employers there is not the ski industry, it is conducting retail outlets.**

- 2.10 A copy of the transcript of this hearing is at Annexure M of the Statement of Gavin Girling.
- 2.11 During the 1989 Hearing, the Retail Traders Association of New South Wales (“RTA”) made appearances on behalf of the retail employers operating in the New South Wales alpine regions, and surrounding areas. The RTA did not oppose the creation of the NSW Ski Industry Award or seek to extend coverage to its members that operated in the alpine region (but who did not operate alpine lifting facilities).¹⁰
- 2.12 It was with regard to the above specific historical industrial context that the Association sought the creation of a stand-alone award to cover the Alpine Lifting Companies and its employees.
- 2.13 On 10 October 2008, at the commencement of the award modernisation process, the Association sent two letters to the AIRC seeking a “stand alone” modern award be made for the “snowsports industry”, which, as the Coverage Applicants correctly note in their April Submissions, the Association considered to be confined to “ski resorts”¹¹. Contrary to the Coverage Applicants submissions, in that correspondence the Association clearly defined “ski resorts” as the members of the Association that operate all of the ski resorts in Australia, i.e. the Alpine Lifting Companies.
- 2.14 On 9 March 2009, the Association filed its first submissions with respect to the creation of the Award in the AIRC (“**Associations March 2009 Submission**”), which enclosed a draft award prepared by the Association, and which had the following to say regarding coverage:

Clause 4: Coverage

- 6.2 It is proposed that the Draft Award cover “Alpine Resorts” and their employees within the classifications in Schedule A to the Award, to the exclusion of any other modern award.
- 6.3 As noted above, due to the unique nature of the Snowsports Industry, and the flexibility required due to the seasonal, and weather-dependent, nature of that Industry, **the ASAA submits that it is appropriate that the Draft Award apply as a stand-alone modern award to Alpine Resorts.**

¹⁰ Ibid at page 305B

¹¹ Annexure T of the Statement of Gavin Girling.

- 2.15 The coverage of the Association's draft award reflected the historical position in the industrial regulation of the "snowsports industry", as outlined in paragraph [2.7] above.
- 2.16 As the Coverage Applicants note in their April Submissions, the AIRC accepted the submissions of the Association and the AWU with respect to the proposed coverage of the Award and on 22 May 2009 released the first exposure draft for the Award, which rightly only extended coverage to the Alpine Lifting Companies.
- 2.17 Throughout the entire award modernisation process the coverage of the Award was limited to the Alpine Lifting Companies. As made clear by the Association in its December 2016 Submission, the coverage of the Award and the historical industrial context that informed that coverage was the subject of extensive written and oral debate both in hearings and in conferences with the AIRC¹².

3 Consideration given to the presence of other employers in the alpine area

- 3.1 The Coverage Applicants assert that during the award modernisation hearing on 30 June 2009 ("**June 2009 Hearing**"), the Association unintentionally misrepresented to the Full Bench that there were no businesses operating in the same region as the Alpine Lifting Companies that were providing similar services and that were subject to the same seasonal/climatic conditions¹³.
- 3.2 The Association wholeheartedly rejects this assertion which distorts the response given by Mr Harmer during the June 2009 Hearing, ignores oral submissions made during the June 2009 Hearing, and subsequent written submissions that further clarified the issue. A transcript of this hearing can be found at Annexure Z of the Statement of Gavin Girling.
- 3.3 The relevant question asked by Justice Giudice of the Association during the June 2009 Hearing was as follows:

PN3688 JUSTICE GIUDICE: Yes, Mr Harmer, I was particularly interested in the definition and the submission that was made about the requirement that the resort include alpine lifting. **The suggestion seemed to have been made that there would be other resorts that don't include alpine lifting which would be covered by other awards and that was the issue that I was interested in your submission on.**

- 3.4 The Association responded to Justice Giudice's initial question referred to in the paragraph above accordingly:

PN3689 MR HARMER: In our respectful submission, your Honour, **there would be no alpine resorts involved in the ski industry as we understand it that does not involve ski lifts**, so I am unable to assist with the nature of any resort operating in the ski areas that would fall into that category. There are, of course, your Honour, for example in Jindabyne there are operations that might be described as resorts in terms of accommodation and things of that nature which some other facilities,

¹² Association's December 2016 Submission at paragraph [6.2]

¹³ Part 9 of the Coverage Applicants April Submissions.

but they do not operate in the ski area and do not fall under the intended coverage of the exposure draft.

3.5 As is made clear in paragraphs [2.13] to [2.17] of these submissions, throughout the award modernisation process the Association understood and asserted that the alpine resorts “involved in the ski industry” were the Alpine Lifting Companies, the entities the subject of the pre-reform awards on which the Award was based. This understanding was reflected in the coverage clause proposed by the Association in its draft award, and subsequently accepted by the AIRC in its exposure draft published on 22 May 2009. As such, it was not inaccurate or misleading for the Association to state that “there would be no alpine resorts involved in the ski industry *as we understand it* that does not involve ski lifts”.

3.6 Moreover, it was not inaccurate or misleading for the Association to assert that in Jindabyne there are establishments that offer accommodation and like facilities but that do not fall within the intended coverage of the exposure draft.

3.7 Justice Giudice then asked a follow up question of the Association regarding the “resorts” in Jindabyne specifically referred to by the Association:

PN3690 JUSTICE GIUDICE: And with the exception of lifting, do those resorts or other establishments provide the same or similar services to the public as the resorts covered by this award.

3.8 The Association responded to the above question as follows:

PN3691 MR HARMER: The example I just used, your Honour, was talking about lower areas of altitude, so they're not operating in the precise region, they're not as heavily impacted by snow and they're not providing any of the services associated with skiing that we are dealing with, in our respectful submission, your Honour.

3.9 Again, the response in the paragraph above was neither inaccurate nor misleading. The Association was asked a direct question about certain “resorts” in Jindabyne, and the Association responded correctly that while these “resorts” do provide services within the ambit of alpine tourism, they do not provide the services associated with snowsports that define the Alpine Lifting Companies, i.e. alpine lifting.

3.10 It is a factual distortion to claim that the AIRC was misled in that it was allegedly led to believe that there were no other businesses operating in the same region as the Alpine Lifting Companies that were not engaged in alpine lifting activities. Written and oral submissions were made during the award modernisation process that many businesses operated in the alpine region (that would implicitly be subject to the same seasonal/climatic conditions) as the Alpine Lifting Companies, but that would not be covered by the Award as they did not run alpine lifting facilities.

3.11 During the June 2009 Hearing, the Association made reference to the large number of businesses engaged in “accommodation and entertainment and other purposes” in the alpine area that sub-lease from the Alpine Lifting Companies:

PN3639 MR HARMER: The ASU raises similar issues and our response again is similar. The only specific aspect of the ASU submission which goes beyond the hospitality and childcare workers goes to both clerical

and municipal employees. Both those categories have been historically covered by the awards I've referred to, particularly in New South Wales where, if I can just explain very briefly in terms of municipal services, obviously the exposure draft only covers employers in this unique industry. It doesn't cover local government work but within the lease allocated to each resort within the National Park, **they are very much isolated and self-contained operations and accommodate a large number of people and sublet to a large number of operations for accommodation and entertainment and other purposes.** All municipal services have to be on a self-contained basis provided by each of the resorts and it's for that historical reason that the industry awards have catered for municipal services, if you like, water supply and other things being supplied by these resorts and that's been dealt with under the resort work category, for example in New South Wales;

- 3.12 Furthermore, during the June 2009 Hearing, the Shop, Distributive and Allied Employees' Association (“SDA”) made clear in its oral submissions that multiple general awards would operate within alpine regions because the Award contained a very tailored coverage clause that would exclude all businesses in the alpine area that did not operate alpine lifting facilities:

PN3654: The key issue clearly in terms of whether or not the service workers are in this award or out is really determined by the issue of the coverage clause of the Alpine Resorts Award and **the very coverage clause of the Alpine Resorts Award means that the other industry awards will necessarily apply in the snow sports industry or in the ski fields and that's simply because the coverage clause of the Alpine Resorts Award is so specific, it actually should probably be renamed the Alpine Lifting Award because the whole definition of the industry is dependent upon an establishment that includes alpine lifting which simply means that any establishment in the ski fields or in the snow sports industry that does not provide alpine lifting is simply not covered by the Alpine Resorts Award.**

PN3655: In that sense it's not an award covering the resorts, it's an award covering only those establishments that include alpine lifting. **Very clearly, in our submission, not all employers who are employers within the ski fields area are going to be employers who include alpine lifting.** That very fact means that the other industry awards will apply and it is inequitable, in our submission, for employees only under this award to be put in a lesser position than employees who would also work in the ski fields who would be employed under the prime industry awards that would cover their respective classifications

- 3.13 During the June 2009 Hearing, the Association again noted that there are a number of businesses that operate in the alpine areas, but that they are distinguishable from the Alpine Lifting Companies as they do not operate lifting facilities:

MR HARMER: The definition is satisfactory to the Australian Ski Areas Association, your Honour. **The resort operators measure their productivity and market share by reference to ski lift hours or trips and all of the alpine resorts operate ski lifts and it would appear to be a significant distinguishing feature compared to other employers in the region of which there obviously are some.** The unique

circumstances we face and I apologise if this is not directly in response to your question, your Honour, but in response to comments made by some of the unions, we cannot emphasise too much how much the exigencies of the weather can devastate our business and how much poor weather in terms of lack of snow and the reporting of it can reduce demand for our product to such a significant extent as to render the resorts non-viable in some seasons.

- 3.14 The exact line of questioning that the Coverage Applicants assert mislead the AIRC during the June 2009 Hearing was the subject of subsequent written submissions made by the SDA on 6 July 2009 (“**SDA July 2009 Submission**”)¹⁴.
- 3.15 The SDA acknowledged in its July 2009 Submissions that the Association answered Justice Giudice’s questions regarding coverage (as discussed in paragraphs [3.1] to [3.9]) both “honestly” and “correctly”.
- 3.16 The SDA then went on to clarify certain oral submissions made during the June 2009 Hearing (referred to at paragraph [3.11] to [3.12] and above) that there were a number of businesses operating within areas controlled by the Alpine Lifting Companies that would not be covered by the Award because they did not operate alpine lifting facilities:
10. The group of sub-lessees are not “alpine resorts”, they are simply operations within an area controlled by an “alpine resort”.
 11. It is the sub-let operations which constitute the group of employers who are operating in the ski fields and within the resort but who are not engaged in alpine lifting and whose employees would be covered by the general Modern Awards for the various industries.
- 3.17 The “sub-lessees” that the SDA is referring to were recognised by the Association during the June Hearing 2009 as engaging in activities in the alpine areas such as “accommodation and entertainment and other purposes” (see paragraph [3.11] above).
- 3.18 In light of the above, it is astonishing and entirely inaccurate for the Coverage Applicants to assert that, due to the conduct of the Association, the AIRC was under a mistaken belief that there were no other businesses operating in the same region or climatic conditions as the Alpine Lifting Companies, and as a result the AIRC “determined the coverage of the Alpine Resorts Award on a mistaken basis”.¹⁵
- 3.19 The AIRC properly determined the tailored coverage of the Award on the basis of the extensive oral and written submissions made during the award modernisation process, with regard to the primary purpose of the Award as outlined in paragraphs [2.2] to [2.3] above, and consistent with the extensive history of coverage and award regulation clearly placed before the AIRC.

¹⁴ Annexure X to the Statement of Gavin Girling

¹⁵ Coverage Applicants April Submissions at [17.2]-[17.3].

4 Lack of submissions made by ABL during the award modernisation process

- 4.1 The Coverage Applicants note that they did not make submissions during the award modernisation process and nor did any other entity representing “Alpine Tourism Businesses”. The Association does not dispute this point, and notes that the Coverage Applicants (and any other entities representing Alpine Tourism Businesses) were entitled to appear before the AIRC with respect to the creation of the Award, but chose not to.
- 4.2 The Coverage Applicants interest in the Award appears to have only arisen as a consequence of the Fair Work Ombudsman’s investigation in 2014 of businesses operating within alpine areas that were incorrectly applying the Award¹⁶.

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¹⁶ See Part 9 of the Statement of Gavin Girling.