FAIR WORK COMMISSION

Matter No. 2016/25

FOUR YEARLY REVIEW OF MODERN AWARDS

HORTICULTURE AWARD 2010

SUBMISSIONS OF THE NATIONAL UNION OF WORKERS

Background

1. These submissions are filed on behalf of the National Union of Workers (**NUW**) in accordance with the directions issued by the Full Bench on 12 September 2016 and amended on 23 March 2017.

2. These submissions are made in respect of the applications by Mitolo Group Pty Ltd, Australian Industry Group and Maranello Trading Pty Ltd and others (**the employer parties**) to vary the *Horticulture Award 2010* (**Horticulture Award**).

3. The employer parties seek orders varying the *Horticulture Award* pursuant to:

   (a) Section 156 of the *Fair Work Act 2009* (Cth) (**FW Act**) (**the four yearly review application**); and

   (b) Section 160 of the FW Act (**the ambiguity, uncertainty or error application**).

4. For the reasons set out in these submissions the NUW opposes the proposed variations. The applications should be dismissed.

5. The status quo is that employees who perform work at "off-farm" packing and processing facilities are covered by the *Storage Services and Wholesale Award 2010* (**SSW Award**) and are not covered by the *Horticulture Award* (**the relevant workers**).

6. The proposed variations each seek to vary the coverage of the Horticulture Award so that it covers the relevant workers.

7. As explained further below, the *Horticulture Award* has vastly inferior wages and conditions to the *SSW Award*.

8. The proposed variations are significant and will have the following dual effects:

   (a) Firstly, the coverage of the *SSW Award* will be reduced;

   (b) Secondly, the modern award minimum wages applicable to the relevant workers will be varied as minimum wages will be drastically reduced.

9. If the variations are ordered this will result in a significant diminution of the award safety net for low paid workers. The proposed variations would result in employer parties increasing profit margins at the expense of the low paid.

10. The NUW is entitled to represent and does represent workers covered by the *Horticulture Award* and the *SSW Award.*

11. The NUW relies on the following witness statements:

   (a) The witness statement of George Robertson dated 21 April 2017 (**the Robertson Statement**);

(b) The witness statement of Kay Rault dated 21 April 2017 (**the Rault Statement**); and

(c) The witness statement of Mark Johnston dated 21 April 2017 (**the Johnston Statement**).

12. In Part A of these submissions, the NUW explains the impact of the proposed variations being granted by illustrating the vast differences between the *Horticulture Award* and the *SSW Award.*

13. In Part B of these submissions, the NUW makes submissions as to why the four yearly review application should be dismissed.

14. In Part C of these submissions, the NUW makes submissions as to why the ambiguity, uncertainty or error application should be dismissed.

15. In Part D of these submissions, the NUW makes submissions as to why the Commissions should not entertain making a retrospective variation.

PART A: THE HORTICULTURE AWARD VERSUS THE SSW AWARD

16. The wages and conditions provided for in the *SSW Award* are vastly superior to the wages and conditions provided for in the *Horticulture Award*.

17. The Horticulture is inferior in the following key respects:

(a) ordinary hourly rates (across all classifications);

(b) early morning shift loadings;

(c) afternoon shift loadings;

(d) night shift loadings;

(e) overtime rates; and

(f) public holiday rates.

18. Further to the above it must be noted that the *Horticulture Award* also provides employers with the option of negotiating "piecework agreements" which can significantly reduce the wages received by workers.

19. Attached to this statement and marked "**Schedule 1**" is document prepared by the NUW which illustrates the disparity between the wages that are payable under the *Horticulture Award* and the *SSW Award*.

20. Furthermore, the NUW relies on the Robertson Statement at paragraphs [9] to [19] which also addresses the disparity between the wages that are payable under the *Horticulture Award* and the *SSW Award*.

21. It is plain that if the proposed variations are granted the relevant workers will face significant detriment and hardship as the living standards of these workers will be drastically reduced.

PART B: THE FOUR YEARLY REVIEW APPLICATION

The legislative scheme and applicable principles

The central importance of the "modern awards objective"

22. Section 156 of the FW Act provides that the Commission must conduct a review of the modern awards after each four years of operation.

23. The Commission’s task in conducting a four yearly review is relevantly constrained. The task is to review the modern award against the modern awards objective to ensure that the modern award, in conjunction with the National Employment Standards (**NES**), “*provide a fair and relevant minimum safety net of terms and conditions*” (section 134 of the FW Act).

24. Pursuant to section 134(1) of the FW Act the Commission is required to take into account the following which are defined as “the modern awards objective”:

> “(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.”

25. In *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154 at [109], the Federal Court explained that the above are "*broad considerations which the Commission must take into account when considering whether a modern award meets the objective set by s 134(1).*"

26. The Commission has accepted that no particular weight should be attached to any one consideration over another and to the extent that in a particular matter there is tension between some of the considerations in section 134(1) of the FW Act "*the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*" (*Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406 at [19] and [20]).

Necessity versus mere desirability

27. The Commission must be satisfied that the proposed variation is "necessary" to achieve the modern awards objective as section 138 provides:

> "A modern award may include terms that it is permitted to include, and must included 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." (emphasis added).

28. There is guidance on the requirement of "necessity". It has been found that when considering whether the requirement is met the Commission is required to form a "value judgement" which is based on the prescribed considerations in s 134(1) with regard to the submissions and evidence provided by the parties on the prescribed considerations (see *Four Yearly Review of Modern Awards* [2014] FWCFB 1788 at [36]) (**the Preliminary Jurisdictional Decision**).

29. The Federal Court has emphasised the importance of the Commission distinguishing between what is "merely desirable" and what is established to be "necessary" (*Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] 205 FCR 227).

The Preliminary Jurisdictional Decision

30. The *Preliminary Jurisdictional Decision* provides guidance to the Full Bench as to how it should conduct the review.

31. In the *Preliminary Jurisdictional Decision* the Full Bench explained that when conducting the review the Commission is not conducting this process divorced from the context of the creation of the modern award and will proceed on the basis that "prima facie" the modern award met the modern awards objective when it was made in 2010. Relevantly, the Full Bench stated:

> "In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made." (emphasis added)

32. In the *Preliminary Jurisdictional Decision* the Full Bench has provided guidance as to how this review should be conducted. Significantly at [23] the Full Bench stated:

> "The Commission is obliged to ensure that modern awards, together with the

> NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that <u>a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation.</u> The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, <u>where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”</u> (emphasis aded)

33. Without any doubt the proposed variations in the instant matter qualifies as a “significant change”. This would seem to be an uncontroversial proposition.

34. Thus, it is incumbent on the employer parties to justify the proposed significant changes with a cogent merit argument supported by probative evidence. The employer parties carry the onus of satisfying the Commission that the modern awards objective is no longer being met. As explained below the employer parties fail to discharge this onus.

The special rule about reducing award coverage

35. Further to the above, there are a number of “special rules” in the legislation. It is submitted that two of these special rules are applicable in the instant matter and set out additional requirements that must be met by the employer parties.

36. Firstly, the special rule about varying modern award minimum wages in section 156(3) of the FW Act is applicable.

37. Section 156(3) provides:

> "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**." (emphasis added)

38. Work Value reasons are defined in section 156(4) as follows:

> "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.

39. Accordingly, in the present matter it is incumbent on the employer parties to satisfy the Commission that the proposed variations, which will vary the modern award minimum wages payable to the relevant workers, is justified on work value reasons. As explained below, the employer parties do not satisfy this special test.

40. Secondly, the special rule about reducing coverage in section 163(1) of the FW Act is applicable and key to the Commission's consideration of whether to vary the award pursuant to the four yearly review application.

41. Section 163(1) provides:

> "The FWC must not make a determination varying a modern award so that certain employer 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** (emphasis added)

42. The *Explanatory Memorandum to the Fair Work Bill 2008* explains that the legislative intent behind section 163(1) is to ensure that when workers cease to be covered by one award and commence being covered by another that the new award provides an adequate safety net.

43. Paragraph 623 relevant provides:

> "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.**" (emphasis added)

44. Accordingly, in the present matter it is incumbent on the employer parties to satisfy the Commission that altering the coverage of the Horticulture Award and the SSW Award will result in the relevant workers being covered by an award that is appropriate for them.

Should the Commission vary the Award pursuant to the four yearly review application?

Is the special rule about varying modern award minimum wages satisfied?

45. The NUW submits that the special rule in section 156(3) about varying award wages is not satisfied and accordingly the four yearly review application should be dismissed.

46. It is submitted that this rule is engaged because the variation would result in the minimum award wages payable to a particular class of workers (the relevant workers) being varied.

47. As explained above, it is incumbent on the employer parties to satisfy the Commission that the variation is justified on "work value reasons".

48. All of the employer parties have failed to even mention this key rule in their submissions. This rule significantly qualifies the Commission's power when minimum award wages are being varied and is of central importance to the jurisdiction invoked.

49. The employer parties' failure to address this rule is a fundamental deficiency in the four yearly review application.

50. On the basis of the submissions and witness statements relied on by the employer parties (which are directed at matters other than section 156(3)) the Commission cannot be satisfied that work value reasons justify the proposed variation.

51. There is no material that suggests that the nature of the work performed by the relevant workers, their level of skill and responsibility nor the conditions under which they perform the work has changed since the modern awards were created in such a way that would justify the variations.

52. There is material before the Commission that indicates the contrary:

    (a) the Robertson Statement at [19];

    (b) the Rault Statement at [19]; and

    (c) the Johnston Statement at [24].

53. In summary the four yearly review application should be dismissed because section 156(3)) is not satisfied.

Is the special rule about reducing coverage satisfied?

54. The NUW submits that the special rule in section 163(1) about reducing award coverage is not satisfied and accordingly the four yearly review application should be dismissed.

55. All of the employer parties have failed to even mention this key provision in their submissions. This rule significantly qualifies the Commission's power when coverage is being varied and is of central importance to the jurisdiction invoked.

56. The employer parties' failure to address this rule is a fundamental deficiency in the four yearly review application.

57. On the basis of the submissions and witness statements relied on by the employer parties (which are directed at matters other than section 163(1)) the Commission cannot be satisfied that the *Horticulture Award* would provide an appropriate safety net for the relevant workers. The Four yearly review application should be dismissed for this reason alone.

58. In light of the submissions made in Part A above if the four yearly review application was granted this would result in a significant diminution of the award safety net for the relevant workers. Thus, the *Horticulture Award* would not provide an appropriate safety net within the meaning of section 163(1).

59. Further to the above in support of the submission that the Horticulture Award would not provide an appropriate safety net for the relevant workers the NUW relies on the following two matters.

60. Firstly, in *Award Modernisation* [2009] AIRCFB 345 (the decision that, inter alia, created the *Horticulture Award*) the six member Full Bench presided over by Justice Giudice specifically considered how far the coverage of the *Horticulture Award* should extend and expressly ruled that it should be confined within the "farm gate". The Full Bench relevantly found at [53]:

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

61. Secondly, in *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 at [46] the Full Bench accepted that "*work location was intended to be a critical element in the coverage of the Horticulture Award…*".

62. As established in the *Preliminary Jurisdictional Decision* at [27] the Full Bench when conducting this review is required to follow previous Full Bench decisions unless there is a cogent reason for not doing so.

63. There is simply no cogent reason for the Full Bench to entertain derogating from the above rulings.

64. Consistently with the above Full Bench decisions the present Full Bench should not be satisfied that the *Horticulture Award* is an appropriate award for the relevant workers who perform their work outside of the "farm gate".

65. In summary the four yearly review application should be dismissed because section 163(1)) is not satisfied.

The considerations in section 134(1)

66. The NUW makes the submissions set out below in relation to the considerations in section 134(1).

<u>Section 134(1)(a) - relative living standards and the needs of the low paid</u>

67. This consideration militates in favour of rejecting the proposed variation. It is submitted that in light of the submissions made in Part A above if the variation was granted this would result in a significant diminution of the award safety and thus living standards.

68. The employer parties have not given appropriate attention to this consideration which on any view holds great significance in the present matter.

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

69. This consideration militates in favour of rejecting the proposed variation. It is submitted that in light of the Robertson Statement at [18] the Commission should find that the proposed variation would be likely to stifle enterprise bargaining.

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

70. This is a neutral consideration.

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

71. To the extent that any of the employer parties establish any of these matters this must be balanced against the significant detriment that will be caused to workers.

Section 134(da) – the need to provide additional remuneration for prescribed matters

72. This factor militates in favour of rejecting the proposed variation as the proposed variation would result in inferior loadings as detailed in Schedule 1.

Section 134(e) – equal remuneration

73. This is a neutral consideration.

Section 134(f) – impact on business, including on employment costs and the regulatory business

74. To the extent that any of the employer parties establish any of these matters this must be balanced against the significant detriment that will be caused to workers. It should also be noted that employers in many cases choose to have their packing and storage work performed "off-site" due to benefits arising from this.

Section 134(g) – simple and easy to understand modern award system

75. This is a neutral consideration.

Section 134(g) – simple and easy to understand modern award system

76. This is a neutral consideration.

Section 134(h) – impact on employment growth, inflation etc…

77. To the extent that any of the employer parties establish any of these matters this must be balanced against the significant detriment that will be caused to workers.

Summary on the considerations in section 134(1)

78. The NUW contends that the proposed variations are not necessary to provide a fair and relevant minimum safety net. The modern awards objective is currently met. In the circumstances of this matter given the significant diminution of the award safety and thus living standards the balancing of the considerations compels the conclusion that the variations should be rejected.

79. The employer parties fail to establish that the variations are anything more than "merely desirable" and fail to put forward a cogent merit argument that would even come close to justifying the significant changes proposed.

80. In summary the four yearly review application should be dismissed.

PART C: THE AMBIGUITY UNCERTAINTY OR ERROR APPLICATION

The legislative scheme and applicable principles

81. Section 160 relevantly provides:

> "The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error"

82. In *Re Tenix Defence Pty Limited* [2012] FWAFB 3210 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 awards. 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." (emphasis added)

83. It is submitted that the above principles are applicable to section 160.

84. In *Re: Timber & Allied Industrial Award 1999* [2003] AIRC 1137 Munro J observed that the Commission's power to correct an "error" to an Order that it has made is analogous to the "slip and error rule" in Court. Munro J held that it allows a correction in circumstances where the error was unintentional, the order or judgment does not conform to the intention of the Court and there is no matter of controversy about the error.

85. It is submitted that the above principles are applicable to "error" in section 160.

Step 1: Is there an ambiguity or uncertainty or error?

86. It is submitted that there is no ambiguity or uncertainty.

87. As explained above, when the *Horticulture Award* was created the six member Full Bench presided over by Justice Giudice specifically considered how far the coverage of the *Horticulture Award* should extend and expressly ruled that it should be confined within the "farm gate". The Full Bench relevantly found at [53]:

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

gate."

88. That the Full Bench which created the *Horticulture Award* deliberately put in place a location limit on coverage was confirmed by the Full Bench in *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 at [46] wherein it accepted that "*work location was intended to be a critical element in the coverage of the Horticulture Award…*".

89. There is no merit in the submission that the *Horticulture Award* contains an ambiguity or uncertainty. It must fail. The creators of the Award expressly intended for the coverage of the Award should be confined within the "farm gate". The unique situation in this matter is that the Commission has the benefit of the decision which created the *Horticulture Award.* The submissions which are made about the predecessor awards are of little assistance in these circumstances.

90. Turning to the other threshold question of whether there is an "error" it is submitted that it cannot be said that the error was unintentional, nor that the coverage of the *Horticulture Award* does not conform to the intention of the Full Bench which created it and finally it is matter if controversy between the parties. In summary, this ambitious claim is fundamentally misconceived and must fail. It is noted that understandably this particular claim is not made by the AIG in its submissions.

91. On the basis that there is not an ambiguity, uncertainty or error established this application must be dismissed.

Step 2: If there an ambiguity or uncertainty or error how should the Commission exercise its discretion?

92. In the event that contrary to the above submissions the Commission finds that there is an ambiguity or uncertainty or error the NUW makes the following submissions.

93. It is submitted that the Commission should exercise its discretion by refusing to grant the variation. The NUW relies on the matters set out in Part B above.

PART D: THE APPLICATION FOR RETROSPECTIVITY

94. The employer parties seek to have any variation granted under section 160 applied retrospectively.

95. It is submitted that the employer parties have failed to establish "exceptional circumstances" within the meaning of section 165(2)(b). Accordingly, the Commission should refuse to grant any retrospectivity.

Further submissions

96. The NUW reserves its position to make further submissions after the evidence has closed.

Disposition

97. The NUW submits that the Commission should dismiss the four yearly review application and the ambiguity, uncertainty or error application.

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21 April 2017