DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Horticulture Award 2010
(AM2016/25)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAMS
COMMISSIONER SAUNDERS SYDNEY, 16 NOVEMBER 2017

4 yearly review of modern awards – Horticulture Award 2010.

Introduction

[1] Section 156 of the *Fair Work Act 2009* (**FW Act**) provides that the Fair Work Commission (**Commission**) must conduct a review of all modern awards every four years (**Review**).

[2] As part of the Review, various employer parties have made applications to vary the coverage terms in clause 4 of the *Horticulture Award 2010* (**Horticulture Award**) pursuant to s.156 of the FW Act.

[3] The employer parties have also made applications pursuant to s.160 of the FW Act to vary the Horticulture Award in order to remove any ambiguity or uncertainty, and apply to have their proposed variation operate retrospectively.

[4] The relevant employer parties are Mitolo Group Pty Ltd, Maranello Trading Pty Ltd, and the Australian Industry Group (**Ai Group**). Mitolo Group Pty Ltd and Maranello Trading Pty Ltd are part of the Mitolo Group of Companies (**Mitolo**) which carries on business as a large scale South Australian based potato and onion producer. The applications by the employer parties are supported by Gayndah Packers Pty Ltd (**Gayndah**), the National Farmers Federation (**NFF**) and Voice of Horticulture (**VOH**).

[5] The National Workers Union (**NUW**) and the Australian Workers Union (**AWU**) contend that the employer parties have failed to make out their case for the proposed variation in respect of the applications made under ss.156 and 160 of the FW Act.

[6] We deal with the applications pursuant to ss.156 and 160 of the FW Act as outlined in Part A and Part B below.

PART A

Application made pursuant to s.156 of the FW Act

The Legislative Framework

Statutory construction – general observations

[7] This part of our Decision deals with the legislative provisions relevant to these proceedings. We begin by making some general observations about the task of statutory construction.

[8] The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy.[1] Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.[2]

[9] Each provision of the FW Act must be read in context by reference to the language of the FW Act as a whole.[3] The relevant legislative context may operate to limit a word or expression of wide possible connotation.[4] The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:

> '… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'[5]

[10] The provisions of an Act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.[6]

[11] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[7] (***Alcan***), the High Court described the task of legislative interpretation in the following terms:

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[1] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p. 408.
[2] See *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [59]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 at [26]–[37]; *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139 at [16]–[19].
[3] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].
[4] See *Prior v Sherwood* (1906) 3 CLR 1054; *R v Refshauge* (1976) 11 ALR 471 at p. 475.
[5] (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ; also see *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [65]–[66].
[6] *Ross v R* (1979) 141 CLR 432 at [440]; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at p. 479 per McHugh and Gummow JJ.
[7] (2009) 239 CLR 27 at [47].

'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'

[12] We now turn to the specific provisions relevant to these proceedings.

The relevant statutory provisions

[13] Section 156 of the FW Act states as follows:

'**4 yearly reviews of modern awards to be conducted**

Timing of 4 yearly reviews

(1) The FWC must conduct a ***4 yearly review of modern awards*** starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

What has to be done in a 4 yearly review?

(2) In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A.

Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.'

[14] In addition to s.156, a range of other provisions in the FW Act are relevant to the Review: s.3 (objects of the Act); s.55 (interaction with the NES); Part 2-2 (the NES); s.134 (the modern awards objective); s.135 (special provisions relating to modern award minimum wages); Divisions 3 (terms of modern awards) and 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions and exercise of powers of the Commission); s.578 (matters the Commission must take into account in performing functions and exercising powers); and Division 3 of Part 5-1 (conduct of matters before the Commission).

[15] The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:

'**Performance of functions etc. by the FWC**

FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that FWC performs its functions and exercises its powers efficiently etc. (see section 581).'

[16] Section 578 states:

'**Matters the FWC must take into account in performing functions etc.**

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

[17] As stated in s.578(a), in performing functions and exercising powers under a part of the FW Act (including the Review function under Part 2-3 Modern Awards) the Commission must take into account the objects of the FW Act and any particular objects of the relevant part. The object of Part 2-3 is expressed in s.134, the modern awards objective. The object of the FW Act is set out in s.3, as follows:

'**Object of this Act**

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.'

[18] In conducting the Review, the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).

[19] The Review is to be distinguished from *inter partes* proceedings. Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.[8] The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.

[20] The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*.[9] We adopt and apply that decision and in particular the following propositions:

(i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013;

(ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award;

(iii) The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made; and

(iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.

[21] We now turn to the relevance of the 'modern awards objective' to the Review.

The modern awards objective

[22] The modern awards objective applies to the performance or exercise of the Commission's modern award powers, which are defined to include the Commission's functions or powers under Part 2-3 of the FW Act. The Review function is set out in s.156, which is in Part 2-3 and so will involve the performance or exercise of the Commission's modern award powers. It follows that the modern awards objective applies to the Review.

[8] *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140].
[9] [2014] FWCFB 1788 at [19]–[24] (the *Preliminary Jurisdictional Issues Decision*).

[23] The modern awards objective is set out in s.134 of the FW Act, which states:

'**The modern awards objective**

What is the modern awards objective?

(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

(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

(e) the principle of equal remuneration for work of equal or comparable value; 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.

This is the modern awards objective.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[24] The modern awards objective is to '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 the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.[10] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[11] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[25] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions.

Section 138 and the modern awards objective

[26] Section 138 of the FW Act emphasises the importance of the modern awards objective in the following terms:

'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[27] To comply with s.138 the terms included in modern awards must be 'necessary to achieve the modern awards objective'.

[28] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2),*[12] Tracey J considered the proper construction of the expression 'the Commission is satisfied that making [a determination varying a modern award] … is *necessary* to achieve the modern awards objective', in s.157(1). His Honour held:

'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA

[10] See *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J.
[11] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836; *National Retail Association v Fair Work Commission* [2014] FCAFC 118.
[12] *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* (2012) 205 FCR 227.

> must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[13]

[29] The above observation, in particular, the distinction between that which is 'necessary' and that which is merely desirable, is apposite to our consideration of s.138. Further, we agree with the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable. It seems to us that what is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 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.[14]

[30] In the *Preliminary Jurisdictional Issues Decision*, the Full Bench considered what had to be demonstrated by the proponent of an award variation and concluded that:

> 'To comply with s.138 the formulation of terms which must be included in modern awards or terms which are permitted to be included in modern awards must be terms "necessary to achieve the modern awards objective" … In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.'[15]

[31] The above proposition is supported by the terms of s.138 and the legislative context. Section 138 requires that a 'modern award may include terms … only to the extent necessary to achieve the modern awards objective'. The section focuses attention on the terms of a

[13] Ibid at [35]–[37] and [46].
[14] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.
[15] [2014] FWCFB 1788 at [36].

modern award, rather than on the terms of a proposed variation. Further, as we have mentioned, the jurisdictional basis for the Review is s.156. Section 157 deals with the variation of modern awards *outside* the system of 4 yearly reviews. Section 157(1) states, relevantly:

> **'FWC may vary etc. modern awards if necessary to achieve modern awards objective**
>
> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
>
> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
>
> Note 1: The FWC must be constituted by a Full Bench to make a modern award (see subsection 616(1)).
>
> Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
>
> Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (3) The FWC may make a determination or modern award under this section:
>
> (a) on its own initiative; or
>
> (b) on application under section 158.

[32] Section 157(1) makes express reference to the Commission being satisfied that the 'determination varying a modern award' is necessary to achieve the modern awards objective. There is no such express reference in either s.138 or s.156.

[33] The Commission's task in the Review is to 'survey, inspect, re-examine or look back upon' a modern award as a whole to ensure that it, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account paragraphs (a) to (h) of s.134(1) of the FW Act.[16]

[34] It is not necessary for there to have been a material change in circumstances since the making of the modern award, or its last review, to empower the Commission to vary a modern award in a Review.[17] A modern award may be found not to achieve the modern awards objective for 'reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.'[18] However, it is not necessary for the Commission to conclude that the modern award, or a term of it, does not meet the modern awards objective, to empower the Commission to vary a modern award in a Review.[19] Rather, the task in the Review is to 'review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'[20]

[35] The Full Court of the Federal Court recently explained the function of the Commission in a Review as follows in the *Penalty Rates Case* (at [48]):

> '…the modern awards objective requires the FWC to perform two different kinds of functions, albeit that that modern awards objective embraces both kinds of function. 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" and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) 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 which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act…'

[36] The composite phrase 'fair and relevant' in the chapeau to s.134(1) involves broad concepts.[21] The perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances which may be considered, in addition to the s.134(a) to (h) matters and other relevant facts, matters and circumstances, in

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[16] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, [30] and [38] (*Penalty Rates Case*).
[17] Ibid [23]-[40].
[18] Ibid [34].
[19] Ibid [45], applying *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [28]-[29].
[20] Ibid.
[21] Ibid [65].

determining whether a modern award, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.[22]

Evidence

[37] We note the following persons gave evidence in relation to these proceedings:

- Ms Paula Colquhoun, Human Resources Manager for Mitolo (**Exhibits 4-7**);
- Mr Bryan Robertson, Executive Officer of HortEx Alliance Incorporated (**Exhibit AIG4**);
- Mr Godfrey Cody, CEO of the Primary Skills Industries Skills Council (**Exhibit AIG5**);
- Ms Robin Davis, CEO of Potatoes South Australia Inc (**Exhibit AIG6**);
- Mr Keith Rice, Chief Executive of Primary Employers Tasmania and Poppy Growers Tasmania (**Exhibit NFF1**);
- Mr Gavin Scurr, Managing Director of Pinata Farms Pty Ltd and Director of the Australian Mango Industry Association (**Exhibit NFF2**);
- Mr Brett Guthrey, Chairman of the NSW Farmers Horticulture Committee and President of Persimmons Australia Inc (**Exhibit NFF3**);
- Mr Derek Lightfoot, Managing Director of Tropical Pines in Queensland and a Board Director of Growcom, the peak horticultural body in Queensland (**Exhibit NFF4**);
- Mr Philip Turnbull, CEO of Apple and Pear Australia (**Exhibit NFF5**);
- Ms Lynn Tonsing, Administrative Manager at Gayndah (**Exhibit GP2**);
- Mr Kay Rault, Grader at Mitolo (**Exhibits NUW1 and NUW2**);
- Mr George Robertson, Organiser at the NUW (**Exhibits NUW3 and NUW4**);
- Mr Mark Johnston, Forklift Driver at Geoffrey Thompson & Growers Cooperative Company Pty Ltd (**Exhibit NUW5**);
- Mr Jafar Kazmi, Organiser at the NUW (**Exhibit NUW6**);
- Mr Paul White, General Manager at Zerella Fresh (**Exhibit Z1**); and
- Mr John Dollison, Deputy Chair of the VOH (**Exhibit VH1**).

[22] Ibid [53] and [65].

[38] We have fully considered all the above evidence, as well as all other exhibits (Mitolo 1-7; AIG1-AIG6; NFF1-NFF5; GP1-GP2; NUW1-NUW6; AWU1-AWU5; Z1; and VH1), correspondence and submissions.

[39] We now turn to consider the issues raised before us in these proceedings.

The 'Farm Gate' – A Geographical Location or a Virtual Concept?

[40] When the Full Bench of the Australian Industrial Relations Commission (**AIRC**) made the Horticulture Award and other awards relating to agriculture and farming, they took the following approach to coverage of the relevant awards:[23]

> 'Our overall approach to coverage of the pastoral and horticultural Awards is that they should be confined to agricultural production within the "farm gate".'

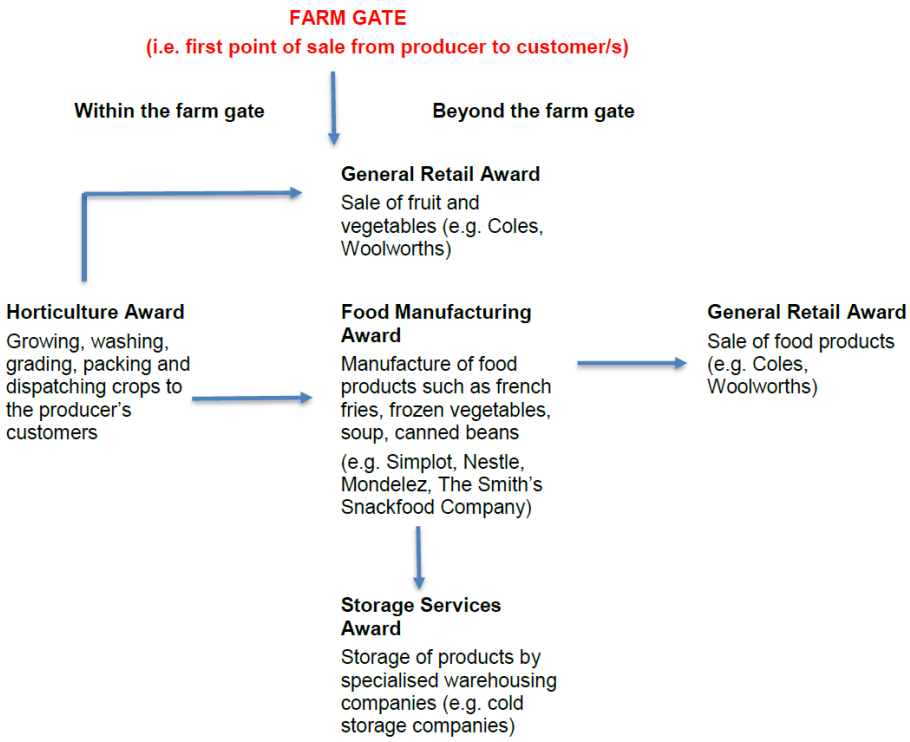
[41] The term 'farm gate' received little consideration in the award modernisation proceedings and was not defined or explained by the Full Bench. However, the reference to the 'farm gate' by the Full Bench was in the context of delineating between activities which properly come within the agricultural industry because they are carried out as part of agricultural operations and those which are properly processing, manufacturing or storage/warehousing activities. In particular, the AIRC's statement was made against the backdrop of arguments advanced by the AMWU that the coverage of the Horticulture Award should not cross over into food manufacturing activities previously covered by the *Food Preservers' Award 2000.*

[42] One of the issues in the present proceedings is what is meant by the 'farm gate'; is it a physical barrier or a virtual concept?

[43] In its final submissions the Ai Group used the diagram below to depict what it considers ought be the dividing line between the Horticulture Award, on the one hand, and the other awards shown on the diagram, on the other hand, and what what activities are constituted as within and beyond the 'farm gate'.

[23] *Award Modernisation* [2009] AIRCFB 345, [53].

Diagram 1: Award coverage within the supply chain in the horticulture and related industries



[44] We have fully considered the competing submissions and evidence of the parties in relation to this issue. In brief summary, the employer parties contended that the 'farm gate' relates to a concept that contemplates the point at which produce has been rendered fit for sale and ready for market. Conversely, the NUW and the AWU contended that the 'farm gate' is a physical in nature and refers to a geographical location. In particular, the AWU asserted that:

> 'This Full Bench should find that the "farm gate" has a clear meaning which is the geographical boundary of a farm and that the coverage of the Horticulture Award is currently deliberately confined to the "farm gate".'[24]

[45] The AWU contended that Senior Deputy President Hamberger adopted a geographical definition of 'farm gate' in his decision in *Application by National Union of Workers*.[25] In particular, we note it was held at [8] and [9] that:

> **'**[8] The relevant parts of the coverage clause of the Horticulture Award 2010 are as follows:
>
> > "4.1 This industry award covers employers throughout Australia in the horticulture industry and their employees in the classifications listed in Schedule B – Classification Structure and Definitions, to the exclusion of any other modern award.

[24] AWU Closing Submissions dated 31 July 2017, [30].
[25] [2010] FWA 8228.

4.2 Horticulture industry means:

(a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

(b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables."

[9] During the hearing there was some discussion about whether the coverage of the Horticulture Award 2010 extends beyond the "farm gate". Having examined the transcript of the consultations before Commissioner Lewin that led to the development of the modern award I am satisfied that the reference to "*upon farms, orchards and/or plantations*" should be regarded as qualifying all the activities listed in the preceding paragraph. The phrase "*including fruit and vegetables*" merely emphasises that these products are included in the concept of "*horticultural crops*". The effect of this construction is that the modern award only covers activities such as picking, packing, storing etc. to the extent those activities happen on farms, orchards and/or plantations.'

[46] Further, the AWU and the NUW contended that the adoption of a different definition of 'farm gate' would require a departure from the decision in *Mitolo Group Pty Ltd v National Union of Workers*[26] (***Mitolo***). In particular, the Full Bench in *Mitolo* held:

'[45] We do not consider that paragraph (a) of the definition is readily amenable to the "substantial character" test because it operates by reference to particular types of work locations used for particular commercial activities. The primary part of the paragraph refers to "agricultural holdings, flower or vegetable market gardens", and thus emphasises at the outset that the industry is to be defined by reference to where the commercial activity is conducted. It then goes on to list certain types of commercial activity required to be conducted at those locations. The subordinate part of the paragraph beginning with the word "including" then describes additional types of locations – "farms, orchards and/or plantations" – used in relation to fruit and vegetables. We accept Mitolo's submission that "including" is a word of extension, so to the extent that a relevant location cannot be characterised as an agricultural holding or a flower or vegetable market garden, the location will nonetheless fall within the industry definition if it is a farm, orchard or plantation.

[46] That work location was intended to be a critical element in the coverage of the Horticulture Award is confirmed in the decision of the Full Bench of the AIRC in its *Award Modernisation* decision of 3 April 2009 in which, among other things, it made the Horticulture Award and other awards relating to agriculture and farming. In relation to coverage, the Full Bench said: "Our overall approach to coverage of the pastoral and horticultural awards is that they should be confined to agricultural production within the 'farm gate'." It is clear therefore that it is not sufficient that commercial activities of the type described in paragraph (a) of clause 4.2 are carried

[26] [2015] FWCFB 2524.

on by the employer; they must also be carried out at the type of work locations specified in the paragraph.' (references omitted)

[47] However, at [59] in *Mitolo*, the Full Bench noted as follows:

'The 4 yearly review of modern awards required by s.156 of the FW Act is currently proceeding. The Horticulture Award and the Storage Services Award fall within shortly upcoming stages of the current review. If any party considers that the coverage or other provisions of the two awards are such that the modern awards objective in s.134 of the FW Act is not being met, the current review provides an opportunity for such an issue to be agitated before a Full Bench of the Commission.'

[48] Therefore, the Full Bench in *Mitolo* considered that the 4 yearly review would provide an opportunity for parties to address the issue of coverage of the Horticulture Award and/or the Storage Services and Wholesale Award. That is, the Full Bench in *Mitolo* implicitly conceded that a new finding could be reached by us regarding the issue of coverage in our 4 yearly review. Noting this concession, we are not persuaded that we must depart from the decision of the Full Bench in *Mitolo* in making our findings as part of the 4 yearly review. The task before the Full Bench in *Mitolo* was the proper construction of the coverage clause in the Horticulture Award, whereas our task in this Review is to 'survey, inspect, re-examine or look back upon' the Horticulture Award as a whole to ensure that it, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account paragraphs (a) to (h) of s.134(1) of the FW Act.[27]

[49] We have had the benefit of extensive submissions and evidence, as well as inspections in conducting this 4 yearly review. Having regard to this and for the reasons set out below, in our view, despite the contentions of the AWU and the NUW, it is abundantly clear that the 'farm gate' is the first point of sale from a producer to a customer. That is, the 'farm gate' is a virtual concept. This is highlighted by the following example relating to potatoes:

- All activities carried out by the producer up to the point at which the potatoes are sold to a retailer or sold to a food processing company are within the 'farm gate' and the work is carried out under the Horticulture Award.

- Once the potatoes move through the 'farm gate':

    - If the potatoes have been sold to a retailer, the retailer's employees' work of selling the potatoes to consumers is carried out under the *General Retail Industry Award 2010* (**General Retail Award**);

    - If the potatoes have been sold to a food processor, the food processor's employees' work of manufacturing frozen chips and potato chips is carried out under the *Food, Beverage and Tobacco Manufacturing Award 2010* (**Food Manufacturing Award**);

    - Food processors typically sell their products to retailers. The retailer's employees' work of selling processed food to consumers is carried out under the General Retail Award;

[27] *Penalty Rates Case* at [30] & [38].

- Food processors often engage specialised cold storage companies to store manufactured food products (e.g. frozen chips) which have not yet been delivered to retailers. Specialised cold storage companies and their employees are covered by the *Storage Services and Wholesale Award 2010* (**Storage Services and Wholesale Award**).

[50] The 'farm gate' is not a reference to a physical barrier or gate that hangs from a fence on a particular farm. Rather the evidence in these proceedings demonstrated that the 'farm gate' is a well-known *concept* in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s. That is, the 'farm gate' concept is not determined by the location of work.

[51] The producing of horticultural crops involves a number of integrated and interconnected processes that often take place across numerous physical locations, to ensure the most efficient use of resources, and to meet production needs and customer requirements.

[52] These include activities at the beginning of the process (such as sowing, planting and raising), in the middle of the process (such as harvesting and picking) and at the end of the process (such as washing, grading, packing and despatching) before the crops are transported to market.

[53] The fact that activities such as washing, grading, packing and despatching may be undertaken at different premises to where the crops are grown and harvested does not mean that these activities are 'beyond the farm gate'.

[54] It has been held that 'cleaning, sorting and bagging' are 'the last stages of harvesting'.[28] We agree with this characterisation.

[55] Viewing the concept of the 'farm gate' in this manner is consistent with the coverage of the pre-modern *Horticulture Industry (AWU) Award 2000* (**Horticulture Award 2000**), which was the main pre-modern award upon which the Horticulture Award was based. Coverage under the Horticulture Award 2000 was not constrained by locational limitations and the Horticulture Award was, in our view, not intended to be either.

[56] If it had been the Award Modernisation Full Bench's intention to introduce a locational limitation to coverage under the modern award, it would have set out its intention and reasons for doing so during the award modernisation process. Instead, the Full Bench used the expression 'farm gate' which has a well-understood meaning in the industry; a meaning which is not determined by the location where work is carried out.

[57] Further, the concept of the 'farm gate' is directly connected to the concept of the 'farm gate price', which is commonly used for accounting purposes and economic analysis in respect of the horticulture industry.

[58] The Organisation for Economic Co-operation and Development (**OECD**) defines the term 'farm gate price' as:

[28] *The National Union of Workers, South Australian Branch v Comit Farm Produce Pty Ltd (No. 2)* [1998] SAIRC 14 (20 March 1998).

> 'A basic price with the "farm gate" as the pricing point, that is, the price of the product available at the farm, excluding any separately billed transport or delivery charge.'[29]

[59] This definition is consistent with the definition of 'farm gate price' in the Collins English Dictionary, which defines the term as:

> 'The price for the sale of farm produce direct from the producer.'[30]

[60] The concept of the 'farm gate price' is also used by the Australian Bureau of Statistics (**ABS**) for the purpose of agricultural statistics. In this context, the ABS refers to prices at the farm gate as 'local value'. The term 'local (basic value)' is defined by the ABS as:

> 'The value of agricultural commodities at the point of production. Local value is derived by subtracting the marketing costs from Gross value. Marketing costs are defined as the cost of moving agricultural commodities from the point of production (farm) to the point of sale.[31]

[61] 'Gross value' (as referred to in the above definition) is defined by the ABS as:

> 'The value of production at the point of sale (i.e. where it passes out of the Agricultural sector of the economy). It is the value placed on recorded production at wholesale prices, realised in the market place.'[32]

[62] It is evident from the above that the 'farm gate price' of a cultivated product is generally considered to be the price of the product before it leaves the producer and is transported to the first point of sale.

[63] The 'farm gate price' of horticultural crops is the value of the crops at the end of the horticultural process, that is, once the crops have been grown, harvested, washed, sorted, graded, packed and bagged by the producer and are ready to go to market. It is not the value of crops at a specific, physical location or 'gate', but the value of the crops at the completion of the horticultural process, regardless of where the activities are carried out.

[64] The following evidence strongly supports the above argument that the 'farm gate' is a virtual concept.

Witness Statement of Bryan Robertson

[65] Mr Bryan Roberston, who is the Executive Officer of HortEx Alliance Incorporated and has extensive experience in the agricultural industry since 1991, stated in his witness statement at [44]-[49] that:

> 'The accepted industry understanding of the term "farm gate" is that it is a concept and not a physical thing. It refers to the time when the product leaves the primary producer in a "fit for purpose" state for the customer.

[29] OCED Glossary of Statistical Terms – Farm Gate Price Definition. Available at: https://stats.oecd.org/glossary/detail.asp?ID=940.
[30] See: https://www.collinsdictionary.com/dictionary/english/farm-gate-price.
[31] Australian Bureau of Statistics, Value of Agricultural Commodities Produced. Available at: http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/F276A671BC2F9899CA256F0A007D8CB1?OpenDocument.
[32] Ibid.

> The view that "the farm gate" refers to a physical gate around a farm is archaic and not in line with what agriculture does and how it works today.
>
> Although traditionally growers operated from one piece of land, there is no physical farm gate or boundary now because many businesses in the vegetable industry have multiple properties from which they run their businesses. The produce is typically grown in different locations and brought back to a central location where it washed, graded and packed to meet fitness for purpose criteria. Therefore, the modern, common understanding of the term is that produce leaves "the farm gate" once it is ready for market.
>
> Primary Industries and Regions SA (**PIRSA**), which is a key economic development agency in the Government of South Australia, requires the Horticulture Coalition of SA (of which HortEx is a part ~~and I am a Board Member~~) to provide information on the farm gate value of horticultural product leaving producers in South Australia every year. This information is used by PIRSA for future economic planning. I am also on the panel of Biosecurity South Australia which is the quarantine body for South Australia and a part of PIRSA.
>
> I have been closely involved in the process of collecting this information for PIRSA in the past. From this it is my understanding that, for the purpose of collecting the information, produce that has left the farm gate is generally regarded as produce that is in a fit for purpose condition that is acceptable to the marketplace (with the market place referring to specifications from the supermarkets/merchants or the government).
>
> I have always understood this to be how the term 'farm gate' is interpreted in the industry.'[33] (emphasis added)

Witness Statement of Robin Anne Davis

[66] At [41]-[44] of her witness statement, Ms Davis asserted that:

> 'The "farm gate" value is a widely used agricultural term that means the value of produce at the first point of sale. It is understood in the industry as the market price that the primary producer receives.
>
> For example:
>
> - If potatoes are being processed into French fries, the farm gate value of the potatoes is the value at which the potatoes are sold to the food manufacturer (e.g. McCain Foods) for (this is the first point of sale);
>
> - If potatoes are being taken directly to the retail chain, the farm gate value of the potatoes is the value at which they are sold to the supermarket for (this is the first point of sale).

[33] Witness Statement of Bryan Robertson dated 22 December 2016 (with amendments made by Mr Robertson at the hearing on 21 June 2017 marked).

> Potato producers in South Australia have an annual farm gate production worth in excess of $208 million. This means that the value of potatoes at the first point of sale (i.e. when the potatoes leave the primary producer) is worth in excess of $208 million. In this context, the "farm gate" is virtual – not physical. It means the point in the value chain when the product is fit for purpose and the first point of sale.'

[67] Ms Davis' evidence remained consistent in cross-examination as evidenced from the below transcript extract at PN1253-PN1261:

> 'MR CRAWFORD: Ms Davis, do you see that's an OECD document taken from an OECD glossary of statistical terms?---Yes, I do.
>
> There's a definition cited of producer price for agricultural commodities and it reads:
>
> > *The producer price is the average price or unit value received by farmers in the domestic market for a specific agricultural commodity, produced within a specified 12 month period. The price is measured at the farm gate, that is at the point where the commodity leaves the farm and therefore does not incorporate the cost of transport and processing.*
>
> Do you see that?---Yes, I see that.
>
> Do you agree with that definition of the farm gate, that is the farm gate is the point in time where the commodity leaves the farm?---There are many definitions of farm gate. What's important here is that farm gate is a virtual concept, so it is at the point where a commodity is actually directly sold from the producer. But where that farm gate is, is a concept only.
>
> Well why do you say it's a virtual concept? Where do you draw that definition from?---Because it's not a gate. It's not a real gate.
>
> Do you accept that the term "farm gate" is reference to a geographical area to the boundaries of a farm?---Not necessarily. A farm gate is really a point at which the product is sold directly to the supermarkets from a producer.
>
> I guess that means you dispute the OECD definition because they seem to think that term is geographical nature in that it refers to the point where the commodity leaves the farm?---No, I don't. I'm not saying that at all. Leaves the farm doesn't necessarily present itself geographically. I don't agree with that.
>
> Nothing further.'

[68] Thus, we agree with the employer parties and we are satisfied that the 'farm gate' is not a reference to a physical barrier or geographical location. Rather, the 'farm gate' is a reference to a well-known *concept* in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s.

[69] We agree with the approach taken by the Full Bench of the AIRC in 2009 to confine coverage of the Horticulture Award to 'agricultural production within the "farm gate".'[34] However, for the reasons set out above, we are of the view that the meaning of the concept of a 'farm gate' in a modern agricultural sector may not have been fully appreciated at the time the Horticulture Award was first made and the definition of the horticultural industry was formulated. In this Review, we will properly bring to account the meaning of the expression 'farm gate' (as set out in the previous paragraph).[35]

Coverage of the Horticulture Award

[70] Clause 4 of the Horticulture Award indicates that coverage is to be determined by answering two questions:

1. Is the work performed within the horticultural industry; and, if so

2. Does the work come within one of the classifications within the Horticulture Award?

[71] The AWU and the NUW rely upon the Full Bench's finding in *Mitolo*, namely, that:

> '… work location was intended to be a critical element in the coverage of the Horticulture Award …'[36]

[72] In this regard, the AWU and NUW contended that coverage is ultimately determined by whether the work performed is physically located on a farm. However, we note the following extract from s.132 of the FW Act:

> 'Modern awards may set minimum terms and conditions for national system employees in particular industries or occupations.'

[73] Having regard to the above extract, it is noteworthy that s.132 of the FW Act contemplates that modern awards may set terms and conditions for employees, in particular, industries or occupations, but it is silent as to whether an industry in a modern award may be defined in whole or part by reference to the location where work is undertaken.

[74] The AWU contended that the coverage clause in the Horticulture Award is driven by location, relying on clause 1.4 of the *Fruit and Vegetable Growing Industry Award – State 2002* (**Queensland Award**),[37] which states as follows:

> 'Subject to the exemptions in clause 1.7, this Award applies to all employers and their employees engaged in the fruit and vegetable growing industry, including the preparation of land, cultivation, planting, care, picking, handling, treating, packing and despatching of all fresh fruits (including tomatoes) and vegetables, on <u>or from</u> fruit and vegetable farms, vineyards, orchards and plantations, throughout the state of Queensland.' (emphasis added)

[34] *Award Modernisation* [2009] AIRCFB 345 at [53].
[35] *Penalty Rates Case* at [34].
[36] [2015] FWCFB 2524, [46].
[37] AWU submissions dated 21 April 2017, [32]-[33].

[75] As observed by the AWU in its opening submissions,[38] this was one of the predecessor awards to the Horticulture Award. Contrary to the assertion of the AWU, clause 1.4 of the Queensland Award does not confine coverage to work done 'on' a location that is behind a physical farm gate. Rather, it also operates in respect of any farm produce that comes 'from' a location throughout the State of Queensland.

[76] We now outline the nature of the horticulture industry having regard to the evidence before us.

The Nature of the Horticulture Industry

[77] In outlining the nature of the horticulture industry, we have particular regard to the evidence of Bryan Robertson, Robin Davis and Mark Cody, which reveals the following regarding the operation of horticultural businesses:

- Producing vegetables is an integrated process that typically involves a number of activities including preparing the land, seeding, growing, cultivating, harvesting, washing, grading and packing for despatch;[39]

- It is common for vegetable producers to operate across multiple properties, with one central location and secondary properties for production;[40]

- Businesses often have multiple properties because it is difficult to acquire land of the required size in one location and, consequently, as businesses expand, they need to acquire land wherever they can obtain it;[41]

- Horticultural businesses often draw produce from a large number of different growing locations;[42]

- To produce various horticultural crops (e.g. potatoes), land needs to be left fallow;[43]

- It is common for producers with multiple growing sites to have a single, centralised washing and packing facility where produce that has been grown and harvested is taken to be washed, graded and packed;[44]

- These centralised washing and packing facilities are sophisticated and expensive and it would be inefficient for one horticulture business to have more than one such facility;[45]

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[38] Ibid [32].
[39] Witness statement of Bryan Robertson at paragraph 28; witness statement of Robin Davis at paragraph 24; Witness statement of Mark Cody at paragraphs 12 and 13.
[40] Witness statement of Mark Cody at paragraphs 17-19; Witness statement of Robin Davis at paragraphs 28-30; Witness statement of Bryan Robertson at paragraphs 23-25.
[41] Witness statement of Bryan Robertson at paragraph 21 and 22; Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 16.
[42] Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 17.
[43] Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 17.
[44] Witness statement of Mark Cody at paragraphs 17-19; Witness statement of Robin Davis at paragraphs 28-30; Witness statement of Bryan Robertson at paragraphs 23-25.
[45] Witness statement of Bryan Robertson at paragraph 25; witness statement of Robin Davis at paragraph 30; Witness statement of Mark Cody at paragraphs 17-20.

- Washing and packing facilities typically need to be in a centralised location to be able to access the required electricity, gas and water, and to ensure that the produce is able to be easily transported;[46]

- Vegetable producers are required to meet strict fitness for purpose specifications set by Governments and major retailers in order to be able to sell their produce;[47]

- The perishable nature of most horticulture products requires fast despatch to customers;[48]

- Supermarkets generally receive potatoes within 24 to 48 hours of them being harvested;[49]

- Cool rooms in centralised washing and packing facilities typically only hold products for a very short period of time pending despatch to customers;[50] and

- There are substantial costs and competitive pressures upon businesses in the horticulture industry.[51]

Classifications in the Horticulture Award

[78] In order to be covered by the Horticulture Award, the employees of a business that is covered by clause 4.2 must also be covered by the relevant classifications in the Award.

[79] The classifications in Schedule B of the Horticulture Award undoubtedly include the packing, storing, grading, forwarding, washing and treating of horticultural crops.

[80] For example, in clause B.1.3, the indicative tasks of a Level 1 Employee include:

- Sorting, packing or grading of produce where this requires the exercise of only minimal judgment.

[81] Similarly, in clause B.2.3, the indicative tasks of a Level 2 Employee include:

- Performing a range of tasks involving the set up and operation of production and/or packaging or picking equipment, labelling and/or consumer picking equipment;

- Sorting, packing and grading beyond the scope of Level 1 duties;

- Using hand trolleys, pallet trucks or other mechanical or power driven lifting or handling devices not requiring a licence; and

- General and routine product testing.

[46] Witness statement of Bryan Robertson at paragraph 25; Witness statement of Mark Cody at paragraph 17.
[47] Witness statement of Bryan Robertson at paragraphs 28-43; and witness statement of Robin Davis at paragraphs 31-38.
[48] Witness statement of Mark Cody at paragraph 15; Re-examination of Bryan Robertson at Transcript PN1011.
[49] Cross-examination of Robin Davis at Transcript PN1216-PN1217.
[50] Cross-examination of Robin Davis at Transcript PN1219.
[51] Witness statement of Bryan Robertson at paragraph 57; and witness statement of Robin Anne Davis at paragraphs 47-48.

[82] Further, the indicative tasks for Level 3, 4 and 5 Employees in Schedule B also clearly cover functions connected to the washing, grading and packing of horticultural crops (albeit at a higher skill level).

Storage Services and Wholesale Award Modernisation Developments

[83] During the development of the Storage Services and Wholesale Award, the main area of contention between Ai Group and the NUW concerned the potential disturbance in coverage of numerous industry awards if the coverage of the Storage Services and Wholesale Award extended beyond those businesses that were principally engaged in the storage of goods.

[84] In its Stage 3 pre-exposure draft submission dated 6 March 2009, Ai Group stated, in particular:

> 'The intent of the coverage clause is to ensure that the scope of the Award does not inadvertently extend coverage of the Award to employers operating in other industries. In order to ensure this, subclause 4.2 provides for a general exclusion.'

[85] The NUW opposed this exclusion,[52] however, the Full Bench accepted Ai Group's submissions and the exclusion clause was incorporated into the Storage Services and Wholesale Award.

[86] We note that clause 4.2(a) of the Storage Services and Wholesale Award states as follows:

> '4.2 Notwithstanding clause 4.1, the award does not cover:
>
> (a) an employer to the extent that the employer is covered by another modern award that contains classifications relating to functions included within the definition of the storage services and wholesale industry with respect to any employee who is covered by that award …'

[87] Clause 4.2(a) of the Storage Services and Wholesale Award operates to exempt employers who employ employees to perform the functions included within the definition of 'storage services and wholesale industry' in the award[53] if another modern award covers that employer and the award contains classifications relating to the abovementioned functions. As outlined in clause 3.1 of the Storage Services and Wholesale Award, these functions are the 'receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, dispatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary.'

[88] The Horticulture Award contains classifications relating to functions included within the definition of the 'storage services and wholesale industry'. For example, the classification structure of the Horticulture Award includes, as indicative tasks, the sorting and packing of

[52] NUW Submission, Award Modernisation – Stage 3 – Storage Services, 7 April 2008, http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW_further_storage.pdf; Also see NUW mark-up of Storage Services and Wholesale Award 2010 exposure draft dated 9 May 2009, 19 June 2009.
[53] Storage Services and Wholesale Award 2010, cl 3.1.

produce[54] and inventory and store control.[55] Furthermore, the Horticulture Award lists the activities of packing, storing and forwarding of fruit and vegetables within its coverage clause at 4.2(a).

[89] The abovementioned developments support the view that, at the time the Storage Services and Wholesale Award was made, it was the intention of the AIRC's Award Modernisation Full Bench that the Storage Services and Wholesale Award not apply to employers and employees in the horticulture industry, given that the Horticulture Award covers packing, storing and despatch functions.

Horticulture Award Modernisation Developments

[90] Whilst there were a number of pre-modern awards and Notional Agreements Preserving State Awards (**NAPSAs**) which applied to horticulture businesses, the main pre-modern award upon which the terms of the Horticulture Award are based (including the coverage terms) is the Horticulture Award 2000.

[91] This is evident from the following extract of the AIRC Full Bench's *Stage 2 Award Modernisation Decision* regarding the making of the Horticulture Award:

> 'We have revised the ordinary hours and overtime provisions of the exposure draft. The provisions in the Horticulture Award 2010 are generally in line with the relevant provisions of the *Horticulture Industry (AWU) Award 2000*, as it applies to what are referred to as the Schedule A respondents to that award. We have also included more extensive provisions for pieceworkers and included piecework provisions we consider are consistent with the requirements of the consolidated request. A number of other provisions have been altered to make the interaction with the NES clearer.'[56] (emphasis added)

[92] This is also confirmed in the recent Full Bench decision in the *4 Yearly Review of Awards - Casual and Part-Employment Case*:[57]

> '[735] It is apparent that the current provisions of the Horticulture Award were derived substantially from provisions of the federal pre-reform *Horticultural Industry (AWU) Award 2000* (2000 Award) as it applied to respondents to that award, although it rationalised a range of other pre-reform awards and State award provisions transmitted into NAPSAs which contained diverse provisions. The 2000 Award provided for different provisions applicable to "Schedule A" respondents on the one hand and "Schedule B" and "Schedule C" respondents on the other …'

[93] As identified by the Full Bench in the above extract, the Horticulture Award 2000 consisted of three schedules, with one set of key conditions applying to Schedule A respondents and another set of key conditions applying to Schedule B and C respondents. Schedule A respondents were named employers in Victoria, South Australia and New South Wales. Schedule B and C respondents were named Victorian employers and four employer

[54] Horticulture Award 2010, cl B1.1.3 and B1.2.3.
[55] Ibid cl B.4.3.
[56] [2009] AIRCFB 345.
[57] [2017] FWCFB 3541.

organisations – Ai Group, VECCI, the VFF Industrial Association and the TFGA Industrial Association.

[94] The coverage provisions which applied to the different schedules of the Horticulture Award 2000 applied to the packing, storing, grading, forwarding, washing and/or treating of horticultural crops in connection with a horticultural enterprise without limitation as to where the work was carried out.

[95] In relation to Schedule A respondents, clause 6.1 of the Horticulture Award 2000 provided that the following functions were covered:

- The dehydration of fresh fruits and/or partly dried fruits (clause 6.1.1(a));
- The packing of fresh pears and all classes of citrus fruits (clause 6.1.1(b));
- The processing of fruit juices (clause 6.1.1(c)); and
- The cultivating, picking, packing and forwarding of fresh and/or dried fruits and canning fruits (clause 6.1.1(d)).

[96] In relation to Schedule B and C respondents, clause 6.2 of the Horticulture Award 2000 provided that the following functions were covered:

- The cultivation, picking, dehydration, crystallisation, washing, juicing, canning, or any other processing, of fruits or vegetables (clause 6.2.1(a));
- The storing, packing, or forwarding of fruits or vegetables (clause 6.2.1(b)); and
- The preparation of vineyard products (clause 6.2.1(c)).

[97] It is clear from the above that, as long as any of the activities referred in clauses 6.1 (for Schedule A respondents) and 6.2 (for Schedule B and C respondents) were undertaken in connection with a horticultural enterprise, the relevant business would be covered under the Horticulture Award 2000 regardless of *where* the activities were carried out.

[98] During the award modernisation process, all of the draft Horticulture Awards submitted by parties involved in the proceedings clearly covered treatment, packing, storing and despatch of horticultural products by horticulture businesses, regardless of the location where such activities were carried out.

[99] In a draft award submitted by the AWU on 31 October 2008, 'horticulture industry' was defined as follows:

> '4.3 Horticulture Industry means all employees who are employed in classifications in this award:
>
> (a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration,

crystallisation or treating of horticultural products and crops, including fruit and vegetables; or

(b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural products and crops, including fruit and vegetables; or

(c) the storing, canning, grading, processing, packing or despatching horticultural products and crops.' (emphasis added)

[100] An NFF draft award submitted on 31 October 2008 proposed the following definition:

'4.2 For the purpose of clause 4.1 Horticultural Industry includes:

(a) the management, cultivation, picking, dehydration, crystallisation, washing, juicing, processing, canning, storing, grading, preparation for packing, packing and/or forwarding of horticultural products; and

(b) the preparation and treatment of land or other growing medium for any of the purposes in clause 4.2(a); and

(c) preparation of vineyard products where this is ancillary to activities in clause 4.2(a).' (emphasis added)

[101] On 24 November 2008, the Horticulture Australia Council (**HAC**) submitted a draft award with the following coverage provision:

'4.3 This award applies to employees employed in the Horticulture Industry who are engaged in activities including the following:

(a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticulture industry products and crops, including fruit and vegetables; or

(b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticulture industry products and crops, including fruit and vegetables; or

(c) the storing, canning, grading, processing, packing or despatching horticulture industry products and crops; or

(d) producing compost for, cultivating, picking, preparing for packing, packing and/or forwarding of fungi or mushrooms; or

(e) upon plant nurseries, flower, turf, tree farms or other similar enterprises in connection with the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; the production and modification of growing media and

clearing, treating or preparing of land for the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; or the processing, grading, packing, storing, dispatching and distribution of plant material and associated products.' (emphasis added)

[102] It can be seen that the abovementioned AWU, NFF and HAC draft awards all clearly covered treatment, packing, storing and despatch of horticultural products by horticulture businesses, regardless of the location where such activities were carried out.

[103] The first version of the Horticulture Award that was made in April 2009 included the following definition of 'horticulture industry':

'4.2 Horticulture industry means:

(a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

(b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.[58]

[104] Due to the increased costs which would be imposed upon employers through the modern award, Ai Group and the NFF filed joint application on 2 October 2009 to vary the Horticulture Award in a number of respects, including by inserting the words 'storing, grading, forwarding' after the word 'packing' in clause 4.2(a). The main rationale for this was to better align the award with coverage of the Horticulture Award 2000.

[105] In considering the application, the Full Bench of the AIRC held:

'[13] There is no single existing instrument which could be said to apply generally in the industry. Further, it is necessary, when considering the various provisions, to have regard to the totality of the provisions in any particular instrument. There is no definitive information as to the application of the individual awards or NAPSAs. Whilst the provisions of all of the instruments are relevant to some degree, we think greatest weight should be given to the Horticulture Award 2000. That award is a major award. It operates, with respect to Schedule A, in Victoria, South Australia and New South Wales, with respect to Schedules B and C to named employers in Victoria and members of two Victorian employer associations, the Tasmanian Farmers and Graziers Association and the AiGroup.'[59] (emphasis added)

[106] The Full Bench went on to say:

[58] [2009] AIRCFB 345.
[59] [2009] AIRCFB 966.

> '[16] We will insert the definition of "harvest period" as proposed by the NFF and the Ai Group. We will also insert "storing, grading, forwarding" into the coverage clause. Neither variation was opposed by the AWU.'[60]

[107] On the basis of this decision, the coverage clause of the Horticulture Award was expanded on 23 December 2009 to add the following underlined words to clause 4.2(a):

> 'agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations …' (emphasis added)

[108] The following definition of 'harvest period' was also inserted into the Horticulture Award:

> **'harvest period** means the period of time during which the employees of the particular employer are engaged principally in the harvesting, grading or packing of horticultural crops.'

[109] We note the NUW had no involvement in the Horticulture Award modernisation proceedings at all, or in the proceedings relating to the Ai Group and NFF joint application to vary the Award in late 2009. The NUW did not file written submissions or appear in relation to that matter. Having regard to the above, we are not satisfied that the Horticulture Award was in any way narrowed to take account of the coverage of the Storage Services and Wholesale Award. This issue was not even raised by any party in the proceedings.

[110] The abovementioned developments support the view that it was the intention of the AIRC's Award Modernisation Full Bench that:

- Storage, grading, packaging and despatching activities carried out by horticulture businesses would be covered by the Horticulture Award;

- These activities would be covered by the Horticulture Award, regardless of whether these activities are carried out on the same piece of land as the land where horticulture crops are grown; and

- Activities carried out by horticultural businesses 'within the farm gate' (i.e. up to the first point of sale) would be covered by the Horticultural Award.

Inspections

[111] On 6 July 2017, the Full Bench conducted inspections at the premises of Mitolo and Zerella in South Australia.

[112] We note the Angle Vale Road facility operated by Mitolo is, as determined by the Full Bench in *Mitolo* covered by the Storage Services and Wholesale Award, whilst Zerella's washing and packing facility is covered by the Horticulture Award.[61]

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[60] Ibid.

[61] The enterprise agreement which applies at Zerella's washing, grading and packing facility is underpinned by the Horticulture Award, which was used to assess the BOOT at the time the enterprise agreement was approved.

[113] We make the following observations from our inspections that are very relevant to the issues being contested in the current proceedings:

- The activities carried out at the centralised washing, grading and packaging facilities of Mitolo and Zerella are connected with growing and harvesting activities;
- The centralised washing, grading and packing facilities are located in a rural area, amongst farms operated by Mitolo and Zerella;
- It would be inefficient to have washing, grading and packing facilities located on each farm, given the nature of the activities and the extensive equipment required to carry out activities at these facilities;
- Vegetables move through the facilities very quickly (within 48 hours);
- The 'use by' dates on the bags of potatoes despatched to supermarkets are within about two weeks of the despatch date, which highlights the perishable nature of the products and the importance of despatching the products very quickly;
- The cool rooms at Mitolo and Zerella are not areas for storing products, but rather, they are holding areas for goods that are awaiting despatch;
- A large amount of dirt and waste is handled in the centralised washing, grading and packing facilities, as well as vegetables; and
- A substantial proportion of the potatoes, onions and carrots that are harvested do not meet quality standards and are returned to the land from the centralised washing, grading and packing facilities.

[114] Having regard to all of the submissions and evidence before us, as well as our inspections, we are of the view that the work performed at the washing, grading and packing facilities at Zerella and Mitolo (which we note are approximately 1km apart) is very similar in nature.

[115] Mitolo and Zerella both produce the same produce (albeit Zerella also produces carrots) and are competitors.[62] They both undertake the work in their centralised washing, grading and packing facilities in order to ensure such produce is fit for market as part of their integrated business structures.[63] The work performed in both washing, grading and packing facilities involves similar levels of skill and is being undertaken in a similar location. We are of the view that the activities carried out at Mitolo's and Zerella's facilities are horticultural in nature, and are connected with growing and harvesting activities. The principal difference between the washing, grading and packing facilities operated by Mitolo and Zerella is that a very small proportion (about 1%) of the produce that goes through Zerella's facility is grown on land on or immediately adjacent to the Zerella facility, whereas Mitolo does not grow any produce on land on or immediately adjacent to the Mitolo facility. The produce that goes

[62] Exhibit 5 (Supplementary Statement of Paula Colquhoun dated 15 June 2017), [22.2].
[63] See the descriptions of the businesses and work provided by Paul White for Zerella in Exhibit Z1 (Witness statement of Paul White dated 20 December 2016), particularly at [11]-[28], and by Paula Colquhoun for Mitolo in Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at paragraphs [9]-[40], [68]-[80] and in Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [5]-[6] and [18]-[23].

through the Mitolo facility is grown on a number of different farms owned by Mitolo, most of which are in very close proximity to the Mitolo washing, grading and packing facility.

[116] We now turn to the s.134(1)(a)-(h) considerations as part of our evaluative judgment as to whether the Horticulture Award, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

The s.134(1)(a)-(h) considerations

[117] 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. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*:

> 'It is apparent from the terms of s.134(1) that the factors listed in (a)–(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s.134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor ("relative living standards and the needs of the low paid")? Furthermore, it was common ground that some of the factors were inapplicable to the SDA's claim.'[64]

[118] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. This balancing exercise and the diverse circumstances pertaining to particular modern awards may result in different outcomes in different modern awards. As the Full Bench observed in the *Preliminary Jurisdictional Issues decision*:

> 'The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.'[65]

[119] We now turn to consider each of the considerations set out in s.134(1) of the FW Act.

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[64] *National Retail Association v Fair Work Commission* [2014] FCAFC 118, [109]; albeit the Court was considering a different statutory context, the observation at [109] is applicable to the Commission's task in the Review.
[65] [2014] FWCFB 1788, [33]–[34].

Section 134(1)(a) – relative living standards and the need of the low paid

[120] We note there have been no submissions made that the base rates of pay or penalty rates set out in the Horticulture Award do not meet the criteria in s.134(1)(a). In our view, the variations proposed to the coverage of the Horticulture Award do not detract from the maintenance of the relative living standards and the need of the low paid.

[121] This is a neutral consideration in terms of whether any variation to the coverage of the Horticulture Award should be made as part of the Review.

Section 134(1)(b) – the need to encourage collective bargaining

[122] There is an ongoing dispute in the horticulture sector. The NUW and the AWU, in particular, rely upon *Mitolo* at [46] in asserting that work location is a critical element of coverage under the Horticulture Award. Contrastingly, the employer parties contend that the 'farm gate' is a virtual concept and not related to a geographical location or physical boundaries. The position of the unions, broadly speaking, has been rejected by employers in the horticulture sector as outlined in the evidence above in this Decision, who contend that coverage is, or ought be, determined by whether the work is being performed behind a virtual farm gate.

[123] Presently, this dispute does not encourage collective bargaining. Indeed, it makes collective bargaining difficult as parties disagree as to the applicable underpinning modern award for the purposes of the better off overall test ('BOOT').

[124] In our view, making the variation sought is likely to encourage collective bargaining and, thus, achieve the modern awards objective as set out in s.134(1)(b).

Section 134(1)(c) – the need to promote social inclusion through increased workforce participation

[125] This objective is neutral in terms of whether any variation to the coverage of the Horticulture Award should be made.

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

[126] The variation of the coverage provision in the Horticulture Award in the manner contended for by the employer parties will, in our view, meet this modern awards objective. There is a clear and obvious need for flexible modern work practices in the horticulture industry, so as to ensure produce is washed, graded and packed as soon as possible after harvest, in order to be fit for sale in a consumable form. The flexibility built into the Horticulture Award facilitates this requirement, including a broad span of ordinary hours, and the ability of the ordinary hours to be worked over a four week period.

[127] Defining the coverage of the Horticulture Award by reference to the virtual 'farm gate' concept promotes the efficient and productive performance of work by permitting and encouraging a business to determine where it is most efficient to locate its washing, grading and packing facility so that the produce can be dispatched to market in the most efficient and productive manner for the business. Quite often this will be in a central location, on which

produce may or may not be grown. Indeed, it would be inefficient and prohibitively expensive for an employer to have a separate washing, grading and packing facility at each farm or piece of land on which produce is grown. Absent a variation to the coverage provision of the Horticulture Award, a washing, grading and packing facility located on a piece of land on which some produce is grown would be covered by the Horticulture Award, but the same facility on a piece of land on which no such produce is grown would not be covered by the Horticulture Award. Such an arbitrary distinction would lead to inefficient and unproductive outcomes and/or the attempt to introduce token measures to grow some produce on the land on which the facility is located to bring the facility within the coverage of the Horticulture Award.

[128] As outlined in Ms Colquhoun's evidence, many of the growing sites used by the Mitolo parties do not have electricity or internet connection. Further, the location of grading and packing facilities in an area suitable to employers makes it easier to source appropriately skilled workers.[66]

[129] By enabling and encouraging employers to utilise the most efficient and productive location to carry out the work required to make produce fit for consumption and ready to be sold to market, we are of the view that this promotes the notion of flexible modern work practices and the efficient and productive performance of work in s.134(1)(d).

Section 134(1)(da) – the need to provide additional remuneration for employees working overtime; unsocial irregular or unpredictable hours; weekends or public holidays; and shifts

[130] Both the Horticulture Award and Storage Services and Wholesale Award provide additional remuneration for employees working overtime, working unsocial, irregular or unpredictable hours, working on weekends or public holidays and for employees working shifts. However, the Storage Services and Wholesale Award provides for a greater range of penalties when it could be said that a person is working, from the perspective of other industries, outside what would be considered 'ordinary hours', namely, Mondays to Fridays.

[131] Nonetheless, there is no suggestion that the penalty and shift allowance regime in the Horticulture Award does not meet this modern awards objective. The NUW contended that the proposed variation would result in vastly inferior penalty rates. However, the legislation does not contemplate a comparative approach between separate awards in determining whether the criteria in s.134(da) is met.

[132] As there is no suggestion that the Horticulture Award does not meet this modern awards objective, the consideration in s.134(1)(da) is a neutral consideration in respect of the coverage question that is sought to be resolved.

Section 134(1)(e) – the principle of equal remuneration for work of equal or comparable value

[133] As was apparent from our inspections, employees working at the Zerella facility and the Mitolo Angle Vale Road facility perform work that is practically synonymous. However, those employed by Zerella are covered by the Horticulture Award, whilst those employed by Mitolo at the Angle Vale Road facility are not. Noting the synonymous nature of the work

[66] Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [58]; PN392-400.

performed by employees in these regards, we are of the view that making the variation sought would promote the objective in s.134(1)(e).

Section 134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[134] In our view, if primary producers are required to place facilities used to prepare their product for market on sites behind a physical 'farm gate' in order to be covered by the Horticulture Award, this would be unlikely to allow producers to utilise the most efficient and productive structures for preparing produce for market.

[135] A regulatory burden, for example, may include having to consider the impact of changes in award coverage based on where a producer may locate its washing, grading and packing facility. If producers were to ignore award coverage implications when making business decisions regarding the location of their washing, grading and packing facilities, they run the risk of being put at a competitive disadvantage. This is so when compared to the producers that have their washing, grading and packing facilities behind a physical farm gate. This is clearly reflected in the situation which currently exists between Mitolo and Zerella.

[136] As is apparent from the evidence, many of these washing, grading and packing facilities are expensive.[67] Productivity is likely to be impacted detrimentally if the effect of the coverage clause was that these facilities had to be replicated on each and every farm where produce is grown, or a token part of the site on which the facility is located had to be set aside for the growing of crops in a way that is otherwise inefficient.

[137] By requiring producers to place their washing, grading and packing facilities on a location said to be behind a physical farm gate in order to be covered by the Horticulture Award, this will likely impose disadvantages on businesses that are not able to relocate their facility, or set aside part of the site on which the facility is located for growing some produce. It may place these businesses at a competitive disadvantage to those that have a facility on a farm site, or are able to accommodate the growing of some produce on the same site.

[138] Therefore, we are of the view that making the variation sought will meet the criteria set out in s.134(1)(f).

Section 134(1)(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

[139] The concept of a physical 'farm gate', in our view, does not promote a simple and easy to understand modern award system. In this regard, the example of differing award coverage for employees working in Mitolo's Angle Vale Road facility and Zerella's facility demonstrates uncertainty and complexity regarding award coverage for employees who fundamentally perform the same work. This example also depicts an unnecessary overlap between the Horticulture Award and the Storage Services and Wholesale Award.

[140] For these reasons, we are of the view that making the variation sought would promote the objective set out in s.134(1)(g).

[67] See the evidence of Ms Colquhoun at PN 397; Mr White at PN860; Mr Robertson at PN983.

Section 134(1)(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

[141] The construction of the coverage provisions in the Horticulture Award, as contended for by the NUW and AWU, in our view, does not encourage employers to utilise the best and most efficient location to carry out the work required to make produce fit for consumption and ready to be sold to market. As such, the failure to encourage the utilisation of the most efficient business structure may lead to a decline in productivity and an increase in employment costs and regulatory burdens. This can only contribute to an increase in inflation and a decline in the sustainability, performance and competitiveness of the national economy.

[142] For these reasons, we are of the view that making the variation sought would promote the objective in s.134(1)(g).

Conclusion

[143] Having regard to the facts, matters and circumstances set out above, including the matters in s.134(1)(a)-(h) of the FW Act, we are of the view that the Horticulture Award would, if varied in the manner sought by the employer parties, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. We are also satisfied that making the variation sought would result in the Horticulture Award including terms only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

PART B

Application made pursuant to s.160 of the FW Act

[144] Prior to commencing our consideration of the application made pursuant to s.160 of the FW Act, we note that the NUW contended that s.163(1) must be satisfied in order for the Commission to vary the coverage clause of the Horticulture Award in the manner sought, whether the variation is made pursuant to s.156(2)(b)(i) or s.160 of the FW Act.

[145] Section 163(1) of the FW Act provides that:

> 'Special rule about reducing coverage
>
> (1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.'

[146] The NUW further noted that the *Explanatory Memorandum* to the Fair Work Bill 2008 outlines that the legislative intent behind s.163(1) is to ensure that, when employees cease to be covered by one award and commence being covered by another, the new award must provide an appropriate safety net:

> 'Subclause 163(1) provides that FWA must not vary a modern award to restrict coverage unless it is satisfied that the relevant employers or employees will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate to them. This requirement, together with the modern awards objective, is designed to ensure that when considering a change in award coverage, FWA considers whether the content of the new award is an appropriate safety net for the employers and employees that would become covered by it.'

[147] It is clear from the terms of section 163(1) of the FW Act that it prohibits the variation of a modern award if, as a result of the variation, employers or employees would cease to be covered by the modern award the subject of the variation application, unless the Commission is satisfied of the matters set out in the balance of the subsection. In the present proceedings, the award which is the subject of the variation application is the Horticulture Award. No application has been made to vary the Storage and Wholesale Award. If the variation sought by the employer parties to the coverage provision of the Horticulture Award were made, it would, in our view, expand the coverage of the Horticulture Award to more employers and employees, rather than to narrow the coverage of the Horticulture Award. Accordingly, there is no need to consider whether varying the coverage of the Horticulture Award in the manner sought will result in workers being covered by an award which is appropriate for them.[68]

[148] We now turn to consider the application made pursuant to s.160 of the FW Act.

[68] *Fair Work Act 2009* (Cth) s 163(1).

[149] Section 160 of the FW Act states as follows:

> '**Variation of modern award to remove ambiguity or uncertainty or correct error**
>
> (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
>
> (2) The FWC may make the determination:
>
> (a) on its own initiative; or
>
> (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
>
> (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
>
> (d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.'

[150] In the *Preliminary Jurisdictional Issues Decision*, the Full Bench made the following relevant comments about s.160 in the context of the 4 Yearly Review:

> '[51] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Commission may vary a modern award to "remove an ambiguity or uncertainty or to correct an error". These provisions continue to be available during the Review, either on application or on the Commission's own initiative.
>
> …
>
> [52] In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties will be provided with an opportunity to comment on any such proposed variation.
>
> …
>
> [57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the 'specified day'). The default position is that the 'specified day' must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive 'and' in s.165(2) that a variation can only operate retrospectively if the variation is made under

s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) *and* there are exceptional circumstances that justify retrospectivity.' (our emphasis)

[151] In *Re Tenix Defence Pty Limited*,[69] it was observed that:

'[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:

> "The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention.

[32] Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. In exercising such a discretion the Commission is to have regard to the mutual intention of the parties at the time the agreement was made.' (footnotes omitted)

[152] The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*[70] provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':

'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop*

[69] PR917548, 9 May 2002.
[70] T3721, 24 November 2000.

> *Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'

Horticulture Award – Clear or Ambiguous?

[153] We note clause 4 of the Horticulture Award deals with the issue of coverage. Clause 4.1 states that the award 'covers employers throughout Australia in the horticultural industry and their employees in the classifications listed in schedule B'. Hence, the criteria for coverage is the nature of the horticultural industry and the nature of the work performed by the employees, that is, whether such work falls within a classification covered by the Horticulture Award.

[154] As the Horticulture Award is an industry award that covers employers in the "horticultural industry", the words in clause 4.2 must be construed in that context, namely, that the Horticulture Award is an industry based award, not a location based award.

[155] Clause 4.2 defines the expression 'horticultural industry'. Clause 4.2(a) refers to 'horticultural industry' as meaning 'agricultural holdings … in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops.' (emphasis added)

[156] Clause 4.2(a) does not specify that the activities referred to need to be undertaken 'at', 'on' or 'in' an agricultural holding, flower or vegetable market garden. Rather, the clause specifies that the activities need to be 'in connection with' agricultural holdings, flower or vegetable market gardens.

[157] The words 'in connection with' do not, on their plain and ordinary meaning, impose a restriction on where the activities are undertaken. Instead, they qualify coverage by specifying that there needs to a 'connection' between agricultural holdings, flower or vegetable market gardens and the activities.

[158] The words 'including fruit and vegetables upon farms, orchards and/or plantations' do not, so it is submitted by the employer parties, indicate that the coverage of the Horticulture Award is confined or intended to be confined to activities carried out at a particular location. As the Full Bench in *Mitolo* acknowledged (at [45]), they are words of inclusion and do not confine the scope of the clause. In our view, there is some merit in the contention that these words merely confirm that the reference to horticultural crops includes fruit and vegetables upon farms, orchards and/or plantations.

[159] It would have been a simple matter for the Full Bench when making the Horticulture Award to expressly state that coverage of the Award was confined to physical activities carried out on an agricultural holding or farm, if that had been the intention. For the reasons set out above in connection with our consideration of the application under s.156 of the FW Act, there is a strong argument that the makers of the Horticulture Award did not intend for its coverage to be limited to inside a physical 'farm gate'.

[160] Further, the coverage clause of the Horticulture Award indicates that it covers employers which operate as part of a horticultural enterprise in respect of employees carrying out activities including washing, treating and packing of produce 'to the exclusion of any

other modern award'.[71] Employees working in washing, grading and packing facilities of the kind operated by Mitolo at Angle Vale Road and Zerella undertake such work. Also of relevance is the fact that clause 4.2 of the Storage and Wholesale Award provides that it does not cover 'an employer to the extent that the employer is covered by another modern award that contains classifications relating to functions included with the definition of the storage services and wholesale industry with respect to any employee who is covered by that award.' Accordingly, the terms of the Storage and Wholesale Award evince an intention not to cover an employer and its employees where another modern award regulates activities undertaken by an employer, notwithstanding that those activities are otherwise within the scope of the Storage and Wholesale Award.

[161] The arguments summarised in the previous eight paragraphs support the view that the Horticultural Award, properly construed in contextual, historical and industrial context, covers the performance of work including packing, storing, grading, forwarding, washing and treatment of horticultural crops where such work is carried out as part of a horticultural enterprise regardless of the location at which that work is performed to the exclusion of the Storage and Wholesale Award. However, the Full Bench in *Mitolo* reached a different conclusion as to the coverage of the Horticulture Award, for the reasons set out in the decision published by the Full Bench.[72] In these proceedings, the NUW and AWU support the conclusion reached by the Full Bench in *Mitolo* in relation to the proper construction of the coverage provision of the Horticulture Award.

[162] In our view and in accordance with *Re Tenix Defence Pty Limited*, it is clear for the reasons set out above that there are 'rival contentions advanced' and 'an arguable case' has been 'made out for more than one contention' of the coverage clause of the Horticulture Award. In such circumstances, the Commission should 'err on the side of finding an ambiguity or uncertainty'.

[163] Further, we are of the view that clause 4 meets the test of uncertainty articulated by Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*. That is, clause 4.2(a) is in a 'state of not being definitely known or perfectly clear, doubtfulness or vagueness'.

[164] A prime example of the uncertainty regarding the coverage of the Horticulture Award is demonstrated by the situation with Mitolo whereby there is, in our view, ambiguity and uncertainty as to the notion of 'agricultural holdings'. The Angle Vale Road site was not considered by the Full Bench in *Mitolo* to be an 'agricultural holding' of Mitolo. This is despite the facility being located on land that is only zoned for primary production, in a horticulture precinct,[73] with part of the land which immediately adjoins the Angle Vale Road facility used to conduct seed and variety trials, when not required to lay fallow due to land rotation requirements.[74] The site is integrated in Mitolo's business structure and ensures that Mitolo's produce from its numerous farming locations is washed, graded and prepared so that it is fit for sale to supermarkets and wholesale markets.

[71] Clause 4.1 of the Horticulture Award.
[72] *Mitolo Group Pty Ltd v NUW* [2015] FWCFB 2524.
[73] Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [15].
[74] Exhibit 4 (Witness statement of Paula Colquhoun dated 23 December 2016) at [38]; Exhibit 6 (Statement in reply of Paula Colquhoun dated 17 May 2017) at [10]-[13]; Exhibit 5 (Supplementary statement of Paula Colquhoun dated 15 June 2017) at [17].

[165] This example, in conjunction with ambiguity in relation to the notion of the 'farm gate' as espoused in *Mitolo*, as well as the aforementioned evidence and arguments based on the text and context of the words in the relevant clause, leads us to conclude that there is ambiguity and uncertainty in the proper construction of the coverage clause in the Horticulture Award, particularly in relation to whether the Horticulture Award covers work in a washing, grading and packing facility in circumstances where the packing facility is located on a site at which no produce is grown.

[166] We consider it appropriate to exercise our discretion to vary the Horticulture Award in the manner sought by the employer parties to resolve the ambiguity and uncertainty in the coverage clause of the Award, for the following reasons:

(a) The historical development of the Horticulture Award indicates that it was not intended to be limited to work carried on behind a physical 'farm gate';

(b) Where work in a washing, grading and packing facility is carried out as part of an integrated horticultural business, there is no logical reason for excluding coverage based on the location of the facility. Further, the rationale for inclusion of flexible provisions in the Horticulture Award, which meet the needs of the horticulture industry, are equally applicable to the performance of work in a washing, grading and packing facility, whether such facility is located on a farm or nearby;

(c) The variation, if made, will ensure that coverage of the Horticulture Award reflects modern horticultural business structures and operations, which often involve multiple growing sites and one or more centralised locations for the performance of washing, grading and packing activities in a purpose built facility;

(d) If the Storage and Wholesale Award applies to work undertaken in a washing, grading and packing facility for primary produce, it will not accommodate the flexibility required at times of harvest and will disadvantage businesses where washing, grading and packing work is done at a central location at which no produce is grown; and

(e) Absent variation to the Horticulture Award there will be continuing uncertainty and disputation.

Retrospectively Varying Coverage of an Award

[167] Section 165 of the FW Act states:

'**When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages**

Determinations come into operation on specified day

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

(2) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.' (emphasis added)

[168] In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Full Bench made the following relevant comments about retrospective operative dates:

'[57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the 'specified day'). The default position is that the 'specified day' must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive 'and' in s.165(2) that a variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) *and* there are exceptional circumstances that justify retrospectivity.' (emphasis added)

[169] As we have made a determination under s.160 of the FW Act to vary the Horticulture Award to remove ambiguity and uncertainty, the criteria in s.165(2)(a) has been met. In order to make a variation to the Horticulture Award retrospectively, we must also be satisfied that there are 'exceptional circumstances' that justify the specification of an earlier day.

[170] For the following reasons, we are satisfied that there are 'exceptional circumstances' that warrant the proposed variation to operate retrospectively from the date of commencement of the Horticulture Award, namely, 1 January 2010:

(a) For the reasons set out above, the Horticulture Award was not intended to be limited to work carried on behind a physical 'farm gate'; and

(b) The evidence demonstrates that many employers in the horticulture industry have been applying the Horticulture Award to work undertaken at washing, grading and packing facilities, regardless of whether any produce is grown at the site on which the facility is located. Absent retrospective operation of the variation, we are satisfied there will inevitably be disputation and likely litigation over whether producers have during the past almost eight years (subject to limitation periods) being making underpayments to workers in their packing facilities. Such disputation, litigation and potential back pay orders has the potential to have a significant impact on the viability and/or sustainability of a number of producers in the horticultural industry.

[171] Thus, the criteria in s.165(2)(b) of the FW Act has also been satisfied.

Draft Variation Determinations

[172] Having been satisfied that the employer parties have made out their application under s.156 of the Act and to remove any ambiguity or uncertainty pursuant to s.160 of the Act, we publish the following draft variation determinations to the Horticulture Award in accordance with Ai Group's submissions as follows:

1. Inserting a new definition of 'enterprise' in subclause 3.1 as follows:

'Enterprise means a business, activity, project or undertaking, and includes:

- An employer that is engaged with others in a joint venture or common enterprise; or

- Employers that are related bodies corporate within the meaning of s.50 of the *Corporations Act 2001* (Cth) or associated entities within the meaning of s.50AAA of the *Corporations Act 2001* (Cth).'

2. Inserting a new definition of 'horticultural enterprise' in subclause 3.1 as follows:

'Horticultural enterprise means an enterprise which as an important part of its enterprise engages in the raising of horticultural crops.'

3. Deleting subclause 4.2 and inserting a new subclause 4.2 as follows:

'**4.2 Horticulture industry** means:

(a) the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise; or

(b) clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).'

[173] We also note receipt of correspondence dated 4 October 2017 which indicated that the Ai Group, the NFF and the AWU have agreed to amend clause 4.3 of the Horticulture Award to remove subsection 4.3(f). We are of the preliminary view that the proposed variation by

consent is consistent with the modern award objectives. Therefore, we propose, subject to receipt of any comments, to vary clause 4.3 so that it reads as follows:

> ‘**4.3** Horticulture industry **does not mean:**
>
> (a) the wine industry;
>
> (b) silviculture and afforestation;
>
> (c) sugar farming or sugar cane growing, sugar milling, sugar refining, sugar distilleries and/or sugar terminals;
>
> (d) any work in or in connection with cotton growing or harvesting; cotton ginneries and associated depots; cotton oil mills and the extraction of oil from seed; or
>
> (e) plant nurseries.

[174] The above draft variation determinations, once finalised, will be made retrospectively, with the operating date to commence from 1 January 2010.

Next Steps

[175] Interested parties will have 21 days from the date of this Decision to comment on the above draft variation determinations.

VICE PRESIDENT

Appearances:

S. Smith and *G. Vaccaro* for Australian Industry Group.
M. de Carne, *S. Crawford* and *R. Walsh* for the Australian Workers Union.
E. MacDougall for Gayndah Packers.
J. Bourke QC and *G. Walker* for Mitolo Group Pty Ltd and Maranello Trading Pty Ltd.
B. Rogers for the National Farmers Federation.
K. Sheehan and *Y. Bakri*, of Counsel, for the National Union of Workers.
S. Smith and *T. Angelopoulos* for Voice of Horticulture.

Hearing details:

2017.

Melbourne and Sydney via video link.

20 and 21 June;
4 July;
3 and 4 August.

Final written submissions:

Australian Industry Group final submissions dated 31 July 2017.
Australian Workers Union final submissions dated 31 July 2017.
Gayndah Packers final submissions dated 31 July 2017.
Mitolo Group final submissions dated 31 July 2017.
National Farmers Federation final submissions dated 31 July 2017.
National Union of Workers final submissions dated 31 July 2017.

Printed by authority of the Commonwealth Government Printer

<Price code G, PR597801>