

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Matter No.: AM2020/104

Re Application by: Australian Workers Union

In respect of the MA000028 Horticulture Award

NFF'S AIDE MEMOIRE

Background

1. This document is the NFF's response as to the Background Paper published by the Commission.¹ The Background Paper relates to the NFF's opposition to the AWU and UWU applications to amend the MA000028 Horticulture Award (also '**Award**').
2. This submission sets out the responses under the headings for each question posed. Those responses are:

Question 1

3. The NFF's position is:
 - a. that once the piece rate is set in accordance with cl 15 of the Award, there is no obligation to retain time records; and this construction follows from the plain meaning of the words in that clause; and
 - b. the NFF is not aware of the other parties' position on this point.

Question 2

4. The observations in [9]-[14] of the Background Paper are not contested.

¹ See <https://www.fwc.gov.au/documents/documents/awardmod/variations/2020/am2020104-background-paper-260721.pdf> .

Question 3

5. Whilst Question 3 in the Background Paper refers to paragraph [16], it appears that the Commission seeks comment on paragraphs [17]-[27] of the Background Paper, which involves consideration of sections 578, 157 and related provisions of the FW Act: see particularly [18]-[19] of the Background Paper.
6. NFF adopts the submission of AFPA which is summarised in paragraph [26] of the Background Paper. In effect, the placing of a 'floor' of the hourly rate does involve the minimum rates objective in the FW Act.
7. NFF submits this submission should be preferred over the AWU's submission to similar effect in the AWU's 19 March 2021 submission.

Question 4

8. NFF submits that the essence of the AWU's application is not a 'work value' claim – whether this is put in the alternative or not - and that the AFPA's submission (which appears largely in accordance with AiG's submission on this point) is to be preferred.

Question 5

9. NFF submits that certain of the considerations in section 284 are similar to those the Commission is required to consider in section 134, of the FW Act, and in particular sub-section 134(1)(a),(c), and (e).
10. Apart from repeating its submissions on those sub-sections (including where they are repeated in this aide memoire below) NFF adopts AFPA's submission on this point. NFF observes that those two positions are not inconsistent.

Question 6

11. NFF does not dispute the characterisation of Hu (No 2) (per Rangiah J) in [57]-[58] of the Background Paper.

Question 7

12. NFF does not dispute the findings contained in this question.
13. This conclusion is reinforced by consideration of the special leave transcript, where in 2020 FWO sought to traverse some of the findings of Rangiah J in Hu (No 2) and of the intermediate appeal judges in the Hu Appeal.² It is clear from that transcript that Kiefel CJ and Edelman J (hearing the special leave application) did not find that a 'default' to hourly rate exists.

Question 8

14. Whilst accurate, the summary of the NFF submissions tends to reduce to 'economic pressures' the greater detail of NFF's submissions filed on 26 July 2021. It is striking that the AWU, UWU and Victorian submissions either do not deal comprehensively with economic pressures faced by growers – or else, deal with them in a trifling way.
15. For this reason, NFF repeats its conclusions paragraphs [8],[11]-[13], and [18]-[26] of the NFF submission. The NFF adds that the Commission should be slow to add economic burdens to employers such as those in the Horticulture industry, without a clear warrant to do so.
16. NFF also says that the evidence from the AWUs own organisers revealed a limited approach to enforcement by the organisers and those who would seek to assert employee's rights.

Question 9

17. The NFF presses its opposition to the AWU/ UWU Application.
18. However, in the alternative, if the Commission is minded to make a variation to the Award, then NFF broadly supports the AFPA proposal, subject to some observations. Those observations are (at the time of writing) incomplete, as responses from all of the growers asked about the AFPA proposal have not

² <https://jade.io/article/709120>. It is cited as FWO v Hu & Ors [2020] HCATrans 11.

been received. NFF will give its responses in oral submissions on 30 July 2021.

Question 10

19. None of the observations in [155]-[157] are contested.
20. NFF observes that the 'social' objectives, with a wide ambit, creates a wide scope for the Commission to produce an outcome. In effect, this is a balance between the major competing interests – the modern awards objective and the social objectives.

Question 11

21. The proposition contained in this Question of the Background Paper is not contested.

Question 12

22. The proposition contained in this Question of the Background Paper is not contested.

Question 13

23. The proposition contained in this Question of the Background Paper is not contested.

Question 14

24. The proposition contained in this Question of the Background Paper is not contested.

Question 15

25. There are no further corrections or additions to this Question.

Part B – NFF and AFPA Evidence

26. The NFF presses its opposition to the AWU/ UWU Application.

27. However, in the alternative, if the Commission is minded to make a variation to the Award, then NFF broadly supports the AFPA proposal, subject to some observations.

TIM DONAGHEY

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29 July 2021