

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Matter No.: AM2020/104

Re Application by: Australian Workers Union

As to MA000028 Horticulture Award

NFF'S SUBMISSIONS AS TO KELLY AND MCCLINTOCK EVIDENCE

Background

1. This document is the NFF's submission as to particular documents tendered to the Commission by the AWU.¹ Those documents were subpoena'd from growers in the days before commencement of the hearing and have been the subject of limited submissions to this point.

Union tender

2. The AWU tendered evidence including:
 - a. a bundle of documents produced by Anthony Kelly, a witness called by the NFF (exhibit AWU#18) ('**Kelly documents**'); and
 - b. a bundle of documents produced by Brent McClintock, a witness called by the NFF (exhibit AWU#21) ('**McClintock documents**').
3. On each of 23 July and 28 July 2021, the Commission² produced information notes which identified:

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

² The use of the 'Commission' in this sense appears to refer to Commission research staff, not to members of the tribunal. See notes on piece rates appear to be produced by Commission staff. The NFF is not aware of any request or direction to conduct this analysis, but the documents themselves bear references to 'Fair Work Commission calculations' (see 28 July note, page 2 at the foot of chart 1) and 'Commission staff' (23 July note, at the foot of page 3).

- a. proportions of the payments made above the Horticulture Award Level 1 threshold; and
 - b. other information, such as numbers of employees used by the employers of Mr Kelly and Mr McClintock.³
4. The balance of this submission concerns the utility of the exhibits AWU#18 and AWU#21.

Findings which ought to be made

5. In broad compass, the only findings available to the tribunal in relation to the Kelly-McClintock evidence is that each has complied with their respective notices to produce, by producing to the union parties the exhibits which have now entered into evidence.
6. Any other conclusion or finding of fact faces the difficulty (which is outlined below) that other evidence which may explain the contents of the Kelly-McClintock evidence either was not provided to the tribunal; or else was not put to the witnesses in a way which allows them the opportunity to deal with that puttage.

Findings which ought not to be made

7. Absent cross-examination on this point (and appropriate puttage) the use to which the Commission can put exhibits AWU#18 and AWU#21 are limited.
8. The reasons for this are twofold. The *first* is the rule in Browne v Dunn⁴ which would prevent any conclusion from the raw data alone (including inferences)⁵ absent further evidence.
9. The rule in Browne v Dunn is a fundamental one, and a rule of fairness: MWJ v R.⁶ The effect of not suggesting a particular characterisation or interpretation of exhibits

³ See page 1 of the 28 July note.

⁴ (1893) 6 R. 67. For a recent Australian application of the rule in this case, see Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1.

⁵ Note Hunt J in Allied Pastoral, above n3 at NSWLR 16.

⁶ [2005] 222 ALR 436, at [17] per Gleeson CJ and Heydon J.

AWU#18 and AWU#21 leaves any explanation (or expansion) which either witnesses may have given as an open question.

10. The second is the factual or evidentiary approach taken to inferences, where not all facts are present and in evidence. The High Court has found in relation to inferences:⁷

An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.

11. This *dicta* from G v H has been applied widely. In particular, this limit on the extent to which inferences may be drawn has been considered and approved, both in decisions of State industrial tribunals⁸ and in this tribunal, including its predecessors.⁹ Absent further explanation, it is submitted that no inference can be drawn from the contents of AWU#18 and AWU#21.

Conclusion

12. The NFF does not dispute the accuracy of the Commission's assessment of the piece rate data.
13. In circumstances where the party tendering the documents did not suggest otherwise to either witness, or even suggest any assessment of exhibits AWU#18 and AWU#21, little in the way of conclusions can be drawn beyond what is outlined in the notes.
14. Any attempt at further assessment is in the nature of speculation, as it requires either evidence not tendered, or further evidence beyond the exhibits AWU#18 and AWU#21.

⁷ G v H [1994] HCA 48; 181 CLR 387; 68 ALJR 860; 124 ALR 353 at [#].

⁸ See for example Harrison DP in Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2004] NSWIRComm 65; Samaraweera v Director-General of Health [2011] NSWIRComm 1009.

⁹ White v Kabi Organic Golf Course [2012] FWA 2376, per Spencer C; see also Brock v BHP Coal Pty Ltd [2013] FWC 9200, per Asbury DP.

TIM DONAGHEY

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6 August 2021