

**IN THE FAIR WORK COMMISSION**

Matter No. AM2014/231 / AM2016/25

**MITOLO GROUP PTY LTD** First Applicant

**AUSTRALIAN INDUSTRY GROUP** Second Applicant

**MARANELLO TRADING PTY LTD** Third Applicant

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**MITOLO PARTIES' CLOSING SUBMISSIONS<sup>1</sup>**

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<sup>1</sup> These closing submissions should be read with the Mitolo Parties' opening submissions dated 23 December 2016 (Tab 1 in Volume 1 of Exhibit 2).

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## A. Overview

1. The dividing line between the coverage of the *Horticulture Award 2010* (**Horticulture Award**) and that of the *Storage Services and Wholesale Award 2010* (**Storage and Wholesale Award**) is entirely ambiguous and uncertain. The uncertainty stems from differing views about whether the horticultural industry, as covered by the Horticulture Award should be subjected to an artificial physical barrier characterised as a physical “*farm gate*”. Industry have overwhelmingly recognised the concept of the virtual farm gate since the inception of the Horticulture Award, such that the Horticulture Award extends to the activities which are carried out as part of a contemporary horticultural enterprise or business. On the other hand the NUW in some instances and the Commission in *Mitolo Group Pty Ltd v NUW*<sup>2</sup> have applied the concept of a physical farm gate so as to arbitrarily exclude from coverage any activities not physically carried out on a farm.<sup>3</sup>
2. The evidence<sup>4</sup> reveals that the dividing line applied by industry is that point after harvest where produce first becomes capable of being sold to market

<sup>2</sup> [2015] FWCFB 2524.

<sup>3</sup> At [48]-[52].

<sup>4</sup> See paragraphs [19]-[27] below.

after that produce has been prepared for sale to market in grading and packing facilities.<sup>5</sup>

3. The alternative dividing line, characterised as a physical farm gate, has emerged apparently at the urging of the NUW. A grading and packing facility is said to fall behind the physical farm gate if any part of that business's produce is grown at the same premises, no matter how small, but beyond the physical farm gate and thus outside the horticultural industry if that business's produce is grown at another location, no matter how close in location to the grading and packing facility.<sup>6</sup>
4. The use of the concept of a physical farm gate as a dividing line is arbitrary, is not certain<sup>7</sup>, is not driven by any industrial logic and results in absurd situations such as that which has arisen as between the Mitolo Parties and Zerella, competitors located one kilometre apart whose essentially identical grading and packing facilities are said to operate under different awards.<sup>8</sup>
5. Further, the application of a physical boundary is archaic. It assumes the horticulture remains dominated by family operated single plot farms and does not take into account how agriculture actually operates in a modern competitive world. It is therefore inconsistent with the objects and philosophy that underpin the application of modern awards.
6. If the coverage of the Horticulture Award is not clarified, it is apparent that there will be continued uncertainty and disputation over questions of coverage, including debates over the notion of "*the farm gate*". The evidence is that the horticultural industry (including the Mitolo Parties) to date have substantially conducted themselves on the basis that the work done in grading and packing facilities is covered by the Horticulture Award irrespective of whether such work is done behind a **physical** farm gate.<sup>9</sup> As a result, unless such a variation is made to commence from the date of the commencement of the Horticulture Award, namely, 1 January 2010, a

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<sup>5</sup> And thus those activities fall behind the virtual farm gate.

<sup>6</sup> See further the discussion at [30]-[36] below.

<sup>7</sup> For example, the concept of a physical farm gate as set out above does not correspond to the 2001 OECD definition contained in Exhibit AWU5. See also the uncertainty which is discussed at [37]-[47] below.

<sup>8</sup> See further [71]-[75] below.

<sup>9</sup> See paragraphs [9]-[15] below.

ripe area for disputation will remain as to whether such employers (including the Mitolo Parties), who have considered that their grading and packing facilities were behind a virtual farm gate were covered by the Horticulture Award rather than the Storage and Wholesale Award, have been underpaying their workers.

7. The current uncertainty as to whether an employer with a grading and packing facility is subject to the Horticulture Award or to the Storage and Wholesale Award must be addressed prospectively and retrospectively. The proposed variation<sup>10</sup> jointly submitted to the Commission by the Mitolo Parties and the other employer parties provides such certainty. To date, no alternative solution has been proposed to this unsatisfactory state of affairs.

**B. The industry's application of the Horticulture Award**

8. The evidence in this matter establishes that horticultural businesses are overwhelmingly applying the Horticulture Award to their washing, sorting, grading, treating, packaging and forwarding activities, where carried out at a separate physical location to their growing sites.
9. Ms Paula Colquhoun, Mitolo Parties' Human Resources Manager, gave evidence that:
  - (a) Mitolo Parties' position is and always has been that the employees working at the Angle Vale Road facility are covered by the Horticulture Award, as the Angle Vale facility is part of the Mitolo Parties' fully integrated horticultural business and all of the duties carried out at the Angle Vale facility fall within the scope of the classifications of the Horticulture Award;<sup>11</sup>
  - (b) a competitor of the Mitolo Parties, Zerella, is covered by the Horticulture Award for its employees performing work in its washing and grading and packing facility approximately one kilometre down the road from the Angle Vale Road facility, with the only discernible difference being that around 1% of Zerella's total produce is grown at

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<sup>10</sup> Exhibit AIG3.

<sup>11</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [93- [95].

the same site. The Zerella Enterprise Agreement underpinned by the Horticulture Award was approved by the NUW and by the Commission with the NUW's support earlier this year;<sup>12</sup>

- (c) Virginia Farm Produce, a further competitor of the Mitolo Parties has a collective agreement underpinned by the Horticulture Award in respect of its packing house employees.<sup>13</sup>
10. The evidence of Bryan Robertson, who until recently was the Executive Officer of HortEx Alliance Incorporated, a not for profit organisation established to support vegetable growers in South Australia and predominately growers from the northern Adelaide Plains region, was that:<sup>14</sup>
- (a) HortEx has approximately 290 members who are primary producers of vegetables who also clean, grade and pack their produce;<sup>15</sup>
  - (b) the vast majority of the businesses represented by HortEx use the Horticulture Award for the work they undertake;
  - (c) by way of example, at a workshop with 30 members held in February 2016, when those members were asked what award was applied to their operations, including the washing, grading and packing of their produce, all 30 said the Horticulture Award was used.<sup>16</sup>
11. Ms Tonsing, the Administrative Manager of Gayndah Packers Pty Ltd, gave evidence that:
- (a) there are 12 packing sheds within the immediate vicinity of the Gayndah packing business and most of those sheds apply the Horticulture Award;<sup>17</sup>
  - (b) after the Full Bench decision of the Mitolo proceedings, Gayndah Packers carried on using the Horticulture Award because the owners

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<sup>12</sup> Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [18]-[23]; Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [33], [41]; Exhibit 3; PN808-809.

<sup>13</sup> Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [24]-[26]

<sup>14</sup> Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [2]-[4].

<sup>15</sup> Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [9], [16]-[20].

<sup>16</sup> Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [58]-[59].

<sup>17</sup> Exhibit GP2 (Witness statement of Lynn Tonsing dated 20 December 2016) at [40].

of its business have their own orchards, “*just like the other packing sheds in the region own orchards and apply the [Horticulture Award]*”.<sup>18</sup>

12. The evidence of Robin Davis, the CEO of Potatoes SA, is that:
  - (a) Potatoes SA represents approximately 95% of all potato producers in South Australia, including five of the six largest companies in the fresh produce sector Australia wide;<sup>19</sup>
  - (b) it is common for potato producers with multiple growing sites to have a single centralised washing and grading and packing facility;<sup>20</sup>
  - (c) there is widespread anxiety amongst Potatoes SA members if the Horticulture Award was to no longer apply to all of their operations.<sup>21</sup>
13. The clear inference that arises from Ms Davis’ evidence is that the majority of the Potatoes SA members are utilising the Horticulture Award across their washing, grading and packing facilities.
14. The evidence of Godfrey Cody, the CEO of the Primary Industries Skills Council, was that growers in the Virginia area who attended a meeting about the current award review process were concerned about the possibility of the Storage and Wholesale Award adding substantial costs to the current labour costs.<sup>22</sup> The inference that arises from this evidence is that those growers are presently applying the Horticulture Award.
15. The evidence of John Dollisson, who was until recently the Deputy Chair of the Voice of Horticulture, a member based organisation which represents horticultural growers and businesses across a variety of specific product industries,<sup>23</sup> was that:
  - (a) many horticultural businesses have grown over time with the addition of new growing plots which are often not adjoining existing growing

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<sup>18</sup> PN631.

<sup>19</sup> Exhibit AIG6 (Witness statement of Robin Davis) at [2], [19]-[20].

<sup>20</sup> Exhibit AIG6 (Witness statement of Robin Davis) at [29].

<sup>21</sup> Exhibit AIG6 (Witness statement of Robin Davis) at [45].

<sup>22</sup> Exhibit AIG5 (Witness statement of Godfrey Cody) at [23].

<sup>23</sup> Exhibit VH1 (Witness statement of John Dollisson dated 23 December 2016) at [1]-[4], as clarified in oral evidence.

plots and with grading and packing facilities which are often not located on the main farm site or with a number of growers getting together to run joint grading and packing facilities;<sup>24</sup>

(b) labour is often shared across different activities within a business and is commonly undertaken under the Horticulture Award.<sup>25</sup>

16. The NUW acknowledges in Mr George Robertson's statement<sup>26</sup> that within the horticulture industry, there are sites and employers covered by the Horticulture Award, as well as sites and employers covered by the Storage and Wholesale Award.<sup>27</sup> Mr Robertson refers to both types of sites as being part of the '*horticulture industry*'.<sup>28</sup> The distinction between the two appears to be simply by reference to whether a grading and packing facility is on farm or off farm. In other words, the distinction is based on the application of the concept of a physical farm gate, as opposed to a virtual farm gate.
17. Nowhere in George Robertson's evidence or any other evidence is the difference between workers carrying out grading and packing work on farm as opposed to those who do the same work off farm addressed or explained.<sup>29</sup>
18. In contrast to the widespread application of the Horticulture Award to grading and packing facilities within the industry, there is no evidence of any consistent position being taken as to the enforcement of the physical farm gate interpretation. Indeed, when Ms Rault, with the assistance of the NUW, brought a small claim for underpayment based on the Storage and Wholesale Award, once the Mitolo Parties indicated that they intended to transfer the proceedings to the Federal Court for the purpose of seeking a declaration that the Mitolo Parties were covered by the Horticulture Award, Ms Rault and the NUW quickly discontinued the claim.<sup>30</sup>

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<sup>24</sup> Exhibit VH1 (Witness statement of John Dollisson dated 23 December 2016) at [5]-[10].

<sup>25</sup> Exhibit VH1 (Witness statement of John Dollisson dated 23 December 2016) at [13].

<sup>26</sup> Exhibit NUW3 (Witness statement of George Robertson dated 21 April 2017).

<sup>27</sup> Exhibit NUW3 (Witness statement of George Robertson dated 21 April 2017) at [5].

<sup>28</sup> Exhibit NUW3 (Witness statement of George Robertson dated 21 April 2017) at [5].

<sup>29</sup> Exhibit NUW3 (Witness statement of George Robertson dated 21 April 2017) at [6].

<sup>30</sup> Tab 2 of Exhibit 1 – entries for 10 February, 3 May and 5 May 2016.



**C. The farm gate – what should it mean?**

19. Reliance has been placed upon the statement made by the Australian Industrial Relations Commission (AIRC) in the Stage 2 Award Modernisation Proceedings concerning the “*farm gate*” as justifying limiting the application of the Horticulture Award to activities which occur on a farm or agricultural holding. However, the concept of the “*farm gate*” received little consideration by the AIRC in the award modernisation proceedings. In particular, there was no apparent consideration of the generally recognised meaning of that term in the horticultural industry or of the industrial illogicality and anomalies associated with equating the term to a physical boundary. In the circumstances the AIRC should not be taken to have intended the term to delineate a physical boundary.<sup>31</sup>
20. In any event, whatever the AIRC understood the concept of the “*farm gate*” to mean in the award modernisation proceedings, the members of this Full Bench have the benefit of clear, uncontradicted and consistent evidence from highly experienced industry participants as to the generally understood meaning of that term in the horticultural industry. The effect of that evidence is that the term does not relate to a physical barrier or boundary. Rather, it is a concept that contemplates that point when produce has been rendered fit for sale and ready for market. As the activities of sorting, grading, washing, treating and packing are undertaken before horticultural produce is fit for sale they are all activities which are carried on behind the farm gate.
21. Bryan Robertson, who as noted above was the Executive Officer of Hortex Alliance Incorporated and has extensive experience in the agricultural sector since 1991,<sup>32</sup> gave evidence in relation to the meaning of the term “*farm gate*” in the horticultural industry in his witness statement.<sup>33</sup> Relevantly, he stated that:

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<sup>31</sup> See the Mitolo Parties’ opening submissions dated 23 December 2016 (Tab 1 in Volume 1 of Exhibit 2) at [128]-[133] and the Mitolo Parties’ supplementary submission dated 23 December 2016 (Tab 3 of Volume 1 of Exhibit 2) at [66]-[70]. See also Exhibit AIG2 (Ai Group Submission dated 23 December 2016) at [39]-[57].

<sup>32</sup> Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [2]-[14] as amended; PN974-977.

<sup>33</sup> Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [44]-[49].

*“The accepted industry understanding of the term ‘farm gate’ is that it is a concept and not a physical thing. It refers to the time when the product leaves the primary producer in a ‘fit for purpose’ state for the customer.*

*The view that ‘the farm gate’ refers to a physical gate around a farm is archaic and not in line with what agriculture does and how it works today.*

*Although traditionally growers operated from one piece of land, there is no physical farm gate or boundary now because many businesses in the vegetable industry have multiple properties from which they run their businesses. The produce is typically grown in different locations and brought back to a central location where it washed, graded and packed to meet fitness for purpose criteria. Therefore, **the modern, common understanding of the term is that produce leaves ‘the farm gate’ once it is ready for market.**” (emphasis added)*

22. In re-examination Mr Robertson elaborated on the evidence in his statement, deposing that:<sup>34</sup>

*“The farm gate in industry is a concept. If you’re looking years ago, yes, there was a potential physical boundary that you could say was a gate, but because of the economies of scale and the competition for land, you may have an original home block where a family started producing vegetables. They’ve since expanded. They’ve grown to full capacity on that site. They’ve purchased other blocks of land that are further afield that meet their requirements for their particular vegetable enterprise and those fields or paddocks and their product come back to the central location. That is all within what we classify as the ‘farm gate’, even though geographically they are separated. But everything comes within the business. Anything outside the farm gate is when you first sell. So you’ve grown the product. **You’ve graded, cleaned, made it fit for purpose and it’s ready to leave for the first customer.** ... As soon as they’re despatched for sale, whether it’s to a merchant, to a supermarket or to a value-add manufacturer who turn them into something other than the original, that’s when they have left the farm gate and that’s the industry recognised position of what the farm gate means.” (emphasis added)*

23. Mr Robertson’s evidence remained consistent in cross-examination.<sup>35</sup>
24. Ms Robin Davis, who as noted above is the Chief Executive Officer of SA Potatoes, gave evidence about the concept of “*farm gate*” in her statement as follows:<sup>36</sup>

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<sup>34</sup> PN1012.

<sup>35</sup> PN997.

<sup>36</sup> Exhibit AIG6 (Witness statement of Robin Davis) at [41]-[43].

***“the ‘farm gate’ is virtual – not physical. It means the point in the value chain when the product is fit for purpose and the first point of sale.”*** (emphasis added)

25. Ms Davis’ evidence in cross-examination was unshaken as to the industry concept of a farm gate.<sup>37</sup>
26. In re-examination, Ms Davis also reaffirmed her evidence in chief.<sup>38</sup>
27. The evidence of Mr Dollisson refers to farm gate value and farm gate returns in the same sense.<sup>39</sup>
28. The variation to the Horticulture Award sought by the Mitolo Parties reflects this contemporary industry usage and understanding of the farm gate concept, in contrast to the use of an unsupported, arbitrary, outdated and industrially illogical physical barrier for which the union parties apparently contend.
29. The horticultural chain includes seed selection and trialing, sowing, planting, raising, cultivating, harvesting, picking, washing, grading, treating, packing, storing and forwarding of horticultural crops. All of these activities, including the post-harvest steps, are essential to readying the produce for sale in accordance with customer requirements and food safety regulations.<sup>40</sup> Unless and until the post-harvest activities have been undertaken the produce is not saleable. As such, they are activities which occur behind the virtual farm gate as that concept is understood and applied in the horticultural industry.

**D. Physical boundary – an unworkable concept**

30. No logic or industrial basis has been identified to support the imposition of an artificial physical farm gate boundary to govern the coverage of the Horticulture Award.

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<sup>37</sup> At PN1251-1260. See also the exchange at PN1227-1236.

<sup>38</sup> PN1267–1268.

<sup>39</sup> Exhibit VH1 (Witness statement of John Dollisson dated 23 December 2016) at [3]. See also Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [41] as amended; PN810-820.

<sup>40</sup> See Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [28]-[43]; cross-examination of Bryan Robertson at PN988-997; Exhibit AIG6 (Witness statement of Robin Davis) at [31]-[37]; Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [49.2] and [49.3]; cross-examination of Paula Colquhoun at PN422 and PN433; cross-examination of Robin Davis at PN1237.

31. Numerous questions immediately arise when that concept is adopted. Some examples are as follows.
- (a) Is it sufficient that any proportion of the produce prepared for sale in the grading and packing facility is grown on site or immediately adjacent, regardless of how small?
  - (b) Must all of the produce handled in the facility come from that site, in which case:
    - (i) does the handling of any produce in the facility grown elsewhere, even if grown a short distance away, render the entire facility outside of the horticultural industry and the Horticulture Award;
    - (ii) is the Horticulture Award to apply to produce grown “*on site*” and the Storage and Wholesale Award to produce brought in from other farms operated within the same business;
    - (iii) will the Horticulture Award only apply if a business has a grading and packing facility located on every growing site?
  - (c) If the land on or immediately adjacent to the grading and packing facility is lying fallow for one or more years due to land management practices or a lack of demand, does that render the grading and packing facility “*outside of the farm gate*” during those fallow years?
  - (d) Must the crop grown on the site of the grading and packing facility be owned by the same entity as employs the persons in the facility, or is a related entity sufficient?
  - (e) Must the land on which the crops are grown and the grading and packing facility is located be owned or leased by the same entity?
  - (f) What if the land on which the crops are grown are on a different title to the title where the grading and packing facility is located?
  - (g) Is it sufficient that the titles be immediately adjacent, or would fencing or a private or public road separating the two titles place the facility beyond the physical farm gate?

- (h) Is it sufficient that some form of crops or livestock are grown or raised “*on site*” (and thus the site is literally on a farm) even if those farming activities are unrelated to the produce handled in the grading and packing facility?
32. That the above issues (and others) immediately arise illustrates that the imposition of a physical boundary does not lead to certainty of coverage. Rather, it results in an arbitrary application of the Horticulture Award by reference to historical co-incidences, and inefficient business structures. It penalises efficient and modern business structures based on economies of scale and centralised locations by delineating coverage by reference to the location of the facilities. This risks the loss of such efficiencies, and loss of the resulting advantages, such as increased employment and lower prices for consumers. Further, utilising such a test is liable to result in disputation as to what is and is not behind the physical farm gate.
33. There is no evidence that establishes any differences between the duties carried out by persons working in a grading and packing facility arising out of the physical location of the facility.
34. Indeed, all of the activities described by the NUW’s witnesses in what are said to be facilities not covered by the Horticulture Award<sup>41</sup> are entirely consistent with the work observed by the Commission on the view being undertaken by staff at the Zerella facility, which the NUW accepts is covered by the Horticulture Award.
35. The absurdity of coverage being dictated by the physical location is illustrated by Mitolo’s acquisition in September 2016 of the farming site at Nildottie in South Australia. This farming site not only grew potatoes but had its own grading and packing facility. It was more efficient, however, to close the grading and packing facility at Nildottie and for such produce to be dealt with at the Angle Vale Road grading and packing facility.<sup>42</sup> If a physical location test is applied, the exact same work in respect of the

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<sup>41</sup> Exhibit NUW1 (Witness statement of Kay Rault dated 21 April 2017) and Exhibit NUW2 (Second statement of Kay Rault dated 30 June 2017); Exhibit NUW5 (Witness statement of Mark Johnston dated 21 April 2017) at [4]-[8]; Exhibit NUW6 (Witness statement of Jafar Kazmi dated 30 June 2017) at [14]-[18].

<sup>42</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [90]-[91]; PN405-414.

potatoes grown on the Nildottie farm that was performed on site under the Horticulture Award prior to September 2016 would now be carried out at the Angle Vale Road grading and packing facility under the Storage and Wholesale Award.

36. Employers in the horticulture industry should not be burdened with the uncertainty and potential financial impact that arises from how such a test is to be applied where the evidence overwhelmingly establishes that the industry utilises the concept of a virtual farm gate, and that a physical farm gate would lead to arbitrary, uncertain and inefficient outcomes.

**E. Analysis of the Horticulture Award, ambiguity and uncertainty**

37. An analysis of the applicable coverage provisions of the Horticulture Award<sup>43</sup> reveals that coverage is not intended to be governed by reference to the location at which the work is undertaken or any physical farm gate.
38. Clause 4 deals with the issue of coverage. Clause 4.1 confirms that the award “*covers employers throughout Australia in the **horticultural industry and their employees in the classifications listed in schedule B***”. Hence, the criteria for coverage is the nature of the industry (horticulture) and the nature of the work performed by the employees (that is, does it come within a classification).
39. Clause 4.2 defines the expression “*Horticultural Industry*”. Clause 4.2(a) refers to the fact that the horticultural industry means “***agricultural holdings ... in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops***” (emphasis added).
40. The situation with Mitolo illustrates that there is an ambiguity or uncertainty as to the notion of “*agricultural holdings*”, which requires clarification. The Angle Vale Road site was not considered to be an “*agricultural holding*” of Mitolo. This is despite being located on land that is only zoned for primary production, in a horticulture precinct,<sup>44</sup> with part of the land which immediately adjoins the Angle Vale Road facility used to

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<sup>43</sup> Tab 11 of Exhibit 1.

<sup>44</sup> Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [15].

conduct seed and variety trials, when not required to lay fallow due to land rotation requirements.<sup>45</sup> The site is integrated in Mitolo’s business structure, and ensures that Mitolo’s produce from its numerous farming locations is washed, graded and prepared so that it is fit for sale to supermarkets and wholesale markets.

41. The only matter that appears to distinguish the Angle Vale Road grading and packing facility from that of Zerella (which having been accepted as being subject to the Horticulture Award by the Commission must constitute an *agricultural holding*)<sup>46</sup> is that a very small portion of the produce that goes through that facility is grown on land on or immediately adjacent to the Zerella facility. There is no logical reason why that small amount of land use is sufficient to render the Zerella site an *agricultural holding* but neither the role of the Angle Value Road facility within the Mitolo business, nor the undertaking of seed operations and growing of seed and variety trials on the Angle Vale Road facility is sufficient.
42. The preferable construction which accords with modern industrial realities takes the business operations as a whole into account, so as to properly assess whether a part of that business structure is in itself an agricultural holding or forms part of an agricultural holding. That this construction is to be preferred is reinforced by the reference in clause 4.2(a) to agricultural holdings “*in connection with*” various activities, including the specific activities undertaken in Mitolo’s grading and packing facilities, namely, “*packing, storing, grading, forwarding*”. The phrase “*in connection with*” is well recognised to be of broad import,<sup>47</sup> and its use reflects an intention that a narrow approach to coverage is not intended.
43. It is a narrow and simplistic approach to simply answer the question as to whether certain land is wholly or in part an agricultural holding by whether

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<sup>45</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [38]; Exhibit 6 (Statement in reply of Paula Colquhoun dated 17 May 2017) at [10]-[13]; Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [17].

<sup>46</sup> Exhibit 3; evidence of Paul White at PN808-809.

<sup>47</sup> See for example, *J P Morgan Australia Ltd v Consolidated Minerals Pty Ltd* [2011] NSWCA 3 at [41]-[42]; *Re Burswood Management Limited*; *Dallas Reginald Dempster and Lim Kok Thay v the Attorney-General of the Commonwealth of Australia and the Director of the Office of Legal Aid Administration* (1990) 23 FCR 144 at [11], and the cases cited therein.

the work at that location is behind a physical farm gate (whatever that expression means).

44. To the extent the notion of the “*farm gate*” is to be used to inform the meaning of the expression “*agricultural holdings*” it should not be used by reference to a physical farm gate. To do so only focuses attention on **location** and ignores the notion of **industry**, the latter of which is the focus of the coverage clause and the approach which underpinned the development of the coverage clause in the award modernisation process.<sup>48</sup>
45. Clause 4.1 confirms that the ultimate task of interpretation is to identify the meaning of the expression “*horticultural industry*”. As the NFF described it in their opening submissions at [27], the relevant horticultural activities are those which take produce from “*seed to bag*”. Such activities include not only the planting and harvesting of produce, but also activities such as grading, packing, storing and forwarding of produce, being the activities required to deliver the produce in a fit condition to its first point of sale.
46. In this respect, the same activities necessary to carry produce “*from seed to bag*” are carried out on small to medium size farms and by larger scale entities such as Mitolo. While those activities are in some cases performed on or adjacent to productive land, or in other cases at a separate centralised location, both locations should nonetheless be considered to be agricultural holdings (or part of agricultural holdings), and as part of the horticultural industry. Looked at another way, locations where activities are performed that involve the necessary preparation of produce before it is able to be sold should be seen as an agricultural holding or forming part of an agricultural holding regardless of whether it is located where the produce is grown, or in a centralised location convenient to services, utilities and transport links.
47. Accordingly, the proper construction of clause 4.2(a) applies both to productive land and to those premises on which activities occur so as to render produce fit for market.

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<sup>48</sup> See, for example, the discussion and decisions referred to at [4] and [5] of the Mitolo Parties Supplementary opening submission (Tab 3, Volume 1 of Exhibit 2).



48. The above analysis and the evidence discussed at paragraphs [21] to [27] above also demonstrate that an ambiguity or uncertainty currently exist in respect of the coverage provisions in the Horticulture Award. The jurisdictional prerequisite for the Commission to make a variation of these coverage provisions pursuant to s.160 exists.<sup>49</sup>

**F. Application of the Storage and Wholesale Award**

49. Clause 4 of the Storage and Wholesale Award<sup>50</sup> deals with coverage. Clause 4.1 provides that the award covers “*the storage services and wholesale industry and their employees in the classifications listed in clause 14*”. The expression “*storage services and wholesale industry*” is defined in clause 3.1 to mean the following:

*“the receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, despatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary.”*

50. Although detailed activities are identified in this definition, it must be borne in mind that it is a definition of a phrase from which the underlying intent of the coverage of the award is to be ascertained.
51. The first part of the industry referred to is “*Storage Services*”. On any sensible view, although potatoes may be stored for some limited period whilst awaiting dispatch, the essential activities of the Angle Vale Road facility (and indeed, the Zerella grading and packing facility) are not focused around storage. The focus, in fact, is upon despatch to market as soon as possible. The evidence in response to the line of cross-examination that sought to establish that there was a storage focus in the horticulture industry was consistent, and unshaken.<sup>51</sup> This is unsurprising in light of the perishable nature of produce. Even where produce has a longer storage life, such as apples and pears, the evidence was that producers’ focus was on selling that produce sooner rather than later.<sup>52</sup>

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<sup>49</sup> See also Mitolo Parties’ opening submissions (Tab 1 in Volume 1 of Exhibit 2) especially at [49]-[54].

<sup>50</sup> Tab 12 of Exhibit 1.

<sup>51</sup> See, for example, Mr White at PN833-838; Mr Robertson at PN997-1001; Ms Colquhoun at PN1158-1166 and Ms Davis at PN1215-1219.

<sup>52</sup> See, for example, Mr Turnbull at PN1399.

52. Further, the capacity of certain produce to be stored for longer periods does not change the fact that the critical function of a grading and packing facility in respect of produce such as apples is not in providing storage, but rather in ensuring product is ultimately fit for consumption in the market place. Longer life produce still needs to be washed (or otherwise cleaned) and graded,<sup>53</sup> two functions that are not mentioned in the Storage and Wholesale Award.
53. The second part of the industry referred to in clause 4.1 is the “*Wholesale Industry*”. Intuitively, the activities involved in a grading and packing facility, whether undertaken behind a physical farm gate or behind a virtual farm gate, would not, in common parlance be described as part of the wholesale industry. They are horticultural activities. In this sense, again, the Horticulture Award is a clear better fit than the Storage and Wholesale Award.
54. The definition of “*Storage Services and Wholesale Industry*” also refers to “*produce, goods or merchandise*”. Thus, although it is accepted that under this definition the word “*produce*” could contemplate farm produce, traditionally it could be viewed that the usual application of the Storage and Wholesale Award is in respect of warehouse activities concerning “*goods or merchandise*”. This is consistent with the separate definition of “*wholesale*” in clause 3.1, namely, “*the sale of commodities in large quantities other than to final consumers*”.
55. Importantly, the Storage and Wholesale Award is specifically drafted as a fall-back award. It is not intended to trump another modern award if the work is also covered by that modern award. This is reflected in clause 4.2(a) which states as follows:
- “the award does not cover:*
- (a) *an employer to the extent that the employer is covered by another modern award that contains classifications relating to functions included within the definition of the storage services and wholesale industry with respect to any employee who is covered by that award.”*

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<sup>53</sup> Mr Turnbull at PN1411 and Mr Cody at PN1039.

56. The intent is therefore that where there is an overlap in terms of industries and classifications with another award, the other award will prevail<sup>54</sup>. On any objective view, the activities at the Angle Vale Road facility more comfortably fit within the Horticulture Award than the Storage and Wholesale Award. This is reinforced by the fact that the same activities performed in facilities which happen to have productive land on the same site are accepted as being covered by the Horticulture Award, as so clearly exemplified by the approval of the Zerella Enterprise Agreement.
57. The clarification sought by the Mitolo Parties and the other employer parties<sup>55</sup> would remove any uncertainty that it is the Horticulture Award that covers these activities, as opposed to the fall-back position of the Storage and Wholesale Award.

**G. No challenge is made to the regime under the Horticulture Award**

58. The flexible regime under the Horticulture Award has been recognised by the Commission as appropriate to the horticultural industry, and no challenge to this regime has been brought. The arbitrariness of a physical farm gate being the demarcation line therefore cannot be supported simply based on a rate of pay argument.
59. Similarly, the argument that the work in grading and packing facilities is different and/or more skilled than work on a farm is also not sustainable.
60. First, the logic of the latter argument does not correspond to the logic of the physical farm gate concept, where work in a grading and packing facility as well as planting and harvesting work is accepted as appropriately covered by the Horticulture Award (including subject to relevant rates of pay and penalties) if done behind a physical farm gate. But the same work done by the same business in a facility on a separate location is subject to the Storage and Wholesale Award. The skill or value of the work in the grading and packing facility does not change depending on which side of the physical farm gate it falls.

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<sup>54</sup> See also the discussion at [134]-[143] of the Mitolo Parties' opening submissions dated 23 December 2016 (Tab 1 of Volume 1 of Exhibit 2) and [138]-[150] of the Mitolo Parties' supplementary submission dated 23 December 2016 (Tab 3 of Volume 1 of Exhibit 2).

<sup>55</sup> In the form of Exhibit AIG3.

61. Secondly, the classifications utilised in the Horticulture Award encompass a broad range of skills and types of work, including those used in planting, growing and harvesting activities, as well as those used in washing, grading and packing activities. The classifications under the Horticulture Award are not subject to any challenge.
62. Thirdly, it cannot also simply be said that work in a grading and packing facility is more skilled than work on a farm outside of a grading and packing facility. Indeed, Mr Turnbull denied that proposition outright.<sup>56</sup> Such an assessment would need to be made based in the particular circumstances of each employer and each relevant employee.
63. There is no logical reason why the same work in a grading and packing facility conducted by a business which grows and sells horticultural produce ought to be covered by a different award simply because it is performed on a particular location behind a physical farm gate. This is reinforced by the view conducted at Mitolo and Zerella. That there was no discernible difference in the work performed at either facility reveals the fallacy of an argument predicated on differing skill levels.
64. An outcome such as that seen as between Zerella and the Mitolo Parties is capricious and has no industrial logic behind it, particularly where there is no challenge to the appropriateness of the Horticulture Award.

#### **H. Importance of flexibility**

65. The most distinguishing feature between the Horticulture Award and the Storage and Wholesale Award is the more flexible working arrangements and lower regime of penalties under the Horticulture Award.
66. As reflected in the evidence,<sup>57</sup> this need for flexibility stems from numerous features that specifically impact on the horticulture sector, in contrast, for

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<sup>56</sup> PN1405. See also the evidence of Mr Robertson at PN1005; Mr Cody at PN1060; Mr White at PN846-850; Ms Davis at PN1220-1222.

<sup>57</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [107]-[112]; Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [12], [27]-[30]; Exhibit AIG4 (Witness statement of Bryan Robertson dated 20 December 2016) at [50]-[56]; Exhibit AIG5 (Witness statement of Godfrey Cody) at [15]. See also the evidence of Mr White at PN843-845; Mr Dollisson at PN940; Mr Robertson at PN 984-987; Mr Cody at PN 1045, PN1052-1053; Ms Colquhoun at PN 1173-1191.

example, to the sector for electronic goods. The features that create the need for greater flexibility include:

- (a) the perishable nature of produce, where timelines between harvesting and delivery to the market may be critical;
- (b) seasonal factors;
- (c) harvesting times;
- (d) the quantity and quality of any harvest;
- (e) the impact of weather; and
- (f) the short timelines often faced between receiving orders (or variations to orders) from supermarkets and wholesale markets and a need to deliver on such orders.

67. The need for flexibility does not simply apply at the point of the harvest of produce. It extends to the work needed to ensure that the harvested produce is fit for sale to the market place. The industry's need for flexibility does not cease when produce enters the door of a grading and packing facility. Indeed, the evidence was that the challenges that affect the growing of produce, also affect work done in grading and packing facilities to much the same extent.<sup>58</sup>
68. Further, there is no evidentiary basis to suggest that the need for flexibility in respect of work in a grading and packing facility changes depending on whether such work is or is not behind a physical farm gate.
69. A modern award needs to recognise the commercial realities of modern agriculture. This includes the fact that grading and packing facilities for economic or logistical reasons (including such basic reasons that there may not be access to power on a particular farm site<sup>59</sup>), may be located at places other than where farm produce may be grown.
70. The flexibility provided in the Horticulture Award was clearly intended to support the special business needs of the horticulture sector.<sup>60</sup> The

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<sup>58</sup> See, for example, PN613, PN940, PN1184.

<sup>59</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [58].

<sup>60</sup> See, for example, the discussion at [74]-[80] of the Mitolo Parties' supplementary submission dated 23 December 2016 (Tab 3 of Volume 1 of Exhibit 2).

Horticulture Award will fail to carry into effect this intention if coverage is determined by the archaic and inflexible notion of a physical farm gate. Businesses in the horticultural industry will be denied the benefit of the appropriate regime merely because they adopt an efficient business practice of having a central grading and packing facility, rather than arranging their business in an attempt to fit within the arbitrary demarcation line of a physical farm gate.

**I. The current arbitrary application of coverage based on location**

71. There is no clearer example of the arbitrary nature of coverage based on a physical farm gate test than the fact that the work undertaken at the grading and packing facility at the Angle Vale Road facility by Mitolo is said by the NUW and the Commission in *Mitolo Parties Ltd v NUW*<sup>61</sup> to be subject to the Storage and Wholesale Award, but identical work performed one kilometre down the road at the Zerella grading and packing facility is said by the NUW and the Commission<sup>62</sup> to be covered by the Horticulture Award. This is not defensible in terms of any modern industrial approach.
72. Mitolo and Zerella both produce the same produce (albeit Zerella also produces carrots) and are competitors.<sup>63</sup> They both undertake the work in their centralised grading and packing facilities in order to ensure such produce is fit for market as part of their integrated business structures.<sup>64</sup> The work performed in both grading and packing facilities is essentially identical, involving similar levels of skill and being undertaken in a similar location.
73. Furthermore, putting aside the limited amounts of produce obtained from other growers to supplement that grown by Mitolo and Zerella, the produce is from Mitolo growing sites<sup>65</sup> and Zerella growing sites respectively.<sup>66</sup>

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<sup>61</sup> [2015] FWCFB 2524.

<sup>62</sup> Exhibit 3; evidence of Paul White at PN808.

<sup>63</sup> Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [22.2].

<sup>64</sup> See the descriptions of the businesses and work provided by Paul White for Zerella in Exhibit Z1 (Witness statement of Paul White dated 20 December 2016), particularly at [11]-[28], and by Ms Colquhoun for Mitolo in Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at paragraphs [9]-[40], [68]-[80] and in Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [5]-[6] and [18]-[23].

<sup>65</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [52], [53], [67]; Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [22].

There is only **one difference**. On the property where Zerella’s grading and packing facility is located, it also grows 1% of its produce.<sup>67</sup> This token amount of produce grown on site is said to have justified the NUW entering into an enterprise agreement with Zerella underpinned by the Horticulture Award, which was subsequently approved.

74. On this approach, if Mitolo chose to grow some potatoes for market in the area behind its Angle Vale Road facility that is currently lying fallow and where seed and variety trials are undertaken,<sup>68</sup> it could then claim that the grading and packing facility is behind a physical farm gate (in fact, the question might be asked why the current fallow land does not in any event mean that the facility is within a physical farm gate). To do so simply to achieve an outcome in respect of coverage, however, would be entirely unsatisfactory. Where crops are grown ought to be dictated by the commercial drivers that lead to the choice of appropriate land, rather than with an eye to securing the necessary flexibility that comes with coverage under the Horticulture Award.

75. It cannot have been the intent of the modern award regime that persons who are in the same sector competing directly one against the other do not face a **level playing field** in terms of the applicable industrial regime. Such arbitrary outcomes cannot have been contemplated by the legislature as to how a regime of modern awards are to operate in the market place.

**J. Work done in grading and packing facilities – the Horticulture Award is a better “fit” than the Storage and Wholesale Award**

76. An analysis of the classifications provided in the Horticulture Award compared to those in the Storage and Wholesale Award also is supportive of a conclusion that the work done in grading and packing facilities should be covered by the Horticulture Award. The classifications in the Horticulture Award are a more appropriate “fit” for such work than the classifications provided in the Storage and Wholesale Award.

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<sup>66</sup> Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [44].

<sup>67</sup> Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [22.4].

<sup>68</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [36]; Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [17]; Exhibit 6 (Statement in reply of Paula Colquhoun dated 17 May 2017) at [11]-[12].

77. A schedule of the work classifications in respect of each of these awards is to be found behind Tab 13 of Exhibit 1. By way of example, the schedule reveals, on page 2, that in respect of the very important task of “grading”, a task specifically referable to primary produce, is only recognised and dealt with in the Horticulture Award. The Horticulture Award distinguishes the task of grading from the broader task of “quality control” (see page 4 of the schedule). The Storage and Wholesale Award has no specific classification for the task of “grading”, leaving the carrying out of that industry specific task to be shoehorned into the concept of “quality control”.
78. That the classifications provided in the Horticulture Award are more suitable than the classifications provided in the Storage and Wholesale Award in respect of work in a grading and packing facility is reinforced by the enterprise agreement negotiated by the NUW with Zerella,<sup>69</sup> where the classifications have been taken nearly word for word from the Horticulture Award.

**K. Criteria for coverage – should not be driven by location**

79. The coverage clause of the Horticulture Award<sup>70</sup> indicates that coverage is to be determined by asking two questions:
- (a) is the work performed within the horticultural industry; and, if so
  - (b) does the work come within one of the classifications within the Horticulture Award?
80. On the strained construction that is put against Mitolo and the employer parties, a third criterion of location is introduced. Irrespective of whether the work is part of the horticultural industry and comes within the classification of the Horticulture Award, coverage is to be ultimately determined by whether the work is physically located on a farm. As identified above, there is no justification for this third criterion.
81. Section 132 provides a guide to Part 2-3 of the *Fair Work Act 2009* (Cth) (**FW Act**), which governs modern awards and the 4-yearly review. The second sentence of this guide states that “[m]odern awards may set

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<sup>69</sup> Exhibit 3.

<sup>70</sup> Clause 4, found in Tab 11 of Exhibit 1.



*minimum terms and conditions for national system employees in particular **industries or occupations***". It is noteworthy that the guide to Part 2-3 contemplates that modern awards will be directed towards industries or occupations and not driven by the question of location.<sup>71</sup>

82. The AWU seeks to defend a coverage clause driven by location by putting forward what it appears to say is an exemplar coverage clause,<sup>72</sup> namely, clause 1.4 of the *Fruit and Vegetable Growing Industry Award – State 2002 (Queensland Award)*.<sup>73</sup> Clause 1.4 states as follows:

*“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.”* (emphasis added)

83. As observed by the AWU in its opening submissions,<sup>74</sup> this was one of the predecessor awards to the Horticulture Award. Contrary to the assertion of the AWU, clause 1.4 of the Queensland Award does not confine coverage to work done **on** a location that is behind a physical farm gate. To the contrary, it operates in respect of certain categories of work in respect of any farm produce **“from”** a location throughout the State of Queensland. The produce does not even need to be produce of the employer.
84. The Queensland Award’s coverage clause focuses on work carried out in respect of farm produce, including treating, packing and despatching. On the underlying approach of this coverage clause, Mitolo should be covered by the Horticulture Award.

#### **L. Statutory regime for 4 yearly reviews of modern awards**

85. Section 156 of the FW Act mandates for the Commission to conduct a 4 yearly review of modern awards. The Mitolo Parties discuss the requirements for variations within the 4 yearly review in their opening submissions and there is no need to repeat those matters here.

<sup>71</sup> Consistent with the approach of the AIRC in the award modernisation process – see [44] above.

<sup>72</sup> See AWU submissions dated 21 April 2017 at [32]-[33].

<sup>73</sup> See AWU submissions dated 21 April 2017 at [32]-[33].

<sup>74</sup> See AWU submissions dated 21 April 2017 at [32].

86. Such reviews are not to be simply conducted on the presumption that the initial crafting of the modern award was appropriate, as it would render the process of review unnecessary. The fact that such reviews have been legislated recognises that improvements may be made to better meet the objectives provided in s.134 of the FW Act.
87. In order to enliven the Commission's discretion to vary an award in the context of a 4 yearly review it is not necessary to demonstrate that there has been a material change in circumstances since the making of the award such that the award is no longer achieving the modern award objectives.<sup>75</sup> Rather, the 4 yearly review involves a fresh assessment of modern awards unencumbered by previous decisions.<sup>76</sup>
88. The NUW in its opening submissions at [36] contends that Mitolo is required to meet the requirements of s.156(3) in its application. This sub-section concerns determinations to vary a modern award in respect of minimum wages and has no application in these proceedings. What is in issue are the coverage provisions of the Horticulture Award.
89. The distinction between changes concerning coverage and changes concerning minimum wages in a modern award is confirmed by note 1 under s.156(1), which states “*Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164)*”.
90. The NUW in its opening submissions at [40] further contends that Mitolo needs to meet the requirements of s.163(1). This sub-section deals with variations to a modern award which cause employees not to be covered by that award. There is no suggestion that the variation sought to the Horticulture Award will cause any persons currently covered by that award not to be covered by it. Furthermore, s.163(1) is directed to circumstances where the variation results in employees no longer being covered by any

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<sup>75</sup> *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [230]-[268], following the *Restaurants 2014 Penalty Rates decision* [2014] FWCFB 1996 at [91]-[92]; *4 yearly review of modern awards – Fire Fighting Industry Award* [2016] FWCFB 8025 at [34]-[37]. For completeness, the Mitolo Parties note that the rejection of this “*material change in circumstances*” test is the subject of judicial review proceedings in the Federal Court in respect of the *Penalty Rates decision*.

<sup>76</sup> *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [288]-[290].

award. That is clearly not so in this case as all employees will continue to be covered by an award. Accordingly s.163(1) also has no application in these proceedings.

**M. The objectives of modern awards**

91. The objectives of modern awards are set out in s.134 of the FW Act. Section 134(1) requires the Commission to 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 various matters. This task is referred to in the FW Act as the “*modern awards objective*”.
92. The use of the word “*relevant*” in s.134(1) in connection with reference to a “*minimum safety net of terms and conditions*” is “*intended to convey that a modern award should be suited to contemporary circumstances*”.<sup>77</sup>
93. No party contends that the current safety net of terms and conditions in the Horticulture Award fails to provide a fair and relevant minimum safety net. As such, the fact that rates of pay and penalty rates are more advantageous for employees under the Storage and Wholesale Award than under the Horticulture Award is not a basis for restricting coverage under the Horticulture Award to where work is performed behind a physical farm gate as distinct from a virtual farm gate.
94. Furthermore:
- (a) the current uncertainty as to the coverage of the Horticulture Award does not further the modern awards objective; and
  - (b) the amendments sought by the Mitolo Parties and other employer parties will have the effect of not only resolving uncertainty but of actively furthering the modern awards objective as defined in s.134 of the FW Act.
95. The particular matters required to be taken into account by the modern awards objective are further addressed below.

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<sup>77</sup> *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120]; *4 yearly review of modern awards – Fire Fighting Industry Award* [2016] FWCFB 8025 at [29]. This is one of the findings the subject of judicial review proceedings in respect of the *Penalty Rates decision*.

**(a) *Relative living standards and needs of the low paid***

96. The proceedings are not about the minimum rates contained in either the Horticulture Award or the Storage and Wholesale Award. There has been no submission that the base rates of pay or penalty rates set out in the Horticulture Award do not meet the criteria in s.134(1)(a).
97. Whilst rates under the Storage and Wholesale Award are in some respects higher than the base rates under the Horticulture Award, this cannot give rise to any suggestion that the rates set by the Horticulture Award do not meet the modern awards objective in relation to living standards and the needs of the low paid.

**(b) *The need to encourage collective bargaining***

98. There is currently clearly in the horticulture sector a stand-off. The NUW (and possibly the AWU) asserts that coverage under the Horticulture Award is determined by whether the work is behind a physical farm gate. This position, broadly speaking, has been rejected by the horticulture sector, who say that coverage is determined by whether the work is being performed behind a virtual farm gate.
99. Presently, this stand-off discourages collective bargaining. Indeed, it makes it near impossible, as parties will be unable to agree as to the applicable underpinning modern award for the purposes of the BOOT test. Resolving the current uncertainty as to the application of the Horticulture Award by making the variation sought is likely to encourage collective bargaining and thus achieve the modern awards objective as set out in s.134(1)(b).
100. Indeed, the evidence of the Mitolo Parties' human resources manager is that it is still the Mitolo Parties' desire to have an enterprise agreement but because of the uncertainty around the coverage of the Horticulture Award, they have not at this time progressed to a new agreement.
101. The evidence was also that once the coverage issue is confirmed, the Mitolo Parties would be looking at a new collective bargaining process.<sup>78</sup>

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<sup>78</sup> PN517-520; Exhibit 6 (Statement in reply of Paula Colquhoun dated 17 May 2017) at [25].

102. Until the question of coverage is clarified by way of a variation to the coverage clause, this stand-off will continue. Hence, this objective supports the variation advanced by Mitolo and others.

***(c) The need to promote social inclusion through increased workforce participation***

103. This objective is neutral in terms of whether any variation to the coverage of the Horticulture Award should be made.

***(d) The need to promote flexible modern work practices and the efficient and productive performance of work***

104. Contained in this aspect of the modern awards objective are key concepts at issue in this matter, namely, flexibility and efficiency. Not only is this objective strongly supportive of the variation sought by the Mitolo Parties and others, there is no contradictory evidence.

105. The Commission has heard evidence about the factors which give rise to a need for flexibility throughout the horticulture industry. This includes aspects of the value chain that involve produce being washed, graded and packed after harvest so as to be fit for sale in a consumable form.<sup>79</sup> This makes it plain that this modern awards objective is met by the flexibility associated with the terms of the Horticulture Award, such as the broader span of ordinary hours that applies under the Horticulture Award and the ability for those ordinary hours of work to be worked over a four week period as opposed to a seven day period.<sup>80</sup>

106. In addition to the promotion of flexible modern work practices, confirmation that the Horticulture Award applies, as contended for by the Mitolo Parties, promotes the efficient and productive performance of work. Critically, it permits a business to determine where it is most efficient to locate a facility to carry out the process of washing and preparing produce for dispatch to market in the most efficient and productive manner for that

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<sup>79</sup> See paragraphs [66] and [67].

<sup>80</sup> See clause 22 of the Horticulture Award as compared to clause 22 of the Storage Services and Wholesale Award.

business.<sup>81</sup> In the case of the Mitolo Parties, that is in a centrally located grading and packing facility.<sup>82</sup>

107. As Ms Colquhoun gave evidence, many of the growing sites used by the Mitolo Parties do not have electricity or internet connection. There is also a need for growing sites to lay fallow, only being used for a crop once every four years for disease management and land health reasons (raising the question as to whether the use of a facility on such a growing site would only be covered by the Horticulture Award once in every four years). Further, it simply would not be financially viable to have a facility on every single site by reason of the costs of grading and packing facilities. Also, the location of the grading and packing facility in a suitable area makes it easier to source appropriately skilled workers.<sup>83</sup>
108. Providing producers with the certainty as to coverage of the Horticulture Award will enable them to structure their business in the most efficient and productive manner for the performance of work, without having to choose between that objective and putting in place arbitrary or token measures for the placement of such a facility in a manner said to be physically behind the farm gate.
109. It should be left in the hands of businesses to determine where their work can most efficiently and productively be performed, rather than decisions being driven by arbitrary applications or interpretations of the coverage of the Horticulture Award.
110. The variation of the coverage provision in the manner proposed by the Mitolo Parties and other employer parties will meet this modern awards objective.

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<sup>81</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [58]; Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [25]; Exhibit AIG5 (Witness statement of Godfrey Cody) at [17]-[19]; Exhibit AIG6 (Witness statement of Robin Davis) at [29]-[30].

<sup>82</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [36], [58], [67]; See also Exhibit AIG4 (Witness statement of Bryan Robertson dated 22 December 2016) at [21]-[23], [25]; Exhibit AIG5 (Witness statement of Godfrey Cody) at [17]; Exhibit AIG6 (Witness statement of Robin Davis) at [28]-[30]; Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [14]; Exhibit VH1 (Witness statement of John Dollisson dated 23 December 2016) at [11]-[12].

<sup>83</sup> Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [58]; PN392-400.

***(da) The need to provide additional remuneration for employees working overtime and other types of hours***

111. Both the Horticulture Award and Storage and Wholesale Award provide additional remuneration for employees working overtime, working unsocial, irregular or unpredictable hours, working on weekends or public holidays and for employees working shifts. Having said this, it is accepted that the Storage and Wholesale Award provides for a greater range of penalties when it could be said that a person is working, from the perspective of other industries, outside what would be considered “ordinary hours”, namely, Mondays to Fridays.
112. Nonetheless, there is no suggestion that the penalty and shift allowance regime in the Horticulture Award does not meet this modern awards objective. Rather, the position taken by the NUW and AWU is essentially that it is preferable for workers to be paid the more generous penalty and shift allowances provided for in the Storage and Wholesale Award. This is said to be so regardless of the particular needs of the horticulture industry.
113. If it was intended by the legislature that coverage issues would be determined by a preference as to how well-paid a worker was under one award as compared to another, such an approach would have been spelt out in the legislation. It has not.
114. As there is no suggestion that the Horticulture Award does not meet this modern awards objective, the consideration in s.134(1)(da) is a neutral consideration in respect of the coverage question that is sought to be resolved.

***(e) The principle of equal remuneration for work of equal or comparable value***

115. At present, the NUW contends for a regime where workers doing identical work at the Zerella and the Angle Vale Road grading and packing facilities are subject to different remuneration regimes. This is untenable and goes to the heart of undermining an important part of the regime of modern awards.
116. This objective supports the variation contended by Mitolo and the other employer parties.

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

117. This objective is strongly supportive of the variations sought by the Mitolo Parties and others, with the evidence overwhelmingly indicating that clarification of the coverage clause is necessary to meet this objective.
118. If primary producers are required to place facilities used to prepare their product for market on sites behind a physical farm gate in order for coverage under the Horticulture Award to apply, or, alternatively, to set aside a token part of the site on which such facilities are placed for the growing of crops in a way that is otherwise inefficient – this will not encourage producers to choose the most efficient and productive structures for preparing produce for market.
119. The rudimentary and blunt approach to coverage based on work being behind a physical farm gate can only have an adverse impact on productivity, employment costs and the regulatory burden faced by producers. This regulatory burden will include having to consider the impact of changes in award coverage based on where a producer may locate its grading and packing facility. If producers were to ignore award coverage implications when making business decisions regarding the location of their grading and packing facilities, they run the risk of being put at a competitive disadvantage. This is so when compared to the producers that have their grading and packing facilities behind a farm gate. This is clearly reflected in the situation which currently exists between Mitolo and Zerella.
120. As we have observed at paragraph [31] above, there are many questions raised as to what is required to place a grading and packing facility behind a physical farm gate. On one possible application of the physical farm gate test, produce dealt with within the grading and packing facility actually has to be grown behind the same farm gate as where the facility is also located. As is apparent from the evidence, many of these grading and packing facilities are extremely expensive.<sup>84</sup> It would be a catastrophe in terms of

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<sup>84</sup> See the evidence of Ms Colquhoun at PN 397; Mr White at PN860; Mr Robertson at PN983.



efficiency and productivity if the effect of the coverage clause was that these facilities had to be replicated on each and every farm where produce is grown.

121. Failing to make the amendment as sought will require producers to place their facilities on a location said to be behind a physical farm gate, or otherwise face a higher wage cost with reduced flexibility. This will impose disadvantages on those businesses who are not able to relocate their facility or set aside part of the site for potentially inefficient growing of produce. It will place such businesses at a competitive disadvantage compared to those businesses in the same industry carrying out the same work who, perhaps by reason of no more than fortunate historical reasons, have a facility on a farm site or are able to accommodate the growing of produce on the same site.
122. Horticultural enterprises who happen to be carrying out grading and packing work on the “*wrong side*” of the outdated concept of a physical farm gate will face an increased regulatory burden if that is the determinative factor as to which award will apply. Such producers will need to consider which award applies to which work, particularly where staff work across different areas of the production cycle.
123. The coverage clause of the Horticulture Award being amended as sought by the Mitolo Parties will enable horticultural businesses to place their facilities in locations where in production terms is most efficient for them to be located, and will meet this aspect of the modern awards objective.

***(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***

124. This objective strongly supports the making of the variation sought.
125. The position contended for by the NUW and the AWU as to coverage involves a consideration of the location at which washing and packing activities are undertaken. Their position reduces as to whether the facility in question is located behind a physical farm gate. Such a locational concept is vexed with uncertainty. Only the virtual farm gate concept contended for by the Mitolo Parties and other parties provides certainty.

126. As Zerella's General Manager, Mr Paul White, said:

*“it would be a nonsense to reach a different conclusion for one packing shed versus another within the same company. Similarly it would be a nonsense to have a different conclusion reached for different packing sheds within the Australian horticultural industry.”*<sup>85</sup>

127. The current coverage arrangements for the Horticulture Award have resulted in such a nonsense. They are far from simple or easy to understand. They are simply a source of debate, disputation and uncertainty.

128. Further, s.134(1)(g) also speaks of avoiding unnecessary overlap of modern awards and of achieving a stable and sustainable modern award system. As part of this objective, people working in a business producing horticultural products who do the same work as those in another business producing horticultural products, should be covered by the same award. As the example of Zerella and Mitolo demonstrates, based on the NUW's (and possibly the AWU's) position, this is not the case.

129. Unless the variation for which the Mitolo Parties contend is made there will be a system that is not simple, is not easy to understand and is not stable and sustainable in the modern horticultural sector.

***(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***

130. Again, this objective is supportive of the variations sought.

131. The construction of the coverage provisions in the Horticulture Award, as contended by the NUW and AWU, positively discourages primary producers from choosing the best and most efficient location to carry out the work required to make produce fit for consumption and ready to be sold to market. Such discouragement from producers choosing, all things being equal, the most efficient way of structuring their business can only cause a drag on economic growth, sustainability, performance and competitiveness in terms of the national economy. The encouragement of such inefficiencies can also only contribute to ultimately higher costs for

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<sup>85</sup> Exhibit Z1 (Witness statement of Paul White dated 20 December 2016) at [50].

the consumer and thus add to any inflationary pressures present in the economy.

**N. Any variation does not need to meet a test of “necessary”**

132. The NUW in its opening submissions at [27] contends that in order for there to be any variation as a result of the mandatory 4 yearly review process, the variation must meet the test of “necessary”. In support of this submission, the NUW cite the decision in *SDA v National Retail Association* (2012) 205 FCR 227. This submission is misconceived.
133. The *SDA* decision concerned the application of s.138 of the FW Act. Section 138 provides a check to ensure that any modern award is not unnecessarily cluttered with terms that will only create a regulatory burden. Terms should only be included “to the extent necessary” to achieve the modern award objectives. It was in this context that the Court in *SDA* discussed the fact that any variation of a modern award, if it introduced new terms, should meet the requirements of s.138.<sup>86</sup>
134. The Commission need not be satisfied that the variation proposed is in itself necessary to achieve the modern awards objective. The task of the Commission is to make a finding as to whether the modern award achieves the modern awards objective. If it is not then it is varied such that it only includes terms that are necessary to achieve the modern awards objective in accordance with s.138. The focal point of the Commission’s consideration is the modern award as varied.<sup>87</sup>
135. In order for the Commission to be satisfied that a modern award is not achieving the modern awards objective, it is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations. The Commission’s task is to balance the various

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<sup>86</sup> As applied in *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [136]-[141].

<sup>87</sup> *Ibid* at [137] to [141], citing *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [111]-[114].

considerations and ensure that the modern awards provide a fair and relevant minimum safety net of terms and conditions.<sup>88</sup>

136. Section 138 accordingly has no application in these proceedings as what is sought is a variation of an essential existing term, rather than the introduction of additional terms, and no test of “*necessary*” applies.
137. Furthermore, if a threshold test of “*necessary*” was required in respect of any variation that flowed from a 4 year review of a modern award, such a requirement would have been provided for by the legislature. In particular, such a requirement would be found in s.156 and/or s.134. To the contrary, there is no such requirement in these provisions.
138. In any event, for the reasons identified above, the variations sought by Mitolo and others on any proper view are overwhelmingly necessary.

**O. The need to remove ambiguity/uncertainty**

139. The Mitolo Parties also advance their case to remove an ambiguity or uncertainty pursuant to s.160 of the FW Act.
140. Such an ambiguity or uncertainty plainly exists, as is apparent from the divergent views as to the current position in respect of coverage under the Horticulture Award.<sup>89</sup> The fact that uncertainty exists is put beyond doubt by the fact that Zerella’s grading and packing facility is said to come within the Horticulture Award but Mitolo’s grading and packing facility is not, simply because Zerella grows 1% of its produce on land adjacent to where its facility is located.
141. The variation proposed by the Mitolo Parties and others will remove this current ambiguity or uncertainty.

**P. Any variation should be made retrospective – the need for exceptional circumstances is met**

142. Pursuant to s.165(2), if any variation to the Horticulture Award made pursuant to s.160 of the FW Act is to have an earlier operation, the Commission must be “*satisfied*” that there are exceptional circumstances

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<sup>88</sup> Ibid at [162]-[163], following *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [109]; *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [21]; *4 yearly review of modern awards – Fire Fighting Industry Award* [2016] FWCFB 8025 at [27].

<sup>89</sup> See the discussion at [8]-[29] and [37]-[48].

that justify such an earlier operation (s.165(2)(b)). Such exceptional circumstances are met in this case.

143. For the reasons identified above, without retrospective operation of this variation, there will inevitably be disputation and most likely litigation over whether producers over a period of some 7½ years (subject to limitation periods) have been making underpayments to workers where their grading and packing facility is said not to be behind a physical farm gate. If such a construction was accepted by a court, the consequences in terms of back payments for the horticulture industry would be massive, as the evidence is that the industry is generally applying the broader interpretation of the coverage of the Horticulture Award, based on the virtual farm gate concept. Such back pay orders, inevitably, are likely to cause a profound impact on the viability and sustainability of many producers.
144. The threat, if not the actual experience, of litigation on a mass scale over whether there has been underpayments in the horticulture sector going back years should not be permitted to occur. This is especially so when regard is had to the lack of evidence of any consistent position being taken as to the enforcement of the narrow interpretation of the coverage clause in the Horticulture Award contended for by either the NUW or the AWU.
145. Indeed, the only evidence of such enforcement relates to when the NUW on behalf of Ms Rault brought a small claim for under payment based on the Storage and Wholesale Award with the assistance of the NUW. Two days after Mitolo indicated that it intended to transfer the proceedings to the Federal Court for the purpose of seeking a declaration that the Mitolo Parties was covered by the Horticulture Award, Ms Rault and the NUW quickly discontinued the claim.<sup>90</sup>
146. Other than this example, there is no evidence to suggest the NUW, the AWU or any other organisation has sought to recover what on their construction would be underpayments of wages by producers which have systematically occurred all around Australia.

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<sup>90</sup> Tab 2 of Exhibit 1 – entries for 10 February, 3 May and 5 May 2016.

147. Even if such litigation is not brought, the uncertainty that such litigation **may** be brought will inevitably have a detrimental effect on the horticulture sector. Business decisions will always have to be made under the shadow that a substantial back payment claim may be made at any time until the expiry of the limitation period. The door should not be left open for interested parties to later decide to agitate these issues by way of bringing underpayment claims.
148. By reason of the matters above, the only way to effectively resolve the relevant ambiguity and uncertainty and any dispute as to coverage is for the variation to be made retrospective, effective from 1 January 2010.

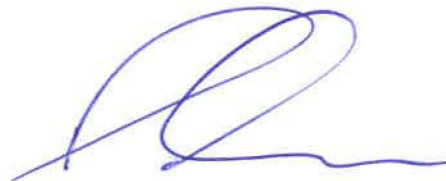
**Q. Conclusion**

149. By reason of the matters above pursuant to s.160 of the FW Act or further and, in the alternative, pursuant to s.156 of that Act, the Mitolo Parties seek:
- (a) an order that the Horticulture Award be varied in the terms set out in Exhibit AIG3;
  - (b) an order pursuant to s.165(2) of the FW Act that such variation commence from 1 January 2010.

**JUSTIN L BOURKE QC**

**GILLIAN C WALKER**

**DATED:** 31 July 2017



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