

IN THE FAIR WORK COMMISSION

Matter No: AM2014/198

Section 156 - Four yearly review of modern awards

AM2014/198-Alpine Resorts Award 2010

SUBMISSION

UNITED VOICE

1. This submission is directed principally to the claims made in the award stage review of the *Alpine Resorts Award 2010* ('the Award') by Australian Business Industrial and the New South Wales Business Chamber (ABI) and the Australian Hotels Association (AHA) to vary the coverage of the Award to apply to workplaces that would currently be covered by the *Hospitality Industry Award 2010* ('the Hospitality Award') and the *Restaurant Industry Award 2010* ('the Restaurant Award'). More specifically we are concerned with the affect of the coverage claims on employees receiving morning, evening and week end penalty rates under the safety net created by these modern awards.
2. We note the submission made by the Australian Workers Union ('AWU') and the Shop Distributive and Allied Employee's Association ('SDA') made in this review concerning the Award and support their submissions.
3. The Award is peculiar in that it does not contain any week end penalty rates or loadings for morning or evening work. There is no coherent way in which the Award deals with disutility associated with work at unsocial times. Further, all work under the Award appears to have the same level of disutility. At the most basic level, the Award disregards periodicity and the recognition of the need for a predicable break in the pattern of work.
4. The base rates of the Award are low.
5. The Award is deficit in relation to its treatment of week end and evening work and this matter should be the principal focus of the Commission's review. The work covered by the Award is tourism work which requires work at unsocial times.
6. The ABL and the AHA coverage claims now seek to extend the coverage of the Award to employees currently under the safety net conditions created by the Hospitality Award and the Restaurants Award. The rates clauses in these awards have recently been thoroughly

reviewed. We note the comparison of terms and conditions made by the AWU on page 5 to 6 of its submission of 1 August 2017 of the Award, the Hospitality Award and the Restaurants Award which clearly demonstrate this deficiency.

7. As the Full Federal Court in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*¹ recently observed:

*It is of the essence to appreciate that a modern award is not an instrument the product of agreement, or conciliation and arbitration as representing all the terms and conditions of employment of identified employees. Rather, together with the National Employment Standards its purpose is to provide a **fair and relevant minimum safety net** of terms and conditions.²*

8. While we have a different view concerning the amount of compensation that should be attributed to the disutility associated with week end and evening work, there is no argument that there should be some premium paid for work on weekends and in the evening. As the Penalty Rates Full Bench in its decision of 23 February 2017³ observed at [158]

Compensating employees for the disutility associated with working on weekends is a primary consideration in the setting of weekend penalty rates.

9. The Commission in conducting its function under section 156 of the Act and is not bound by the claims of participants. The Award must be reviewed ‘*in its own right*’ and the Commission can and should act independently and where appropriate disregard claims made by participants in the review process subject to the *Fair Work Act 2009* and the rules of natural justice.

10. Recently, the Full Federal Court in *Shop, Distributive and Allied Employees Association and another v The Australian Industry Groups and others* [2017] FCAFC 161 (‘the Federal Court Penalty Rates case’) observed at paragraph 38:

The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2) (a). In that context “review” takes its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”. Consequential upon a review the FWC may exercise the powers in s 156(2) (b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2) (a).

11. The claims by ABL and the AHA to broaden the Award’s deficient provisions concerning penalty rates to what it has identified as ‘*Alpine tourism businesses*’ are essentially rent seeking and have no place in the review of the Award.

¹ [2017] FCAFC 123.

² As above at paragraph 18.

³ ~~As above at paragraph 18.~~ *4 yearly review of modern awards –Penalty Rates* [2017] FWCCFB 1001 (‘the Penalty Rates

³ *4 yearly review of modern awards –Penalty Rates* [2017] FWCCFB 1001 (‘the Penalty Rates Decision’).

12. The Federal Court Penalty Rates case appears to have clarified the nature of the ‘*review*’ the Commission is conducting in the 4 yearly review. Historical arguments concerning award modernisation appear to be less significant. The Award is unusual insofar as it deals with a very narrow subset of the tourism sector: Alpine tourism businesses which include a ski lift. As a starting point this appears a problematic way to define a sector in relation to a safety net instrument.
13. The making of the Award was a mistake and the Commission in this review should reassess the need for this peculiar modern award rather than seek to broaden its application.
14. The attempt by ABL to conduct an analysis of the Award and its claims against the modern awards objective is problematic. The confected use of the terms ‘*snow sports industry*’ and ‘*snow sport enthusiasts*’ belie the fact that chefs, waiters, barpersons and other hospitality workers who work in Alpine areas are hospitality workers. Whether or not these workers are skiers, snowboarders or tobogganists should be irrelevant to the Commission’s consideration of what a fair and relevant safety net of conditions for these workers should be.
15. The statement in ABL’s submission of 13 April 2017 at page 33 that the extension of the Award’s ‘*terms and conditions to retail and hospitality employees of Alpine Tourism Businesses will not have any significant detrimental impact on employees*’ is errant.
16. The ABL further notes:

*Weekend and evening work is not considered inconvenient for employees within Alpine Tourism Businesses. This is because the vast majority of employees in fact prefer working on weekends rather than week days. Indeed, employees actively seek out weekends and evening work so as to be able to go skiing/snowboarding during weekdays.*⁴
17. This rationale for maintaining and expanding the Award which provides no compensation for work at conventional unsocial hours is facile. Applying this logic, the Award should contain a loading for all weekday work during daylight hours when ski conditions are good to compensate these workers aka ‘*ski enthusiastic*’ for the inconvenience of having to work when the ski slopes are uncrowded by week end day trippers from Sydney and Melbourne.
18. While the Federal Court Penalty Rates case has indicated other relevant factors can be taken into account, it is not authority for the proposition that the modern awards objective can be completely subsumed in reviewing a modern award to the assumed recreational interests of employees covered by a particular award.
19. The Award should be revoked and the work that it covers should be subsumed into relevant related modern awards which contain conventional penalty rate clauses. The justification for

⁴ Submission on behalf of ABI, NSWBC and Thredbo Chamber of Commerce, Alpine Resorts Award 2010, 13 April 2017, p34.

the Award's existence was always tenuous and the recent authorities would appear to give the Commission a clear mandate to resolve what is a deficiency in the terms and conditions of a group of employers who have the misfortune to be employed by an entity which includes a ski lift.

20. Alternately, some penalty rates structure should be imposed within any version of the Award that exists after this review that deals with evening, morning and week end work.
21. We apologise about the lateness of this submission. Unless the Commission requires further assistance we were not intending to further participate in the review of this award.

United Voice

13 October 2017