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**Sent:** Tuesday, 27 June 2017 6:40 AM

**To:** Chambers - Catanzariti VP

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**Subject:** RE: AM2016/25 - 4 yearly review of modern awards – Horticulture Award 2010

Dear Associate and Parties,

Please find attached the following documents distributed at the hearing last Tuesday:

1. Outline of Submissions (Exhibit GP1); and
2. Exhibit LT-4 to Ms Lynn Tonsing's witness statement, being amended aerial photographs.

Regards,

Emma MacDougal  
Senior Associate  
Workplace Relations

**Macpherson Kelley**

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**IN THE FAIR WORK COMMISSION**

**MATTER: AM2016/25 HORTICULTURE AWARD 2010 (MA4028)**

**4 Yearly Review of Modern Awards**

Email: amod@fwc.gov.au

**OUTLINE OF SUBMISSIONS BY GAYNDAH PACKERS**

1. In accordance with the Directions issued by Vice President Catanzaritti on 12 September 2016 and the subsequent submission filed on 21 October 2016, Gayndah Packers Pty Ltd (**Gayndah Packers**) makes the following further submission in support of the application to vary Clause 4 of the Horticulture Award.
2. The intended affect of the proposed changes (as previously filed) to the coverage clause would confirm that employees working within a packing shed and in connection with a horticultural enterprise (that is a related legal entity) would be covered by the Horticulture Award.
3. The application to vary the Horticulture Award in the terms proposed is necessary to give effect to the modern awards objective, rectify the uncertainty and ambiguity about award coverage and give effect to the Objects of the Fair Work Act 2009.
4. The Act provides that the Commission must conduct a 4 yearly review of modern awards (s.156 (1)). Section 156(2) deals with what has to be done in a Review:

*Legislative context for the 4 yearly modern award review*

- (1) In a 4 yearly review of modern awards, the FWC:
  - (a) must review all modern awards; and
  - (b) may make:
    - (i) one or more determinations varying modern awards: and
    - (ii) one or more modern awards: and
    - (iii) one or more determinations revoking modern awards; and
  - (c) must not review, or make a determination to vary, a default fund term of a modern award.
5. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its

usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Importantly the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).

6. The Full Bench has previously considered the parameters of the award review when considering variations for example including to annual leave provisions in the *4 Yearly Review of Modern Awards – Annual Leave*.<sup>1</sup>
7. We submit that the reasoning of the Fair Work Commission in that matter should be adopted and has been reproduced as follows:

**[16]** The modern awards objective is central to the review. The modern awards objective applies to the performance or exercise of the Commission's "modern award powers", which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is in Part 2-3 of the Act and so will involve the performance or exercise of the Commission's "modern award powers". It follows that the modern awards objective applies to the Review.

**[17]** The modern awards objective is set out in s.134 of the Act, as follows:

**"134 The modern awards objective**

*What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation of work; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours; or
  - (iii) employees working on weekends or public holidays; or
  - (iv) employees working shifts; and
- (e) the principal of equal remuneration for work of equal or comparable value; and

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<sup>1</sup> [2015] FWCFB 3406 at [16]-[23].

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

**[18]** The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a "fair and relevant minimum safety net of terms and conditions" taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process.

**[19]** No particular primacy is attached to any of the s.134 considerations and not all of the matters will necessarily be relevant to a particular proposal to vary a modern award.

**[20]** There is a degree of tension between some s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

**[21]** The modern awards objective requires the Commission to take into account, among other things, the need to ensure a "stable" modern award system (s.134(1)(g)). The need for a "stable" modern award system supports the proposition that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of the merit argument required will depend on the variation sought. As the Full Bench observed in the *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision*:

"Some proposed changes may be self evident and can be determined with little formality. 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."

**[22]** The Review is broader in scope than the transitional (or 2 year) review (Transitional Review) of modern awards provided for in Item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, and is the first full opportunity to consider the content of modern awards. However, the broad scope of the Review does not obviate the need for a merit argument to be advanced in support of a proposed variation. As the Full Bench in *Re Security Services Industry Award 2010* recently observed:

"[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. 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. These tests encompass many traditional merit considerations regarding proposed award variations."<sup>12</sup>

**[23]** In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.<sup>13</sup> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is “necessary” in a particular case is a value judgment based on an assessment of the s.134 considerations having regard to the submissions and evidence directed to those considerations.<sup>14</sup>

**[24]** In performing functions and exercising powers under a part of the Act (including Part 2-3—Modern Awards) the Commission must take into account the objects of the Act and any particular objects of the relevant part (see s.578(a)). The object of Part 2-3 is expressed in s.134 (the modern awards objective) to which we have already referred. The object of the Act is set out in s.3 as follows:

### **"3 Object of this Act**

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be determined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial actions; and

(g) acknowledge the special circumstances of small and medium-sized businesses.

### ***Evidence to Support the Award Variation***

8. Collectively, the following matters support the need for the award variation in respect to the coverage provision of the Horticulture Award.
9. Until the *Mitolo*<sup>2</sup> decisions the application of the Horticulture Award was well understood.
10. The *Mitolo* decisions have thrown into question the application of that Award as opposed to the Storage Services and Wholesale Award 2010 (**Storage Award**).
11. The *Mitolo* decisions have created confusion as there are potentially two awards that may apply.
12. The current landscape is such that the award coverage is uncertain. The application of the Storage Award would have a significant financial and operational impact to the business.
13. The existing positions are not easily transferable to the classification structure within the Storage Award.
14. There is an immediate additional dollar cost through the translation to the new classification structure and other provisions within the Storage Award.
15. The additional costs threaten the viability of the business.
16. Gayndah Packers is a major employer in the local community, the continuation of this is threatened.
17. There are other like businesses within the immediate vicinity that can and do pay lower rates under the Horticulture Award. In most cases this is because they have an orchard on the same property. This creates an unfair playing field that causes significant disadvantage to Gayndah Packers.
18. The industrial landscape is such that employees doing the same work within close vicinity will be paid different rates and have different conditions that apply.
19. The market reality is that there is no practical way for the additional costs to be passed onto other growers.
20. Cheaper packing alternatives are available to the contract packers as such the probability that contract packing opportunities will be lost is high.

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<sup>2</sup> *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524; *Mitolo Group Pty Ltd* [2014] FWC 7682.

21. There is incongruence between bio security measures and the requirement for the packing shed to be on the farm.
22. There is an absurdity that exists because of the ability that an employer has to manipulate the outcome of the applicable industrial regulation which arises depending on the legal structure of an operation.
23. The closure of Gayndah Packers would have a considerable impact to not only to the community but also the domestic and export citrus markets.
24. The fundamental nature of the business is not storage or warehousing but work within the citrus industry. The products are perishable and there is no storage or warehousing of products of a kind that is traditionally understood by the meaning of storage.
25. The variation to the coverage provision would provide the financial security and certainty for the business to operate amongst like business competitors.

***Historical application of pre modern awards***

26. Prior to the introduction of the modern awards the *Fruit and Vegetable Growing Industry Award – State 2002* operated (**pre modern award**).
27. The pre modern award was a feeder award to the Horticulture Modern Award.
28. Clause 1.4 Coverage of the pre modern award provides:

*Subject to the exemptions in Clause 1.7, this Award applies to all employers and their employees engaged in the fruit and vegetable growing industry, including the preparation of land, cultivation, planting, care, picking, handling, treating, packing and despatching of all fresh fruits (including tomatoes) and vegetables on or from fruit and vegetable farms, vineyards, orchards and plantations throughout the state of Queensland.*

29. This coverage clearly covers packing sheds which were not located on a farm.
30. There is no exemption under clause 1.7 that excludes the packing shed.
31. Accordingly it is arguable that the intention of the award modernisation process was to continue the parameters of the scope of coverage that existed previously. There is no evidence to the contrary. As such the coverage of the Horticulture Award should be varied to give effect to what existed previously.

### ***Application of the evidence to the modern award review parameters***

32. If the award variation is not granted the following elements of the modern awards objectives are arguably not satisfied:

(a) Section 134 (f) likely impact on business, including on productivity, employment costs and the regulatory burden:

For the reasons that:

- (i) The employment costs make the business uncompetitive and non financial; and
- (ii) The Storage Award inhibits productivity and will have a negative effect on the business, impose costs and create unnecessary burdens on the business to apply an Award which is out of step with the true nature of its business.

(b) Section 134 (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

For the reasons that:

- (i) Without the variations there is an argument that the Storage Award may apply;
- (ii) In the Award Modernisation decision<sup>3</sup>, the Full Bench noted that 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;
- (iii) In this case the substantial character of the business is that it operates within the citrus industry, it is not concerned with storage or wholesale of goods; and
- (iv) The variation would provide the necessary clarity for the Horticulture Award to apply.

(c) Section 134 (h) the likely impact on ... the sustainability, performance and competitiveness of the national economy:

For the reasons that:

- (i) The lack of clarity threatens the viability and sustainability of an important part of the national economy; and
- (ii) The competitiveness of the business is affected since either like businesses operate under a different cost structure.

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<sup>3</sup> [2008] AIRCFB 1000 at [28]; cited in *Transport Worker's Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 at [141].



33. The variation to the coverage provisions gives effect to the objects of the Act and considerations required by the Fair Work Commission when fulfilling the modern awards objectives, specifically, promoting productivity and economic growth.

***Orders Sought***

34. The variation pursuant to section 156 to the clause 4 Coverage of the Horticulture Award in the terms proposed be granted.
35. That the uncertainty be rectified by applying the variation retrospectively in accordance with the section 160 application.
36. In the absence of the orders above being granted that there be a separate hearing in respect to the application of transitional provisions.

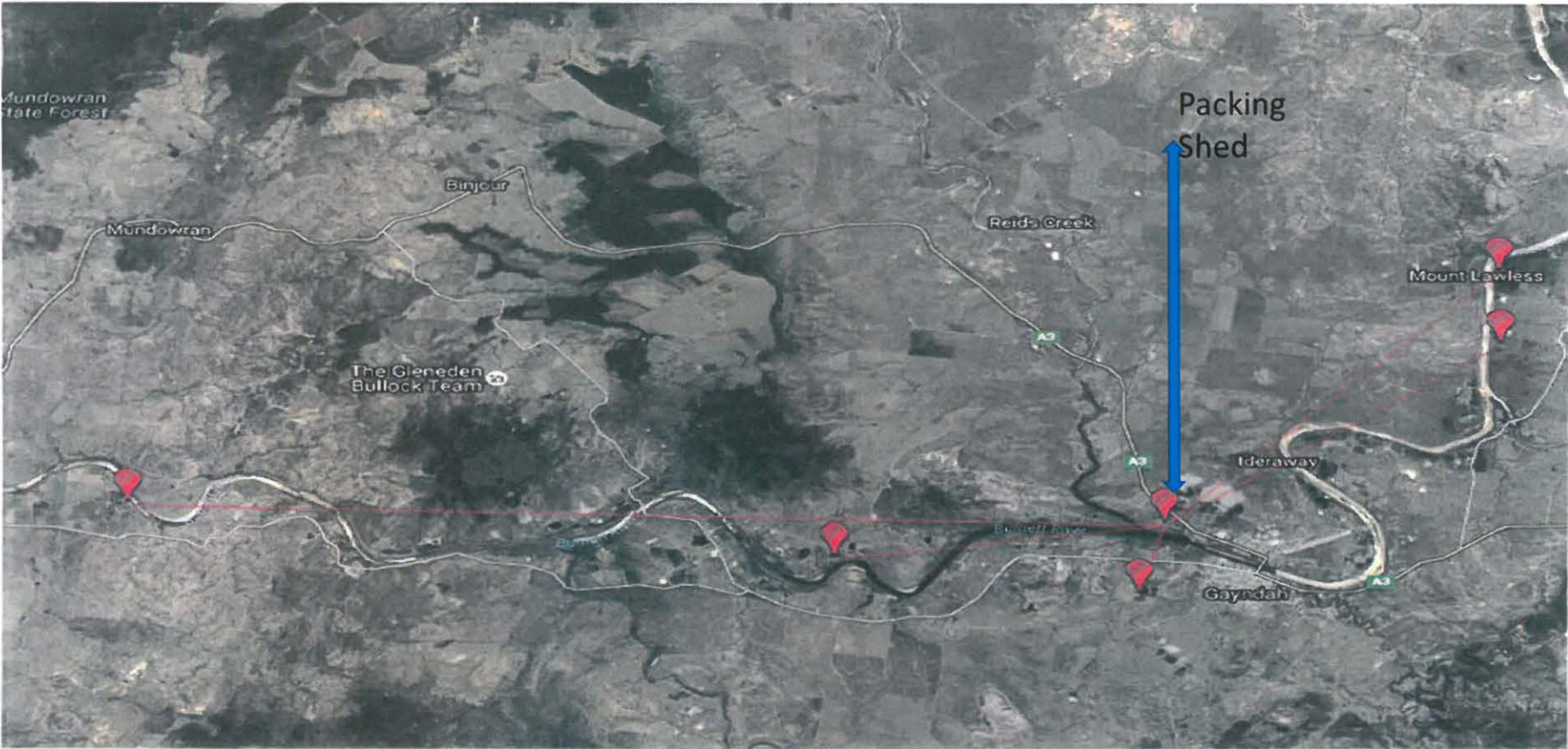
**Macpherson Kelley Lawyers**

**For Gayndah Packers Pty Ltd**

**December 2016**

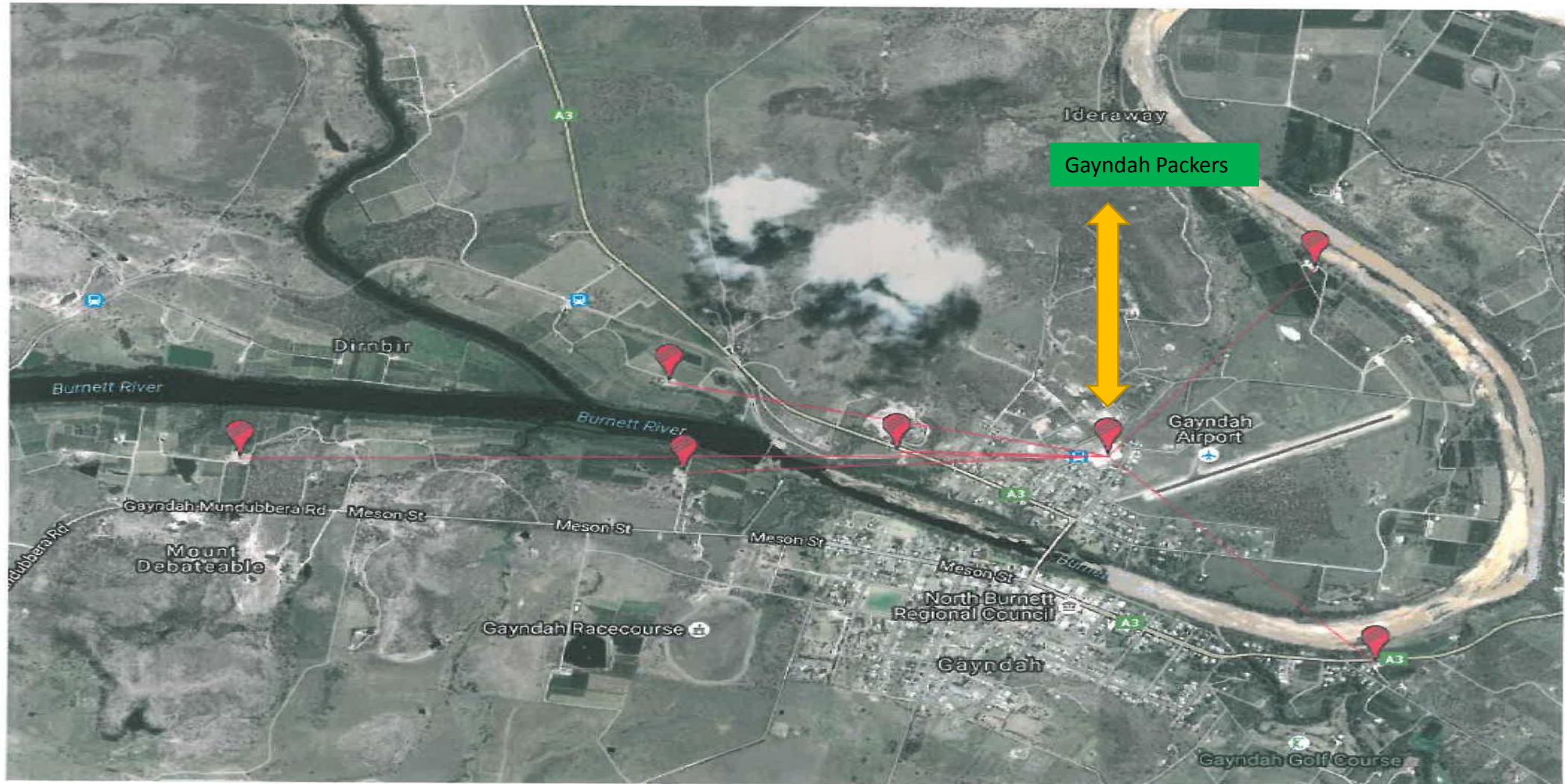
Example of a Packing shed close to Gayndah Packers – showing location of the Farms/Growers which supply fruit to the packing shed shown on the map

Amended version of Exhibit LT-4 dated 21 December 2016





# Citrus Packing sheds around Gayndah Packers





# Gayndah Packers showing 9 of 10, of the owners orchards

