DECISION

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Application by Emma Treves
(AM2022/25)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
COMMISSIONER MCKENNA

MELBOURNE, 26 MAY 2023

Application to vary a modern award – Horticulture Award 2020 – payment of overtime for casual employees – clause 21.4.

Introduction

[1] On 9 August 2022, Ms Emma Treves lodged an application pursuant to s 158 of the *Fair Work Act 2009* (Cth) (FW Act) to vary the *Horticulture Award 2020* (Award). Ms Treves claims to be an employee covered by the Award with standing to make the application on this basis. In her application, Ms Treves seeks to delete clause 21.4 of the Award so as to remove the current overtime penalty rate entitlement for casual employees. Clause 21.4 provides:

> **21.4 Payment for overtime—casual employees**
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> Each hour worked in excess of 12 hours per engagement, 12 hour[s] in a single day or 304 ordinary hours over an eight week period will be paid at a rate of **175%** of the employee's ordinary hourly rate for his or her classification (inclusive of the casual loading).

[2] Clause 21.4 was introduced during the 4 yearly review of modern awards (4 yearly review), as a consequence of the part-time and casual employment common issues proceedings.[1]

[3] Ms Treves contends that the overtime entitlement should be removed because, while it was intended to benefit employees, it has in fact left them worse off. Employers cannot afford to pay overtime rates, she contends, and as a result once casuals reach 304 hours in an eight-week period they are not given any further work until the next eight-week period begins. This has led, she says, to a loss of work and income.

[4] Evidence and submissions have been filed in respect of Ms Treves' application in accordance with the Commission's directions. All parties appearing in the matter agreed that the matter should be determined 'on the papers', that is, without a formal hearing.

History of overtime entitlements for casual employees in the Award

[5] When the Award first took effect on 1 January 2010, it provided for overtime entitlements in clause 24.2 as follows:

> **24.2 Payment of overtime**
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> **(a)** The rate of pay for overtime will be 150%, except for overtime worked on a Sunday.
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> **(b)** The rate of pay for overtime worked on a Sunday, except during harvest period, will be 200%.
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> **(c)** Should employees be required to work on a Saturday and the majority of such employees elect not to work on the Saturday but rather on the Sunday then such work performed on that Sunday will be paid for at the rate prescribed for Saturday work.
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> **(d)** During harvest period, the first eight hours of overtime in a week may include five hours[‘] work on a Sunday at the rate of 150% but all Sunday work in excess of the eighth overtime hour worked in the week, or in excess of five hours on a Sunday, will be paid at the rate of 200%.
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> **(e)** All employees required to work on a Sunday will be paid for a minimum of three hours.

[6] However, clause 15.1 of the Award separately permitted, by agreement between the employer and the employee, for the employee to be paid a piecework rate rather than an hourly rate. Clause 15.2 required the piecework rate to enable the 'average competent employee' to earn at least 15 per cent more than the relevant hourly rate under the Award. An agreed piecework rate was to be paid for all work performed in accordance with the piecework agreement, and clause 22 (ordinary hours of work and rostering), clause 24 (overtime) and clause 24.5 (meal allowance) did not apply to an employee on a piecework rate (clause 15.2 and 15.5). Accordingly, clause 24.2 only ever had effect with respect to non-piecework employees.

[7] In the course of the part-time and casual employment common issues proceedings conducted as part of the 4 yearly review, the Australian Workers' Union (AWU) advanced a claim to 'clarify' that casual employees are entitled to overtime rates where the employee has worked outside the span of hours. This claim had its origin in a finding made by the Fair Work Ombudsman that there was an ambiguity in the application of clause 24.2 to casual employees. The then clause 10.4(a) (now 11.1) provided that a casual employee's ordinary hours of work were 'the lesser of an average of 38 hours per week or the hours required to be worked by the employer', but, because there was no definition of the period over which ordinary hours were

to be averaged, the ordinary hours of a casual employee could not conclusively be determined. Consequentially, a casual employee's entitlement to overtime rates also could not be determined.

[8] This claim was dealt with in a Full Bench decision issued on 5 July 2017[2] (2017 decision). The AWU's claim, in the form ultimately advanced, was for the ordinary hours of casual employees to be the lesser of 38 per week or the hours of work required by the employer, to be worked between 6:00 am and 6:00 pm Monday to Sunday.[3] The AWU called four witnesses in support of its claim, three of whom were AWU officials who described the working conditions of casual horticulture workers in various parts of Australia. The AWU's case was that the horticulture industry was highly casualised, that casual employees were not being paid overtime rates, that the lack of overtime rates for casual employment incentivised casualisation, and that there was no rationale for a distinction to be made between permanent and casual employees in relation to overtime entitlements. The AWU also noted that, prior to 2010, casual employees in Queensland were entitled to overtime penalty rates under the *Fruit and Vegetable Growing Industry Award – State 2002*.

[9] The AWU's claim was opposed by the National Farmers' Federation (NFF). It adduced evidence from 24 witnesses, most of whom were operators of horticulture businesses. It submitted that businesses in the horticultural industry did not operate in a standard business environment where work could be limited to preconceived notions of standard hours, since the environment dictated the work roster, and horticulture farmers were price takers, meaning that the principles underpinning the payment of penalty rates were inapplicable to the industry. The claim was also opposed by Australian Business Industrial and the Australian Industry Group (Ai Group), which also adduced evidence from a number of witnesses from the industry.

[10] In its consideration of the claim, the Full Bench first analysed the history of the development of the relevant provisions of the Award,[4] and stated the following conclusions:

> [744] … That has left the position in the Horticulture Award quite unclear. Except perhaps in relation to shiftworkers, clause 22 does not identify the ordinary hours of casual employees. Clause 10.4(a) defines the ordinary hours of casual employees as being '... the lesser of an average of 38 hours per week or the hours required to be worked by the employer', but in relation to the former situation there is no period over which the average is to be calculated, meaning that the ordinary hours are ultimately incapable of identification. That has 2 consequences. First, the Horticulture Award does not comply with s 147 of the FW Act, which relevantly requires a modern award to 'include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award <u>and each type of employment permitted by the award</u>' (underlining added). Second, although the overtime provisions in clause 24 do not in terms exclude casual employees, the lack of any proper definition of their ordinary hours means that there is no foundation upon which any payment of overtime may be calculated.
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> [745] Employer groups and their members in the industry have interpreted the Horticulture Award as excluding casuals from any entitlement to overtime. This interpretation is substantially based on clause 22.1(d) which, as set out earlier, provides 'All time worked by full-time and part-time employees in excess of the ordinary hours

will be deemed overtime'. However the exclusion of any reference to casuals in this provision is not determinative of the position, since clause 22.1 is only concerned with the ordinary hours of full-time and part-time employees (other than shift workers) and does not deal with casual employment at all.

[746] Certainly the evidence clearly demonstrates that employers covered by the Horticulture Award do not, as a matter of fact, pay overtime penalty rates to casual employees. That is the case notwithstanding that the [*Horticulture Industry (AWU) Award 2000*] at least required Schedule A employers to pay overtime to certain categories of casual employees, and at least one pre-reform State award of significance, the *Queensland Fruit and Vegetable Growing Industry Award – State 2002*, also required casuals to be paid for overtime.

[747] One aspect of the Horticulture Award which received little attention in the evidence and submissions was clause 15–Pieceworkers… Clause 15 sets out a facilitative mechanism by which employees, including casual employees, may agree with their employer to be paid piecework rates that 'must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee' (clause 15.2). Critically, clause 15.5 provides that, relevantly, the overtime provisions of clause 24 do not apply to an employee who is paid piecework rates. The evidence and submissions before us did not disclose the extent to which casual employees under the Horticulture Award are paid piecework rates in lieu of hourly rates. Presumably this must occur to a significant degree given the attention given to piecework in the award modernisation process. It does mean that the AWU's overtime claim would have no effect on casual employees on piecework rates and their employers. However, whatever may be the extent of the utilisation of piecework rates, the evidence before us establishes that the AWU claim would affect significant numbers of employers and their casual employees.

[11] The Full Bench concluded that the Award's non-compliance with s 147 needed to be rectified, and that 'as a matter of general principle … we consider that it is necessary to achieve the modern awards objective of a fair and relevant safety net for a modern award which prescribes overtime penalty rates for weekly employees to also prescribe them [for] casual employees.' In reaching this conclusion, the Full Bench said that it had taken into account the considerations specified in s 134(1) of the FW Act and placed particular weight upon ss 134(1)(da)(i) ('the need to provide additional remuneration for … employees working overtime') and (f) ('the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden').

[12] Importantly, for present purposes, the Full Bench then made the following finding:

[749] We consider that evidence adduced by the NFF and ABI convincingly demonstrates at least the following propositions:

(1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs

would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.

(2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.

(3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.

(4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence. Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry. The alternatives mentioned were to move to less labour intensive crops or reduce output.

(underlining added)

[13] The Full Bench also found that award non-compliance in the horticulture industry was widespread and therefore that ‘the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.’[5] The Full Bench said that it was ‘necessary to bear these matters in mind in the application of overtime penalty rates to casual employees under the Horticulture Award in order to ensure that any variation is not counter-productive and [does not] frustrate[] the achievement of the modern awards objective’,[6] and concluded:

[752] In respect of daily hours of work, we consider that the ordinary hours of casual employees should be no more than 12 hours per day, and that overtime penalty rates should be payable for work performed in excess of 12 hours. A 12 hour day is consistent with the facilitative maximum daily hours permitted for full-time employees under clause 22.1(c), and we think is reasonable having regards to the physical demands of harvesting work and the work requirements of employers. There is an additional question as to whether the ordinary daily hours of casual employees should be limited to the period of 6.00 am to 6.00 pm, as it is for full-time and part-time employees under clause 22.1(b), with any work performed outside these hours to be paid at overtime rates. We are not satisfied that the evidence or submissions have properly assisted us in respect of this issue. We will invite further submissions about this from interested parties.

[753] In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. There remains 2 critical issues to be resolved: first, over what

> period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time.
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> . . .
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> [755] We consider that a better solution to the difficulty would be to allow an averaging period of sufficient length to allow long hours of work to be performed in short periods of time without attracting overtime penalty rates. We are provisionally minded to allow weekly hours to be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period. However because this was, again, an issue not extensively explored in the evidence and submissions, we will allow interested parties an opportunity to make further submissions about this (and, if necessary, to adduce further evidence) before we make a final decision. We will also direct the parties to confer in order to endeavour to reach an agreed outcome. A member of the Commission will be made available to assist if interested parties request this to occur.
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> (underlining added)

[14] Subsequent to the 2017 decision, submissions were received from parties regarding the period as to the daily span of hours and the period over which ordinary hours might be averaged. In respect of the latter issue, the submissions from employer groups (including the NFF and the Ai Group) supported an averaging period of six months or more, while the submissions of the AWU and the then National Union of Workers (NUW) supported an averaging period of no more than four weeks. On 1 February 2018, the AWU, NUW, NFF and Ai Group jointly requested that a member of the Full Bench conduct a conciliation conference in relation to the issue. This request was granted and after what turned out to be a series of conferences, these parties advanced a joint proposal for the implementation of the 2017 decision. This relevantly involved the following elements:

- the averaging period would be eight weeks, so that overtime would be payable after 304 ordinary hours over this period;
- the span of ordinary hours would be 5:00 am to 8:30 pm Monday to Sunday (subject to the capacity to agree to move the span an hour earlier in States that do not observe daylight saving time);
- ordinary hours outside the daily span would attract a penalty rate of 15 per cent in addition to the casual loading; and
- a maximum of 12 ordinary hours per day could be worked, with overtime payable after this.

[15] The parties also agreed as to the penalty rates to apply to overtime.

[16] This proposal was considered by the Full Bench in a decision issued on 9 August 2018 (2018 decision).[7] The Full Bench concluded:

> [83] To the extent that the above proposal represents what could be characterised as a broad industry consensus as to an acceptable approach to implementing our conclusion in the principal decision concerning overtime penalty rates for casual employees in the Horticulture Award, we would provisionally be prepared to accept and give effect to it. Although it involves some problematic elements, including a less beneficial span of hours and overtime penalty rate for casual employees than for permanent employees, it may arguably be justifiable on the basis that it would give effect to the principal decision on at least an introductory basis, in circumstances where the horticultural industry has never paid penalty rates for casual overtime before and is rife with award compliance problems. However, we acknowledge that there are likely be other parties who, because they did not attend the scheduled hearing on 1 February 2018, did not have the opportunity to participate in the conference which occurred on that day and the ensuing exchange of views regarding the proposal. To that end, we propose to publish a draft determination to give effect to the proposal and then provide interested parties with 21 days to make further submissions in relation to it. We will then determine whether any further conferences or hearings should be conducted before making a final determination.

[17] Following the publication of the draft determination, further submissions were received, and these were considered by the Full Bench in a further decision published on 2 April 2019[8] (2019 decision). The Full Bench noted that the AWU, NUW, Ai Group and the NFF remained broadly in support of their earlier joint proposal. The NFF proposed certain drafting modifications to the draft determination, and submitted that a transitional period of not less than six months was required for any variation to the Award because 'the Commission's decision in this matter would have a very significant financial impact on growers' and 'growers would need time to prepare for, manage and find ways to absorb this financial impact and for industry bodies to disseminate information regarding the outcome of this matter and educate growers as to its requirements.'[9]

[18] Submissions were also received from 16 individual horticulture businesses opposing the variation of the Award in terms of the draft determination. The contentions advanced included that growers would be 'put out of business' if they had to pay overtime, and:

> … if the determination was implemented growers would manage hours of work so as to avoid having to pay overtime thereby exacerbating existing difficulties in attracting and retaining seasonal workers, particularly as many seasonal harvest workers were working holidaymakers/overseas backpackers who sought to maximise their income during the harvest period meaning that any reduction in hours they were offered would make harvesting work less attractive to them…[10]

[19] The Full Bench considered that these submissions sought to re-agitate matters already considered and dealt with in the 2017 decision[11], and said:

> [32] Accordingly, while we note the concerns expressed in many of the submissions received from growers, we have already considered the issues raised and balanced them against the interests of employees. Nothing raised in the submissions would cause us to re-visit the conclusion reached in the principal decision that casual employees covered by the *Horticulture Award* should be entitled to overtime penalty rate entitlements. We

> further note that the draft determination seeks to accommodate these employer concerns by providing a less beneficial span of hours and overtime penalty rate for casual employees than for permanent employees covered by the *Horticulture Award*. Indeed in the August 2018 decision we noted that these less beneficial entitlements 'may arguably be justifiable on the basis that it would give effect to the principal decision on at least an introductory basis, in circumstances where the horticultural industry has never paid penalty rates for casual overtime before and is rife with award compliance problems.'

[20] The Full Bench considered and dealt with the drafting issues raised by the NFF and, in relation to the NFF's request for a transitional period, said that none was required because the industry had been on notice as to the intention to introduce overtime provisions for casual employees since the 2017 decision.[12] The Full Bench varied the Award effective from 15 April 2019. That variation, among other things, added what is now clause 21.4 (then clause 24.3) to the Award.

[21] There was a further development relevant to the issue of overtime under the Award when, effective from 28 April 2022, a Full Bench varied the piecework provisions of the Award.[13] This variation arose from an application made by the AWU and was the subject of substantive Full Bench decisions made on 3 November 2021[14] and 1 February 2022.[15] The main purpose of the variation was to establish a minimum wage floor for piecework under the Award. However, one further feature of the variation was to allow an employer, by right, to pay a full-time, part-time or casual employee a piece rate for performing a task (clause 15.2(c) of the Award) rather than the previous position whereby (at least nominally) the employee's agreement was required. Thus, as a result of this variation, the current position is that an employer may choose to pay casual employees piecework rates that accord with the requirements of clause 15.2 and, if they do so, the overtime provision in clause in clause 21.4 does not apply.

Treves' case

[22] Ms Treves filed the following evidentiary material in support of her case:

(a) An undated statement of evidence made by herself and filed on 20 October 2022. The statement annexes a payslip summary for a period of work from 15 February to 7 July 2022.

(b) A statutory declaration made by herself on 16 January 2023, filed as part of her material in reply to the case of the AWU and the United Workers' Union (UWU).

[23] The following facts may be gleaned from this material. Ms Treves resides in North Queensland. She has worked in packing sheds as a casual harvest employee since 2003. Ms Treves started as a packer and grader, and then became a supervisor training and supervising packers and graders, overseeing quality control, running grader and shed software programs, and doing despatch. Until the end of 2021, she moved around to different sheds in Queensland, the Northern Territory and earlier in Western Australia. She did this to keep working all year, often returning to the same farms for some years. From the end of 2021, Ms Treves stopped

moving around and worked as a casual employee in her 'home area' only. She has worked under the Award since it was introduced for the majority of her employment.

[24] From 15 February 2022, Ms Treves was employed as a casual employee under the Award to run despatch in a farm's packing shed during harvest. Ms Treves does not identify her employer, the location of the employer (although it is presumably somewhere in the vicinity of her residence in North Queensland), or the kind of produce being harvested. Once engaged, Ms Treves worked until 4 April 2022, when work stopped 'while the next variety matured'. Picking then restarted on 24 April 2022, and she returned to work on 26 April 2022 when the shed reopened.

[25] At the end of the second week of June 2022, Ms Treves' employer told her that she would have to take time off during the next two weeks (12-25 June 2022). Ms Treves states that this was because she had worked almost 304 hours with two weeks of the then-current eight-week period yet to run and the business could not afford to pay overtime rates throughout the next two weeks. It is not clear whether this is what the employer told her or what she believes to be the case. This is said to have occurred when the shed was at its busiest and it was her peak earning time and a chance to make up for earning no income in the period 5-25 April 2022. Ms Treves says that 'the new 8-week period' started on 26 June 2022, and she started working again. On 30 June 2022, picking was completed for the year, and packing finished on 1 July 2022. Ms Treves finished work in the shed on 7 July 2022.

[26] Ms Treves has prepared a summary of the dates and hours of work during this employment, which she compiled from her payslips. Her summary is reproduced below:

WEEK (Sun-Sat)	HOURS WORKED	[Notes]
3 - 9 July	29.50	7th July - I finish work in the shed
26 June - 2 July	30.00	New 8 week period begins. 1st July harvest finishes
19 - 25 June	18.50	8 week period ends Total hours worked: 320.75 Includes 16.75 hours paid at the overtime rate. My employer couldn't afford any more overtime, so I didn't work for 3 days in week 7 and 3 days in week 8. The shed worked full time.
12 - 18 June	18.50	
5 - 11 June	43.50	
29 May - 4 June	45.00	
22 - 28 May	48.75	
15 - 21 May	50.00	
8 -14 May	45.75	
1 - 7 May	50.75	Start of 8 week period in which I lost work due to the overtime rule
24 - 30 Apr	44.00	

WEEK (Sun-Sat)	HOURS WORKED	[Notes]
5 - 26 Apr	*No work, waiting for crop to mature*	
3 - 9 Apr	8.25	
27 Mar - 2 Apr	45.75	
20 - 26 Mar	48.00	
13 - 19 Mar	13.25	
6 - 12 Mar	37.75	
27 Feb - 5 Mar	39.75	
20 - 26 Feb	32.00	
13 - 19 Feb	27.50	

[27] Ms Treves did not work on 9 August 2022 (the date she lodged this application to vary the Award) because she went to the United Kingdom on 10 August 2022 for a period of six weeks. The period from 8 July to 9 August 2022 was too short a time to find another job, and it was winter during which there is little harvest work available.

[28] Ms Treves submitted that she had standing to make her application. As to her work history, although she was not working on 9 August 2022 when she made her application, she had worked under the Award for the majority of her employment. She also submitted that 6 July 2022 should be taken to be the date of her application because on that date she wrote a letter to the Commission asking for clause 21.4 of the Award to be removed. She did not make a formal application to vary the Award at that time because she did not know such a process existed, and made one after the Commission informed her of that process.

[29] As to the merits of the application, Ms Treves advanced (in summary) the following contentions:

- Casual employees were the intended beneficiaries of the overtime provisions, yet in practice they are worse off.

- Employers cannot afford to pay overtime rates, as put forward in submissions to the Commission prior to clause 21.4 being inserted.

- In practice, employers avoid paying overtime to casual employees — once a casual employee reaches 304 hours in an eight-week period, they are given no work until the next eight-week period starts and therefore receive no income during that time.

- Prior to the introduction of overtime rates for casuals, employees were able to make up for quieter times by working long hours during peak periods.

- Employers employ enough casual staff to cover the busy times without having to pay overtime. Then, during the quieter periods, employers run part-time rosters because there are too many people for the work available. This reduces the ability for a casual employee to earn money.

- Before the introduction of clause 21.4, casual employees were able to keep working at the normal award rate during busy times.

- The introduction of overtime rates reduces the financial attractiveness of casual horticultural work and decreases workforce participation.

[30] Ms Treves made the following specific submissions in relation to the modern awards objective in s 134(1) of the FW Act:

- <u>Relative living standards and the needs of the low paid</u> (s 134(1)(a)) — the Award reduces how much income she is likely to earn as a casual employee as she earns money only when she works and her safety net, which was being able to work long hours to earn money to cover the quiet periods, has gone as a result of clause 21.4.

- <u>The need to promote social inclusion through increased workforce participation</u> (s 134(1)(c)) — she can no longer afford to work as a casual employee as a result of clause 21.4.

- <u>The need to promote flexible modern work practices and the efficient and productive performance of work</u> (s 134(1)(d)) — it is questionable whether workplace efficiency or productivity is promoted if employers stand down staff who are happy to work at the normal pay rate, as she was, because they cannot afford overtime rates, especially when there is a labour shortage.

- <u>The need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; weekends or public holiday; or shifts</u> (s 134(1)(da)) — This 'need' resulted in her not working at all for six days at a time when longer hours were available after a period of no work and with the harvest and her job about to end. She does not work unless an employer can afford to employ her and she would have happily worked these days at the ordinary pay rate.

- <u>The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden</u> (s 134(1)(f)) — The Commission gave more weight to s 134(da)(i) than to s 134(1)(f), even though growers said overtime rates were unaffordable, meaning that both casual employees and employers lose. The object of the FW Act in s 3 demonstrates that the point of the FW Act is to promote national economic prosperity, not to impose unaffordable labour costs on a whole industry which result in casual employees losing work as well as considerable extra work and operational complications for employers.

Submissions and evidence of other parties supporting the application

National Farmers' Federation

[31] The NFF submitted that, prior to April 2019, the Award did not provide for casual employees to be paid overtime, and that this position was agreed with the AWU during the award modernisation process which established the Award. The NFF reiterated the reasons for its opposition to the AWU claim in the 4 yearly review and submitted that:

- horticultural businesses are limited in their capacity to control staff hours during peak periods and are heavily reliant on a casual workforce during those periods;
- the introduction of overtime for casuals has significantly increased the cost of doing business, which cannot be passed on to consumers; and
- growers have attempted to limit their exposure to overtime pay by, among other things, capping the number of hours each of their casual staff works.

[32] The NFF submitted that the casual overtime requirements exacerbate existing labour shortages in the horticulture sector. Farms need a larger overall workforce when each employee within that workforce is only available for a fixed number of hours. It submitted that when their hours are capped, employees abandon jobs to find work elsewhere and, in addition to having to replace those employees from a small pool of potential workers, businesses must also allocate resources to inducting and training new workers.

[33] The NFF contended that workers have experienced a decline in income as growers are rostering their casual staff to limit or avoid overtime, capping the hours of work at 304 hours for each eight-week period so the workers have fewer hours and reduced earnings. It says that this detriment is most keenly felt by migrant workers, particularly those in the Pacific Australia Labour Mobility (PALM) scheme who are typically engaged as casual employees, leave home and family purely to earn Australian currency to remit to their families and want to work as many hours as possible but do not have the option to change employment when their hours are capped. The NFF further noted that, as these workers have limited social and community connections in Australia, they often have little to engage them in their spare time and would prefer to work.

[34] The NFF submitted that if the Commission is not minded to grant the application, it may consider a middle ground of a 26-week averaging period, as put forward during the 4 yearly review.

Australian Industry Group

[35] Similarly to the NFF, the Ai Group submitted that, prior to April 2012, casual employees were not entitled to overtime rates under the Award except where they performed shiftwork in accordance with then clause 22.2. The Ai Group noted that it had opposed the AWU's claim in the 4 yearly review, including on the grounds that the changes sought would result in very significant adverse implications for horticultural operators, would introduce restrictions and costs that would seriously undermine their current operations, and were unsustainable and

inappropriate when regard was properly given to the seasonal nature of work. It submitted that the material filed by other parties in this matter demonstrated that:

- Employers in the horticulture sector are not able to pass on increased business costs to consumers, including increased labour costs. The requirement to pay overtime rates, in addition to other increased business costs caused by a combination of factors, has adversely affected employers (including their viability), thereby jeopardising the future of the whole sector.

- Many casual employees are willing to work more than the 304 hours over an eight-week period, but employers are financially not in a position to pay overtime rates, thereby restricting the hours of work and earnings of casual employees.

- Once the 304 hours over an eight-week period have been exhausted, casual employees are commonly not provided work. As a result, they seek work elsewhere, forcing employers to source new workers, who are not readily available. Recruitment of new employees comes at an additional cost to employers.

- The horticulture sector is experiencing persistent labour shortages. Clause 21.4 is further impacting on the industry’s ability to attract and retain workers and create employment opportunities for horticultural workers.

- The horticulture sector cannot effectively operate within the confines of the inflexible hours of work provisions now prescribed by the Award in relation to casual employees, because the work performed relates to perishable produce and is contingent upon weather patterns.

Northern Territory Farmers Association

[36] The Northern Territory Farmers Association (NT Farmers) is the peak body for plant-based industries in the Northern Territory. NT Farmers submitted that, while the Australian horticultural sector is critically understaffed, the Northern Territory sector has historically suffered from acute and persistent labour shortages, unlike the rest of Australia, due to remoteness, short seasons and climatic conditions. It submitted clause 21.4 exacerbates this problem.

[37] NT Farmers said that harvest windows in the Northern Territory are short, particularly so in the mango sector where the entire window can run for only three months and may be as short as four weeks. Short harvest windows provide an opportunity for employees to work intensively to maximise earning potential, but clause 21.4 unfairly limits access to additional work hours by forcing employers to either pay overtime rates or lay off staff once they reach the 304-hour limit in eight weeks. Farmers are therefore forced to try to hire more staff or to leave produce to rot in their fields. Because of remoteness, there is little for employees to do to occupy their time during any rest period and sitting idle on the farms can lead to feelings of isolation, homesickness and excessive drinking. NT Farmers submitted that the cap on hours should be modified to provide for an averaging period of 26 weeks.

Fruit Growers Victoria

[38] Fruit Growers Victoria (FGV) is an organisation which represents fruit growing, packing and exporting businesses in Victoria. In its submission, it emphasised that most fruit crops have a three-month season during which the harvest must happen immediately. It submitted that 304 ordinary hours of work is not sufficient to cover the work required to be done during the season, and growers cannot afford to pay workers 175 per cent of their ordinary rate for hours in excess of this. As a result, growers do not allow employees to work more than the allowed ordinary hours and instead engage additional employees. FGV submitted that the period of averaging ordinary hours should be extended to 12 weeks.

Bundaberg Fruit and Vegetable Growers Ltd

[39] Bundaberg Fruit and Vegetable Growers Ltd (BFVG) is a not-for-profit regional organisation representing the interests of fruit, vegetable, nut and herb growers, and the businesses that support them, in the Wide Bay-Burnett region of Queensland. BFVG submitted that clause 21.4 limits the ability for casual employees to maximise their earning potential by working intensively for a short period of time, by requiring employers to pay overtime rates for casual employees who have worked more than 304 hours in eight weeks. BFVG submitted that this significantly increased the cost of business for no additional productivity outcomes and stated the cost cannot be passed onto consumers. It submitted that the current overtime provisions are not feasible for growers and that employers must expand their workforce to compensate for this shortfall, which unsustainably increases the resources required to attract, induct and train new workers.

Individual employers

[40] The following individual horticultural businesses filed submissions in support of the application:

- Amaroo Farms;[16]
- AW Steicke and Sons;[17]
- BLS Farming Pty Ltd;[18]
- Borderland Pty Ltd;[19]
- Budou Farms;[20]
- Caamano Farms;[21]
- Cordoma Group;[22]
- Diaco Fresh;[23]
- Eastcoast Beverages;[24]
- Holla-Fresh Pty Ltd;[25]
- JV Orchards Pty Ltd;[26]
- Temba Orchards Pty Ltd;[27] and

- Tranquil Hills Orchards.[28]

[41] The above businesses appear to be a mix of those who directly employ casual workers under the Award and those who use 'contractor employment'. In general, these businesses submitted that the overtime provisions have had a negative impact on their businesses and employee earnings. Most proceed on the premise that they will not pay overtime and thus will not allow employees to exceed 304 hours of work in an eight-week period, and they therefore must instead expand their workforce to fill this shortfall. Many comment that attracting, inducting, and training new workers for this purpose means they incur additional expenses that are unsustainable. Many also comment that casual employees seek out new employment rather than wait for a new eight-week block to commence. Some employers highlight that, working in the agricultural sector, they cannot forecast or follow standard business hours due to the perishability of their products and weather patterns. Many also note that they are 'price takers', with little say over the amount they receive for their produce. One employer also states that it has lost workers to employers who pay lower rates but offer more hours, submitting the penalty rate provisions in the Award may lead workers to seek employment with 'dodgy operators' who pay in cash and do not restrict their hours. Most of these employers appear to support the removal of overtime provisions in the Award altogether.

Statutory declarations

[42] On 20 October 2022, Mr Royson Watas, who is located in Griffith NSW, filed a statutory declaration made by himself and witnessed by Mr Kevin Cerato JP. The declaration reads (as written):

> The form completed by Lady Emma Trewes [sic] is a MUST support from us all casual workers under Horticultural award with the help of our Sponsors. She has summarized everything the workers are facing under the 2020 horticultural awards in all her points made. Reading through the points my biggest question is that "Who benefits from all this Awards"?
>
> I haven't read through the FWC awards and FWA regulations but from all points of view!
> summarize below.
>
> 1. The 2020 horticultural awards changes the main ideas of a worker coming aboard to work for his/ her financial supports.
>
> 2. Approved Employer loses
> A. workers through absconding
> B. Money through absconding
>
> 3. Farmers take advantage of the penalty rate (overtime rate) by bringing in more worker to avoid the overtime rate with the workers. Resulting in Farmer wins workers loses. i.e., workers don't reach 304 hours within the period of 8 weeks, most hours lose are around 15hrs to 50hrs which also result in loses of money still to be paid to a worker.

> Good question she raised was "Why does the FWC have this power if it doesn't understand industry it regulates".
>
> We the workers stand with Madame Emma Trewes to Say we want to see or ensure that Horticulture awards 2020 is being repeal by removing the overtime pay rates, would answer the cry and struggle of the SWP casual workers or workers under the same award.
>
> We go in full support of her summary and wanted to see the award change back to the way it was.

[43] On 28 October 2022, Ms Lidia Cerato of 'Job Shop Welfare' filed statutory declarations made by the following 10 persons also located in Griffith, NSW: Madlen John, Willie Koali, Titus Tari, Bruce Toara, Marson Banga Garae, Noten Matautava, Sailesi Benony Cuong, Simion Nathaniel, Soterio Malturneim and David Ben. The substance of each declaration is identical, including as to spelling and capitalisation, indicating that each of the persons signed a pre-prepared document. A number of the persons share the same address (including six who have the same address as Mr Watas). The declarations are all witnessed by Mr Kevin Cerato. The declarations state:

> The form completed by Emma Trewes [sic] is a MUST to support for all us casual workers under the Horticulture Award with the help of our sponsors. She has covered everything the workers are facing Under the 2020 Award.
>
> The Horticulture award does not allow us to fulfil our duties and obligations, as we are here to give Aid to the farmers and aid our families back home. These conditions leave a lot of us no other Option but to abscond. We are often overworked and then nothing.
>
> Farmers take advantage of the penalty rates by bringing in more workers than required - then we Must go without work for weeks with no income, but we still have expenses, Travel, Accom[m]odation, Bus & Fuel, Food and Medical- not a lot is left after these are deducted and we are not working.

Australian Workers' Union

[44] The AWU opposed Ms Treves' application. It filed witness statements made by the following persons:

- Taylor Rundell (AWU National Economist)
- Shane Roulstone (AWU National Organising Director)
- Lieta Sauiluma-Duggan (AWU National Campaign Organiser)

Taylor Rundell

[45] Mr Rundell is the National Economist at the AWU. In his witness statement, Mr Rundell said that there is significant independent evidence that the horticulture industry presently has

the capacity to pay overtime, and either absorb the costs or pass on the costs to buyers. He referred to data from a recent 'Agricultural forecasts and outlook' report (Outlook Report) published by the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) on 6 September 2022. The Outlook Report predicts the agricultural industry will grow to $13.8 billion output in the 2022-23 financial year. ABARES identified several factors contributing to this positive outlook and noted that 'many fruit growers have made substantial expansions to orchards in previous years which have now matured and are producing fruit'.[29]

[46] Mr Rundell also referred to the following information from the ABARES' report 'Labour use in Australian agriculture – analysis of survey results, 2021-22' (Labour Use Survey):

- The primary restraint on labour use has been the COVID-19 pandemic 'which resulted in a reduction in the availability of farm workers from overseas and placed restrictions on the movement of people within Australia'.

- Despite lower overall numbers of workers, the Labour Use Survey notes that horticulture production increased, in part due to 'maximising the use of available workers'.

- In response to the lack of labour available in 2021-22, farms increased the working hours of their existing workforce, meaning employees were working longer hours, presumably with greater overtime.

[47] Mr Rundell also outlined horticulture industry evidence from Hort Innovation which has reported consistent growth in the fruit industry and overall growth in the vegetable industry. Mr Rundell noted that the reports do not identify overtime costs as a barrier (significant or otherwise) to growing the sector.

Shane Roulstone

[48] Mr Roulstone is the National Organising and Campaigns Director of the AWU. Mr Roulstone gave the following evidence, based on his engagement with workers and employers in the horticulture industry and involvement in industry bodies:

- Around 60 per cent of the workforce are engaged through labour hire bodies.

- About 20 per cent of the workforce are PALM workers and workers from East Timor, and 30 per cent are from Asia or South America.

- The overwhelming majority of workers are casuals with limited English-language skills.

- Prior to the pandemic and the Full Bench decisions on piecework,[30] around 80 per cent of workers were paid piece rates, but since the decisions around 60 per cent are paid an hourly rate with some type of incentive on top, 20 per cent are paid piece rates only and 20 per cent are paid by cash-in-hand arrangements.

- As a term of the agreement between the Commonwealth Government and approved employers under the PALM scheme, PALM workers are meant to be guaranteed an average of 30 hours of work per week over an eight-week period.

- The ongoing and consistent concern from PALM workers is that they are not getting their minimum 30 hours per week, not that their employer cuts their hours off once they hit 304 hours over eight weeks.

- Another major concern of PALM workers is deductions from wages for the cost of accommodation and travel, with employers often profiting from deduction arrangements by charging well above market rates.

- Many of the Asian migrant workers are working for cash-in-hand and are paid a flat hourly rate for all hours worked.

- Costa is an employer that pays overtime in accordance with the Award on a regular basis. Its main concern is getting enough staff, rather than paying overtime.

- Those supporting the application suggest they can easily replace a worker that would be entitled to overtime rates with another worker who would not, which is inconsistent with public commentary from the industry about labour shortages.

Lieta Sauiluma-Duggan

[49] Ms Sauiluma-Duggan is a National Campaign Organiser with the AWU, and primarily organises in the horticulture industry, particularly with workers from the Pacific Islands. Ms Sauiluma-Duggan said she was surprised by the argument that horticulture workers were being denied hours of work because they have reached 304 hours in eight weeks, and that the main complaints she had been hearing at farms in Queensland, Victoria and New South Wales concerned workers not getting enough hours and deductions for the cost of accommodation and travel. She gave a summary of telephone discussions she had had with 10 Pacific Island workers on 13-14 December 2022 about their working hours in the horticulture industry as follows:

> I spoke with Alvin Miti Amiatu. He was sponsored by Madec. He worked on farms from May through to August 2022. Often two or three days of work each week for many weeks. He left Tully in October for Lakeland due to a lack of hours. He will shortly be leaving for Samoa as his visa is expiring soon.
>
> I spoke with Kirisimasi Taumai. He was sponsored by MacKay Lakeland. He recently left Lakeland due to bullying and a lack of hours.
>
> I spoke with Andrew Stanley Fa’atafea. He was sponsored by Labour Solutions/Eastern Colours after PowerPac went into administration. He had many weeks over the course of employment where there was a shortage of work. He left Stanthorpe due to lack of hours.
>
> I spoke with Lomitusi Lafaele. He was sponsored by Mambulloo Northern Territory. After about five months in NT, he was sent to Griffith to Top Shop working for

Rambola. He was then sent to Mildura working for PGP with Costa. He had over 4 weeks of limited hours — one, two or three day weeks. Then about 7 weeks of no work but waiting for PGP to pick up more work for them. He couldn't wait anymore so he left and is now living with his family in Broadmeadow, Victoria.

I spoke with Aleki Auta Lualua. He was sponsored by Madec, later transferred to Collins Farm due to lack of work. Many weeks, at least 2 months of two, one day weeks or none at all. Left Tully due to lack of work.

I spoke with Fuatino Tuigamala, Apaula Kerisiano Enesi, Lusia Ulugia and Agalelei Senio. They were all sponsored by MacKay in Lakeland. They all left due to bullying, discrimination and lack of hours. They had many months of less than 38-hour weeks.

I spoke with Tasi To'aono. He was sponsored by Jobs Australia Tasmania. Tasi is one of the 70 workers from Samoa who got to Tasmania and were told the fruit wasn't ready. Therefore, they stayed home for 3 months without work. When they started work, Jobs Australia deducted double and triple rent for the weeks they had no work.

Submissions

[50] The AWU submitted that Ms Treves did not have standing to make her application under s 158(1) of the FW Act since, on her own evidence, she was not an employee under the Award at the time she made her application. Accordingly, it submitted, the Commission should dismiss the application pursuant to s 587 of the FW Act on the basis that it is not made in accordance with the FW Act and has no reasonable prospects of success.

[51] As to the merits of the application, the AWU noted that it sought to overturn the relatively recent decision of the Full Bench made during the 4 yearly review to insert the casual overtime provisions into the Award. The AWU submitted that it is well-established that previous decisions of a Full Bench will generally be followed unless there are cogent reasons for not doing so and, further, probative evidence is required to substantiate why it is necessary for an award to be varied to ensure it meets the modern awards objective. It submitted that the evidence filed by Ms Treves and others in support of the application is not sufficient to justify a departure from the Full Bench's previous decisions and does not demonstrate that it is necessary to vary the Award in order to achieve the modern awards objective. The Full Bench had considered arguments filed in support of the present application before adding the current casual overtime clause to the Award. The AWU also noted that the NFF's proposal for a 26-week averaging period was considered and rejected by the Full Bench during the 4 yearly review.

[52] The AWU submitted that the Commission cannot accept Ms Treves' premise that employers covered by the Award cannot afford to pay overtime rates without probative financial information. If employers could not afford to pay overtime rates, the AWU submitted, it would be easy to substantiate this with audited financial reports demonstrating, for example, extremely tight margins or losses threatening the viability of businesses. The AWU observed that no evidence of this sort had been filed, nor had any independent industry data about the economic conditions of the industry been cited in support of the application.

[53] The AWU further submitted that the proposition that it is economically rational for employers to engage new workers rather than pay experienced workers overtime rates is not self-evident and needed to be substantiated with probative evidence. An employee who has generated an overtime entitlement by working more than 304 hours in an eight-week period would, it submitted, be more productive than a new employee hired to perform the same hours and that this increased productivity needed to be factored into calculations to determine cost efficacy. The AWU submitted that Ms Treves and those supporting the application have not attempted to demonstrate why it is more cost-effective to engage new employees. The absence of probative evidence substantiating the claims that employers cannot afford to pay overtime rates to casual employees and that capping hours is more viable than paying overtime should prevent the Commission from granting the application.

[54] The AWU acknowledges there are significant challenges associated with operating a horticultural farm, including the impact of the weather and negotiating a fair price with large supermarket chains, but submitted that this is why the Award provides comparatively generous conditions for employers, including the absence of weekend penalty rates for ordinary time, a flat overtime rate of time-and-a-half in addition to the casual loading, a lengthy averaging period, and the capacity to engage employees at the Level 1 pay rate in the Award indefinitely, which is the same as the National Minimum Wage.

United Workers' Union

[55] The UWU likewise opposed the application. It submitted that none of the submissions made in support of the application raised any new matter that had not been considered in the 2017, 2018 and 2019 decisions in the 4 yearly review, and no compelling reasons or evidence had been provided to suggest that the Commission should depart from these previous decisions. The UWU also pointed to the decision made in 2017 by a different Full Bench during the 4 yearly review to vary the coverage clause of the Award to retrospectively cover a significant number of workers in packing sheds 'beyond the farm gate' who were previously covered by the *Storage Services and Wholesale Award 2010* (Storage Award).[31] The effect of this decision was to deprive casual employees of overtime entitlements they had previously enjoyed by virtue of being covered by the Storage Award. The 2019 decision restored overtime entitlements to these casual employees (albeit less beneficial ones) but, if the Commission were to grant Ms Treves' application, it would once more entirely remove the overtime entitlements which these employees had previously enjoyed. The UWU submitted that such a drastic stripping of entitlements over such a short period of time could never be consistent with the modern awards objective.

[56] The UWU submitted that none of the submissions lodged provided supporting evidence showing that overtime entitlements are unaffordable within the industry but instead only provided vague, broad statements as to why this is the case. None of the employer submissions addressed the substantial flexibility in the Award such as piecework provisions and time off instead of payment for overtime, which allows employers to remove or ameliorate the effect of paying overtime to casual employees. In respect of the statutory declarations provided by 10 farm workers in New South Wales, the UWU submitted that they generally appear to support the notion that workers in the industry are 'overworked', and should be afforded overtime rates. As to the contention that employers within the industry are 'price takers', the UWU submitted that no cogent evidence for such a proposition had been put forward, and any inter- or intra-

industry competition problems are more appropriately addressed through reform or by the Australian Competition and Consumer Commission rather than the cutting of casual overtime entitlements. The UWU submitted that the notion that some industries are justified in allowing casual employees to work long hours without additional remuneration simply because they utilise more casual employees than others is to be rejected.

[57] The UWU referred to that part of the modern awards objective in s 134(1)(da)(i), and submitted that casual employees in the horticulture industry should be compensated fairly for long, irregular, unsocial hours or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work. It said that no evidence had been provided to support the claims that casual employees are financially worse off as a result of the overtime provisions, and they are not worse off as they are entitled to overtime rates. The NFF's alternative claim for a 26-week averaging period had previously been rejected by the Commission, and the current provisions for an eight-week averaging period, ordinary hours able to be worked at any time, and a maximum of 12 hours per day are sufficiently flexible to accommodate the requirements of the horticulture industry.

Consideration

Standing

[58] Under item 1 of s 158(1) of the FW Act, the persons who may make an application to vary the terms of a modern award (other than outworker or coverage terms) are an employer, employee or organisation that is covered by the modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award. Section 133 defines 'employee' for the purpose of the provision as meaning a 'national system employee'. That term is defined in s 13 as follows:

> A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.

[59] Ms Treves has made her application purportedly in the capacity of an employee covered by the Award. However, on her own evidence, she was not employed in that capacity at the time she lodged her application on 9 August 2022. She ceased her casual employment with the unnamed employer the subject of her witness statement on 7 July 2022, and she gives no evidence, nor does she assert, that she has performed any work covered by the Award at any time since (even in response to the AWU's challenge to her standing). Hence, she was clearly not 'employed' at the time she made her application by a national system employer under the Award, and it cannot be said that she was 'usually employed' as such in the absence of any evidence of employment under the Award after 7 July 2022.

[60] We do not accept Ms Treves' contention that the letter she sent to the Commission's Awards Team by email on 6 July 2022 should be treated as her application. In this letter, Ms Treves complained about the same issue as dealt with in her witness statement. That letter concluded:

> Please, please either:

i) Cancel s.21.4 altogether or

ii) Increase the number of hours which can be worked in an 8 week period, and allow for days of no work in the previous 8 week period, to be offset against hours worked in the current 8 week period. or

iii) Allow me to easily agree with my employer, to work all hours at the normal award rate. No overtime pay.

Section 21.4 cuts to the heart of how much I and other farm employees can earn. I therefore hope the Commission will give the issues raised here serious consideration – they affect so many people – and answer my questions and request for change. I would be glad to answer any questions the Commission may have. My contacts are [redacted].

[61] The Commission's staff responded to the above letter by email on 8 July 2022. The response, among other things, gave advice as to how to make an application to the Commission to vary an award. Ms Treves, as earlier recounted, subsequently lodged her application on 9 August 2022.

[62] We do not consider, in the circumstances described, that Ms Treves' letter of 6 July 2022 could be treated as if it were her application in the present manner. Ms Treves did not request that it be treated as such at any time prior to the AWU raising the issue of her standing in its submissions filed on 16 December 2022; instead, she (and all parties) proceeded on the basis of her application filed on 9 August 2022. The letter does not in substance align with the application; it constitutes, in effect, a complaint and suggests three different ways in which the Award might be changed to meet that complaint, only one of which (option (i)) is pressed in the application before us.

[63] Section 585 of the FW Act requires that an application to the Commission be made in accordance with the procedural rules relating to applications of this kind, which relevantly prescribe the form in which an application to vary an award is to be made. Ms Treves' application filed on 9 August 2022 complied with the relevant procedural rules, but her letter of 6 July 2022, even if notionally treated as an application, plainly did not. Section 586(b) empowers the Commission to waive an irregularity in the form or manner in which an application is made. However, even if it were applicable, we would not exercise our power under s 586(b) to waive any 'irregularity' in respect of the 6 July 2022 letter because Ms Treves' subsequent application for variation, which fixes upon just one of the three suggested variations to the Award, is the basis upon which the matter has proceeded from the outset.

[64] Accordingly, we find that Ms Treves was not entitled to make her application under s 158, and the application must be dismissed on this basis.

[65] However, we will in any event set out our consideration of the merits of Ms Treves' application. Section 157(3)(a) empowers the Commission to make a determination varying a modern award on its own initiative so, were we persuaded that the Award should be varied as Ms Treves proposes, we could do so notwithstanding that her application was not validly made.

Merits

[66] Under s 157(1)(a), the Commission may vary a modern award if it is satisfied that doing so is 'necessary to achieve the modern awards objective'. The modern awards objective is set out in s 134(1) of the FW Act as follows:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[67] The following principles apply when considering whether to vary a modern award to achieve the modern awards objective:

- Fairness in the context of the modern awards objective is to be assessed from the perspective of the employees and employers covered by the modern award in question.[32]

- The obligation to take into account the considerations in s 134(1) means that each consideration, insofar as it is relevant to the proposed variation, must be treated as a matter of significance in the decision-making process.[33] No particular primacy is attached to any of the s 134(1) considerations.[34]

- It is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award.[35] Generally speaking, the s 134(1) considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[36]

- In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the matters in ss 134(1)(a)-(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

- What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134(1) considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation, and the submissions and evidence.[37]

- While the s 134(1) considerations inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters the Commission might properly consider to be relevant.[38]

[68] Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable need to be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence. In assessing an application for variation of a modern award, the Commission will take into account previous decisions relevant to any contested issue, and will proceed on the basis that, *prima facie*, the modern award achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.[39]

[69] We have earlier outlined the process whereby an entitlement to overtime penalty rates for casual employees was added to the Award. The substantive decision was made in 2017 upon consideration of a substantive body of evidence, the terms of the entitlement were settled as a

result of consultations between the AWU, what is now the UWU, the NFF and the Ai Group, and the entitlement came into effect on 15 April 2019. The comprehensiveness and recency of this decision-making process, and the industry consensus concerning the precise terms of the entitlement, place a considerable burden on any party agitating for change.

[70] Ms Treves' evidentiary case goes nowhere near meeting this burden. Her case seemingly revolves around a single incident which occurred in July 2022. Before we turn to the evidence concerning this incident, it is necessary to observe that, although the casual overtime entitlement has been in place since April 2019, and Ms Treves' evidence is that she was regularly working as a casual under the Award until July 2022, she gives no evidence of any prior difficulty with the overtime provision. Having regard to the degree of her concern about the issue, we can only infer that if there had been any prior difficulty, she would have told us about it. We further infer, therefore, that from April 2019 until her employment in mid-2022, Ms Treves either did not work sufficient hours over each eight-week period to qualify for overtime or that she did work in excess of such hours and her employers paid her the overtime entitlement. Both alternatives negate much of what she propounds in her case.

[71] Even in respect of the 2022 incident itself, Ms Treves' case is highly problematic for the following reasons:

(1) Ms Treves' analysis of her pay records shows that she worked for an initial period of eight weeks (with the pay week apparently being Sunday to Saturday). She did not reach the award overtime threshold of 304 hours in the eight-week period, notwithstanding that in three of those eight weeks she exceeded 38 hours in the week, because of the high degree of variability in her weekly hours. This shows the degree of flexibility which clause 21.4 provides in allowing ordinary hours to be averaged over an eight-week period.

(2) Ms Treves' employer then apparently put her off for three weeks because of a lack of work. This shows the intermittent nature of casual horticultural work. Ms Treves assigns no blame to the Award, or to her employer, for this situation.

(3) Ms Treves then performed 44 hours' work in the week 24-30 April 2022. However, in Ms Treves' analysis, this week does not count as part of the next eight-week period for overtime purposes. She instead places the start of the next eight-week period in the following week (1-7 May 2022). Ms Treves provides no explanation for this, and her analysis appears simply to be wrong. If the commencement of the eight-week period was in the week 24-30 April 2022, the consequence is that the second of the two weeks in which Ms Treves complains of a loss of work falls outside of the relevant eight-week period, meaning that the overtime clause could not have been the cause of this. It also means that Ms Treves passed the 304-hour threshold, and qualified for overtime, during a week in which she worked 43.5 hours (5-11 June 2022).

(4) Even on its face, Ms Treves' analysis does not support her point. Ms Treves says that the relevant eight-week period commenced in the week 1-7 May 2022 and that, in the last two weeks of the eight-week period (12-18 and 19-25 June), in which she only worked 18.5 hours in each week, she lost work because she had

qualified for overtime. However, Ms Treves' own analysis does not substantiate this. At the completion of the seventh week (12-18 June 2022), Ms Treves had not yet reached the overtime threshold of 304 hours. She reached the threshold of 304 hours in the eighth week (19-25 June 2022), but she was *not* put off at that point. Instead, her own analysis shows that she then worked 16.75 hours *at the overtime rate*. This belies Ms Treves' central contention that this employer, or, by extension, any employer, could never afford to pay overtime. Ms Treves' case pays no regard to the remuneration benefit which the Award overtime rate conferred on her for this period. Assuming in Ms Treves' favour that it is true that the employer then put her off because it did not want to continue to pay the overtime rate, that simply represents a conventional cost-benefit decision which an employer is entitled to make with respect to a casual employee. Ms Treves gives no evidence that any other employee performed the work that she had been doing for the balance of the week, so it is not even clear whether there was any other work for her to perform at the time she was put off.

(5) Although Ms Treves attempts to generalise the issue she has raised as being applicable to other employees in the industry, she gives no evidence that any other employee of the employer the subject of her witness statement was put off work because they became entitled to overtime. Indeed, Ms Treves says that the packing shed continued to work full time during the two weeks in which she says she lost work.

[72] Other material before the Commission provides some support for Ms Treves' general contention that the effect of clause 21.4 has been that some employees may have lost hours of work because they have become entitled to overtime. However, this is stated by way of generalised assertions rather than by any evidence of primary facts, and it is impossible to ascertain to what extent horticultural workers reach the 304-hour threshold in any eight-week period or to assess the counterfactual scenario of how many hours they might have worked if the overtime entitlement did not exist.

[73] The only material in support of Ms Treves' application that appears to emanate from employees working under the Award is the statutory declaration of Mr Watas, and, separately, the statutory declarations of 10 other persons which are in identical terms to each other. As to the former, it may be accepted that Mr Watas is a casual worker under the Award who considers that he has lost work because of clause 21.4. However, there is no basis to accept Mr Watas' generalised assertion that he speaks on behalf of 'all casual workers under the Horticultur[e] [A]ward'. As to the latter, we can ascribe little weight to these statutory declarations. They appear to be an adaptation of Mr Watas' declaration (including the misspelling of Ms Treves' name), and the fact that they were clearly all pre-prepared by (an) unknown person(s) in unknown circumstances and then signed by the declarants casts doubt as to the extent to which the declarations reflect the knowledge and beliefs of the declarants. It is also unclear in whose interest Ms Cerato from 'Job Shop Welfare' was acting when she filed these declarations. Further, the declarations identify a number of very problematic issues which 'muddy the waters' to a considerable degree, namely the references to:

- conditions leaving many workers with no choice but to 'abscond';

- many workers being ‘overworked’ and then given no work;

- farmers ‘tak[ing] advantage of the penalty rates by bringing in more workers than required’; and

- expenses being ‘deducted’ which leave workers with ‘not a lot … left’ when they are not working.

[74] The scarcity of the material before us does not permit these issues to be interrogated further. It is sufficient to say that they raise significant questions which would not be answered by varying the Award as Ms Treves proposes.

[75] Against this, the evidence in the AWU witnesses’ statements, particularly Mr Roulstone and Ms Sauiluma-Duggan, paints a different picture about the concerns of workers under the Award. They identify the real issue as being that workers are not being provided with sufficient work to meet the required 30 hours per week required under the PALM scheme, rather than that they are losing work because they have reached the overtime threshold of 304 hours in an eight-week period. Although the AWU’s evidence is of a hearsay and limited nature, we are satisfied that it is representative of the concerns of at least a portion of the casual workforce under the Award. This evidence contradicts the rationale of Ms Treves’ application.

[76] The employer/business submissions generally assert three propositions: *first*, they are ‘price takers’ and therefore cannot pass on the cost of paying overtime; *second*, they employ additional casual workers rather than having workers work overtime; *third*, this causes cost and inconvenience for employers and creates difficulties in retaining labour. There is no primary factual material provided to support any of these propositions, and they are fundamentally contradicted by the ABARES Outlook Report and Labour Use Survey. The Outlook Report generally shows that the horticulture industry is in good shape, with the gross value of production having increased significantly since 2019.[40] It also casts a question upon whether, in the current high inflation environment, horticulture businesses can still be characterised as ‘price takers’ which are incapable of passing on any increase in their input costs. At least with respect to vegetable production, inflationary pressures have driven a significant increase in vegetable prices, indicating a capacity to pass on increases in prices inputs.[41] The position is different with fruit production, but that appears to be a result of expansion of output due to fruit growers having made ‘substantial expansions to orchards in previous years’.[42] Nonetheless, the Outlook report states: ‘[t]here has been some recovery in prices throughout the first half of 2022 due to rising input costs.’[43]

[77] As to the use of labour, it is difficult to reconcile what the employer/business submissions say about their use of labour with what the Labour Use Survey states. The tenor of the submissions is that additional workers are employed purely for the purposes of avoiding the payment of overtime under clause 24.1 of the Award. That would suggest that employment in the industry has increased since the overtime entitlement was introduced in April 2019. However, the Labour Use Survey finds that the opposite is the case: the total number of workers used by Australian horticulture farms decreased by 20 per cent in the three years to 2021-22.[44] Notwithstanding this, production has increased by 3 per cent over the same period,[45] indicating a significant increase in productivity. The Labour Use Survey explains how this was achieved:

> Horticulture farms have adapted to constrained labour supply by adjusting production systems and management practices, effectively reducing their demand for labour and maximising the use of available workers. For example, some farms have streamlined labour roles and increased labour productivity, while others have altered crop plantings to lengthen the peak harvest period.[46]
>
> (underlining added)

[78] The reduced use of labour in the horticulture industry has been driven by a shortage of available workers, with 57 per cent of horticulture farms reporting difficulty in recruiting workers in 2021-22.[47] The Labour Use Survey describes the increasing use of advanced machinery, and the repeat use of seasonal workers from previous years, as means utilised by the sector to deal with constrained labour availability and to increase productivity.[48] Critically, the Labour Use Survey also reports:

> Another adjustment made by farms in response to the lack of labour available in 2021–22 was increasing the hours worked by the existing workforce. Around 27% of Australian horticulture farms in 2021–22 had their employees working longer hours on average compared to previous years, with these farms employing 35% of the Australian horticulture workforce.[49]
>
> (underlining added)

[79] In the face of this objective evidence, it is not possible to accept the three broad propositions advanced in the employer/business submissions: horticulture businesses do have at least some capacity to pass on increases input costs in their pricing, the use of labour across the industry has been reduced and made more efficient, and the industry is generally in a healthy state, with increasing production value and greater productivity. While the employer/business submissions may have some anecdotal value, they cannot be taken as indicative of any industry-wide problem whereby additional employees are hired to ensure that no employee works a number of hours that might attract an overtime entitlement.

[80] Finally, we observed earlier that, under the Award, an employer has the option of paying piece rates to employees that comply with specified conditions and, if this is adopted, the employer is exempt from paying overtime rates. If the April 2019 overtime variation had the restrictive effect contended for, a move away from paying casual employees hourly rates of pay and towards paying them piece rates might have been expected. However, the opposite has occurred: the Labour Use Survey found that the use of pieceworkers in the horticulture industry has declined from 33 per cent of all workers in 2019-20 to 24 per cent in 2021-22.[50]

[81] Underlying the contradictory character of much of the material before us, the Labour Use Survey is also difficult to reconcile with the concerns expressed in the statutory declarations, and in the AWU's witness statements, as to insufficient working hours. However, we are not satisfied that, considering the material before us in total, there is a sufficient (or any) justification in varying the Award to delete clause 21.4.

[82] It may also be noted that, even taking the case advanced by Ms Treves and the employer interests at its highest, they have raised nothing of any relevant substance which was not considered comprehensively in the 2017 decision. We have earlier set out the key findings of the Full Bench in that decision. In particular the Full Bench found that the most likely response

of employers to the introduction of any 'onerous' overtime penalty rates would be to try to avoid its incidence, that most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments and employ more casuals to cover the hours, and that this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry. In order that the introduction of an overtime penalty rate not be counter-productive and frustrate the achievement of the modern awards objective, the Full Bench identified that the entitlement should be the subject to an averaging period so that 'overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time'.[51] In light of this conclusion, the NFF, the Ai Group and the unions agreed upon an eight-week averaging period in conjunction with a broader span of hours and a concessional overtime rate (time-and-a-half for all overtime hours worked plus the casual loading). We consider that the employer case before us here does no more than seek to re-litigate matters decided in the 2019 decision and re-open the agreement reached by the NFF, the Ai Group and the unions as to the terms of the overtime entitlement for casual employees.

[83] We do not consider that the variation proposed by Ms Treves is necessary in order for the Award to meet the modern awards objective. The addition of the overtime entitlement for casual employees caused the Award to meet the modern awards objective for the reasons stated in the 2017, 2018 and 2019 decisions, and it has not been demonstrated that the Full Bench's conclusions in those decision were wrong when decided or have been vitiated by subsequent events. We further note that it is clear that the grant of Ms Treves' proposed variation would require us to give no weight to the prescribed consideration in s 134(1)(da), which is the most directly relevant of the matters in the subsection, and the evidence does not demonstrate that any of the other matters in s 134(1) would be better served by the grant of the variation.

Conclusion

[84] Ms Treves' application is dismissed.

PRESIDENT

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[1] AM2014/196 and AM2014/197.

[2] [2017] FWCFB 3541, 269 IR 125.

[3] Ibid at [691].

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[4] Ibid at [735]-[743].

[5] Ibid at [750].

[6] Ibid at [751].

[7] [2018] FWCFB 4695 at [81].

[8] [2019] FWCFB 2108.

[9] Ibid at [19]-[24].

[10] Ibid at [26].

[11] Ibid at [31].

[12] Ibid at [39].

[13] PR737899.

[14] [2021] FWCFB 5554.

[15] [2022] FWCFB 4.

[16] Amaroo Farms submission, 31 October 2022.

[17] AW Steicke and Sons submission, 25 October 2022.

[18] BLS Farming submission, 20 September 2022.

[19] Borderland submission, 27 September 2022.

[20] Budou Farms submission, 13 October 2022.

[21] Caamano Farms submission, 20 September 2022.

[22] Cordoma Group submission, 25 October 2022.

[23] Diaco Fresh submission, 31 October 2022.

[24] Eastcoast Beverages submission, 20 September 2022.

[25] Holla-Fresh submission, 11 October 2022.

[26] JV Orchards submission, 28 October 2022.

[27] Temba Orchards submission, 26 October 2022.

[28] Tranquil Hills Orchards submission, 20 September 2022.

[29] Statement of Mr Rundell, 14 December 2022 at [7]-[8] citing the Outlook Report, 42-43.

[30] See [21] above.

[31] [2017] FWCFB 6037, 270 IR 253.

[32] *Annual Wage Review 2017-18* [2018] FWCFB 3500, 279 IR 215 at [21]-[24].

[33] *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154 at [56].

[34] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [33].

[35] *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154 at [105]-[106].

[36] Ibid at [109]-[110], albeit the Court was considering a different statutory context.

[37] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [49].

[38] *Shop, Distributive and Allied Employees Association v National Retail Association* (No.2) [2012] FCA 480, 205 FCR 227 at [35].

[39] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, 265 IR 1 at [269].

[40] Outlook Report at 42, Figure 7.1.

[41] Ibid at 43-45

[42] Ibid at 45.

[43] Ibid.

[44] Labour Use Survey, at 2.

[45] Ibid.

[46] Ibid.

[47] Ibid at 4.

[48] Ibid at 3.

[49] Ibid.

[50] Ibid at 5.

[51] [2017] FWCFB 3541, 269 IR 125 at [753].