

*Fair Work Act 2009*  
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards

AM2016/25

***Horticulture Award 2010 – substantive claims***

**SUBMISSIONS FROM THE AUSTRALIAN WORKERS' UNION ON DRAFT  
DETERMINATIONS**

**Background**

1. On 16 November 2017, a Full Bench of the Fair Work Commission issued a Decision in *4 yearly review of modern awards – Horticulture Award* [2017] FWCFB 6037 (“**Decision**”) regarding claims to vary the coverage of the *Horticulture Award 2010* (“**Horticulture Award**”).
2. The Full Bench determined the employer parties had “made out their applications”<sup>1</sup> under sections 156 and 160 of the *Fair Work Act 2009* (“**FW Act**”), published draft variations to the Horticulture Award and provided interested parties with 21 days to comment on the draft variations.
3. The following comments on the draft variations are filed on behalf of The Australian Workers’ Union (“**AWU**”).

**Rights reserved**

4. The AWU expressly reserves all rights in relation to the Decision.

**Draft variation – coverage extension**

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<sup>1</sup> [2017] FWCFB 6037 at [172].

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5. The draft variation is in such broad terms that its practical effect is impossible to identify.
6. The primary concern of the AWU is a dramatically reduced safety net of employment conditions for employees who are currently covered by the *Storage Services and Wholesale Award 2010* (“**Storage Award**”).
7. This concern particularly arises in relation to employees working at facilities which pack, store, grade or forward horticultural crops in metropolitan areas.
8. The Decision recognises that the Horticulture Award relates to “agriculture and farming”<sup>2</sup> and specifically the “agricultural industry”.<sup>3</sup>
9. Large packing facilities located in metropolitan areas are not part of the agricultural industry and employees working at these facilities should not have the same minimum conditions of employment as employees working on a farm.
10. These proceedings have primarily arisen from a dispute about award coverage for the Angle Vale Road facility operated by Mitolo Group Pty Ltd (“**Mitolo**”).
11. This Full Bench (aside from Commissioner Saunders) inspected the Angle Vale Road facility and nearby farms operated by Zarella Holdings Pty Ltd (“**Zarella**”) on 6 July 2017.
12. In its Decision, this Full Bench identified *inter alia* that (our emphasis):
  - “the centralised washing, grading and packing facilities are located in a **rural area**, amongst other farms operated by Mitolo and Zarella”<sup>4</sup>;
  - “the produce that goes 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”<sup>5</sup>; and
  - “the rationale for inclusion of flexible provisions in the Horticulture Award, which meets the needs of the horticulture industry, are

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<sup>2</sup> [2017] FWCFB 6037 at [40].

<sup>3</sup> [2017] FWCFB 6037 at [41].

<sup>4</sup> [2017] FWCFB 6037 at [113].

<sup>5</sup> [2017] FWCFB 6037 at [115].

equally applicable to the performance of work in a washing, grading and packing facility, whether such facility is located on a farm or **nearby**<sup>6</sup>.

13. Evidence in these proceedings was also led from Gayndah Packers Pty Ltd which operates in a rural area and is owned by farmers who have orchards within a close proximity of the centralised packing shed.<sup>7</sup>
14. The NFF led evidence from Pinata Farms Pty Ltd which has packing sheds in the same locations as its farms<sup>8</sup> and Tropical Pines which has a packing shed on a farm in the Sunshine Coast region and a packing facility near farms in Yeppoon.<sup>9</sup>
15. Mitolo belatedly led evidence about its Eastern Creek facility on 23 July 2017. However, it is noteworthy that employees at that facility are currently being paid under the Storage Award<sup>10</sup> - as opposed to the off-farm packing facilities in rural areas which have been the focus of this case.
16. We note this Full Bench specifically decided not to inspect the Eastern Creek facility<sup>11</sup> and it follows that this Full Bench has not inspected any packing facilities located in a metropolitan area.
17. Further, evidence led by the National Union of Workers in these proceedings suggests the Storage Award is currently being applied in a number of facilities which pack horticultural produce in metropolitan areas.<sup>12</sup>
18. For all these reasons, the AWU submits that this Full Bench should confine the extended coverage of the Horticulture Award to packing, storing, grading and forwarding work performed in rural areas in close proximity to farms, orchards and/or plantations.
19. This type of variation would allow the Horticulture Award to cover:
  - the Angle Vale Road premises;

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<sup>6</sup> [2017] FWCFB 6037 at [166](b).

<sup>7</sup> See the amended version of attachment LT-4 to the witness statement of Lynn Tonsing filed on 27 June 2017.

<sup>8</sup> See statement of Gavin Scurr dated 14 December 2016 at [3].

<sup>9</sup> See statement of Derek Lightfoot dated 12 December 2016 at [3] and [11].

<sup>10</sup> See second supplementary statement of Paula Colquhoun dated 3 July 2017 at [32].

<sup>11</sup> See Transcript for 4 July 2017 at PN1147.

<sup>12</sup> See second statement of George Robertson dated 30 June 2017.

- the Zerella facility inspected by the Full Bench;
- the packing shed operated by Gayndah Packers Pty Ltd; and
- the packing sheds operated by Pinata Farms Pty Ltd and Tropical Pines.

20. The variation would not allow coverage of Mitolo’s Eastern Creek facility. This is appropriate because the facility is located in an industrial area of Sydney as opposed to a rural agricultural area. Presumably, this is why Mitolo did not lead evidence about the Eastern Creek facility until the National Union of Workers drew the Full Bench’s attention to it on 30 June 2017.

21. The draft variation proposed by the AWU is attached as Schedule A to these submissions. This variation confines coverage to off-farm packing facilities located in a rural area in close proximity to farms, orchards and/or plantations.

22. A substantial benefit of the variation proposed by the AWU is that it avoids the use of complicated definitions of an “Enterprise” and a “Horticultural Enterprise”.

23. The definition of “Enterprise” included in the draft variation refers to a “joint venture”. The High Court has previously found:

*The term "joint venture" is not a technical one with a settled common law meaning.*<sup>13</sup>

24. The modern awards objective is to provide a “fair and relevant safety net of terms and conditions” and this is to take into account “the need to ensure a simple, easy to understand, stable and sustainable modern award system”.

25. This means a modern award should be capable of being understood by a worker in the horticultural industry – not only by a Queens Counsel or a representative of an employer association with decades of industrial experience.

26. It is manifestly absurd to expect a horticultural worker to understand what a joint venture, common enterprise, related body corporate or an associated entity is and the inclusion of these terms to define coverage in a modern award is completely at odds with the modern awards objective.

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<sup>13</sup> *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1 per Mason, Brennan and Deane at [5].

27. In contrast, a horticultural worker has a fighting chance of being able to work out whether they are working in a rural area in close proximity to a farm, orchard and/or plantation.
28. On a practical level, it appears the draft variation could cover employees working at a Woolworths or Coles supermarket who pack, store and grade fruit and vegetables. All that would be required is for a Woolworths or Coles entity to start purchasing horticultural farms in the future and for that to be considered an “important part” of the enterprise’s overall operations.
29. We appreciate that the inclusion of a locational element of coverage is contrary to some views expressed in the Decision. However, the AWU’s draft variation solves the problem identified by Mitolo for its Angle Vale Road facility and for the other employers identified above.
30. Importantly, the AWU’s draft variation avoids the problem which necessarily arises with the draft variation - the Full Bench cannot possibly know how far it would extend the coverage of the Horticulture Award because this could only be ascertained by analysing the corporate structures of affected employers.

#### **Consent variation – broadacre field crops**

31. As noted at paragraph [173] of the Decision, the AWU has agreed to an amendment to clause 4.3 to deal with the interaction between the Horticulture Award and the *Pastoral Award 2010*.
32. However, this variation does not arise from an application pursuant to s 160 of the FW Act and hence it does not appear capable of retrospective application as foreshadowed in the Decision.<sup>14</sup>
33. Further, the relevant variation to the definition of broadacre field crops in the *Pastoral Award 2010* which has led to this agreed variation only took effect on 15 February 2016.<sup>15</sup>

**Crawford de Carne Lawyers  
For The Australian Workers’ Union**

**7 December 2017**

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<sup>14</sup> [2017] FWCFB 6037 at [174].

<sup>15</sup> See: <https://www.fwc.gov.au/documents/awardsandorders/html/pr577025.htm>

## SCHEDULE A – AWU DRAFT VARIATION

1. Delete subclause 4.2 and insert a new subclause 4.2 in the following terms (added words underlined):

### **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 in a rural area in close proximity to 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.