

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards

AM2016/25

Horticulture Award 2010 – substantive claims

SUBMISSIONS IN REPLY FROM THE AUSTRALIAN WORKERS' UNION

Background

1. We act on behalf of The Australian Workers' Union (AWU) in this matter.
 2. On 12 September 2016, Vice President Catanzariti issued Directions regarding the filing of material for substantive variations sought to the *Horticulture Award 2010 (Horticulture Award)* during the 4 yearly review proceedings.
 3. The following parties have filed material in support of variations to the coverage of the Horticulture Award:
 - Mitolo Group Pty Ltd (Mitolo);
 - Australian Industry Group (AIG);
 - Maranello Trading Pty Ltd (Maranello);
 - National Farmers' Federation (NFF);
 - Gayndah Packers Pty Ltd (Gayndah Packers);
 - Zarella Holdings Pty Ltd (Zarella); and
 - Voice of Horticulture (VOH).
 4. Mitolo, AIG and Maranello also appear to be seeking a variation pursuant to 160 of the *Fair Work Act 2009* (FW Act) to remove an ambiguity or uncertainty or to correct an error.
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5. Whilst they have expressed their position in a variety of ways, the position of the employer parties is essentially that they want to overturn the outcome of the *Mitolo*¹ proceedings.²
6. It is apparent from a review of the materials filed by the various employer groups that they have inundated the Commission with voluminous amounts of documentation, which is supposed to be relevant to the coverage of the Horticulture Award. The compilation of the Mitolo and Maranello submission and attachments may have kept Leo Tolstoy busy for the best part of a year.
7. However, much of the material is relatively worthless in terms of assessing the intended operation of the Horticulture Award, which is ultimately captured in a small number of paragraphs written by the Award Modernisation Full Bench.

The nature of the contentious work

8. The various employer parties are seeking to vary the Horticulture Award, so the facilities whereby employees wash, pack, store, grade and/or forward fruit and vegetables fall within the coverage of the Horticulture Award, even if they are not located on an agricultural holding or farm.
9. The *Mitolo* Full Bench stated the following in relation to the relevant Mitolo site:

*Relevantly, it is not cultivated land and is not used for the raising of crops or animals. It is best described as a mechanised vegetable processing facility.*³

10. This description is consistent with the following evidence referred to in paragraph [132] of the AIG's submissions in this matter (references omitted):

It is common for producers with multiple growing sites to have a single, centralised washing and packing facility where produce that has been grown and harvested is taken to be washed, graded and packed. Both witness statements reveal that these facilities are highly sophisticated and expensive and that it would be

¹ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524

² The issue raised by the AIG in relation to broadacre farming and the *Pastoral Award 2010* is a separate and discrete issue.

³ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB at [50]

nonsensical from both a financial and operational efficiency perspective to have more than one such facility. The evidence of Bryan Robertson also shows that these washing/packing facilities typically need to be in certain, centralised locations to be able to access the required electricity, gas and water, and to ensure that the produce is able to be easily transported.

11. Contrary to the submissions of the various employer groups in this case, there is nothing illogical about sophisticated fruit and vegetable processing facilities which are not located on farms being covered by a different award to a small packing shed located on a fruit and vegetable farm.

The fallacy that it was not intended for an employer to be covered by different awards and that location cannot determine coverage

12. Many of the employer submissions refer at length to problems associated with an employer having to apply different awards within its integrated business.

13. However, the *Mitolo* Full Bench specifically identified that Mitolo accepted its truck drivers were covered by a road transport award, as opposed to the Horticulture Award.⁴

14. In addition, in earlier modern award review proceedings, the evidence from Mitolo was that the following other awards are relevant to its workforce:

- *Manufacturing and Associated Industries and Occupations Award 2010*;
- *Wine Industry Award 2010*;
- *Clerks – Private Sector Award 2010*; and
- *Road Transport and Distribution Industry Award 2010*.⁵

15. Further, it is not unique in the modern award system for the same type of work to be covered by different awards with the relevant award being determined by reference to the location of the work.

⁴ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB at [56](1)

⁵ See paragraph 23 of the statement of Paula Colquhoun in the Casual employment proceedings – found here:

https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/ai%20group_reply%20evidence_%20casual%20and%20part-time%20employment_paula%20colquhoun_final_redacted.pdf

16. The coverage of the *Building and Construction General On-site Award 2010* proceeds strictly on this basis because its operation is limited to work performed on construction sites under clause 4.9.
17. This means work such as traffic control, concrete batch plant operation, landscaping and asphaltting can be covered by different awards depending on whether the work is performed on a construction site.
18. Similarly, the operation of a forklift can be covered by an array of different modern awards depending on the location of the work.
19. The Mitolo and Maranello submission helpfully highlights numerous modern awards that are confined in their operation to work at a specific location.⁶
20. The Mitolo and Maranello submission also helpfully highlights that the Award Modernisation Full Bench adopted a widespread coverage distinction between farming and processing operations.⁷
21. However, the horticultural industry is somewhat different to the seafood, poultry and livestock industries, in that many farmers have small-scale processing operations located on the farm. It was clearly intended that these processing operations would be covered by the Horticulture Award.
22. Further, there does not appear to be - based on the material filed by the employers in this case, a substantial number of employers who have off-site fruit and vegetable processing facilities.
23. In this context, given the definition of the “storage services and wholesale industry” in clause 3 of the *Storage Services and Wholesale Award 2010* specifically refers to “produce”, it is understandable that the Award Modernisation Full Bench would not have considered it necessary to create a separate processing award for the horticulture industry.

Award modernisation

24. Whilst an array of documents were filed by various parties during the award modernisation process, the task of ascertaining the Award Modernisation Full Bench's intent is best achieved by reference to the statement issued

⁶ See paragraph 119 of the Mitolo and Maranello submission

⁷ See paragraph 144 to 151 of the Mitolo and Maranello submission

when the initial exposure draft was released and the decision accompanying the making of the modern award.

25. In relation to the Horticulture Award, the relevant statement and decision are:

- *Award Modernisation* [2009] AIRCFB 50 from [23] to [30] (Statement); and
- *Award Modernisation* [2009] AIRCFB 345 from [50] to [66] (Decision).

26. The clearest statement of intent from the Award Modernisation Full Bench about the coverage of the two general farming awards: the Horticulture Award and the *Pastoral Award 2010*, can be found in paragraph [53] of the Decision where the Full Bench 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”.

27. Whilst the AIG try valiantly in their submission to suggest “within the farm gate” means something other than within the confines of a farm, even the Organisation for Economic Co-operation and Development’s (OECD) definition of “farm gate price” cited at paragraph [51] of the AIG submission is entirely consistent with this meaning. The “price of the product available at the farm” cannot mean the price of the product after it has been transported to an off-site processing facility and then processed.

28. The variation to the coverage of the Horticulture Award made by the Award Modernisation Full Bench on 23 December 2009⁸, whereby reference was added to “storing, grading, forwarding”, does not provide any indication of an intent to disturb the “farm gate” coverage limitation.

29. It is also worth noting that in the Statement, the Award Modernisation Full Bench refers at paragraph [26] and [27] to the cotton ginning industry and the fact that it is “an industrial processing activity rather than an agricultural activity”.

30. This distinction led the Full Bench to ultimately create a separate *Cotton Ginning Award 2010*. Cotton ginning enterprises are obviously

⁸ *Award Modernisation* [2009] AIRCFB 966

entirely reliant on cotton farms in terms of their workload and cotton farming is covered by the *Pastoral Award 2010*.

31. A similar distinction exists in relation to large-scale fruit and vegetable processing facilities, which are not located on agricultural land. The Award Modernisation Full Bench's treatment of cotton ginning is another indication that it quite deliberately intended to exclude processing operations which do not occur on agricultural land from the coverage of the Horticulture Award and the *Pastoral Award 2010*.
32. In making the Modern Awards, the Full Bench considered the backdrop of relevant pre-modern awards, including the history of industrial regulation, conditions, coverage and terminology. The AIG submissions helpfully highlight the *Horticultural Industry (AWU) Award 2000*⁹, as the application of that award should be considered. Other pre-modernisation award application provisions worth noting include those within such awards as *The Fruit Growing and Fruit Packing Industry Award*¹⁰ in Western Australia and the *Fruit and Vegetable Growing Industry Award - State 2002 (Queensland Award)*.
33. The coverage of the Queensland Award at clause 1.4 provided:
- 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.*
(Our Emphasis).
34. In NSW, two pre-modern awards distinguished rural industry work from large-scale fruit and vegetable processing facilities via the use of the "on farm" in the *Horticultural Industry (State) Award*.¹¹
35. The employer submissions regarding the term "farm gate", including AIG's position that "within the farm gate" could mean anything other than it does literally, are implausible in reference to the pre-modern awards the Full Bench modernised.

Economic performance of the industry

⁹ (AP784867CRV), http://www.airc.gov.au/consolidated_awards/ap/ap784867/asframe.html

¹⁰ (AN160134)

¹¹ (AN120247)

36. Many of the employer submissions refer to the precarious economic state of businesses operating in the horticultural industry in support of their argument that the conditions in the *Storage Services and Wholesale Award 2010* cannot be sustained.
37. There is nothing new in this – during award modernisation the employer parties sought that the operation of the Horticulture Award should be delayed by two years due to economic concerns.¹²
38. However, the Commission should treat anecdotal evidence from individual businesses with caution because the industry-wide economic data is more consistent with an industry on the rise.
39. The AWU has previously relied upon a range of economic data about the horticultural industry in the Casual and Part-time Employment common issue proceedings.
40. The material was ‘Exhibit 186’ in those proceedings and the most relevant data is summarised from paragraph [8] to [18] of the AWU’s ‘Closing Submissions’ dated 5 August 2016.¹³ The AWU seeks to rely upon this same material in these proceedings.
41. Specifically, the AWU refers to the following Commonwealth Government economic data which demonstrates a particularly strong performance by employers in the agricultural sector in recent years:
- The index for total prices received by farmers measured against 1997-98 rates was 152.1 in 2014-15 whereas the index for total prices paid in 2014-15 was only 146.7. In addition, the price received by farmers for both fruit and vegetables has increased at a higher rate than labour costs for farmers in the agricultural industry since 1997-98¹⁴;
 - From 2011-12 to 2014-15, labour costs for the agricultural industry increased by 3.1% whereas the real net value of farm production increased by 41%¹⁵;

¹² *Award Modernisation* [2009] AIRCFB 800 at [99]

¹³ Found here: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014196-197-sub-awu-050816.pdf>

¹⁴ See TAB 3, page 148 and 149 of Exhibit 186 – ABARES ‘Agricultural Commodities – vol. 6 no. 2 June quarter 2016

¹⁵ See TAB 3, page 150 of Exhibit 186 – ABARES ‘Agricultural Commodities – vol. 6 no. 2 June quarter 2016

- The gross value of total farm production from 2011-12 to 2014-15 increased by 14%. The gross value of production for total horticulture increased by 4.3% from 2011-12 to 2014-15 and is forecast to increase significantly in 2015-16 and 2016-17¹⁶;
- The total value of farm exports increased by 21% from 2011-12 to 2014-15. The total value of horticultural exports increased by 59% from 2011-12 to 2014-15 with further increases forecast for 2015-16 and 2016-17¹⁷;
- The NFF have recently publicly referred to IBISWorld research which says that of the top 20 Australian industries by growth in export, agricultural products make up at least 10 – “the growth potential of the sector simply cannot be refuted”¹⁸; and
- The growth in value of deposits into the Commonwealth Government’s ‘Farm Management Deposits Scheme’ is at extremely high levels including in relation to the horticulture industry. At 30 June 2016, the total holdings in the Farm Management Deposits (FMD) Scheme were \$5.07 billion.¹⁹

42. Further, whilst the horticultural industry obviously has its own unique challenges, it has not suffered the same negative effects of globalisation that many other industries such as manufacturing have endured.

43. This is because “the fresh produce industry in Australia generally has a high level of protection from imported produce due to Australia’s geographic isolation and Australian quarantine regulations”.²⁰

The section 160 application

44. It is somewhat puzzling that Mitolo, the AIG and Maranello are suggesting the current coverage of the Award is ambiguous, uncertain or an error.

45. A Full Bench of the Commission in the *Mitolo* proceedings did not give any indication that they considered the current coverage to be

¹⁶ See TAB 3, page 160 and 161 of Exhibit 186 – ABARES ‘Agricultural Commodities – vol. 6 no. 2 June quarter 2016

¹⁷ See TAB 3, page 166 of Exhibit 186 – ABARES ‘Agricultural Commodities – vol. 6 no. 2 June quarter 2016

¹⁸ See TAB 8 of Exhibit 186 – Country News ‘Leave trade deals alone’ 5 July 2016 by Tony Mahar CEO of the NFF

¹⁹ See <http://www.agriculture.gov.au/ag-farm-food/drought/assistance/fmd/statistics>

²⁰ See TAB 7, page 23 of Exhibit 186 – Costa Prospectus

ambiguous or uncertain. Hence the Full Bench arrived at precisely the same interpretation as Deputy President Bartel in the first instance proceedings.

46. Further, the *Mitolo* Full Bench specifically determined that the intent of the Award Modernisation Full Bench was to confine the operation of the Horticulture Award to farming locations.

47. The parties could have sought judicial review of the *Mitolo* Full Bench decision, but they did not.

48. Hence, it is clear the Commission has already conclusively determined that the coverage of the Horticulture Award is clear and deliberate.

49. The parties should not now be asking the Commission to arrive at a different conclusion, particularly when no new arguments have been presented to support that conclusion.

50. The section 160 application is an inappropriate attempt to “appeal” the *Mitolo* Full Bench decision, so the retrospective operation provisions can be utilised. The application should not be entertained by the Commission.

51. The resources of the Commission should be focused upon a merit review of the coverage clause in the Horticulture Award in the 4 yearly review process as contemplated by the *Mitolo* Full Bench.²¹

Broadacre farming

52. The AWU accepts that there may be a need to clarify the interaction between the coverage of the Horticulture Award and the *Pastoral Award 2010* following a variation to the definition of “broadacre field crops” in 4 yearly review proceedings for the *Pastoral Award 2010*.

53. The most efficient approach to resolving this issue is likely to be a conciliation process because it is likely an agreement can be reached between the parties given the intent of the variation to the *Pastoral Award 2010* was not to disturb the coverage of the Horticulture Award.

Conclusion

²¹ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB at [59]

54. The AWU is opposed to the claims by the employer parties in these proceedings to extend the coverage of the Horticulture Award beyond the “farm gate”.

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

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