

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards

AM2016/25

Horticulture Award 2010 – substantive claims

CLOSING SUBMISSIONS FROM THE AUSTRALIAN WORKERS' UNION

Background

1. During a hearing on 4 July 2017 the Full Bench directed parties to file any written closing submissions they wish to rely upon by the close of business on 28 July 2017. This date was later extended to 31 July 2017.
2. The AWU's written closing submissions are below.

Section 160 application – ambiguity, uncertainty or error

3. An important legal distinction exists between the current coverage of the *Horticulture Award 2010* (**Horticulture Award**) and what a party thinks the coverage of the Horticulture Award should be.
 4. This Full Bench has two applications before it, an application under section 160 of the *Fair Work Act 2009* (**FW Act**) which relates to the current coverage of the Horticulture Award and a claim which is part of the 4-yearly review of modern awards undertaken pursuant to section 156 of the FW Act – this claim relates to what the parties think the coverage of the Horticulture Award should be.
 5. The Full Bench Decision in *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 (**Mitolo Appeal**) highlighted this distinction at paragraphs [58] and [59] (our emphasis):
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[58] Much of the evidence and submissions at first instance and some of the submissions (particularly those of the interveners) in the appeal were concerned with the proposition that the application of the Storage Services Award rather than the Horticulture Award to an operation such as Mitolo’s at Angle Vale Road would result in increased employment costs and a loss of business flexibility. In that context, we need to emphasise that, in applying the better off overall test as required by the FW Act to the Agreement, considerations of this nature did not arise for consideration. The question of which of the two awards applied to Mitolo and its employees at the time Mitolo made its application is one which, as we have explained, is resolved simply by the application of the coverage provisions of those awards, interpreted according to their ordinary meaning, to the uncontested facts of this case.

[59] The 4 yearly review of modern awards required by s.156 of the FW Act is currently proceeding. The Horticulture Award and the Storage Services Award fall within shortly upcoming stages of the current review. If any party considers that the coverage or other provisions of the two awards are such that the modern awards objective in s.134 of the FW Act is not being met, the current review provides an opportunity for such an issue to be agitated before a Full Bench of the Commission.

6. It is apparent from these paragraphs that the Full Bench in the Mitolo Appeal did not consider there was any ambiguity or uncertainty in the legal application of the current coverage terms in the Horticulture Award. The Full Bench specifically found it could interpret the coverage terms of the Horticulture Award according to their “ordinary meaning”.
7. This is significant given the submissions filed by Mitolo Group Pty Ltd and Maranello Trading Pty Ltd (**Mitolo Group**) on 23 December 2016 place substantial reliance on extrinsic materials in terms of interpreting the Horticulture Award.¹ The Mitolo Appeal Full Bench made a specific finding that the coverage of the Horticulture Award has an “ordinary meaning” – it is well established that “evidence of the surrounding circumstances will not be admitted to contradict the plain language of

¹ See ‘Submissions of Mitolo Group Pty Ltd and Maranello Trading Pty Ltd in support of applications under sections 160 and 156 of the Fair Work Act 2009 (Cth) for variation of coverage clause of Award 2010’ dated 23 December 2016 at [91]

the agreement”.² We note the Mitolo Group have accepted this rule also applies to the interpretation of an award.³

8. In these circumstances, this Full Bench would have to specifically depart from the Mitolo Appeal Full Bench’s Decision to find there is currently ambiguity or uncertainty in relation to the coverage of the Horticulture Award.
9. The Mitolo Appeal Full Bench also found that the locational limitation on the coverage of the Horticulture Award was deliberately included by the Award Modernisation Full Bench:

[45] We do not consider that paragraph (a) of the definition is readily amenable to the “substantial character” test because it operates by reference to particular types of work locations used for particular commercial activities. The primary part of the paragraph refers to “agricultural holdings, flower or vegetable market gardens”, and thus emphasises at the outset that the industry is to be defined by reference to where the commercial activity is conducted. It then goes on to list certain types of commercial activity required to be conducted at those locations. The subordinate part of the paragraph beginning with the word “including” then describes additional types of locations - “farms, orchards and/or plantations” - used in relation to fruit and vegetables. We accept Mitolo’s submission that “including” is a word of extension, so to the extent that a relevant location cannot be characterised as an agricultural holding or a flower or vegetable market garden, the location will nonetheless fall within the industry definition if it is a farm, orchard or plantation.

[46] That work location was intended to be a critical element in the coverage of the Horticulture Award is confirmed in the decision of the Full Bench of the AIRC in its Award Modernisation decision of 3 April 2009 in which, among other things, it made the Horticulture Award and other awards relating to agriculture and farming. In relation to coverage, the Full Bench said: “Our overall approach to coverage of the pastoral and horticultural awards is that they should be confined to agricultural production within the ‘farm gate’.” It is clear therefore that it is not sufficient that commercial activities of the type described in paragraph (a) of clause 4.2 are carried on by the employer; they must also be carried out at the type of work locations specified in the paragraph.

² *The Australian Meat Industry Employees Union v Golden Cockerel Pty Limited* [2014] FWCFB 7447

³ See ‘Submissions of Mitolo Group Pty Ltd and Maranello Trading Pty Ltd in support of applications under sections 160 and 156 of the Fair Work Act 2009 (Cth) for variation of coverage clause of Award 2010’ dated 23 December 2016 at [63]

10. Far from representing an error, the Mitolo Appeal Full Bench found that the locational limitation was deliberately included in the Horticulture Award by the Award Modernisation Full Bench.
11. As a result, this Full Bench would have to specifically depart from the Decision of the Mitolo Appeal Full Bench to find that there is currently an error in the coverage of the Horticulture Award.
12. In its *Preliminary Jurisdictional Issues*⁴ Decision, a five-member Full Bench of the Commission stated the following in relation to previous Full Bench decisions being followed (references omitted):

[25] *Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:*

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] *While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):*

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] *These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any*

⁴ 4 Yearly Review of Modern Awards: *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [25] to [27]

contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

13. The three applicants⁵ for the section 160 application have not presented any material that could satisfy this Full Bench that cogent reason exists for this Full Bench to depart from the Decision of the Mitolo Appeal Full Bench that the coverage of the Horticulture Award has an ordinary meaning and the locational limitation on coverage was deliberately included.
14. We note the affected parties could have sought judicial review of the Mitolo Appeal Full Bench Decision and they did not. That course of action would have been a more appropriate forum to continue contesting the Mitolo Appeal Decision than in these Fair Work Commission proceedings.
15. For these reasons, this Full Bench should simply follow the Decision of the Mitolo Appeal Full Bench and dismiss the section 160 application because there is no ambiguity, uncertainty or error in relation to the current coverage of the Horticulture Award.

Award review proceedings

16. Whilst the AWU considers there is no merit whatsoever in the section 160 application, the Mitolo Appeal Full Bench did clearly suggest the affected parties may wish to present an argument about what the coverage of the Horticulture Award should be during the 4-yearly award review process.
17. This case has now been pursued and hence the critical question for this Full Bench is whether it is *necessary* to vary the coverage of the Horticulture Award to ensure the modern awards objective specified in section 134 of the FW Act is met.
18. A significant component of this task is an assessment of whether it is appropriate for the coverage of the Horticulture Award to continue to be confined on a locational basis to within the “farm gate”.

What is the “farm gate”?

⁵ Mitolo Group Pty Ltd, Maranello Trading Pty Ltd and the Australian Industry Group.

19. It has been suggested in these proceedings that the farm gate is a “virtual concept”⁶ and “a point at which the product is sold directly to the supermarkets from a producer”⁷.
20. We note the latter proposed definition would be inherently difficult to apply if the produce is never sold to a supermarket or if the producer sells the product to an intermediary who then sells the product to a supermarket.
21. Whilst corporate structures almost inevitably become increasingly complex as the years go by, these developments have not altered the fact that the “farm gate” means the geographical boundary of a farm.
22. The OECD know this, their definition of a “Producer Price” is (our emphasis):

*A producer price is the average price or unit value received by farmers in the domestic market for a specific agricultural commodity produced within a specified 12-month period. This price is measured at the farm gate – that is, at the point where the commodity leaves the farm – and therefore does not incorporate the costs of transport and processing.*⁸

Whilst this definition has not been updated since 2001, presumably this is because it has not required any amendment. The definition still appears in 2017 in the OECD’s online ‘Glossary of Statistical Terms’.

23. The Mitolo Appeal Full Bench also understood that a “farm gate” is the geographical boundary of a farm, this is clear from paragraph [46] of their Decision as cited above.
24. Senior Deputy President Hamberger also adopted a geographical definition of the “farm gate” when determining an application by the National Union of Workers to vary the Horticulture Award in 2010. His Honour stated at paragraph [9]:

During the hearing there was some discussion about whether the coverage of the Horticulture Award 2010 extends beyond the ‘farm gate’. Having examined the transcript of the consultations before Commissioner Lewin that led to the development of the modern award I am satisfied that the reference to ‘upon farms, orchards and/or plantations’ should be regarded as qualifying all the activities listed in the preceding paragraph. The phrase ‘including fruit and vegetables’ merely emphasises that these products are included in the concept of ‘horticultural crops’. The effect of this construction is that the modern award only covers activities such as picking, packing, storing

⁶ Paragraph [44] of the witness statement of Robin Davis – Exhibit “AIG 6”.

⁷ See cross-examination of Robin Davis – Transcript for 4 July 2017 at PN1259.

⁸ See Exhibit “AWU 5”.

*etc. to the extent those activities happen on farms, orchards and/or plantations.*⁹

25. The National Farmers' Federation (**NFF**) also seemingly acknowledge a geographical meaning for the "farm gate". The NFF has a document on their website titled 'NFF Farm Facts: 2012'¹⁰ which states (our emphasis):

Economic

The agricultural sector, at farm-gate, contributes 3 percent to Australia's total gross domestic product (GDP). The gross value of Australian farm production in 2009-10 was \$48.7 billion. Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all the economic activities supporting farm production through farm inputs, agriculture's contribution to the GDP averages out at around 12 percent (or \$155 billion).

26. Further, the Mitolo Group accept that the coverage of the *Pastoral Award 2010* is confined on a locational basis to farms¹¹.

27. The Award Modernisation Full Bench specifically stated:

Our overall approach to coverage of the pastoral and horticultural awards is that they should be confined to agricultural production within the 'farm gate'.¹²

It makes little sense that the Award Modernisation Full Bench would make this general statement but then proceed to confine the coverage of the *Pastoral Award 2010* to farms but extend the coverage of the Horticulture Award beyond farms.

28. It would be quite dangerous for the Commission to depart from the well-established geographical meaning of a "farm gate" and adopt subjective definitions presented in a variety of ways by witnesses in these proceedings without reference to any objective economic material.¹³

29. Further, the adoption of a different definition for the "farm gate" by this Full Bench would require a departure from the Mitolo Appeal Full Bench

⁹ *National Union of Workers* [2010] FWA 8228

¹⁰ Found here: <http://www.nff.org.au/farm-facts.html>

¹¹ See 'Submissions of Mitolo Group Pty Ltd and Maranello Trading Pty Ltd in support of applications under sections 160 and 156 of the Fair Work Act 2009 (Cth) for variation of coverage clause of Award 2010' dated 23 December 2016 at [117].

¹² *Award Modernisation* [2009] AIRCFB 345 at [53].

¹³ Robin Davis was asked during cross-examination where the "virtual" concept came from and was unable to identify a source – Transcript for 4 July 2017 at PN1258.

Decision. No cogent, and certainly no consistent, reason has been presented as to why a different definition should be adopted.

30. This Full Bench should find that the “farm gate” has a clear meaning which is the geographical boundary of a farm and that the coverage of the Horticulture Award is currently deliberately confined to the “farm gate”.

31. This Full Bench can then proceed to determine the more significant and genuine issue, which is whether the coverage of the Horticulture Award should remain confined to within the “farm gate”.

Should coverage of the Horticulture Award be confined to the farm gate?

32. This Full Bench has an important decision to make in relation to the breadth of coverage for the Horticulture Award. This Full Bench must determine whether it is appropriate for employees working in off-farm fruit and vegetable packing facilities to have the same safety net of employment conditions as employees working on a farm, orchard or plantation.

It is common for location to determine award coverage

33. The first important point is that it is extremely common amongst the modern awards system in Australia for coverage to be determined on a locational basis. The Mitolo Group have acknowledged this in their submissions and identified numerous modern awards that operate on a locational basis.¹⁴

34. This establishes that it is common and obviously intended within the modern award system for the same type of work to be covered by different awards depending on the location that the work is performed at.

35. This means the mere fact that the packing and processing of fruit and vegetables on a farm is covered by one award and the packing and processing of fruit and vegetables off-farm is covered by a different award is not remarkable in the modern award system and does not provide sufficient justification to vary the coverage of the Horticulture Award. If this is significant justification to vary the coverage of the Horticulture Award, the coverage provisions in numerous modern awards may need to be reconsidered.

Operating a farm is different to operating an indoor packing facility

¹⁴ See ‘Submissions of Mitolo Group Pty Ltd and Maranello Trading Pty Ltd in support of applications under sections 160 and 156 of the Fair Work Act 2009 (Cth) for variation of coverage clause of Award 2010’ dated 23 December 2016 at [116] to [119].

36. The second important point is that operating a farm is a relatively unique type of business. Employer groups such as the NFF frequently highlight this point and use it as justification for their pursuit of flexible conditions for employers who operate a farm.

37. This happened most recently in the Casual and Part-time employment common issue proceedings which occurred as part of the 4-yearly review of modern awards. The AWU sought clarification in these proceedings of overtime entitlements for casual employees covered by the Horticulture Award.

38. In assessing the AWU's claim, the Casual and Part-time Employment Full Bench placed significant weight on the following unique conditions in the horticulture industry:

- businesses are price takers and have limited scope to pass on increased labour costs;
- “casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is”;
- “casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on”; and
- employers will try and avoid overtime payments if they are imposed.¹⁵

39. The findings above from the Casual and Part-time Employment Full Bench in relation to the nature of harvesting work have little relevance to the Mitolo Group's off-farm facilities which “meet customer demands for 12 months of the year”¹⁶ and “supply the major supermarkets 52 weeks each year”¹⁷. Employees at the Angle Vale Road site seemingly work from Monday to Saturday throughout the year.¹⁸ They are not engaged for brief harvest periods and they work indoors so rain does not prevent work continuing.

¹⁵ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [749]

¹⁶ Second Supplementary Witness Statement of Paula Colquhoun at paragraph [22] – Exhibit “7”.

¹⁷ Second Supplementary Witness Statement of Paula Colquhoun at paragraph [25] – Exhibit “7”.

¹⁸ Witness Statement of Paula Colquhoun at paragraph [113] – Exhibit “4”.

40. Whilst the final terms of the overtime conditions for casual employees in the Horticulture Award are still being finalised by the Casual and Part-time Employment Full Bench, it appears clear the overtime regime will be tailored to conditions faced by employers undertaking harvesting operations.

41. An employer which does not operate a farm will obviously not undertake harvesting functions. Geoffrey Codey tried valiantly to avoid the question of whether an employer who does not undertake farming operations would have a harvest period during cross-examination of 21 June 2017 but ultimately stated:

PN1078

Leaving aside family businesses, just a legal entity, a company that does not grow any fruit or vegetables, does that legal entity have harvest period or not?---Well, I'm unsure because I really have no idea whether that legal entity is engaged in the production of horticultural product.

42. This questioning had arisen because clause 24.2 of the Horticulture Award contains differing overtime conditions during harvest periods. These provisions make no sense for an employer who does not operate a farm because they will not have a harvest period. This is a compelling example of why the Horticulture Award is not an appropriate safety net for employees who don't work on a farm.

43. The following excerpt from the cross-examination of John Dollisson on 21 June 2017 is relevant to the issue of whether it is appropriate for the Horticulture Award, which clearly has quite generous conditions for employers compared to other modern awards, should be the safety net for employees of employers who don't deal with the unique challenges associated with operating a farm:

PN925

Thank you, Mr Dollisson. So, I mean, I guess regardless of whether it's a figure around 30 per cent or 50 per cent, it is reasonably clear that labour costs in the horticulture industry do make up a substantial proportion of operation costs. That is clear, isn't it?---That's very clear. In fact, there is a table on page 12 in that report which shows the significance of hired labour.

PN926

At paragraph 19 of your statement, you talk about the fact that it's not possible to mechanically harvest a lot of fruit and vegetables in Australia at the moment; is that correct?---Not only in Australia, but around the world, that's correct.

PN927

That means rather than using machinery, you have to employ people to actually pick the fruit and vegetable; is that right?---Correct. Some industries like nuts where they can use tree shakers, it's happening and it will happen over time, but at the moment, yes, we have to employ people to do the harvesting.

PN928

I guess the lack of an ability to use machinery necessitates a higher labour cost figure in terms of that picking work, doesn't it?---Correct.

PN929

At paragraph 12 of your statement, you talk about how sometimes different legal entities can be created and you say often this is required by funding entities to ensure security of their loans; is that correct?---That's correct.

**** JOHN ANTHONY*

DOLLISSON

XXN MR CRAWFORD

PN930

Is it correct that banks or other lenders can be reluctant to lend money to a farm operator because of the inherent risk involved in running a farm?---Correct, and weather issues and the vulnerability of agriculture, correct.

PN931

Yes, because a farmer could plant all their crops and then there could be a fire or a flood or a drought and they would lose all that money they have invested in the land, wouldn't they?---They'd lose the money invested in the crop. Obviously, they still have the money invested in the land. The land is always saleable.

PN932

Yes, true. That's a good point. In terms of the weather, on a farm most of the work is performed or a lot of the work is performed outdoors, isn't it?---Most of the work in horticulture is performed outdoors except when you get into the nursery industry and some of the more modern glasshouses, particularly tomato processing, et cetera.

PN933

So if it's raining, it's a difficulty on a farm. It's hard to perform work if it's raining; is that right?---That's correct, and it's potentially dangerous if you're using mechanical equipment as well.

PN934

That's, I guess, an additional difficulty that farmers face in terms of running a farm?---Correct.

PN935

In contrast to all of that farm work, Mr Dollisson, if there is a facility that is not on a farm that is used just for processing and packing functions, do you accept that those facilities will generally be highly mechanical, quite sophisticated?---Certainly in the bigger or the larger members in the industry, that's the case. For the vast majority of horticultural farms, they are small family farms, often run by the family labour with some supporting labour which may work to harvest the fruit and then post the harvest work to help package or process the fruit.

PN936

But for these larger facilities that are having produce from a number of sites brought in, they will generally be quite sophisticated mechanical operations, won't they?---The bigger ones are certainly that.

PN937

In contrast to someone operating a farm, there is a much greater ability in these facilities to use machinery as opposed to pure person-labour, isn't there?---There is in the bigger facilities, correct.

**** JOHN ANTHONY*

DOLLISSON

XXN MR CRAWFORD

PN938

Is it correct that in these larger facilities, in particular, but probably any facilities, they will be indoors, they will be covered?---They are generally covered particularly with the mechanical equipment.

PN939

So if it's raining, work could still occur in that facility, couldn't it?---Correct, and often if it's raining, the employees that were going to work in the harvesting will come in and work on the processing line.

...

Additionally, are you somewhat familiar with the Horticulture Award?---Reasonably familiar.

PN952

Would you accept that in comparison with other awards, the Horticulture Award provides quite favourable conditions for employers?---Look, I think they're reasonable conditions for employers, yes.

PN953

Would you accept that the reason there is quite a lot of flexibility and a number of quite generous provisions for employers in the

Horticulture Award is that it is taking into account the difficulties and risks that farmers face?---And the weather, of course, yes, agreed.

44. It is significant that Mr Dollisson, a very experienced and knowledgeable person in terms of the horticulture industry, specifically acknowledged some important differences between a farming operation and an off-farm packing facility and that the conditions in the Horticulture Award have been developed with regard to the unique difficulties faced by farmers.

ANZSIC codes

45. Finally, it is significant that the Australian and New Zealand Standard Industrial Classification (ANZSIC) system developed by the Australian Bureau of Statistics does not include the packing of fresh fruit and vegetables on a contract or fee basis within its Agriculture, Forestry and Fishing Division.

46. An employer undertaking this function without performing farming work would fall within the Administrative and Support Services Division – Class 7320 Packaging Services.¹⁹

47. This is significant because ANZSIC Codes are often relied upon when Commonwealth Government economic material for an industry is prepared such as the ABARES report titled ‘Australian vegetable-growing farms – An economic survey, 2014-15 and 2015-16’.²⁰ This report surveyed businesses falling within:

- ANZSIC 0122 - Vegetable growing (under cover); and
- ANZSIC 0123 - Vegetable growing (outdoors).

It appears only entities which grow vegetables would be surveyed for this report.

Summary

48. For the reasons outlined above, the AWU does not consider that the Horticulture Award should cover an employer who does not undertake farming operations.

¹⁹ See Exhibit “AWU 3”.

²⁰ See Exhibit “AWU 4”.

49. The Horticulture Award has been specifically developed for employers who operate a farm and is not an appropriate award for an employer who operates a highly mechanised off-farm indoor packing facility.

The Mitolo Group evidence

50. During cross-examination on 20 June 2017, Paula Colquhoun stated the following:

PN506

If you go about halfway down the page there's an exports section and if I take you to the vegetables part of the export section, the nominal figures, do you accept that, again, the export figures are forecast to continually grow for vegetables all the way through to 2021 to 22?---I do but also note you can't actually export potatoes so I don't think that would have much of an impact on our business.

51. Ms Colquhoun's statement that potatoes cannot be exported from Australia was incorrect. Potatoes are one of Australia's biggest vegetable exports.²¹

52. Ms Colquhoun either unknowingly made a definitive statement that was wrong or she has deliberately provided incorrect evidence. Either explanation warrants a cautious approach to the entirety of her evidence from the Commission.

53. Further, Ms Colquhoun's first witness statement included the following at paragraph [3] (our emphasis):

Having regard to my role and duties as Human Resources Manager and as a member of the Senior Management Team for the Mitolo Group I have a detailed understanding of all aspects of the Mitolo Group's business and in particular the matters dealt with in this statement.

54. But when Ms Colquhoun was asked in cross-examination on 20 June 2017 about profit levels for the Mitolo Group her understanding of the business changed dramatically:

PN488

MR CRAWFORD: At paragraph 126 of that statement, you talked about the cost under the Horticulture Award and the Storage

²¹ See page 81 of Exhibit "AWU 1"

Services Award. Has the Mitolo Group provided any data about its revenue for the Full Bench to consider in these proceedings?---I'm actually not privy to that information, I'm sorry. It's a family owned business and I wouldn't have had access to that information.

PN489

But you haven't provided any information in your witness statement about the revenue for the Mitolo Group have you?---No, no.

PN490

You haven't provided any information about the profit levels for the group have you?---No, I'm not privy to that at all, I'm sorry.

PN491

You're able to go away and work out the potential cost for the Mitolo Group depending on award coverage but you're not able to work out how much revenue or profit the Mitolo Group makes, is that correct?---That is correct because I'm privy to the information under my management and under my control, which is employee related data and payroll data. I don't have access to profit and loss statements or financials, I'm sorry.

55. It is euphemistically submitted that it is highly improbable that a member of the Mitolo Group's Senior Management Team would not be privy to basic financial information such as profit levels.

56. It is also significant that the Mitolo Group has continued investing heavily in the Angle Vale Road site despite the Mitolo Appeal Full Bench's Decision that this site is covered by the *Storage Services and Wholesale Award 2010*. Ms Colquhoun stated the following during cross-examination on 20 June 2017:

PN475

Yes. My friend from the NUW made mention earlier to the Mitolo Group investing further resources into the Angle Vale Road site, I think by the acquisition of the Oakville Group, is that correct?---That is correct.

PN476

I believe your most recent statement also refers to the construction of some new dams at the site, is that correct?---That is correct.

PN477

All right, so despite the Full Bench currently clearly stating that that site is covered by the Storage Services Award, the Mitolo Group is continuing to invest resources into that site isn't it?---Yes, it is.

57. It is inconceivable that a large business such as the Mitolo Group would continue investing in the Angle Vale Road site on the

assumption that the current legal situation will change and they will become covered by the Horticulture Award.

58. This evidence suggests the Mitolo Group considers it is worth investing in the Angle Vale Road site even if the *Storage Services and Wholesale Award 2010* continues to cover employees at the site into the future.

Concerns with the draft determination

59. The variations to the coverage provisions of the Horticulture Award sought by the employer groups in these proceedings are unusual and are not consistent with how modern award coverage is normally determined.

60. The effect of the variations would be to have coverage determined to some extent by the industry of the enterprise as opposed to the industry of the employer.

61. Section 143(2) of the FW Act states a modern award must be expressed to cover “specified employers” as opposed to a specified “enterprise of employers”.

62. It would be a significant step for the Commission to endorse this approach to determining award coverage and this could trigger a range of similar applications for other industry awards whereby a corporate group chooses the most advantageous award for its business and then seeks a variation so the whole corporate group can be covered by that award.

63. It is also arguable that if the applicable modern award is determined by reference to the operations of the whole enterprise, then the whole enterprise should be held liable for unpaid employee entitlements.

64. A fair safety net should not allow an employer to rely upon the operations of their whole corporate group when it suits but then rely on the fact that each company is a separate legal entity if there are outstanding employee entitlements.

**Crawford de Carne Lawyers
For The Australian Workers' Union**

31 July 2017