

**From:** Christopher Nowland <[christopher.nowland@harmers.com.au](mailto:christopher.nowland@harmers.com.au)>  
**Sent:** Wednesday, 19 August 2020 10:35 AM  
**To:** Chambers - Hatcher VP <[Chambers.Hatcher.VP@fwc.gov.au](mailto:Chambers.Hatcher.VP@fwc.gov.au)>  
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**Subject:** AM2020/4 – Application to vary the Alpine Resorts Award 2020 [HWL-HARMERS.FID873488]

Dear Associate,

**AM2020/4 – Application to vary the Alpine Resorts Award 2020**

We act for the Australian Ski Areas Association in relation to the above matter.

We have today filed the **attached** application seeking that these proceedings be dismissed, pursuant to section 587(1)(c) of the *Fair Work Act 2009* (Cth). We respectfully seek that this matter be set down for directions hearing so that the Association's application can be programmed for hearing.

If his Honour is so minded to relist the matter for directions hearing, we propose to confer with the applicant's representative and inform you shortly of available dates of the parties for a listing in the next 2 weeks if that is suitable.

The representatives for the Shop, Distributive and Allied Employees' Association and the Australian Workers Union have been copied to this correspondence.

Kind regards,

Christopher Nowland  
Solicitor

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## Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

### The Applicant



These are the details of the person who is making the application.

<b>Title</b>	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
<b>First name(s)</b>			
<b>Surname</b>			
<b>Postal address</b>			
<b>Suburb</b>			
<b>State or territory</b>		<b>Postcode</b>	
<b>Phone number</b>		<b>Fax number</b>	
<b>Email address</b>			

**If the Applicant is a company or organisation please also provide the following details**

<b>Legal name of business</b>	Australian Ski Areas Association Limited
<b>Trading name of business</b>	
<b>ABN/ACN</b>	ACN 006 037 565
<b>Contact person</b>	Colin Hackworth

### How would you prefer us to communicate with you?

Email (you will need to make sure you check your email account regularly)

Post

### Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

## Applicant's representative



These are the details of the person or business who is representing the Applicant.

<b>Name of person</b>	Michael Harmer		
<b>Firm, union or company</b>	Harmers Workplace Lawyers		
<b>Postal address</b>	Level 27, 31 Market Street		
<b>Suburb</b>	Sydney		
<b>State or territory</b>	NSW	<b>Postcode</b>	2000
<b>Phone number</b>	(02) 9267 4322	<b>Fax number</b>	
<b>Email address</b>	<a href="mailto:michael.harmer@harmers.com.au">michael.harmer@harmers.com.au</a> ; <a href="mailto:sudhir.sivarajah@harmers.com.au">sudhir.sivarajah@harmers.com.au</a> ; <a href="mailto:christopher.nowland@harmers.com.au">christopher.nowland@harmers.com.au</a>		

## Is the Applicant's representative a lawyer or paid agent?

Yes

No

## The Respondent



These are the details of the person or business who will be responding to your application to the Commission.

<b>Title</b>	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
<b>First name(s)</b>			
<b>Surname</b>			
<b>Postal address</b>			
<b>Suburb</b>			
<b>State or territory</b>		<b>Postcode</b>	
<b>Phone number</b>		<b>Fax number</b>	
<b>Email address</b>			

## If the respondent is a company or organisation please also provide the following details

<b>Legal name of business</b>	Shop, Distributive and Allied Employees' Association
<b>Trading name of business</b>	
<b>ABN/ACN</b>	99 789 302 470
<b>Contact person</b>	Matt Galbraith

## 1. The Application

### 1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

This application for summary dismissal of proceedings AM2020/4 is made pursuant to section 587(1)(c) of the Fair Work Act 2009.

## 2. Order or relief sought

### 2.1 Please set out the order or relief sought.



Using numbered paragraphs, set out what you are asking the Commission to do.

1. That proceedings AM2020/4 be dismissed, in whole or in part.
2. Stay the directions made by Vice President Hatcher on 22 May 2020 (as varied on 3 July 2020) in matter AM2020/4 pending the hearing and determination of this application.

## 2.2 Please set out grounds for the order or relief sought.



Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

1. On 24 February 2020, the Shop, Distributive and Allied Employees' Association (**SDA**) made an application to the Fair Work Commission (**FWC**) seeking that the Alpine Resorts Award 2020 (**Alpine Award**) coverage be varied. The proposed variation seeks to exclude employees who perform work in classifications under certain other stated modern awards<sup>1</sup> from coverage of the Alpine Award, such that they would (upon variation) be covered by those modern awards applicable to them (**Application**).
2. The SDA proposes that the variation should take the form of an insertion of the following sentence at the conclusion of clause 4.1 of the Alpine Award:  
  
“...*The Award does not cover employees covered by the following awards:*  
  
*The General Retail Industry Award 2010*  
  
*The Fast Food Industry Award 2010*  
  
*The Hair and Beauty Industry Award 2010*”
3. On 22 May 2020, the FWC set a timetable for the provision of submissions and evidence by the parties, which was subsequently varied on 3 July 2020 to provide the SDA with additional time to file their submissions and evidence.
4. On 24 July 2020, the SDA filed submissions in support of its Application. No evidence has been filed.
5. The Australian Workers Union (**AWU**) advised of its support of the SDA submissions, and the Application generally, via correspondence dated 27 July 2020, but offered no submissions or evidence in support.

### **Alpine Award history**

6. The Alpine Award terms and conditions reflect the unique nature of the snowsports industry to which it applies. Its genesis are historical pre-modern awards in place in NSW and Victoria.
7. During the Award Modernisation process, a seven-member bench of the Australian Industrial Relations Commission determined that the Alpine Award should appropriately cover roles that may have otherwise fallen within other occupations or industries, such as fast food, retail, and hair and beauty (without limitation).
8. The Alpine Award was further considered during the Transitional Review of Modern Awards that commenced in 2012 and concluded in about 2013. No application was made by the SDA or the AWU to vary the coverage clause or the classification structure within the Alpine Award.
9. The Alpine Award was subject to review by a Full Bench of the Fair Work Commission (**Full Bench**) during the 4 Yearly Review of Modern Awards (matter number AM2014/198) (**4-**

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<sup>1</sup> See [2] below; adopting the SDA's terminology will be referred to collectively as “General Industry Awards”.

**yearly Review**), recently completed. Relevantly, the coverage clause in the Alpine Award was considered in depth by the Full Bench. The Full Bench handed down three substantive decisions relating to the coverage clause in the Alpine Award – in which the Full Bench:

- (a) dismissed an application seeking the expansion of the Alpine Award’s coverage to include private businesses operating in the immediate vicinity of the alpine resorts; and
- (b) determined that the coverage of the Alpine Award should be restricted to only those employees “*employed at, or in direct connection with the operation of, the alpine resort*”.

10. The parties that participated in the proceedings that underpinned the coverage decisions filed extensive evidence and submissions (comprising many volumes of materials), which were before a Full Bench of the FWC and substantively considered over five hearing days between 30 October and 2 November 2017 and on 18 July 2019.
11. As part of the review of the coverage clause in the Alpine Award, the Full Bench also conducted a comprehensive site inspection of the operations at both Perisher and Thredbo in New South Wales. That site inspection focused, in large part, on the retail, fast food, and hospitality operations owned and operated by Perisher and Thredbo that are properly covered by the Alpine Award.
12. Both the SDA and the AWU were participants in the proceedings that underpinned the coverage decisions and the site inspection of the operations at Perisher and Thredbo. At no stage did either the SDA or the AWU make any application to vary the coverage clause and/or classification structure in the Alpine Award, as proposed now or at all, despite, ample opportunity to do so. Instead, both associations consented to and later strongly supported the amendments made by the Full Bench to the coverage clause in the Alpine Award.

**Dismissal pursuant to s.587**

13. Pursuant to s.157(1) of the Fair Work Act 2009 (**FW Act**), relevantly, the FWC may make a determination to vary a modern award, if the FWC is satisfied that making the determination is necessary to achieve the modern awards objective, having regard to the particular considerations identified in s.134(1) of the FW Act.
14. It is submitted that the Application has no reasonable prospects of success, for the following reasons.
15. *Firstly*, SDA bears the onus of demonstrating that the Fair Work Commission can be satisfied that the variation applied for is necessary to achieve the modern awards objective.
16. The Application relies on no evidence to support its case including, critically, in respect of whether the proposed variation is supported by the modern awards objective, provided in s.134(1) of the FW Act. Instead, it largely relies on bare assertions and claims.
17. The comments in *Security Services Industry Award 2010* [2015] FWCFB 620 are apposite (notwithstanding the different context):

*“Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting*

*a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective.”*

18. In similar vein, it has been held by the Full Bench in the *Jurisdictional Issues decision*:
- “...However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”*
19. That is, for a variation application of this nature to succeed, it should be a rigorous one upon which probative evidence of the issues to be addressed under s.134 of the FW Act have been provided<sup>2</sup>. Having provided no evidence at all, the SDA has no reasonable prospect of discharging its onus and permitting the Fair Work Commission to reach the necessary level of satisfaction.
20. *Secondly*, given that the Application for Variation is such a fundamental challenge to the framework established by prior Full Benches after extensive process, as embodied in the existing Alpine Award, the SDA must establish cogent reasons, supported by probative evidence, to establish the necessity for such a change.
21. The SDA relies on mere assertion which misconceives, and inaccurately represents, the rationale for the Alpine Award, again absent reliance on any evidence. It has no reasonable prospect in the circumstances of establishing the necessary cogent reasons.
22. *Thirdly*, the Application does not address (a position only fortified by the lack of evidence) whether there has been any material change of circumstances, or any change at all, since the Full Bench considered and determined the terms (including coverage) of the Alpine Award during the recently completed comprehensive 4-yearly Review.
23. The Application, informed by the SDA’s submissions, taken at its highest, reveals it is principally based simply on an asserted “anomalous” position in which the Alpine Award provides for “considerably inferior safety net terms and conditions of employment” for employees covered by the Alpine Award but would otherwise be covered by the General Industry Awards.
24. This “anomalous” position, or more objectively, differential conditions existing between potentially applicable modern awards, was addressed in the creation of the Alpine Award during the award modernisation process, and substantially enshrined through the recent 4-yearly Review. It is a situation which has pertained for a decade with previous Full Benches carefully addressing the interplay of the Alpine Award and other modern awards.
25. The demonstration of a material change is at the least a key relevant consideration in the FWC’s determination of the Application. Moreover, given that the Application seeks to cut across fundamental aspects of purpose and scope of the Alpine Award determined over an

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<sup>2</sup> See Application by Chapman [2019] FWC 4415 at [23].

extensive review process, this consideration should carry considerable weight in the circumstances.

26. *Fourthly*, if the SDA's mere assertion of concerns with long standing award arrangements is sufficient to trigger a fundamental further review of a modern award, involving extensive resources from the employer respondents, a process akin to the "4-Yearly Review" of a modern award could be kick started by any party at minimal effort and the spirit and intent of the amending legislation which removed the 4 Yearly-Review"<sup>3</sup> process will be frustrated. Post the temporary transitional dismissal arrangements which existed until 1 January 2020<sup>4</sup>, it is a matter for Fair Work Commission discretion to ensure the spirit and intent of the amending legislation by insisting on cogent reasons, supported by probative evidence, in embarking upon a fundamental review of an existing modern award.
27. For these reasons the Application has no reasonable prospects of success, and accordingly, should be dismissed pursuant to s.587(1)(c) of the FW Act. There is no basis, or no sufficient basis, upon which the FWC can be satisfied that the making of a determination to vary the Alpine Award is necessary. The ASAA should not be put to the expense, effort and call on limited resources during these difficult times, of mounting a response to a case that rises no higher than a discontent with the scope of the Alpine Award comprehensively reviewed, leaving aside the added difficulty of doing so without any evidentiary case to meet.

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<sup>3</sup> Fair Work Amendment (Repeal of 4-Yearly Reviews and Other Measures) Act 2018 (Cth) ("Amendment Act")

<sup>4</sup> Section 27 of the above Amendment Act



### 3. The employer

#### 3.1 What is the industry of the employer?

The ASAA's members are engaged in the tourism industry.

### 4. Industrial instrument(s)

#### 4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Alpine Resorts Award 2020 [MA000092]

### Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

<b>Signature</b>	
<b>Name</b>	Michael Harmer (Solicitor for the Applicant)
<b>Date</b>	19 August 2020



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

**PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS**