

**4 yearly review of modern awards  
Award stage – Horticulture Award 2010  
Matter No. AM2016/25**

**SUBMISSION IN REPLY  
NATIONAL FARMERS' FEDERATION**

Date: 17 May 2017

1. The National Farmers' Federation (**NFF**) files these submissions in accordance with the Direction issued by Vice President Catanzariti on 3 May 2017 relating to the *Horticulture Award 2010* (**Horticulture Award**).
2. The main purpose of these submissions is to respond to the issues raised by the National Union of Workers (**NUW**) in its submission dated 21 April 2017 pertaining to sections 156(3) and 163(1) of the *Fair Work Act 2009* (**FW Act**).

**Summary of NFF's Position**

3. In summary, the NFF is proposing a variation to the coverage of the Horticulture Award so that the coverage is not artificially limited by the particular land use of each property on which an employer conducts aspects of its horticultural business.
4. In advance of its claims, the NFF has filed:
  - (a) submissions in this matter dated 19 December 2016 and 21 April 2017 respectively (**Previous Submissions**);
  - (b) witness statements of:
    - i. Philip Turnbull dated 19 December 2016;
    - ii. Brett Guthrey dated 12 December 2016;
    - iii. Derek Lightfoot dated 12 December 2016;
    - iv. Gavin Scurr dated 14 December 2016;
    - v. Keith James Rice dated 8 December 2016;
    - vi. Barbara Grey dated 19 April 2017;
    - vii. David McKeon dated 21 April 2017;

viii. Jeremy Morton dated 19 April 2017; and

(c) a supplementary witness statement of Keith James Rice dated 21 April 2017, upon which it intends to rely.

5. The NFF submits that the Fair Work Commission (FWC) should make the changes it is seeking to the Horticulture Award pursuant to either section 156 of the FW Act to ensure that the modern awards objective in section 134 of the FW Act is met and/or pursuant to section 160 of the FW Act to remove an ambiguity or uncertainty or to correct an error, for the reasons outlined in its Previous Submissions.
6. The NFF reserves its right to file and/or rely upon further submissions in this matter, including an outline of submissions summarising its overall position and evidence in anticipation of the hearings listed in this matter.

### **The NUW Submissions**

7. In its submission in reply dated 21 April 2017, amongst other things, the NUW, submits that the NFF (and other employer parties) have failed to address the requirements of sections 156(3) and 163(1) of the FW Act in their respective submissions in support of variations to the coverage clause of the Horticulture Award and as such, their applications ought to be dismissed.
8. It is the NFF's submission that the NUW has misconstrued the operation of sections 156(3) and 163(1) of the FW Act and that these sections have no application in the manner proposed for the reasons that follow.

### Section 156(3) – work value

9. The NUW appears to be suggesting that the special rule about varying modern award minimum wages in section 156(3) of the FW Act is applicable in the present circumstances “*because the variation [to the coverage clause of the Horticulture Award] would result in the minimum award wages payable to a particular class of workers (the relevant workers) being varied.*”<sup>1</sup> and that the NFF (and other employer parties) have failed to meet the requirements of section 156(3).
10. The NFF submits that the NUW's submissions in this regard are misconstrued and that section 156(3) of the FW Act has no application for the present purposes.
11. Section 156(3) of the FW Act provides that:

*“In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.”*

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<sup>1</sup> Submissions of the National Union of Workers, 21 April 2017, paragraph 46.

12. The NFF submits that section 156(3) of the FW Act only applies to determinations varying modern award minimum wages. As the NFF is only seeking to amend the coverage clause of the Horticulture Award and is not seeking any variations to the minimum wages under the Horticulture Award (nor any other award for that matter), section 156(3) has no application.
13. Whilst it may be correct to say that an employee's wages may change if they cease to be covered by one modern award and commence being covered by another, this is not a situation that section 156(3) of the FW Act captures.
14. It follows that the NUW has misconstrued the operation of section 156(3) of the FW Act and its submissions in this regard are of no relevance to the present circumstances.

Section 163(1) - coverage

15. The NUW appears to be suggesting that the special rule about changing the coverage of modern awards in section 163(1) of the FW Act is applicable in the present circumstances because, amongst other things, changes are being sought to "*the coverage of the Horticulture Award and the SSW Award*"<sup>2</sup> and that the "*Horticulture Award would not provide an appropriate safety net*"<sup>3</sup> for the relevant workers. The NUW also submits that the employer parties have failed to address this rule and that this is a fundamental deficiency in their respective applications.<sup>4</sup>
16. The NFF submits that the NUW's submissions in this regard are also misconstrued and that section 163(1) of the FW Act has no application for the present purposes. Even if the NFF is wrong on this point, it submits that the Horticulture Award is an appropriate award for the relevant workers for the reasons that follow.
17. Section 163(1) of the FW Act provides:

*"The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them."*
18. The NFF submits that section 163(1) of the FW Act only applies where a party is seeking to **reduce** the coverage of a modern award, such that employees **stop being covered** by the award. As the NFF is only seeking to clarify the coverage of the Horticulture Award, and is not seeking to reduce coverage under the Horticulture Award in any way, section 163(1) has no application.

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<sup>2</sup> Submissions of the National Union of Workers, 21 April 2017, paragraph 44.

<sup>3</sup> Submissions of the National Union of Workers, 21 April 2017, paragraph 58.

<sup>4</sup> Submissions of the National Union of Workers, 21 April 2017, paragraph 56.

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19. It follows that the NUW has misconstrued the operation of section 163(1) of the FW Act and its submissions in this regard are of no relevance to the present circumstances.
20. In the alternative, the NFF submits that even if section 163(1) of the FW Act applies (which is denied), the Horticulture Award is an appropriate award for the relevant workers, taking into account the requirements of section 163(1) of the FW Act and the modern awards objective set out in section 134(1) of the FW Act.
21. In addition to the reasons outlined in its Previous Submissions, the NFF submits that the Horticulture Award is the appropriate industry award for the relevant workers (being employees who are working in packing sheds where these packing sheds are a part of the farm operation in getting the produce to market, whether this shed is on the farm's crop growing land or separate).

**Conclusion**

22. For the reasons outlined above, the NFF submits that neither section 156(3) nor section 163(1) of the FW Act are of any relevance to the present application by the NFF and any suggestion otherwise is misconstrued.

**Tony Mahar**  
**Chief Executive**  
**National Farmers' Federation**

**Sladen Legal - Legal Representative for National Farmers' Federation**

*Sladen Legal*

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**17 May 2017**