

IN THE FAIR WORK COMMISSION

MATTER: AM2016/25 HORTICULTURE AWARD 2010

4 Yearly Review of Modern Awards

CLOSING SUBMISSIONS BY GAYNDAH PACKERS PTY LTD

Introduction

1. These closing submissions are filed on behalf of Gayndah Packers Pty Ltd (**Gayndah Packers**) in support of an application to vary clause 4 of the Horticulture Award 2010 (**Horticulture Award**).
2. Gayndah Packers operates a citrus packing shed in South East Queensland and is one of several employer parties seeking a variation to the coverage clause of the Horticulture Award.
3. The variation sought by Gayndah Packers would have the effect of confirming that employees working within a packing shed and in connection with a horticultural enterprise (that is a related legal entity or a joint venture or common enterprise) would be covered by the Horticulture Award.
4. In support of its application, Gayndah Packers has filed:
 - (a) an Outline of Submissions;¹ and
 - (b) witness statement of Lynn Tonsing.²
5. Submissions have also been filed by Mitolo Group Pty Ltd and Maranello Trading Pty Ltd (together **Mitolo Group**), Australian Industry Group (**Ai Group**) and National Farmers' Federation (**NFF**) alongside a number of witness statements filed by each of these employer parties as well as witness statements filed by Zerella Holdings Pty Ltd and Voice of Horticulture (collectively the **employer parties**). These submissions and witness statements are now in evidence before the Full Bench.

¹ Exhibit GP1.

² Exhibit GP2.

6. On 20 June 2017, 21 June 2017 and 4 July 2017 the Full Bench heard evidence in relation to Gayndah Packers' application as well as the other employer parties' applications, including submissions and evidence in relation to a joint s.160 application by Mitolo Group and Ai Group heard concurrently with the s.156 applications to vary the Horticulture Award (**Hearing**).
7. The variation sought by Gayndah Packers and the other employer parties is in the same terms, and at Hearing the employer parties provided the Full Bench with a single draft Determination.³
8. The terms of the draft determination are 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 section 50 of the *Corporations Act 2001*(Cth) or associated entities within the meaning of section 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).

Legislative Framework of the 4 Yearly Review

9. The legislative framework under the *Fair Work Act 2009* (Cth) (**FW Act**) applicable to the 4 Yearly Review has been considered in detail in various proceedings currently before the Full Bench, including the current proceeding, and was also summarised in our Outline of Submissions.

³ Exhibit AiG3.

10. In summary, the legislative framework is as follows:
- (a) Section 156 of the FW Act requires the Full Bench to review all modern awards and empowers the Full Bench to make determinations varying modern awards;
 - (b) Section 134(1) of the FW Act sets out the modern awards objective and relevantly provides that the Commission must ensure that "*modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*" (our emphasis);
 - (c) In determining what is "*fair and relevant*" the Commission must have regard to the matters set out in s.134(1)(a) to (h); and
 - (d) Section 138 of the FW Act provides that, in achieving the modern awards objective, "*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.*"
11. Accordingly, the task of the Full Bench is to ensure that it is satisfied that the variation sought by Gayndah Packers and the employer parties ensures a fair and relevant minimum safety net for both employers and employees in accordance with s.134 of the FW Act.
12. It is submitted that the submissions and evidence of Gayndah Packers and the employer parties at Hearing establish a merit based case⁴ in favour of the Commission varying the Horticulture Award in the terms proposed by Gayndah and the employer parties and that the variation is necessary to give effect to the modern awards objective, rectify the uncertainty and ambiguity about award coverage and give effect to the objects of the FW Act.

⁴ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [23].

Horticulture Industry

13. The citrus industry, like other fruit and vegetable industries, is subject to a range of operational considerations which means that the business must be flexible and adaptable.
14. The evidence of Ms Tonsing⁵ demonstrates the following:
 - (a) The business is seasonal in nature, and whilst it operates all year round peak season is between mid-March to June;
 - (b) Each variety of fruit has different harvest times which requires the shed to operate in certain ways in order to maximise fruit quality and the price for which the fruit is sold, this includes packing:
 - Imperial mandarins in 14 weeks between April and June;
 - Murcott mandarins in 8.5 weeks between July and August;
 - Lemons and limes throughout the year; and
 - Other fruits (Avana, Daisy and Navel Oranges) between April to June.
 - (c) During peak periods fruit must be moved quickly as it cannot be stored (e.g. Imperial mandarins must be washed, treated, waxed, graded and packed within a couple of hours of arriving at the shed);
 - (d) The operation is based on continuous movement of fruit;
 - (e) During peak times, employees work 10 hours per day, 6 days per week, Monday to Saturday; and
 - (f) Weather impacts may also require work to be undertaken for extended periods (because, for example, rain, hail, fog or heavy dew can damage the fruit).
15. Given these considerations, it is imperative that Gayndah Packers has certainty as to the application of the Horticulture Award.

⁵ Exhibit GP2 (Witness Statement of Lynn Tonsing at [15]-[21]).

16. These same considerations apply to other employer parties who have also lead evidence in relation to the nature of the industry.

Coverage of Horticulture Award

17. The Horticulture Award operates as an industry award.

18. Relevantly, clauses 4.1 and 4.2 of the Horticulture Award provide:

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.*

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

(Our emphasis)

19. Determining coverage necessarily requires an inquiry as to whether an employer operates in the horticulture industry (as defined), and whether an employer's employees fall within the classifications listed in the Award.
20. It is submitted that the words of clause 4.2 should be interpreted broadly and are capable of being interpreted broadly having regard to the phrase 'in connection with'. This phrase operates to link an 'agricultural holding' with picking, grading and packing fruit work. The phrase 'in connection with' does not, on a plain reading, operate to restrict the performance of picking, grading and packing activities to a location.
21. Absent the construction applied in *Mitolo Group Pty Ltd v National Union of Workers* decision⁶ (**Mitolo decision**) (which imposed a physical limitation on where activities are performed) and pressed by the NUW and AWU, Gayndah Packers had a clear

⁶ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524.

understanding that it was covered by the Horticulture Award and that its coverage was not contingent on it operating its packing shed on a farm.⁷

22. This reading is consistent with the historical context of the Horticulture Award.
23. Prior to the introduction of the modern awards the *Fruit and Vegetable Growing Industry Award – State 2002* operated (**pre modern award**). This pre modern award was a feeder award to the Horticulture Modern Award.
24. Notably, clause 1.4 Coverage of the pre modern award provides:

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 or from fruit and vegetable farms, vineyards, orchards and plantations throughout the state of Queensland.

25. This clause clearly covers packing sheds which were not located on a farm, and there is no exemption under clause 1.7 that excludes the packing shed.
26. It is submitted that clause 4.2 of the Horticulture Award should be considered in its historical and industrial context and the Commission should be guided by the relevant authorities pertaining to award interpretation.⁸
27. It is further submitted that the intention of the Award Modernisation process was to continue the parameters of the scope of coverage that existed previously and that the phrase 'farm gate' – as a concept without physical boundaries – was consistent with this approach. Gayndah Packers supports the submissions made by Ai Group⁹ in respect of the concept of a 'farm gate' and that it has no locational limitations. To

⁷ Exhibit GP2 (Witness Statement of Lynn Tonsing at [36], [39], [41]).

⁸ See for example, *Amor v CFMEU* (2005) 222 CLR 241; *Kucks v CSR Ltd* (1996) 66 IR 182.

⁹ Ai Group, *4 Yearly Review of Modern Awards Submission*, 23 December 2016. See also witness evidence in support: Witness Statement of Bryan Robertson, [44] to [49]; Witness Statement of Robin Davis at [41] to [44]; evidence of Bryan Robertson at PN1012; evidence of Robin Davis at PN1253 – PN1268 (inclusive).

interpret farm gate as a physical barrier would result in disparate award coverage as observed by Ms Tonsing.¹⁰

Mitolo Decision

28. Following the Mitolo decision¹¹ there is uncertainty as to coverage of the Horticulture Award in respect of packing sheds which are located on land separate to farms or orchards.

29. This uncertainty arose following the Commission's consideration of a statement made by the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in the *Stage 2 Award Modernisation Decision*:¹²

[53] *Our overall approach to coverage of the pastoral and horticulture awards is that they should be confined to agricultural production within the "farm gate".*

30. Notably, no further explanation was provided by the Full Bench of the AIRC, and the Full Bench in the Mitolo decision¹³ held that clause 4.2(a) imposed a location limitation such that the activities described in the clause "*must also be carried out at the type of work locations specified in the paragraph.*"¹⁴

31. As a result, an unsatisfactory position arises: uncertainty exists as a result of different views as to what constitutes the "*farm gate*" – is it physical land or is it a concept? Does this mean that Gayndah Packers is not covered by the Horticulture Award in respect of packing work undertaken by it in circumstances where neighbouring packing sheds, with employees performing exactly the same work, are so covered?¹⁵

32. Based on the foregoing, it is submitted that the coverage clause of the Horticulture Award should be varied to give certainty to employers who operate packing sheds not behind a physical farm gate.

¹⁰ Evidence of Lynn Tonsing at PN610.

¹¹ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524.

¹² [2009] AIRCFB 345.

¹³ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524.

¹⁴ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524, at [46].

¹⁵ See evidence of Lynn Tonsing, PN609.

33. It is also submitted that the variation sought by Gayndah Packers and the employer parties will also provide certainty that where different corporate arrangements exist within a business, the horticulture enterprise will be covered by the Horticulture Award.

Considerations in section 134(1) of the FW Act

s.134(1)(a) – Relative living standards and the needs of the low paid

34. The variation is concerned to ensure that employers and employees who are properly covered by the Horticulture Award remain so covered.
35. The evidence of the employer parties at Hearing¹⁶ is that the Horticulture Award is being widely applied. There is no evidence before the Commission that there would be any wide-spread diminution of the award safety net, nor evidence that the Horticulture Award does not meet the modern award objective itself.

s.134(1)(b) – The need to encourage collective bargaining

36. Greater certainty in relation to award coverage and therefore the applicable award safety net would encourage collective bargaining.

s.134(1)(c) – The need to promote social inclusion through increased workforce participation

37. This is a neutral consideration.
38. Although it is noted that Gayndah Packers is a major employer in the local community of Gayndah and a decision by the Commission to not make the determination will have negative impacts on Gayndah's business, including in respect of the rostering of work under the Storage Award (reduced hours).¹⁷

¹⁶ Exhibit GP2 (Witness Statement of Lynn Tonsing, at [59.2]; Ms Tonsing at PN584, PN586; Exhibit AiG4 (Witness Statement of Bryan Robertson at [58]-[59]; Exhibit AiG5 (Witness Statement of Godfrey Cody at [23]); Exhibit 4 (Witness Statement of Paula Colquhoun at [93]-[95]).

¹⁷ Exhibit GP2 (Witness Statement of Lynn Tonsing at [57], [58]).

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

39. The Horticulture Award contains flexibilities which respond to the needs of the horticulture industry. The Storage Award would not deliver the same flexibilities as set out in the evidence of Lynn Tonsing.¹⁸

s.134(1)(e) – The need to provide additional remuneration

40. This is a neutral consideration.

s.134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden

41. The evidence of Lynn Tonsing identifies the anticipated increased costs and reduced flexibilities under the Storage Award:

- There would be little capacity to pass on additional costs associated with the Storage Award, and that estimated calculations suggest that a \$7 increase per bin would be required to cover the increased employment costs.¹⁹
- Gayndah Packers is not in a position to “*manipulate the price that we ultimately sell the product for. The price that we receive for the fruit is dictated by us to the market, the main drivers are Woolworths and Coles, and for export markets, via the broker.*”²⁰
- The estimated increase in production wages (based on 2016 hours) is approximately \$202,546, being 15-20%.²¹
- Maximum daily hours is 8 hours or 10 hours by majority agreement (as opposed to 8 hours or up to 12 hours by majority agreement);²²

¹⁸ Exhibit GP2 (Witness Statement of Lynn Tonsing at [53]).

¹⁹ Exhibit GP2 (Witness Statement of Lynn Tonsing at [31]-[33]).

²⁰ Exhibit GP2 (Witness Statement of Lynn Tonsing at [35]).

²¹ Exhibit GP2 (Witness Statement of Lynn Tonsing at [54] and Attachment LT-2).

²² Exhibit GP2 (Witness Statement of Lynn Tonsing at [53.1]).

- Ordinary hours of work are an average of 38 hours per week over 4 weeks (as opposed to 152 hours over a 4 week period);²³
 - The spread of ordinary hours is 7:00am to 5:30pm Monday to Friday, with ability to alter by an hour either side by majority agreement (as opposed to 6:00am to 6:00pm Monday to Friday and by agreement Monday to Saturday);²⁴
 - Saturday penalty rate of 50% (as opposed to no Saturday penalty for casual workers unless public holiday which attracts 225%);²⁵
 - 4 hour minimum engagement (as opposed to no minimum engagement period other than Sunday – 3 hours).²⁶
42. The application of the Storage Award would have a significant financial and operational impact to the business.
43. The variation would result in Gayndah Packers maintaining its current operating costs and flexible work practices.

s.134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards

44. The current landscape is such that award coverage is uncertain.
45. The terms of the variation are clear and will provide employers with certainty as to whether or not they are covered by the Horticulture Award particularly in circumstances where they operate packing sheds on land other than farm land or orchards, and where there are particular corporate structures in place which may otherwise affect award coverage.

²³ Exhibit GP2 (Witness Statement of Lynn Tonsing at [53.2]).

²⁴ Exhibit GP2 (Witness Statement of Lynn Tonsing at [53.3]).

²⁵ Exhibit GP2 (Witness Statement of Lynn Tonsing at [53.4]).

²⁶ Exhibit GP2 (Witness Statement of Lynn Tonsing at [53.5]).

s.134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

46. The variation would provide the financial security and certainty for the business to operate amongst like business competitors.
47. The variation also gives effect to the objects of the FW Act and considerations required by the Commission when fulfilling the modern awards objectives, specifically, promoting productivity and economic growth.

Conclusion

48. For the reasons outlined above, it is submitted that the statutory framework is satisfied thereby empowering the Commission to make the draft determination as sought by Gayndah Packers and the employer parties.

**Macpherson Kelley Lawyers
For Gayndah Packers Pty Ltd
31 July 2017**