

Fair Work Commission

Award Review 2014

Alpine Resorts Award 2010

AM2014/198



Shop Distributive and Allied Employees' Association

11 May 2017

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in respect of the Alpine Resorts Award 2010 (the "award") (AM2014/198). These submissions are made pursuant to the directions of Vice President Hatcher dated 24th November 2016 (issue 4) and relate only to the matter of coverage. The SDA has made various submissions relating to coverage and classifications going back to the making of this award.
2. The SDA notes that a number of parties have sought to expand the coverage of this award, including Australian Business Industrial (ABI), the Australian Hotels Association (AHA) and the Mount Hotham Alpine Resort Management Board.
3. The SDA notes that its opposition to any variation of the coverage clause is aligned with the position of the Australian Ski Areas Association. The SDA supports the submissions of the Australian Ski Areas Association in respect of the matter of coverage.
4. The SDA further notes that the Australian Industry Group in its submissions dated 28 August 2015 (paragraphs 17 – 21)¹ opposes any variation to coverage.
5. Paragraph 20 of AiG's submissions state:

Our concerns include:

- *The award coverage would be based on geographic location rather than the industry which the award was intended to cover; and*
- *The award would cover industries that are more appropriately covered by existing awards;*
- *The proposal would significantly expand the award's coverage.*

6. The Coverage clause in the award is reproduced below.

¹ Australian Industry Group, Reply Submissions, Exposure Drafts & Substantive Claims, Group 2 Awards, 28 August 2015

4. Coverage

[Varied by [PR994425](#)]

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.

4.2 The award does not cover an employee excluded from award coverage by the Act.

4.3 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.

[New 4.4, 4.5 and 4.6 inserted by [PR994425](#) from 01Jan10]

4.4 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.

The definition of alpine resort is contained in the award at clause 3 and reads as follows:

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

7. The coverage clause when read in conjunction with the definition of “alpine resort” is clear, unambiguous and intentional. It is the SDA’s strong submission that the words “alpine lifting” are critical and reflect the history of the making of this award. Any application that seeks to expand the coverage of this award is contrary to the basic principle upon which this award was made.
8. The parties seeking to change the coverage clause are attempting to construct an argument of ambiguity when the clarity is evident in the history of the award modernisation process and the current Alpine Resorts Award itself at various clauses. The award is operating without ambiguity, illogicality or anomaly as when read by itself, and in conjunction with other modern awards the scope is articulated accurately.
9. The SDA has representation of workers engaged in various roles in alpine areas including retail, fast food and hair and beauty. Unless such workers are engaged by a company that includes “alpine lifting” these workers are likely to be covered by:
 - *General Retail Industry Award 2010*
 - *Fast Food Industry Award 2010*
 - *Hair and Beauty Industry Award 2010*

10. The SDA sees the above awards as the appropriate awards to cover such workers in respect of their terms and conditions of employment as well as providing a fairer safety net in terms of higher wages and greater penalties.
11. The SDA in 2009 submitted material that supported the making of this award following the modernisation process in 2008 and 2009. Initially the SDA submitted that the rates for retail workers, fast food workers and hair and beauty workers should reflect the rates in their respective awards. Mr Ryan, for the SDA, on transcript from 30 June 2009, PN3653 stated²

Our prime submission was based upon the premise that retail workers, hair and beauty workers or fast food workers who are employed under the terms of the exposure draft award should have not less than the same relative classification structure as defined industry awards.

12. However, this submission was not supported, and the rates and penalties provided for in the Alpine Resorts Award are inferior to those in the modern awards that would otherwise cover retail, fast food and hair and beauty workers. The SDA's reluctant support for such an arrangement was based on the extremely limited but very explicit coverage clause that limited coverage only to those employees engaged by lifting companies.
13. Mr Ryan clearly stated the SDA's position on the scope of the award at PN3654 of the transcript of 30 June 2009³. Namely that coverage of this award is based entirely on the employer operating ski lifts and that employers who do not engage in lifting operations are excluded.

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.

(emphasis added)

14. The Alpine Resorts Award was purposefully made in acknowledgement of the unique nature of the operations of resorts that includes lifting operations, especially in regard to the considerable capital expenditure in the construction and maintenance of lifting infrastructure combined with the vagaries of the weather. This is a highly unique and specific award tailored for these circumstances.

² AM2008/25 and others, Transcript of Proceedings, 30 June 2009

³ Ibid

15. The Australian Hotels Association and Australian Business Industrial seek to expand coverage of the Award to include businesses operating in Alpine resorts which operate in the labour market located in such resorts. As outlined in their draft determination, the AHA seek to amend the definition of “alpine resort area” to an area within a 10 kilometre radius of various alpine villages/locations.⁴ The draft determination reads:

By deleting the definition of “alpine resort” in clause 3 and inserting in lieu thereof:

alpine resort area means the following:

(a) the area within a 10 kilometre radius of:

- (i) the Thredbo Village LPO;*
- (ii) the Perisher Valley LPO;*
- (iii) the Charlotte Pass Village;*
- (iv) the Mount Buller LPO;*
- (v) the Falls Creek LPO;*
- (vi) the Mount Hotham Alpine Resort; and*

(b) Mount Selwyn, Wilsons Valley/Sawpit Creek, Bogong Alpine Village, Dinner Plain Alpine Village, Mount Stirling, Mount Baw Baw Village, Cradle Mountain and Ben Lomond.

16. The AHA and ABI are seeking to redefine this award from an industry award to an award whose coverage is based on geographical location. This is not appropriate. The witness statements provided by ABI are from people who own or operate businesses on Thredbo, Falls Creek, Mt Buller and Mt Hotham/Dinner Plain. These locations have significant infrastructure and facilities as outlined in the witness statements.

17. In contrast, ABI and AHA also seek to cover alpine areas with very minor infrastructure and facilities (Mount Selwyn, Wilsons Valley/Sawpit Creek, Bogong Alpine Village, Dinner Plain Alpine Village, Mount Stirling, Mount Baw Baw Village, Cradle Mountain and Ben Lomond). For example Mt Stirling is described as⁵:

It is the only Victorian alpine resort with a largely undeveloped and unspoilt true alpine summit, offering a readily accessible 'semi-wilderness' experience for visitors.

⁴ Draft Determination, emailed to FWC 30 November 2016, AHA NSW

⁵ <http://www.mtstirling.com.au/about.php>

According to the Bogong Village Alpine Accommodation website,⁶ The Bogong Alpine Village is below the snow line.

At 800 metres above sea level, the village is just below the snow line. However, the occasional snowfall in winter can be expected.

18. The submissions of ABI and AHA seek to expand coverage of the award to locations that have significant differences to those described in the various witness statements.
19. In contrast The Mount Hotham Alpine Resort Management Board seeks to vary coverage only such that Alpine Resort Management Boards become covered. The draft determination of the Mt Hotham Alpine Resort Management Board reads⁷:

The words 'alpine resort means an establishment whose business, among other things, includes alpine lifting' to be deleted from Clause 3.1;

2. The following words to be added to Clause 3.1;

alpine resort means:

- (a) any establishment whose business, among other things, includes alpine lifting;*
and/or
(b) any establishment which has statutory responsibility for management and operation of an alpine resort, whether or not that establishment operates an alpine lift.

20. The SDA notes that the application made by the Mt Hotham Alpine Resorts Management Board (and draft determination) in which it seeks coverage under the award⁸ will have the effect of including all Alpine Resort Management Boards within the coverage of the award.
21. According to the Alpine Resorts Co-ordinating Council website, there are six officially designated alpine resorts, each managed by an alpine resort management board ("ARMB")⁹. The SDA makes the observation that there are no similar applications from other ARMBs seeking coverage by the award. Change to the coverage clause as proposed by the Mount

⁶ <https://bogongvillage.com/book-now/>

⁷ Draft Determination, emailed to FWC 30 November 2016, Mt Hotham Alpine Resort Management Board (Norton Rose Fulbright)

⁸ Mount Hotham Alpine Resort Management Board, Outline of Submissions, dated 31 March 2017, AM2014/198, PN1

⁹ <http://www.arcc.vic.gov.au/the-alpine-resorts>

Hotham Alpine Resorts Management Board would significantly affect the industrial arrangements of the five other officially designated alpine resorts. To the SDA's knowledge there has been no application to vary the coverage of the award from the ARMBs of the other resorts, nor has there been any indication that they support this variation. In effect this application intends to bind organisations that have not requested to be bound, nor have these organisations been heard on this matter.

22. The Alpine Resorts (Management) Act 1997 defines its purpose at section 1 as:

ALPINE RESORTS (MANAGEMENT) ACT 1997 - SECT 1

Purposes

The purposes of this Act are to—

- (a) establish an Alpine Resorts Co-ordinating Council and six Alpine Resort Management Boards; and*
- (b) provide for the management of several alpine resorts; and*
- (c) amend the [Alpine Resorts Act 1983](#); and*
- (d) make various other related provisions and amendments to other Acts.*

23. Furthermore section 17 of the Alpine Resorts (Management) Act 1997 identifies constitution and membership of the council:

ALPINE RESORTS (MANAGEMENT) ACT 1997 - SECT 17

Constitution and membership of the Council

The Council consists of—

- (a) the chairperson appointed by the Governor in Council on the recommendation of the Minister; and*
- (b) the chairperson of each Alpine Resort Management Board established under this Act; and*

S. 17(c) amended by No. 24/2004 s. 6.

- (c) 4 persons appointed by the Governor in Council on the recommendation of the Minister.*

24. The Alpine Resorts (Management) Act 1997 clearly identifies The Alpine Resorts Coordinating Council as responsible for various functions (section 18):

ALPINE RESORTS (MANAGEMENT) ACT 1997 - SECT 18

The functions of the Council are—

S. 18(aa) inserted by No. 24/2004 s. 7.

(aa) to plan for and facilitate the establishment, development, promotion, management and use of alpine resorts in accordance with the object of this Act;

(ac) to liaise with and encourage the co-operation of all State and local government authorities, industries, communities and other persons involved in the development, promotion, management and use of alpine resorts;

25. The SDA submits that any application to vary coverage of the award that would have the effect of changing the coverage for the six designated alpine resorts should be made by the Alpine Resorts Coordinating Council, which represent all alpine resorts. The purpose of the Alpine Resorts Co-ordinating Council is to provide for the management of several resorts. Each ARMB is represented by its chairperson on the Co-ordinating Council. Included in the functions of the Council are facilitating the management and use of alpine resorts. In addition, the functions of the Council are to liaise with and cooperate with various parties, including government, industries, communities and other persons involved in the management and use of alpine resorts. Without submissions from any other ARMBs and the absence of any indication that the Council support this application, the SDA submits that the variation should not be made.
26. The SDA notes that the management of alpine resorts in NSW is different to the management of alpine resorts in Victoria. In Victoria alpine resorts are managed by resort management boards. The management of alpine resorts in NSW is described below¹⁰.

Managing NSW alpine resorts

¹⁰ <http://www.environment.nsw.gov.au/alpineresorts/index.htm>

The National Parks and Wildlife Service manages the four popular winter resort destinations in NSW alpine resorts.

[Kosciuszko National Park](#) is home to the New South Wales alpine resorts of Perisher, Thredbo, Charlotte Pass Village and Selwyn Snowfields.

These resort areas are unique winter snow-sports destinations and summer mountain retreats, attracting over 1.2 million visitors a year.

The resorts are operated by private organisations under a system of leases granted by the NSW Minister for the Environment under the [National Parks and Wildlife Act 1974](#).

The management challenge for the NSW Government is to support the development of a strong, vibrant ski and alpine resort industry while protecting the important natural and cultural values of Kosciuszko National Park.

The [Kosciuszko National Park plan of management](#) guides the management of the park, including the alpine resort areas.

The four resorts, Perisher Range, Thredbo, Selwyn and Charlotte Pass Village:

- have a collective footprint of 4,099 hectares*
- contain nationally and internationally significant natural values such as restricted habitats of threatened species, endangered ecological communities, sub-alpine and alpine plant communities, alpine rivers and streams and alpine humus soils*
- have combined assets valued at more than \$700 million*
- provide significant economic benefit to the region and NSW through tourism employment, construction and contracted management services*
- have a year-round population of around 1,000 people*
- provide enjoyment for over 1.2 million visitors each year.*

The National Parks and Wildlife Service (NPWS) manages strategic policy development and works with businesses and lodge owners to ensure sustainable practices.

NPWS carries out environmental awareness campaigns, ensures high standards of public health, implements environmental management systems and monitors environmental impacts. NPWS is also responsible for providing services for the Perisher Range Resorts such as [municipal services](#), and for the administration of the [Perisher Range Resorts Environmental Management System](#) (PRREMS).

While the application made by Mt Hotham ARMB would not have any effect on the management of resorts in NSW, at least initially, the possibility of a change to the status of those bodies managing NSW resorts (to a statutory body) could result in these resorts (including resorts without lifting operations) being covered by the alpine award based on the draft determination provided by Mt Hotham ARMB.

- 27.** The SDA strongly opposes any variation to the coverage of this award. Any attempt to vary the coverage of this Award is merely an attempt to avoid the superior terms and conditions of existing awards that currently and appropriately cover workers in industries such as retail, fast food and hospitality.
- 28.** The submissions of those parties seeking to change the coverage provisions of the award have included numerous witness statements. The Mount Hotham Alpine Resort Management Board relies on the witness statement of Mr Jon Hutchins, Chief Executive Officer of the Mount Hotham Alpine Resort Management Board. Australian Business Industrial rely on numerous witness statements from people involved in various roles in alpine areas. These roles include director of a supermarket, owners of accommodation and restaurants, managers of apartment complexes and owner of a property management business.
- 29.** The submissions of those parties seeking an expansion of the coverage of the award are generally consistent in that they refer to the similarity in functions and operations compared with those organisations operating ski lifts, including;
- that many functions are directly related to alpine lifting;
 - that their operations are affected by the vagaries of the weather
 - that there is often considerable capital expenditure
 - that they would benefit from the flexibilities afforded by the award
- 30.** The submissions of those parties seeking an expansion of the coverage of the award do not provide any evidence or information regarding the possible effect on workers themselves should the coverage clause be expanded. Nor do the submissions advance any evidence that workers themselves would be better off under the Alpine Award when compared with the awards that currently apply. For workers in the industries covered by the SDA, this would result in a reduction in pay. The submissions do not include any comparison of the terms and conditions between the award and any of the other awards that currently apply in alpine areas.
- 31.** Many statements make the point that seasonal workers in this industry are often skiers/snowboarders and such flexibilities are beneficial such that employees are generally required to work weekends, when the resorts are busy and then have the opportunity to ski/snowboard during the quieter periods (generally mid week).

32. The submissions do not identify the restrictions to flexibilities that apply under the current modern awards.

33. Where the Alpine Award is compared with the General Retail Industry Award 2010, for example, the retail award in all instances provides more beneficial terms and conditions. The table below compares a number of key provisions (as at 27 April 2017):

Provision	Alpine award	Retail award
Base rate	\$18.92ph \$20.50ph* (seasonal) Resort Worker Level 2 (cl.16.2)	\$19.44ph Level 1 (cl.17)
Saturday loading	0%	25% (cl.29.4(b))
Sunday loading	0%	100% (50%) (cl.29.4(c))
Evening work (Mon – Fri, after 6pm)	0%	25% (cl.29.4(a))
Allowances	N/A	<ul style="list-style-type: none"> • Special clothing (\$6.25 per week, \$1.25 per shift) • Travelling costs • Travelling time reimbursement • Transport Allowance • Cold Work Disability Allowance • Recall Allowance (cl.20)
Overtime	TOIL – the period of time off that an	TOIL – time off instead of payment for overtime

	employee is entitled to take is the same as the number of overtime hours worked (cl.25.4(d))	will equate to the overtime rate (cl.29.3(c))

*The seasonal rate includes a loading of 8.33% in lieu of annual leave

- 34.** Those submissions that propose a change to the coverage clause do not identify the impact on workers affected by such a change. Nor do these submissions outline any process on how such a change would be explained to affected workers. Workers who currently receive higher hourly rates and penalty rates are likely to have a significant reduction to their pay. This is particularly the case in this industry where weekend work is common.
- 35.** The SDA notes that where various weekend and other penalty rates have been decreased in the 4 Yearly review of modern awards – Penalty Rates (AM2014/305), the Fair Work Commission has invited submissions on a transitional process. Those parties seeking a change to coverage to this award have not made any reference to transitioning from an industrial arrangement that includes significant penalties to a new industrial arrangement that includes no penalty loadings.
- 36.** The witness statement of Brett Anthony Williams (dated 21 March 2017)¹¹ states:
- I make it clear to everyone that on Fridays, Saturdays and Sundays they are all locked into work. This is not negotiable given these are the major changeover days (particularly Sundays). All of my employees must work those days.*
- 37.** The witness statement of Rob Aivatoglou¹² at paragraphs 20, 21 and 22 identifies Fridays as when there is high demand for ski equipment, Saturdays which is busy due to purchases, hires and equipment servicing and Sundays as the major changeover day. Furthermore Mr Aivatoglou at PN 41 states:

Given I have all my employees working on a Sunday, this significantly impacts on the level of penalty rates I need to pay under the Retail award for each employee to work that day.

¹¹ Witness Statement, Brett Anthony Williams, dated 21 March 2017, ABI, PN28

¹² Witness Statement, Rob Aivatoglou, dated 31 March 2017, ABI

38. These witness statements do not demonstrate any evidence of an anomaly or ambiguity in the operation of the award. The statements merely identify the type of work conducted, refer to weather, the nature of work in an Alpine environment and activities that workers enjoy when not working. The witnesses then assert that they would prefer to be covered by an award that provides for lower terms and conditions than the awards that they are presently covered by.
39. Given that a significant amount of work done during the ski season is conducted on weekends the effect of expanding coverage would be very significant to a large group of alpine workers particularly in respect of a decrease in pay rates. Furthermore, none of the submissions identify that workers potentially affected by this application are aware of the existence of this application or its effect on them.
40. The SDA notes the letter from Ms Kate Carnell, Australian Small Business and Family Enterprise Ombudsman¹³. This letter supports the application by Australian Business Industrial to extend the coverage of the award. The contents of the letter do not demonstrate an understanding of the history of this matter and merely refer to an “unfair competitive advantage in favour of the larger businesses”. The letter states in the second paragraph

We understand that smaller businesses in these regions are currently subject to restaurant, retail or hospitality awards that are less favourable to employers than the Alpine Resorts Award, particularly with respect to requirements to pay weekend penalty rates.

The Australian Small Business and Family Enterprise Ombudsman is supporting a reduction to the take home pay of low paid workers. This submission should be rejected.

41. *Travelling Shows Award*

The Alpine Award is not the only award that contains a coverage clause that addresses particular and perhaps peculiar circumstances in an industry.

The *Travelling Shows Award* (MA000102) contains an unconventional coverage clause.

The Coverage clause reads:

¹³ Australian Small Business and Family Enterprise Ombudsman, Submission, dated 20 March 2017

4. Coverage

- 4.1** *This industry award covers employers throughout Australia in the industry of travelling shows including the operation by an itinerant employer of any stand, fixture or structure for the purpose of providing amusement, food and/or recreation (but excluding the sale of sample bags) during the currency of and associated with any agricultural or horticultural show, carnival, rodeo, gymkhana, community event or festival, including the erection and/or dismantling and/or maintenance of such stand, fixture or structure, and their employees in the classifications in clause 13 - Classifications*
- 4.2** *This award does not cover employers bound by the General Retail Industry Award 2010.*
- 4.3** *This award does not cover employees who are immediate family members of the employer.*
- 4.4** *The award does not cover an employee excluded from award coverage by the Act.*
- 4.5** *The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.*
- 4.6** *The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)), or employers in relation to those employees.*
- 4.7** *This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.*
- 4.8** *This award covers employers which provide group training services for trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.*
- 4.9** *Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.*
- NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.*
- 42.** This award is specifically identified as an industry award and specifically identifies coverage as applying to employers in the industry of travelling shows and providing amusement, food and/or recreation associated with specific events. This award has a number of similar provisions to the Alpine Award;
- no weekend or late night penalties,
 - no spread of hours

- Overtime /TOIL - the period of time off that an employee is entitled to take is the same as the number of overtime hours worked
 - Significantly lower rates than the awards that would otherwise apply to retail workers or workers selling food (Grades 1-4; \$17.70, 18.91, 19.56, 21.26 respectively)
- 43.** Analogous to the situation in Alpine Resorts, there are likely to be similar businesses operating at the events described in the coverage clause (e.g. food trucks, sellers of various products) who are covered by the General Retail Award 2010 by virtue of not being in the industry of travelling shows nor being an itinerant employer. These employers must apply the terms and conditions of the retail award to their workers, while an itinerant employer in the travelling shows industry may apply the lesser terms and conditions of the Travelling Shows Award.
- 44.** This demonstrates that there are other examples of award coverage where similar activities may be covered by different awards for historical or other reasons.
- 45.** There is no reason to extend the coverage of this award. Employers are adequately and appropriately covered by other relevant modern awards. Any organisation or employer seeking to tailor terms and conditions of employment to a particular enterprise has the opportunity to engage in enterprise bargaining and make an enterprise agreement. This course of action is both supported and encouraged by the Fair Work Act 2009.
- 46.** Any variation to the scope of this award will have significant impacts on the coverage of other modern awards that currently apply in Alpine areas.
- 47.** The SDA submits that there is no ambiguity in either the definition of “alpine resort” or with respect to the coverage clause. The SDA further submits that it was the clear intention of the parties in the making of this award that the scope of this award was limited to those organisations with “lifting operations”. Any party seeking to change the definition “alpine resort” and increase the coverage of this award is removing the fundamental reason for this award’s existence.
- 48.** Any business, operation or employer with unique circumstances requiring specific flexibilities has the ability under the provisions of the Fair Work Act to negotiate an enterprise agreement tailored for their specific requirements.
- 49.** The SDA opposes any variation to the coverage clause.

