

FAIR WORK COMMISSION

Matter No. 2016/25

FOUR YEARLY REVIEW OF MODERN AWARDS

HORTICULTURE AWARD 2010

**SUBMISSIONS OF THE NATIONAL UNION OF WORKERS
REGARDING THE DRAFT VARIATION DETERMINATION**

1. On 16 November 2017 the Commission delivered a decision in this matter ([2017] FWCFB 6037) (**the Decision**). By the Decision interested parties have been asked to comment on the draft variation determinations (**the Draft Variation**), which is set out at paragraphs 172 and 173 of the Decision.
2. These submissions are made without prejudice to any application for judicial review that the National Union of Workers (**NUW**) may make after the Commission makes orders giving effect to the Decision. The NUW reserves all of its rights in relation to any application for judicial review.
3. Given the request that has been made by the Commission, the NUW makes the following submissions in response to the form of the Draft Variation. These submissions are not intended to derogate in any way from the submissions previously made by the NUW that the applications made pursuant to sections 160 and 156 of the *Fair Work Act 2009* (Cth) should have been dismissed by the Commission.

4. The NUW makes the following submissions in relation to the Draft Variation and relies on the submissions that have already been made in relation to the draft variation.¹ The NUW raises three significant issues with the Draft Variation.
5. *Firstly*, the definition of “*horticulture industry*” in proposed new subclause 4.2 would be inconsistent with the reasoning in the Decision and would cause unintended detriment to employees.
6. At paragraph 68 of the Decision the Full Bench stated the following:

“Thus, we agree with the employer parties and we are satisfied that the ‘farm gate’ is not a reference to a physical barrier or geographical location. Rather, the ‘farm gate’ is a reference to a well-known concept in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s.” (emphasis added)
7. The NUW is concerned that broad the definition of “*horticulture industry*” in proposed new subclause 4.2 would lead to the Award applying beyond the “first point of sale” and unintentionally into workplaces that are currently appropriately covered by the *Storage Services and Wholesale Award 2010 (SSW Award)*.
8. This concern arises because under proposed clause 4.2, a workplace at which tasks such as packing, storing and forwarding are performed, which is currently covered by the SSW Award, could become covered by the Horticulture Award if it had a “*connection with a horticultural enterprise*”. This would cause significant detriment to employees as there would be an unintended significant reduction in the award wages payable to these employees.

¹ The NUW relies on the submissions set out in the *Outline of Closing Submissions of the NUW* dated 31 July 2017 and the oral submissions made during the hearing on 4 August 2017 (see in particular PN1787 - PN1807).

9. Without prejudice to the NUW's concerns set out below in relation to the definitions of "*horticultural enterprise*" and the words "*in connection with*", the NUW proposes that the Commission can easily resolve the particular issue raised in paragraphs 7 and 8 by amending draft clause 4.3 in the following manner:

4.3 Horticulture industry does not mean:

- (a) the wine industry;
 - (b) silviculture and afforestation;
 - (c) sugar farming or sugar cane growing, sugar milling, sugar refining, sugar distilleries and/or sugar terminals;
 - (d) any work in or in connection with cotton growing or harvesting; cotton ginneries and associated depots; cotton oil mills and the extraction of oil from seed;~~or~~
 - (e) plant nurseries; or
 - (f) any packing, storing or forwarding of horticultural crops performed for an employer that has received the horticultural crops from a producer who is not a related body corporate or associated entity of the employer within the meaning of clause 3.1.
10. *Secondly*, the Draft Variation would insert into the Horticulture Award a coverage clause that is complex, difficult to understand, ambiguous and uncertain. The NUW raises the following specific matters for the Commission's consideration:
- (a) Inserting a new definition of "*horticultural enterprise*" in subclause 3.1 in the terms "*...an enterprise which as an important part of its enterprise engages in the raising of horticultural crops*" would introduce uncertainty and ambiguity into the coverage clause. The limitation by the words "*important part*" is uncertain and ambiguous. It is susceptible to various meanings.
 - (b) Inserting a definition of "*enterprise*" in subclause 3.1 in the terms "*an employer engaged with others in a joint venture or common enterprise*" or "*employers*

that are related bodies corporate within the meaning of section 50 of the Corporations Act 2001 (Cth) or associated entities within the meaning of section 50AAA of the Corporations Act 2001 (Cth)” would introduce an uncertainty and ambiguity into the coverage clause and make the clause unworkable. The following specific concerns are raised for the Commission’s consideration:

- (i) In light of the definition, striving to determine whether the Horticulture Award covers particular employees in a particular enterprise would in some instances require conducting a complex investigation, which might in many instances be inconclusive. For example, a company search may be required to find out whether the employer of the employee has “*related bodies corporate*”.²
- (ii) Determining whether entities are “*related bodies corporate*” would in some instances require a consideration of whether one entity has the capacity to control the other. This could require multiple company searches and access to the constitutions of the companies.
- (iii) Determining which entities are “*associated entities*”³ would be similarly complex. Such an investigation would require insight into the business, including knowledge of whether an entity exercises practical control over the practices and patterns of behaviour affecting an other entity’s financial or operating policies.
- (iv) The term “*common enterprise*” is undefined in the Corporations Act and is inherently ambiguous.

² See sections 50 and 46 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

³ See s.50AAA of the Corporations Act.

- (v) It is apparent that in some instances employees, the regulator, the NUW or others striving to determine whether the Horticulture Award covers particular employees would not be privy to, or have any right to access all the necessary information to conduct the investigation and as such would not be able to determine whether the Horticulture Award applies or not.
- (vi) Under the proposed definition an employer could be a “*related body corporate*” because of that entity or another entity exercising “*control*” or having a “*qualifying investment*”.⁴ Thus, an employer may become a “*related body corporate*” or “*associated entity*” of a “*horticultural enterprise*” as a result of business transactions or conduct that employees (or others attempting to determine award coverage) would not be privy to and have no right to know.
- (vii) Similarly, an employee would not be privy to information which would indicate whether his/her employer was engaged in a joint venture or not. Moreover, private companies would not ordinarily disclose such information.
- (c) Including in the definition of “*horticulture industry*” in new proposed new sub-clause 4.2 the words “... *in connection with a horticultural enterprise*” would introduce an uncertainty and ambiguity into the coverage clause. It is unclear what “*in connection with*” is intended to capture. It is susceptible to various meanings.

⁴ See sections 46 and 47 of the Corporations Act.

11. It is noted that to date the employer parties have not provided a response which addresses the serious issues raised above.
12. The NUW submits that any variation should address the above problems.
13. *Thirdly*, the variation of the Horticulture Award to include the matters set out above would also be inconsistent with the modern awards objective (particularly s.134(1)(g)) as it would lead to the Award having coverage that is not simple and is not easy to understand. Whilst the Commission has reached its state of satisfaction to vary the award it must take into account s.134(1)(g) when determining the terms of the draft variation.

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