

IN THE FAIR WORK COMMISSION

Matter No:

AM2016/30

FOUR YEARLY REVIEW OF MODERN AWARDS

Applicant:

AUSTRALIAN HOTELS ASSOCIATION

SUBMISSIONS OF THE AUSTRALIAN HOTELS ASSOCIATION

1. These submissions are made on behalf of the Australian Hotels Association (“the AHA”), pursuant to direction 5 of the directions issued by the Fair Work Commission (“the Commission”) on 24 November 2016.
2. In lodging these written submissions, the AHA seeks to amend the coverage clause of the *Alpine Resorts Award 2010* (“the Alpine Award”).
3. On 30 November 2016 the AHA submitted its draft determination (“draft determination”).

The coverage clause in the Alpine Award

4. Coverage is dealt with in clause 4 of the Alpine Award and it provides as follows:

4.1 This industry award covers employers throughout Australia who operate an alpine resort and their employees in the classifications within Schedule B – Classification Definitions to the exclusion of any other modern award.

5. The term ‘alpine resort’ is defined in clause 3.1 as follows:

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“Alpine resort means an establishment whose business, among other things, includes alpine lifting”.

6. The phrase ‘alpine lifting’ is not defined in the Alpine Award, however the AHA submits that this is a reference to the operation of various forms of ski lifts within the resort.
7. There is no express geographical definition contained in the Alpine Award, of where an ‘alpine resort’ can be located, other than that as a matter of practicality, it may be assumed that only a resort in an area conducive to the falling of snow would have taken steps to install an alpine lifting device.
8. The inclusion of the words ‘alpine lifting’ in the definition of ‘alpine resort’ means that a resort whose business does not include ‘alpine lifting’ would not be covered by the Alpine Award.
9. Therefore, whilst a hotel/resort may be located in an alpine resort area and meet the common-sense definition of a ‘resort’, if that establishment does not as part of its business conduct alpine lifting, that resort would not be covered by the Alpine Award. Clause 4.2 of the *Hospitality Industry (General) Award 2010* (“Hospitality Award”) expressly identifies “hotels”, “ski-lodges” and “resorts” as falling under the hospitality industry and therefore are covered by the Hospitality Award. The Hospitality Award, provides a different set of terms and conditions that are not tailored to recognise the seasonal/geographical environment that these hotels, resorts or ski-lodges within alpine areas operate within.
10. Similarly, restaurants and retail outlets that do not conduct alpine lifting as part of their business, would not be covered by the Alpine Award and be covered by other modern awards such as the *Restaurant Industry Award 2010* and the *General Retail (Industry) Award 2010*.

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Issues relating to the coverage clause

11. It is submitted that the coverage clause as it presently stands, and the explicit requirement that a business conduct alpine lifting to be covered by the Alpine Award are an anomaly for the following reasons:

- a) The presence of a man-made construct such as an alpine lifting device, and any costs associated with installing or operating that device of itself should not determine the coverage of a modern award;
- b) Any flexibilities which are built into the Alpine Award do not appear to have a connection with the performance of work relating to alpine lifting itself;
- c) The classifications in the Alpine Award are quite broad and do not solely cover employees who are engaged in alpine lifting or associated activities, rather they include many classifications that are similar to those contained in other awards including, the Hospitality Award;
- d) The requirement that a resort conduct alpine lifting creates an artificial barrier between employers/operators, particularly in circumstances where:
 - i. Some operators that do not have an alpine lifting device are geographically located within the boundaries of an ‘alpine resort’.

Such operators are part of the same labour market and are exposed to the same seasonal/geographical factors as employers engaged in alpine lifting and these operators should be viewed as being part of the same industry;

- ii. Work performed by employees employed by an ‘alpine resort’ and a resort, hotel or ski-lodge can be in some circumstances, materially the same. However, employees would be subject to two different modern awards including different terms and conditions;
- iii. Resorts, hotels and ski-lodges provide essential services such as accommodation to guests who are visiting the ‘alpine resorts’ to engage in snow based activities. Their revenue is therefore inextricably linked to the operation of ski-lifting.

The location of hotels, resorts and ski-lodges in ‘alpine resorts’

12. Whilst ‘alpine resorts’ do provide some accommodation to guests, a great deal of accommodation is provided by independent operators, including AHA members.
13. Many of these hotels, resorts and ski-lodges are located within the geographical boundaries of, or in close proximity to an ‘alpine resort’.

Background to the Alpine Award

14. ASAA provides details in their submissions about the historical background to the Alpine Award and the following are said to be the relevant pre-reform instruments:
 - i. *NSW Ski Tube (State) Award*;
 - ii. *NSW Ski Industry (State) Award*;
 - iii. *NSW Ski Instructors (State) Award*; and

iv. Victorian *Alpine Resorts (Australian Workers Union) Award 2001* (“the State based Awards”).¹

15. ASAA has suggested that the Alpine Award, as it presently stands is predominantly based on the *NSW Ski Industry (State) Award*, which was a consent award and contained several flexibilities.²

16. The *Ski Industry (State) Award*, did not operate as a “common rule”, but was applicable only to the consenting employers, being Murray Publishers Proprietary Limited, Kosciusko Thredbo Pty Limited, Mt.Blue Cow Ski Bowl Pty Limited, Guthega Development Pty Ltd Limited, Mt Selwyn Snowfield Pty Limited and Charlotte’s Pass Village Pty Limited.³

17. It remains the case today that the Alpine Award, only applies to a small number of employers, being the 11 operators of alpine lifting devices.⁴

18. ASAA have suggested that the unique nature of the ‘snow sports industry’ was considered by His Honour Justice Watson when in 1989 the *NSW Ski Industry (State) Award* was created and in particular the following factors were considered by him. These factors are summarised below:

- a) The seasonal nature of the industry – with the majority of employees being engaged only during the ski season;

¹ Australian Ski Areas Association Submissions, dated 21 December 2016 at [4];

² Australian Ski Areas Association Submissions, dated 21 October 2015 at [2] at Annexure “H” to statement of Gavin Alfred Girling, affirmed 21 December 2016;

³ Judgment of Watson J, New South Wales Industrial Relations Commission, 25 July 1989 at [11] at Annexure “L” to the statement of Gavin Girling, affirmed 21 December 2016;

⁴ Australian Ski Areas Association Submissions, dated 21 December 2016 at [1];

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- b) The amount of work per day which depends on the snow conditions on any day;
- c) Weekends are the busiest times at the resort; and
- d) Work is often undertaken by sports enthusiasts who wish to work on weekends when it is busiest and ski on weekdays when it is quieter.⁵

19. If these were the prime reasons justifying the creation of the *NSW Ski Industry (State) Award* in 1989, and later the *Alpine Award*, it is submitted that the matters that were taken into consideration could equally apply to other operators that do not have an alpine lifting device. This is detailed further in these submissions.

Classification under the State based Awards

20. During the award modernisation process, ASAA agitated for a ‘standalone’ award which covered the ‘snow sports industry’.⁶

21. As part of this process, consideration as to the classifications of staff working in the industry was considered and in particular whether there should be a classification covering employees performing hospitality work.

22. The *Ski Instructors (State) Award* did not contain any classifications for work other than ski instructors.

23. The *Perisher Blue Pty Ltd (Ski Tube) State Award*, only applied to employees of Perisher Blue Pty Limited employed in the following classifications:

⁵ Australian Ski Areas Association Submissions, dated 21 October 2015 at [1] -[2] at Annexure “H” to statement of Gavin Alfred Girling, affirmed 21 December 2016;

⁶ Australian Ski Areas Association Submissions, dated 6 March 2009 at [1] at Annexure “U” to statement of Gavin Alfred Girling, affirmed 21 December 2016;

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- a) Trainee driver;
- b) First level train driver;
- c) Second level train driver;
- d) Leading hand track inspector; and
- e) Resort worker – being an employee who performs various maintenance and general duties.⁷

24. The *Alpine Resorts (The Australian Worker's) Union Award 2001* ("AWU Award") was also a consent award with the AWU. The AWU Award did not contain classifications relating to hospitality work and ASAA suggested that the following classifications were covered by the AWU Award:

- a. Lift Operations;
- b. Skier Services;
- c. Ski Hire;
- d. Tickets/Administration;
- e. Workshop;
- f. Retail Shops;
- g. Race Department;
- h. Snow Groomers; and
- i. Snow Makers.⁸

25. The *NSW Ski Industry (State) Award*, contained the classification of 'resort worker', however there was no explanation in the award as to what duties this classification encompassed.

⁷ Australian Ski Areas Association Submissions, dated 6 March 2009 at [6] at Annexure "U" to the statement of Gavin Alfred Girling affirmed 21 December 2016;

⁸ Australian Ski Areas Association Submissions, dated 6 March 2009 at [3]-[4] at Annexure "U" to the statement of Gavin Alfred Girling affirmed 21 December 2016;

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26. In submissions dated 6 March 2009, ASAA noted that hospitality workers employed in NSW and Victorian Alpine Resorts were covered by the *Federal Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* (“Federal Hospitality Award”).⁹
27. However, in submissions dated 12 June 2009, ASAA submitted that the ‘resort worker’ classification in the *NSW Ski Industry (State) Award* had been used by alpine resorts to cover occupations and roles not specifically identified in the Award, including hospitality work and employees engaged in hospitality roles.¹⁰ On this basis, in submissions dated 7 July 2009, ASAA supported the insertion of additional resort worker classifications to reflect higher work value of employees engaged in hospitality roles than what was covered by the existing ‘resort worker’ classification.¹¹
28. Whether alpine resorts had legitimately used the ‘resort worker’ classification to cover hospitality staff, was subject to debate in the modernisation proceedings, with both Australian Services Union and the Liquor Miscellaneous Hospitality Union suggesting that the initial state award did not have classifications for this type of work.¹²
29. On 22 May 2009, a Full Bench of the Australian Industrial Relation Commission issued a statement indicating a provisional view that hospitality workers should be covered by the proposed Alpine Award.¹³

⁹ Australian Ski Areas Association submissions dated 6 March 2009 at [4] at Annexure “U” to the statement of Gavin Alfred Girling, affirmed 21 December 2016;

¹⁰ Australian Ski Areas Association submissions dated 12 June 2009 at [3] at Annexure “EE” to statement of Gavin Alfred Girling, affirmed 21 December 2016;

¹¹ Australian Ski Areas Association submissions dated at [4] at Annexure “F” to the Australian Ski Areas Association submissions dated 21 December 2016;

¹² Submissions of the Liquor, Hospitality and Miscellaneous Union undated at [1] at Annexure “M” to Australian Ski Areas Association submissions dated 21 December 2016;

¹³ [2009] AIRCFB 450 at [222];

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30. Whether or not employees completing hospitality duties in NSW, were engaged correctly through the ‘resort worker’ classification, it is clear that through the modernisation process, the classifications for hospitality workers have expanded and are now very comprehensive.
31. For example, the classification of Resort Worker 1 – Resort Worker 7, cover hospitality duties, including bar work, kitchenhand work, food service duties, housekeeping duties, clerical/office duties, cooks, reception/administrative duties, qualified chefs and supervisors. Many of these duties are similarly contained in classifications found in the Hospitality Award.
32. It is undeniable, that the Alpine Award now contains expanded classifications for employees engaged in hospitality roles and that such employees can be solely engaged to complete hospitality duties and may not be required to complete any duties relating to ‘alpine lifting’.
33. Given that the Alpine Award, has now been expanded to contain comprehensive hospitality classifications, which may cover employees who have no role in alpine lifting, it is clear that the award does not operate to accommodate the technicalities or skill of those involved in such duties.

Response to ASAA’s submissions

Costs of an alpine lifting device

34. ASAA submits that the cost of installing and operating an alpine lifting device justifies the application of an award that only applies to operators who have such a device.¹⁴ This approach is fundamentally flawed for the following reasons;

¹⁴ Statement of Gavin Alfred Girling affirmed 21 December 2016 at [3.15]-[3.23];
AM2016/30 Four Yearly Modern Award Review: Award Coverage Issue

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- a) The quantum of start-up capital is not a factor which should determine award coverage;
- b) Start up and maintenance costs are an inherent cost of doing business;
- c) For example, a resort covered by the Hospitality Award, that may spend a considerable amount of capital investment in creating a resort in a remote or isolated location such as on an off-shore environment does not receive any flexibilities or separate award coverage due to the costs in establishing or maintaining that resort; and
- d) Other awards are not determined on the basis of cost, for example the *Amusement, Events and Recreation Award 2010*, does not distinguish between theme park operators who arguably have large start-up costs in installing roller-coasters, to ten pin bowling centres who would not have the same initial outlay or maintenance costs.

Impact of changing climate

35. ASAA argues that the effects of changing climate, including a shorter snow season, smaller amounts of snow and a decline in the number of ski seasons as a reason for retention of flexibilities under the award.¹⁵

36. This logic is flawed for the following reasons:

¹⁵ Statement of Gavin Alfred Girling affirmed 21 December 2016 at[3.24]-[3.26]
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- a) Hotels, resorts and ski-lodges in ‘alpine resorts’ generally are only open for the ski season. If the ski season is shorter than a hotel will be open for a commensurate lesser amount of time; and
- b) Many other industries are impacted by climate change, however as part of the modern award reviews they have not received concessions or ‘flexibilities’ to offset any financial loss caused by climate change.

Seasonal factors

Geographical proximity

37. Many hotels, resorts and ski-lodges that do not operate an alpine lift are still subject to the same seasonal factors as an operator who conducts alpine lifting on the basis of their geographical location.

38. For example, some members of the AHA are physically located within the bounds of an ‘alpine resort’ such as Perisher Blue Pty Ltd. In terms of proximity of a hotel, resort or ski-lodge to an alpine lift, this can be as close as 10, 50 or 100 metres. Notwithstanding the proximity of some AHA members to an alpine lifting device, it is suggested that hotels, resorts and ski-lodges located up to a 10 kilometre radius from the relevant local village local post office (“LPO”) would be subject to the same seasonal factors.

39. These hotels, resorts and ski-lodges are therefore exposed to exactly the same seasonal factors as resorts who conduct alpine lifting.

Operations of AHA member hotels

40. AHA members provide a range of services to guests who are visiting the alpine resorts, including the following;

- a) Accommodation;
- b) Food and beverage services, including ski-up restaurants which are open to guests who are skiing/snowboarding and may not be necessarily staying at the hotel; and
- c) Storing ski/snowboarding equipment.

Short season

41. Given the close proximity to alpine resorts who conduct alpine lifting, hotels, resorts and ski-lodges that do not conduct alpine lifting similarly operate according to the same short season.
42. Typically, AHA members located in these areas are open for the same short period being, June – September/ Early October, with the resorts closing outside of these periods and staff are not engaged during the off season due to closure. The operation of the hotels is therefore inextricably linked to the ski season and they should be viewed as being part of the broader ‘snow sports industry’.
43. If hotels, resorts and ski-lodges did not provide these accommodation services to the guests of the alpine resorts engaged in lifting, fewer guests would be able to come to the area for skiing/snowboarding. These hotels, resorts and ski-lodges should therefore be recognised as an integral part of the snow sports industry.

Staff employment and retention

44. On the basis of the short season, AHA members encounter the same difficulties as operators engaged in ‘alpine lifting’, including:
- a) The vast majority of staff are only engaged on a seasonal basis;

- b) The work to be provided to employees engaged on a seasonal basis, fluctuates on the basis of weather conditions; and
- c) Additional costs in re-hiring staff each year as not all staff return each season.

Profits derived due to proximity to snow fields

- 45. The profitability of hotels, resorts and ski-lodges that are only open during the skiing season is inextricably linked to the operation of the ski fields.
- 46. AHA members during these months, derive 99-100% of their profits during these months from guests who are staying in the area specifically for the purposes of skiing/snowboarding or other snow based activities.
- 47. If the snow season is poor, fewer guests come to the region and profits decline.
- 48. Given that the weekends are the busiest times for alpine operators, it follows that weekends are also the busiest times for hotel, resort and ski-lodge operators. However, hotels, resorts and ski-lodges do not enjoy the same flexibilities in regards to the weekend.
- 49. Staff who are employed in hotels, resorts and ski-lodges are also snow sports enthusiasts, who wish to have rostered days off during the week so they can ski/snowboard when it is less busy.

Daily bad weather patterns

50. ASAA suggests that if the weather is bad on a daily basis, profits are lost because ski-lifts are not operating.¹⁶ It is submitted that to some extent this would be minimised by the fact that their revenue is somewhat guaranteed through the sale of ticket passes, which may not always be refundable in an instance of bad weather.

51. ASAA suggests that in the instance of a bad day of weather, more guests will spend money in facilities not operated by the alpine lifting company and this is one of the reasons justifying the flexibility in the Alpine Award.¹⁷ The problem with this approach is:

- a) It does not recognise that on days of good snow, the hotels, resorts and ski-lodges not involved in alpine lifting, will make less profit without having the ability to recoup these losses;
- b) Fluctuating weather, on a daily basis is part of doing business. For example on a rainy day a theme park that has made a sizeable investment towards a rollercoaster may experience a sharp decline in revenue on that day.

Guests may then utilise services of other businesses in the broader, tourist districts and such businesses would be arguably be more profitable on an isolated day of bad weather. Such businesses may be profitable by virtue of their proximity to a theme park however they may not have contributed any monies towards the establishment of the theme park.

¹⁶ Statement of Gavin Alfred Girling affirmed 21 December 2016 at [5];

¹⁷ Ibid;

Other anomalies

52. The coverage clause does not require that an alpine resort conduct alpine lifting as a predominant or major part of its operations. Accordingly, an alpine resort that has a wide and diversified operation would be covered so long as alpine lifting is part of its business even arguably on an incidental basis.
53. Many of the alpine resorts have very diversified interests beyond the operation of ski-lifts, including operating ski and snowboard schools, childcare facilities, hotels and suites, hospitality venues, retail and rental stores, property development and maintenance.
54. It is submitted that if all of these operations are covered by the Alpine Award on the basis that the employer as part of its business conducts alpine lifting, despite the employee not performing any work relating to ski-lifting itself, then the coverage clause should be extended to include employers operating within the same labour market.

The Modern Awards Objective

55. The modern awards objective is set out under s. 134 of the *Fair Work Act 2009* (“FW Act”) as follows:

Section 134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
- (a) relative living standards and the needs of the low paid; and*
 - (b) the need to encourage collective bargaining; and*

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- (c) *the need to promote social inclusion through increased workforce participation; and*
- (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (da) *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; or*
 - (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) *the likely impact of any exercise of modern award powers on employment growth, inflation, and the sustainability, performance and competitiveness of the national economy.*

*This is the **modern awards objective**.*

56. The modern awards objective is directed at ensuring that modern awards, together with the National Employment Standards, provide a fair and minimum safety net of terms and

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conditions taking into account the factors set out in s.134(1) of the FW Act (see *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31]).

57. As none of the matters identified in s.134(1) of the FW Act have any particular primacy over the other, the task of the Commission is to balance those matters and ensure a fair and relevant minimum safety net of terms and conditions (see *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32]-[33]).

58. Importantly, in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33]-[34], the Commission identified:

“.....The need to balance the competing considerations in s.134 (1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards..... there may be no one set of provisions in a particular award which 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.” (Emphasis added)

Does the proposed change meet the modern awards objective?

- a) **Increased workforce participation** – allowing hotels, resorts and ski-lodges the benefit of the flexibilities contained in the Alpine Award, particularly the flexibilities contained in respect of weekends, will allow employers to employ more staff, particularly on days such as the weekend which are reported as being the busiest days of the week.

Further, employees may receive more work than they may otherwise have access to due to having access to the multi-hiring/dual-role employment provisions.

- b) **Flexible modern work practices** – hotels, resorts and ski-lodges that are not conducting alpine lifting, will receive the benefit of flexible work practices which ultimately are more suited to the seasonal environment in which they operate.
- c) **Equal remuneration for work of a comparable nature** – Employees performing hospitality work in Alpine Resorts are remunerated in a different manner than employees engaged by hotels, resorts and ski-lodges and governed by the Hospitality Award, despite both being engaged typically only on a seasonal basis. A change to the coverage clause will enable staff to be equally remunerated for the work they have performed.
- d) **Modern award powers on business, including on productivity, employment costs and the regulatory burden** - A change to the coverage clause, will enhance productivity in alpine areas and provide an even playing field between operators, who are subject to the same seasonal and geographical operating conditions.
- e) **Impact of any exercise of modern award powers on employment growth, inflation, and the sustainability, performance and competitiveness of the national economy** – A change to the coverage clause, would permit employment growth in the region by reducing costs of operating and would encourage the alpine area to be consistently competitive.

Conclusion

59. The coverage clause in the Alpine Award should be amended to cover businesses, operating within the same geographical and seasonal environment as ‘alpine resorts’ regardless of whether they conduct alpine lifting.
60. The presence of an ‘alpine lifting’ device should not be the determinative factor of award coverage, particularly when the award itself does not solely deal with employees engaged in alpine lifting.
61. Any arguments raised in support of the relevance of the Alpine Award, can be extended to businesses that operate within the same labour market conditions and are subject to the same weather exigencies. These businesses also operate according to the same short season and income is inextricably linked to the success of the snow season and they further provide essential services to Alpine Resorts and their guests. They should be viewed as being part of the same broader industry.
62. Given the expansive classifications contained under the Alpine Award, employees engaged under the Hospitality Award, could easily be transitioned across.
63. The Fair Work Commission should exercise its powers to remove the artificial barriers between operators and promote an equal playing field between employers and provide equal terms and conditions for employees performing the same duties within the confines of the geographical areas that are subject to these unique seasonal characteristics.

31 March 2017

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