

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 ON EVIDENTIARY WEIGHT

1. On 9 July 2021, the parties agreed that objections to witness statements would not be made. In place of objections, that arrangement, each party would be free to make submissions that a piece of evidence should be given little weight or no weight (irrespective of whether the relevant witness was cross-examined).¹
2. The NFF's submissions as to weight appear in table below the signature at the end of this submission.
3. In effect, the NFF's submissions are:
 - a. the main driver of that objection to the force of such witness evidence, is as is customary in the Commission *the fairness* of the particular evidence. In each case where there is a table set out below, the witness evidence is similar, and a pattern emerges in relation to the types of statement given (for example) without detail, or as a conclusion;
 - b. in many cases this is under the guise of 'experience' or impression of the particular witness. Given the limited probative value of such statements, the

¹ Email communication from AWU to Justice Ross' associate, dated 9 July 2021.

NFF submits that the Fair Work Commission is not assisted by evidence which not a direct statement of the particular witness; and

- c. that in each case where the AWU or UWU rely upon hearsay, opinion or a conclusion (whether on their own, or based further objections, such as hearsay with opinion, or hearsay with conclusion evidence) in its statements, then that evidence should be given little to no weight in the Commission’s deliberations.

Statement of Ms Ee (AWU#1)

Paragraph number in statement	Paragraph or part	Basis for objection
11	Final sentence	<i>Hearsay</i> – This is an extensive assessment of un-named co-workers (we are not given a number) and is both an aggregation of the unknown evidence and based upon earnings apparently communicated by a witness (or witnesses) not called to give evidence
10	Final two sentences	<i>Hearsay</i> – this is a short assessment of un-named persons (‘some workers’) and we are not given any number of such persons, nor an indication of the identity of such persons. <i>Conclusion</i> – the conclusion about ‘10% of them [ie ‘the workers’] is both a conclusion and an aggregation of other information which is not revealed by the witness

Statement of Ms Wang (AWU#2)

Paragraph number in statement	Paragraph or part	Basis for objection
12	Second, third and fourth sentences	<i>Hearsay</i> – this is a statement about what a third party did – or what that third party could do. Hearsay to the extent of both conduct and records, which are not produced

Statement of Mr Bevan (AWU#4)

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
15	Whole	<i>Opinion and hearsay</i> – this appears to be based upon the witness' assessment – of some factor or factors not statement. It is neither given by an expert nor is it probative
18	Final sentence from 'I have had reports' onwards	<i>Conclusion and hearsay</i> – this appears to be information told to the witness, from undisclosed 'other persons'. Further, this is an aggregation of information and to that extent a conclusion
19	Whole	As per paragraph 15 of the same statement, above
20	Whole	As per paragraph 15 of the same statement, above
23	Whole	As per paragraph 15 of the same statement, above
29	First sentence, last sentence	<i>Opinion</i> – this appears to be the witness' belief. The witness is not qualified as an expert. The witness does not say upon which evidence the opinion is based and gives only the conclusion
30	Whole – starts 'a massive benefit'	As per paragraph 29 of the same statement, above.
31	Whole - starts 'I am confident'	As per paragraph 29 of the same statement, above.

Reply statement of Mr Bevan (AWU#5)

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
8	Whole	<i>Opinion</i> – this appears to be the witness’ belief. The witness is not qualified as an expert. The witness does not say upon which evidence the opinion is based and gives only the conclusion
11 – 13	Whole	As per paragraph 8 of the same statement, above
15	Second sentence	As per paragraph 8 of the same statement, above

Statement of Mr Cameron (AWU#6)

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
6	Whole	<i>Conclusion and opinion</i> – this is based upon the opinion of the witness, and an aggregation of some impression not set out in the statement.
9	First sentence	<i>Opinion</i> – this appears to be the witness’ belief. The witness is not qualified as an expert. The witness does not say upon which evidence the opinion is based and gives only the conclusion
14	Whole	<i>Hearsay and opinion</i> – this is a conclusion based upon the opinion of the witness, and an aggregation of some impression not set out in the statement.
15	Whole, excluding first sentence	<i>Hearsay and opinion</i> – as per paragraph 14, above
16- 18	Whole	<i>Hearsay and opinion</i> – this appears to be a combination of opinion, applied to such diverse ranges of subject matters as economics, law and price structures in the horticulture

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
		industry. The witness gives the opinion without being an expert and only the conclusion.

Statement of Mr Gulay (AWU#7)

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
16-20	Whole	<i>Hearsay</i> – this is an aggregation of out-of-court statements without the witness revealing how the information came to him, from whom, nor why that person or persons was not called to give evidence
21	Whole	<i>Hearsay and opinion</i> – this is a conclusion based upon the opinion of the witness, and an aggregation of some impression not set out in the statement.

Statement of Mr Cowdrey (AWU#8)

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
15-16	Whole	<i>Hearsay and opinion</i> – this is a conclusion based upon the opinion of the witness, and an aggregation of some impression not set out in the statement. 'Based on my experiences' in paragraph 15 does not assist the Commission
17-21	Whole	<i>Hearsay and opinion</i> – this appears to be a combination of opinion, applied to such diverse ranges of subject matters as economics, law and price structures in the horticulture

Paragraph number in affidavit	Paragraph or part of affidavit	Basis for objection
		industry. The witness gives the opinion without being an expert and his conclusions are little more than conclusions.

Statement of Mr Roulstone (AWU#9)

Paragraph number	Paragraph or part	Basis for objection
11	Last sentence	<i>Hearsay and opinion</i> – this is a conclusion based upon the opinion of the witness, and an aggregation of some impression not set out in the statement. 'Based on my experiences' in paragraph 11 does not assist the Commission
15-16	Whole	<i>Hearsay and opinion</i> – this is as per the objection to paragraph 11 above 'Based on my experiences' in paragraph 15 does not assist the Commission
17-21	Whole	<i>Hearsay and opinion</i> – this appears to be a combination of opinion, applied to such diverse ranges of subject matters as economics, law and price structures in the horticulture industry. The witness gives the opinion without being an expert and his conclusions are little more than statements, which do not disclose the means of arriving at his conclusions (which in any case are akin to submissions).
28	Final sentence	<i>Opinion</i> – this appears to be a collection of assessments by the witness, without disclosing the extent to which the information presented is observed (ie actual evidence) or merely conclusion. The witness is not an expert
29	Whole	<i>Hearsay and opinion</i> – this appears to be a combination of opinion, based upon what the un-named third parties have in

Paragraph number	Paragraph or part	Basis for objection
		mind as a motivation: the reasoning “in search of good employers” does not assist the Commission
30	Whole	As per paragraph 29 in this statement, above
37 - 41	Whole	<p><i>Hearsay and opinion</i> – this appears to be a combination of opinion, which is the witness’ assessment, of un-named sources of information such as job advertisements, assessments of ‘the majority’ of un-named documents and other things.</p> <p><i>Conclusionary</i> – in addition, these paragraphs contain conclusions which do not assist the Commission in identifying the reasoning of the witness in reaching them. The witness is not an expert</p>

Statement of Mr Carter (AWU#10)

Paragraph number	Paragraph or part	Basis for objection
9	Last sentence	<i>Opinion</i> – the statement is a conclusion based upon the opinion of the witness, and an aggregation of some impression or information not stated. The witness is not an expert
21	Whole	As per paragraph 9 of this statement, above
17, 24-25	Whole	<i>Hearsay and opinion</i> – this is a conclusion based upon the opinion of the witness. It is hearsay to the extent that the witness seeks to speak to the ‘experience’ of particular workers, not named
37 - 39	Whole	<i>Hearsay and opinion</i> – this appears to be a combination of hearsay, (speaking the mind of un-named persons) and

Paragraph number	Paragraph or part	Basis for objection
		opinion (representing the witness' unqualified and conclusionary view
48-50	Whole	As per paragraphs 37-9 in this statement, above
53	Whole	<i>Opinion</i> – as per paragraph 9 of this statement, above

Statement of Mr Robertson (UWU#1)

Paragraph number	Paragraph or part	Basis for objection
27	Second sentence from 'in practice they operate' onwards	<i>Opinion</i> – the statement is a conclusion based upon an assessment of the witness, and not upon anything seen or done by him. The witness is not an expert
29	Last sentence	As per paragraph 27 of this statement, above
30	Whole	As per paragraph 27 of this statement, above
31	Whole	<i>Hearsay</i> – this is an aggregation of out-of-court statements without the witness revealing how the information came to him, from whom, nor why that person or persons was not called to give evidence

Second statement of Mr McDonald (UWU#3)

Paragraph number	Paragraph or part	Basis for objection
18	Whole	<i>Opinion</i> – the statement is a conclusion based upon pure opinion of the witness, and not upon anything seen or done by him. The witness is not an expert

Statement of Mr Karhu (UWU#5)

Paragraph number	Paragraph or part	Basis for objection
23-5	Whole	<i>Relevance</i> – this evidence (in at least 23-24) does not fall for consideration in the present application. <i>Hearsay and opinion</i> – the same paragraphs are (including in paragraph 25) a statement which is a conclusion based upon the opinion of the witness, The witness is not an expert

Statement of Mr Wakefield (UWU#4)

Paragraph number	Paragraph or part	Basis for objection
24	Whole	<i>Opinion</i> – the statement is a conclusion based upon pure opinion of the witness, and not upon anything seen or done by him. The witness is not an expert

Tim Donaghey
Aickin Chambers
29 July 2021