Australian Industry Group

Application to vary the Horticulture Award 2020

Reply Submission
(AM2020/104)

10 DECEMBER 2021

AM2020/104 – APPLICATION TO VARY THE HORTICULTURE AWARD 2020

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the invitation at paragraph [586] of the Decision by the Full Bench issued on 3 November 2021 (**November Decision**) to file submissions in reply to the submissions of other parties on the Commission's draft determination (**Draft Determination**) for the *Horticulture Award 2020* (**Horticulture Award**) and the provisional views expressed in that Decision.

2. Of the submissions filed in response to the Directions in the November Decision, Ai Group wishes to respond to:

   - The submission of the Australian Workers' Union filed 26 November 2021 (**AWU Submission**); and

   - The submission of the United Workers' Union filed 26 November 2021 (**UWU Submission**);

3. Specifically, Ai Group opposes the unions' proposed operative date for the determination of 1 January 2022.

4. Pursuant to s.166(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), the relevant amendments should not be made before 1 July 2022.

5. The amendments which will be made to the Award will have a substantial impact on employers who will need to make significant changes to their payroll and workplace arrangements. The amendments could also result in the loss of employment for many employees if employers are not given sufficient time to adjust to the new arrangements.

6. The Commission should not be satisfied that it is appropriate to specify an operational date earlier than 1 July 2022.

The November Decision

7. The Determination which will be issued by the Commission to implement the November Decision will have a substantial impact on employers covered by the Horticulture Award. The proposed amendments will require employers to:

    - Determine which pieceworkers are 'competent at the piecework task' under draft clause 15.2(d);
    - Set an appropriate piece rate under draft clause 15.2(d);
    - Establish appropriate systems for tracking which employees meet the threshold for application of the piece rate under draft clause 15.2(d);
    - Establish appropriate systems to comply with draft clause 15.2(h) in generating piecework records;
    - Ascertain the likely impact on labour costs in implementing the proposed amendments to the Horticulture Award; and
    - Determine and implement any changes necessary to the employers' labour practices as a result of the impact on labour costs.

8. The high proportion of micro and small businesses covered by the Horticulture Award should weigh in favour of an operative date on 1 July 2022 at the earliest. The Australian Bureau of Statistics *Australian Industry 2019-20* release reveals that 'Micro businesses' (employing 0 – 4 employees) account for over 64% of employment in the Agriculture, Forestry and Fishing ANZSIC division, 'Small businesses' (employing 5 – 19 employees) account for just over a further 15% of employment whilst 'Medium businesses' (employing 20 – 199 employees) and 'Large businesses' (employing 200 or more employees) account for just over 20% of employment.[1] In the absence of dedicated HR staff and support, micro and small businesses are likely to need a significant amount of time to implement the amendments that arise from the November Decision.

[1] ABS, Australian Industry, Table 5 2019-20 (end of June).

Application of s.166(1)

9. In the November Decision, the Commission acknowledged that the Minimum Wages Objective applied to the proposed amendments to the Horticulture Award. It stated, at paragraph [29]: (Emphasis added)

> We agree with the submissions of the AFPA; that at present the Horticulture Award does not prescribe a minimum wage for all pieceworkers. The Uplift Term only sets a minimum wage for the 'average competent employee'. The Application proposes that a minimum be set for all pieceworkers; the fact that the Application does so by reference to the existing minimum wages in the Horticulture Award is not to the point. The Application plainly seeks to set the minimum wage applicable to a particular category of employees (pieceworkers). The Application enlivens ss.157(2) and 284. We consider these matters later in section [6.3].

10. The amendments proposed in the Draft Determination would set the minimum wage applicable to pieceworkers for the same reasons as outlined above. In acknowledgment of this, the Commission has referred to s.166(5) in the Draft Determination in Attachment D to the November Decision.

11. Section 166 of the FW Act deals with when variation determinations setting, varying or revoking modern award minimum wages come into operation. Section 166(1) provides:

> (1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:
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> (a) on 1 July in the next financial year after it is made; or
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> (b) if it is made on 1 July in a financial year--on that day.

12. Section 166(2) provides:

> (2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.

13. With regard to s.166, the Explanatory Memorandum for the *Fair Work Bill 2008* relevantly states:

> **Clause 166 – When variation determinations setting, varying or revoking modern award minimum wages come into operation**
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> 631. Clause 166 provides for when determinations setting, varying or revoking modern award minimum wages come into operation. (These rules apply to determinations made under this Part. Wage variations flowing from annual wage reviews commence in accordance with rules in Part 2-6.)
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> 632. A determination affecting modern award minimum wages will generally come into operation on 1 July in the next financial year, or on the day it is made if made on 1 July (clause 166(1)). This is consistent with the commencement of wage variations from annual wage reviews, and is designed to ensure certainty and predictability for employers and employees (see clause 286).
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> 633. However, if FWA is satisfied that it is appropriate to do so it may specify another day on which the determination comes into operation (clause 166(2)).

14. Although there is little guidance on what considerations are relevant to satisfaction that it is appropriate to specify another day under s.166(2), past decisions of the Commission provide helpful guidance. In the 4 yearly review of modern awards, the Commission made amendments to the rates of pay in the *Social, Community, Home Care and Disability Services Industry Award 2010* (**the SCHADS Award**) for casual employees working overtime and on weekends and public holidays.[2] Taking into account the interest of employers and employees in that decision, issued on 18 October 2019, the Commission determined that 1 July 2020 was the appropriate date.[3]

15. Similarly, in the Full Bench's 25 August 2021 decision pertaining to the operative date of further changes to the SCHADS Award (although not directly relevant to s.166) an operative date of 1 July 2022 was decided upon in order to allow businesses sufficient time to accommodate the increase in labour costs arising from that decision.[4] The Full Bench referred to the *Penalty Rates (Transitional Arrangements) Decision* in which the Commission said:[5]

[2] [2019] FWCFB 7096.

[3] [2019] FWCFB 7096, [35].

[4] [2021] FWCFB 5244, [316].

[5] [2021] FWCFB 5244, [305]; [2017] FWCFB 3001, [144] and [148].

> 'We must also perform our functions and exercise our powers in a manner which is 'fair and just' (as required by s.577(a)) and must take into account the objects of the Act and 'equity, good conscience and the merits of the matter' (s.578).
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> …
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> Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a 'fair and relevant minimum safety net'. Fairness in this context is to be assessed from the perspective of both the employee and employers covered by the modern award in question.'

16. The significant nature of the amendments to the Horticulture Award and the time necessary in order to make relevant adjustments to employers' labour practices supports an operative date of 1 July 2022 for the Draft Determination. This is supported by the following relevant considerations:

    - Fairness to employers covered by the Horticulture Award (s.134(1));
    - The impact on business, including in relation to employment costs, productivity and the regulatory burden (s.132(f)).

Response to arguments in AWU Submission

17. At paragraph [11] of the AWU Submission, reference was made to paragraph [75] of the *Penalty Rates (Transitional Arrangements) Decision* which is reproduced below:[6]

> [75] We reject the proposition advanced by Ai Group, for three reasons. First, the determination of appropriate transitional arrangements is a discretionary decision which depends on the relevant context. The determination of such issues in other cases is of limited assistance. The policy considerations which underpin the proposition that a previous Full Bench decision should usually be followed is more apposite to the determination of legal issues – such as the proper construction of the Act – not discretionary decisions.

18. The AWU states that this "passage highlights that a discretionary matter, such as whether it is 'appropriate' to depart from what is effectively a default operative date of 1 July in s.166(1) of the FW Act, will turn on the facts of the particular case, as opposed to previous decisions or established principles".

[6] [2017] FWCFB 3001, [75].

19. The AWU's submission should not dissuade the Commission from considering past approaches to determining appropriate operational dates, particularly when these pertain to award amendments which will lead to an increase in employment costs. The Commission routinely takes into consideration past decisions with respect to discretionary matters. For example, in its 25 August 2021 Decision relating to the SCHADS Award, the Full Bench said:[7]

> In our view, an appropriate, fair and just balance between these considerations is to provide that the award variations arising from these proceedings will commence operation from the first full pay period on or after 1 July 2022. In our view an operative date of 1 July 2022 is necessary to ensure that the SCHADS Award achieves the modern awards objective.
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> The approach we have decided to take in respect of the operative date of these variations is consistent with the approach taken to the Tranche 1 variations.

20. It is not asserted that such considerations will be decisive in all cases. It is however clear that it is appropriate for the Commission to take into account past decisions to encourage a consistent approach when exercising its discretionary powers. The abovementioned decisions with respect to the SCHADS Award provide relevant examples of cases where the Commission has considered operational dates more than 6 months after the relevant decision to be appropriate. We consider that the same approach is warranted in these proceedings.

21. At paragraphs [20] – [24] of the AWU Submission, the union argues that the Commission should determine an operative date of January 2022 on the grounds of concerns that there will be an influx of applications for enterprise agreements prior to the operative date in order to avoid the impacts of the November Decision. This argument should be rejected.

22. The AWU has provided no evidence that such an influx has emerged or even that numerous employers in the horticulture industry have commenced bargaining in response to the decision. If the AWU's predictions were to be realised, it would be expected that bargaining would have commenced given that

[7] [2021] FWCFB 5244, [316] – [317].

the November Decision was issued more than one month ago.

23. Further, the AWU's reference to enterprise agreement applications made in the wake of the *Part Time and Casual Employment Decision*[8] are misconceived. In *Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm* [2019] FWC 1016 (***Gray Australia***), Commissioner McKinnen considered a number of enterprise agreements which, if approved, would prevent the practical application of pending changes to the Horticulture Award in relation to overtime for casual employees. The Commissioner stated that whilst that of itself would not be fatal to the Agreement, because the better off overall test applies at 'test time', the Commissioner was not satisfied that adequate steps were taken to explain the nature of those pending Award changes, or the likely effect of the Agreement on employees in relation to those changes, to employees who will be covered by those Agreements.[9]

24. In *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253 (***Gray Australia Appeal***), the Full Bench considered an appeal from the decision of Commissioner McKinnon in *Gray Australia*. The Full Bench determined that failure to adequately explain the pending changes to the reference instrument meant that s.180(5) had not been complied with.[10] The Full Bench said that fundamental to determining whether the Agreements were genuinely agreed to was a consideration of the forthcoming changes to the Award and the explanation of such changes to employees under s.180(5) of the Act.[11] The Full Bench said:[12]

> …with the forthcoming changes to the Award known in precise detail, the changes are ones that would be part of the obligation on employers to inform employees about how the proposed Agreements modify the Award changes and explain its terms and effects

[8] *4 yearly review of modern awards – Part-time and Casual Employment* [2019] FWCFB 2108

[9] *Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm* [2019] FWC 1016, [8].

[10] *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253, [99].

[11] *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253, [89].

[12] *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253, [89], [92]. [95].

> accordingly. The forthcoming changes to the Award should, in our view, go to the matter of explanation under s 180(5) of the Act for the purposes of satisfying the question of genuine agreement under s 188 of the Act.
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> …
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> … in this appeal, to satisfy ourselves that the Agreements were genuinely agreed to in accordance with s 188 of the Act, the explanation provided to employees in respect of the forthcoming changes to the Award must reflect the actual nature of the forthcoming changes.
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> …
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> …the explanation provided to employees must have identified that the Award would be varied so as to prescribe the precise nature of the overtime entitlements for casuals, and further explained that the effect of the Agreements is that such entitlements will not be available to the casual employees covered by the Agreements. In our view, an explanation by the employers to employees that did not set out the changes to the Award and the effect of the Agreement in respect of such changes will mean that the Agreement was not genuinely agreed to.

25. As the Full Bench was not satisfied that the forthcoming changes to the Award were accurately or adequately explained to employees in accordance with s.180(5) of the Act, it found that absent for each of the Agreements was the requirement of genuine agreement as set out in s.188 of the Act.[13]

26. The Full Bench said that the deficiency in meeting the requirements of s.180(5) was not one that could be rectified by the provisions in the Act that afford the power to rectify minor procedural or technical errors or by way of an undertaking.[14]

27. Given the Full Bench's acknowledgment in the *Gray Australia Appeal* that failure to adequately explain prospective changes in an Award will result in an Agreement not being genuinely agreed, it should not be accepted that a large number of employers would likely seek to avoid the amendments through enterprise agreement approval applications.

[13] *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253, [99].

[14] *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253, [101].

28. The Commission should not accept the AWU's arguments pertaining to agreement approval applications made as the transition was made from the 'no disadvantage test' to the 'better off overall test'. The bridging period which was available under Item 2, Part 1, of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) enabled enterprise agreements made during that period to be subject to the 'no disadvantage test'. Such applications were not made under the current regulatory system and should be of little substance in the Commission's consideration of how employers are likely to react to an operative date of 1 July 2022.

29. At paragraph [25] of the AWU Submission, the argument is made that an early operational date is appropriate on the grounds that employers have been on notice in relation to the proposed variations for an extended period of time. This is not the case. Employers have been on notice in relation to the contested proceedings which ultimately resulted in the Commission's November Decision. It was by no means certain that a time-based floor in earnings for pieceworkers would be imposed until the November Decision was issued.

30. Moreover, the ultimate decision which was made has resulted in a Draft Determination which is distinct from the proposed amendments initially proposed by the AWU. The Commission cannot be satisfied that employers are likely to have expended the resources necessary to implement the proposed amendments until the November Decision was issued.

Conclusion

31. Ai Group urges the Commission to find that it would not be appropriate to set an operational date for the Draft Determination before 1 July 2022. The unions' arguments to the contrary should not dissuade the Commission from setting the default operational date provided for under s.166(1).