

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 SUBMISSIONS AS TO EVIDENCE

Background

1. This document is the NFF's submission as to evidence¹ of the parties in relation to the NFF's opposition to the AWU and UWU applications to amend the MA000028 Horticulture Award (also '**Award**'). In this submission, I refer to the Fair Work Commission as 'FWC' or 'Commission'.
2. This submission comprises the following parts:
 - a. Part A - the union evidence² - including cross-examination;
 - b. Part B - the NFF and AFPA evidence;
 - c. conclusions.

Part A - Union Evidence

3. The union evidence comprised both lay witnesses and two experts. The lay witnesses included:
 - a. union officers and delegates. There were several in number and included Mr Bevan, Mr Suleiman Ali and Mr Robertson; and

¹ See transcript paragraph [62], 7 July 2021.

² Each of the AWU and UWU are dealt with together.

- b. pickers, though in this second category relatively few in number. They included Mr McDonald, Ms Ee, Ms Wang and Ms Hsu.
4. The expert evidence was of Dr Johanna Howe and Dr Elsa Underhill.

Findings which ought to be made

5. In broad compass, the findings in relation to the lay evidence which should be made include the conclusions set out in this paragraph, and paragraphs [6] and following of this submission, below. These include that:
- a. the unions did not challenge (whether in re-examination or otherwise) the conclusion that there was limited enforcement of obligations under the current form of the Horticulture Award. This evidence consisted of two components, which I set out further below;
 - b. the first part of this conclusion (chronologically) was the evidence of certain pickers. Evidence from one, a Mr Karhu was not required for cross-examination. The evidence of these pickers as to a lack of enforcement varied between the following:
 - i. because of 'language barrier';³
 - ii. because of 'lack of knowledge'. The particular witness stated 'I did not realise. . . I had entitlement' to complain;⁴ and
 - iii. because the worker 'just accepted it';⁵
 - c. the evidence from union delegates and officers was to a vastly different effect, and in the main either improper (in the sense of being hearsay or opinion) or merely conclusions. Much of that does not require further examination and will be the subject submissions as to its weight; and

³ See paragraph [90], Ms Wang's statement (AWU#2).

⁴ See paragraph [165], Ms Ee's statement (AWU#1)

⁵ See paragraph [529], of 13 July 2021. See also AWU#2.

- d. taking these two positions together, the emphasis from AWU and UWU upon non-compliance and low pay, the non-enforcement evidence assumes a particular focus. That is, the reason given for non-enforcement does not rise to the point of making out a case for amendment of the Horticulture Award. Put simply, an enforcement question is only part of the equation. Amending the Award is not (and could not be) a panacea for the enforcement of horticulture industry wages. The AWU's evidence (in particular) does not rise to the point of making out this case. It is akin to making a hopeful gesture, in effect seeking *some change* on the part of the Horticulture Award would lead to greater enforcement and reduced adverse consequences.

On this basis alone, the NFF submits that the union evidence falls short of what is required for the AWU/ UWU's application for amendment.

6. The findings which should be accepted by the Commission include that main aim of the AWU/ UWU application would not be served by the granting of the application – that is, the amendment sought would not necessarily motivate those who are now not abiding by the Award to do so in future. There is no evidence as to any causal link between the facts or points; merely assertions. This is wholly unsatisfactory.

Experts

7. Turning to the expert evidence, NFF submits that this is of limited utility for the Commission. Each of the union experts identified lacunae in the data that exist in relation to those persons engaged (or in many cases, apparently engaged) to pick produce in the Horticulture industry in Australia. For the reasons set out in paragraphs [14]-[16] below, Mr Houston's assessment of that data should be preferred.

Part B – NFF and AFPA Evidence

8. The NFF evidence consisted of statements of growers from a variety of locations; a variety of types of operation and a variety of produce throughout Australia.

9. This evidence presented a comprehensive overview of growers from the smaller, family operations (see exhibit NFF#7, Mr Gaeta's statement) to the larger commercial operations (see exhibit NFF#6, Mr Trewin's statement) and various points in between these extremes. It also presented in the substance of the statement evidence, an array of unchallenged evidence on subject matters related to the setting of piece rates, the adjustment of piece rates and other related matters
10. In addition, NFF evidence came from two additional sources:
 - a. non-grower evidence. That was of Mr Fetui and Ms Uata (both pickers). Neither was required for cross-examination and both statements were tendered; and
 - b. Mr Rogers, an officer of the NFF.

Findings which ought to be made - lay witnesses

11. In terms, the NFF submits that findings should be made that:
 - a. the Horticulture Award, in its present form, is capable of grower compliance. Each of the growers referred to in paragraph [9] above gave in their statements detailed evidence about that compliance – and, save for one witness of them (Ms Silverstein) none was challenged about whether they in fact complied with the Award;
 - b. the Commission should adopt as a whole the evidence of Mr Leileiga Fetui and of Ms Akata Uata. Each is a powerful statement, from a picker's perspective about the negative consequences of granting the AWU/ UWU application;
 - c. the challenge to the NFF's witness, Mr Rogers was more about his understanding of survey evidence than about the content of the evidence itself: see Transcript paragraphs [1846] and following. Such survey evidence should be given considerable weight given that it is a voluntary anecdotal statement from those who were motivated to participate; and
 - d. the reason given for non-enforcement does not rise to the point of making out a case for amendment of the Horticulture Award. Put simply, and enforcement

question is only part of the equation. Amending the Award is not a panacea for the enforcement, given that other avenues exist and were acknowledged by union witnesses.

12. Consideration was given by grower witnesses⁶ of the effect upon access to labour, where piece rates are no longer pursued by many growers. This aspect of the NFF's case has been unchallenged and uncontradicted by the unions' evidence.
13. Special mention should be made of the lack of challenge (whether in cross-examination or otherwise) to any NFF witnesses concerning the consequences of making the AWU/ UWU's variation to the Horticulture Award. The effect of this is:
 - a. many statements by growers about productivity and viability (and occasionally profitability) were not challenged by either union party;
 - b. the statements about the effect of the proposed changes upon the continued growing of certain produce – and either automation or termination of unproductive employees - and changing the balance of crops planted, in order to maximise returns, were not challenged;⁷ and
 - c. the statements about selection of particular workers – who would be productive, and the non-selection of other workers is a far from desirable outcome for growers. Again, this was not challenged in evidence.

Even if, which is contrary to the NFF's submission, the AWU/ UWU application rose to the level of making a case to amend the Horticulture Award, this evidence is a substantial countervailing factor. In short, this undermines the force in the AWU/ UWU application for variation.

Expert evidence

14. The expert evidence of Mr Houston was not lead by NFF. NFF adopts the evidence, to the extent of the critique by Mr Houston in the HoustonKemp report of each of Dr

⁶ Mr Moss statement (NFF#9) – see [39]-[41]. Ms Distill statement (NFF#13) at [28]; Mr Eckersley statement (NFF#14) at [34]; Mr Kelly statement (NFF#2) at [31]-[32].

⁷ See evidence at fn6 above.

Howe and Dr Underhill, regarding hypothecations regarding the average hourly rate paid to Horticulture workers.

15. The NFF submits that it is axiomatic – given that the data regarding all pickers in the Horticulture industry is not complete, that survey produced for another purpose could have substantial force in the way that each of the union witnesses maintained.
16. By contrast, the views of Mr Houston in both of his reports tendered should be preferred by the Commission.

Conclusion

17. The NFF evidence makes good its case concerning productivity and the utility in various regions and for various types of businesses of the current Award terms.
18. The AWU/ UJU application makes scant attempt to consider what consequences for horticulture might exist, if the present application were to succeed. Aside from unreliable opinion evidence from union employees and delegates – none of whom is qualified to give such opinion – little is advanced in this respect.
19. The AWU/ UJU did not challenge the direct statements in respect of the consequences, which were advanced by growers in their statements. In such circumstances, the Commission should accept and give weight to those grower statements.

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26 July 2021