**Fair Work Commission: 4 yearly Review of modern awards**

# AM2014/196 & AM2014/197: CASUAL & PART TIME EMPLOYMENT

# FINAL SUBMISSIONS

# HORTICULTURE AWARD 2010

**Costa Group (Costa)**

**-and-**

**Australian Business Industrial (ABI)**

**-and-**

**NSW Business Chamber (NSWBC)**

**8 AUGUST 2016**

## 1. INTRODUCTION

1.1 These submissions are filed in relation to proceedings AM2014/196 and AM2014/197 (**Proceedings**) by:

(a) Costa Group (ABN 002 687 961) (**Costa**), which is one of Australia's largest horticultural companies and a major grower, packer and distributor of fresh fruit and vegetables. Costa has farms located across every state of Australia and the business presently consists of seven fresh produce categories which include berries, mushrooms, tomatoes, bananas, citrus, table grapes and avocados. Six of these categories are vertically integrated enterprises with activities spanning farming through to retail and wholesale sales. Avocados are a predominantly marketing enterprise. During the peak of the harvest season, Costa Group has 6,000 people working across its farms which cover 3,000ha of farmed land and 30ha of protected glasshouse production across Australia; and

(b) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members;

(c) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

## 2. BACKGROUND

2.1 By application dated 19 October 2015 (**ACTU Claims**) in the Proceedings, the Australian Council of Trade Unions (**ACTU**) seeks to vary the *Horticulture Award 2010* (**Award**).

2.2 The ACTU seek five distinct variations to the Award as follows:

> *"Insert a new subclause 10.5 as follows:*
>
> *10.5 Casual Conversion*
>
> *a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment.*
>
> *b) An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.*
>
> *c) An employee who has worked on a full-time basis throughout the period of casual employment has the right to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment has the right to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked.*
>
> *d) The employer must give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained the six month period.*
>
> *e) An employee who has attained the six month period, may elect to convert to full-time or part-time employment by providing four weeks' notice in writing to their employer, and within four weeks of receiving such notice the employer must consent.*
>
> *f) If a casual employee elects to convert to full-time or part-time employment, the employer and employee must discuss and document:*

*i. whether the employee will become a full time or parttime employee;*

*ii. if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, in accordance with clause 10.3—Part-time employment.*

*g) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in this clause.*

*h) A casual employee who converts to full-time or part-time employment may only revert to casual employment by written agreement with their employer.*

*i) A casual employee who converts to full-time or part-time employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.*

*j) Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor does it permit an employer to require a casual employee to convert if the employee does not wish to do so.*

*k) Casual employees (including irregular casuals) must be given written notice of the provisions of this clause by their employer within four weeks of commencing employment.*

*l) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause.*

*m) Any disputes about the application or operation of this clause shall be dealt with under the procedures set out in clause 9 - Dispute resolution."* (**Casual Conversion Claim**)

*[3] Insert a new subclause 10.3(e) as follows:*

*"An employer is required to roster a part-time employee for a minimum of four consecutive hours on any day or shift."*

*[4] Insert a new subclause 10.4(d) as follows:*

*"The minimum daily or shift engagement of a casual is four hours."* **(Minimum Engagement Claim)**

*[5] Insert a new subclause 10.6 as follows:*

*"10.6*

*a) An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or the employee's work or position outsourced by the employer, to avoid any obligation under this award.*

(**Compliance Claim**)

*b) An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.* (**Engagement Restriction Claim**)

*c) An employer when engaging a casual must inform the casual in writing that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required per week."*

**(Commencement Information Claim)**

2.3 Three witness statements are filed in support of the ACTU Claims:

(a) Adam Algate dated 18 February 2016;

(b) Ron Cowdrey dated 18 February 2016;

(c) Keith Ballin dated 9 October 2015.

2.4 On 22 February 2016, Costa Group, ABI and NSWBC filed comprehensive submissions in response to the ACTU Claims (**Primary Submissions**).

2.5 In support of these Primary Submissions, two witness statements were filed:

(a) Peter John McPherson dated 22 February 2016;

(b) Richard Neil Roberts dated 22 February 2016.

2.6 Contemporaneous submissions were also filed by the National Farmers Federation alongside a number of witness statements, the following of which are now in evidence before the Full Bench:

(a) Alice De Jonge dated 22 February 2016;

(b) Andrew Bulmer dated 22 February 2016;

(c) Andrew Young dated 22 February 2016;

(d) Ann Young dated 22 February 2016;

(e) Brendan Miller dated 22 February 2016;

(f) Brock Sutton dated 22 February 2015;

(g) John Dollisson dated 22 February 2016;

(h) Steve Chapman dated 22 February 2016;

(i) Donna Louise Mogg dated 21 February 2016;

(j) Kylie Collins dated 19 February 2016;

(k) Mick Dudgeon dated 19 February 2016;

(l) Clint Edwards dated 18 February 2016;

(m) Stephen Pace dated 18 February 2016;

(n) Susan Finger dated 16 February 2016;

(o) Vicky Forsyth dated 16 February 2016;

(p) Tracey McGrogan dated 15 February 2016;

(q) Nick Leitch dated 12 February 2016;

(r) Andreas Reahberger - undated;

(s) Chris Fullerton - undated;

(t) Pennie Patane - undated;

(u) Rhonda Jurgens - undated;

(v) Ross Turnbull - undated;

(w) Tim Wollens - undated.

2.7 On 11 July 2016, the Full Bench heard evidence in relation to the ACTU Claims (**Hearing**).

2.8 On 25 July 2016, the ACTU filed submissions in relation to the evidence heard at the Hearing (**ACTU July Submissions**) and these submissions reply to those submissions.

**3. SCOPE OF THESE SUBMISSIONS**

3.1 Section 156(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) requires the Full Bench to review the Award "*in its own right*".

3.2 These submissions will accordingly address the ACTU Claims in the context of the evidence heard by the Full Bench with respect to the very specific context of the horticulture industry.

**4. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW**

4.1 The legislative framework applicable to the 4 Yearly Review has been canvassed in great detail in various proceedings currently before the Full Bench and was also summarised in our Primary Submissions. In summary, this legislative framework is as follows:

(a) Section 156(2) of the FW Act requires the Full Bench to review all modern awards.In doing so, the Full Bench may make determinations varying modern awards.

*(b)* While the hearing of common issues is clearly allowable under s 156(5) of the FW Act, such section requires the Full Bench to review *"each modern award... in its own right."*

(c) Section 134(1) of the FW Act sets out the modern awards objective. The modern awards objective requires that modern awards along with the National Employment Standards provide a "*fair and relevant minimum safety net"* of terms and conditions.

(d) What is "fair and relevant" is conditioned by the requirement to take into account the matters set out in s 134(1)(a) to (h) of the FW Act.

(e) Section 138 of the FW Act outlines that

> *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.*

(f) Given the above, regardless of the process relating to the hearing of these matters, the Full Bench must be satisfied that the ACTU's proposals are necessary to ensure a fair and relevant minimum safety net in accordance with s 134 of the FW Act for each modern award subject to the ACTU Claims.

(g) The above legislative framework was considered in detail in the Preliminary Issues Decision.[1]

[1] [2014] FWCFB 1788

(h) The Preliminary Issues Decision at [23] confirms that the Full Bench remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

(i) This means that, when considering any variation, the Full Bench should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.

(j) The discretion conferred on the Full Bench to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.[2]

(k) When considering the merit basis to make variations to modern awards, the Preliminary Issues Decision held that:

(i) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;[3] and

(ii) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[4]

**5. TASK OF THE FULL BENCH**

5.1 Given the considerations outlined in the Preliminary Issues Decision, the Full Bench is now required to determine whether:

a) the ACTU has advanced a case (as contemplated by the Preliminary Issues Decision), including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation[5], such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;

b) any such exercise of discretion is consistent with s 134 of the FW Act; and

c) the proposed changes would be consistent with s 138 of the FW Act.

**6. HAS THE ACTU ADVANCED A SUFFICIENT EVIDENTIARY CASE?**

6.1 In short, the evidence filed in support of the ACTU Claims is manifestly inadequate.

6.2 Three statements have been filed relating to the Award and these witnesses were not called for cross-examination.

6.3 In summary, the statements:

(a) do not contain any material in support of the Casual Conversion Claim;

(b) do not contain any evidence in support of the Minimum Engagement Claim;

(c) do not contain any material in support of the Compliance Claim;

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[2] Preliminary Issues Decision at [60]
[3] Preliminary Issues Decision at [23] and [60]
[4] Ibid
[5] *Preliminary Issues Decision* at [23] and [60].

(d) do not contain any material in support of the Commencement Information Claim.

6.4 In fairness, this position is perhaps unsurprising given that the statements were drafted to support another union's claims in respect of an overtime provision for casuals and have subsequently been adopted by the ACTU in support of its own claims.

6.5 Notwithstanding this explanation, given that no evidentiary case has been presented by the ACTU in respect of the Award, the ACTU Claims must fail.

## 7. SUBMISSIONS OF THE ACTU

7.1 The ACTU July Submissions provide three arguments in support of the ACTU Claims:

(a) The strong economic performance of the horticultural industry means that it is readily able to absorb any cost implications from the granting of the ACTU Claims.

(b) The Minimum Engagement Claim is not unworkable in the horticulture industry given that employers had the ability under s 524 of the FW Act to stand down employees "*without pay if work has to cease due to unexpected weather events pursuant to s 524(1)(c) of the Fair Work Act 2009*"[6]. In any event, the ACTU submit that the evidence did not disclose the working of shifts shorter than 4 hours.[7]

(c) The Casual Conversion Claim would not apply to harvest workers given that harvest seasons are less than 26 weeks, nor to overseas workers given their visa restrictions[8].

7.2 In summarising the state of the evidence, the ACTU note that:

(a) "*the evidence led by the [National Farmers Federation] does not provide any basis to prevent the Full Bench from inserting a 4 hour minimum engagement period into the Horticulture Award 2010...*"; and

(b) "*there is no credible argument against the Full Bench including a casual conversion clause in awards falling within the agricultural industry within Australia*"[9].

## 8. RESPONSE TO THE SUBMISSIONS OF THE ACTU

8.1 The ACTU July Submissions do not appear to countenance the requirements of the Preliminary Issues Decision.

8.2 Notwithstanding the ACTU's false assertion that the parties in opposition to the ACTU Claims have failed to establish a "*basis to prevent*" or a "*credible argument against*" the granting of the ACTU Claims, the onus plainly falls on the ACTU to provide an evidentiary basis for the making of its claims in relation to the Award.

8.3 No such basis has been established and therefore the ACTU Claims must fail in relation to the Award.

## 9. CASUAL CONVERSION CLAIM

9.1 The ACTU appears to argue in the ACTU July Submissions that the Casual Conversion Claim will have little practical effect given it will not apply to:

(a) harvest employees;[10]

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[6] See ACTU July Submissions at [20]
[7] See ACTU July Submissions at [22]-[23]
[8] See ACTU July Submissions at [25]
[9] See ACTU July Submissions at [29]

(b) overseas workers;[11]

(c) a "*significant proportion*" of casual employees who will elect to stay casual notwithstanding an entitlement to convert to permanent;[12]

9.2 If accepted, these assertions render the Casual Conversion Claim largely inconsequential within the context of the Award. As such, we are unable to ascertain how this position could be said to **support** the granting the Casual Conversion Claim particularly in the context of s 138 of the FW Act which requires the Full Bench to vary modern awards only to the extent necessary to achieve the model awards objective.

9.3 If the Casual Conversion Claim would have little practical effect and is not supported by any evidence whatsoever, we submit that there is absolutely no basis on which to grant the claim.

9.4 Notwithstanding this position, we note that the evidence does not necessarily support the position outlined by the ACTU.

9.5 It is not the case that harvest workers would necessarily be excluded from the operation of the Casual Conversion Claim. By way of example, the statement of Richard Roberts at [37] identified a material percentage of employees who would be subject to the Casual Conversion Claim.

9.6 In respect of the Casual Conversion Claim, with specific reference to the industry and the evidence filed in these Proceedings, Costa, ABI and NSWBC restate as follows:

(a) The nature of the work within the industry is such that 3-6 months of intense activity is ordinarily followed by long periods of relative inactivity. Such a scenario would be particularly unsuited to a 'converted casual' following the cessation of the harvest.

(b) There would be a potential large cost consequence arising from the forced engagement of permanent employees in circumstances where there was no productive work for them to perform.

(c) The Casual Conversion Claim would entail an increased administrative burden and cost in an industry in which employee engagement and administration is relatively informal and unsophisticated.

(d) No current casual conversion provision exists under the Award in any form.

9.7 Notwithstanding the lack of evidence or specific submissions addressing the horticulture industry or Award, it is apparent that the making of the Casual Conversion Claim is not necessary to ensure the Award satisfies the modern awards objective particularly in respect of:

(a) the need to promote flexible modern work practices and the efficient and productive performance of work[13]; and

(b) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden[14]; and

(c) the likely impact of any exercise of modern award powers on employment growth,

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[10] See ACTU July Submissions at [25]
[11] See ACTU July Submissions at [26]
[12] See ACTU July Submissions at [28]
[13] FW Act Section 134(1)(d).
[14] Ibid section 134(1)(f).

inflation and the sustainability, performance and competitiveness of the national economy.[15]

9.8 The Casual Conversion Claim should therefore be refused.

**10. MINIMUM ENGAGEMENT CLAIM**

10.1 The ACTU submit that the weather-dependent nature of the horticulture industry is not an argument against the Minimum Engagement Claim given that employers already have the ability under s 524 of the FW Act to stand down employees, "*without pay if work has to cease due to unexpected weather events*"[16].

10.2 As a threshold issue, the ACTU appear to misstate the effect of s 524 of the FW Act.

10.3 That section provides:

> *(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
>
> > *(a) industrial action (other than industrial action organised or engaged in by the employer);*
> >
> > *(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
> >
> > *(c) a stoppage of work for any cause for which the* ***employer cannot reasonably be held responsible.***
>
> *(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*
>
> > *(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*
> >
> > *(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*
>
> *Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.*
>
> *Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).*
>
> *(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.* [Emphasis added]

[15] Ibid section 134(1)(h).
[16] See ACTU July Submissions at [20]

10.4 In framing its submission, the ACTU appear to have conflated the concept of a stoppage of work as a result of "*unexpected*" circumstances with the concept of a stoppage *"for any cause for which the employer cannot reasonably be held responsible"*

10.5 The latter concept, which is the scenario explicitly outlined within s 524, imports no element of predictability but rather requires a lack of control on the part of the employer. If, as the ACTU appears to suggest, an employer is granted a general right under s 524 to refuse payment where weather conditions prevent the performance of work, there is no basis on which to restrict this right to weather events which are unexpected or unforeseen.

10.6 While all within the horticulture industry wish it were not so, weather events such as rain, frost, cold and dew are all beyond the control of the employer and as such, if these events cause productive work to stop, this is properly understood to be a stoppage of work by a "*cause for which the employer cannot reasonably be held responsible".*

10.7 This difficulty with the ACTU interpretation was queried at the Hearing by Bull DP at PN1082 and PN1084.

10.8 In response to questioning from his Honour, Mr Crawford of the Australian Workers' Union at PN1085 provided the position that if an employer brought staff in to work during a period where rain was forecast, that employer could reasonably be held responsible for the stoppage of work in circumstances where rain prevented the performance work.

10.9 In our submission, to suggest an employer can be reasonably held responsible for rainfall which causes a stoppage of work is untenable and inconsistent with the operation of the FW Act. The position that a stoppage of work caused by rain is clearly not a cause for which the employer can be held responsible appears to have some historical support in decisions of the Full Bench's predecessor tribunals.[17]

10.10 Ultimately, the Full Bench in these Proceedings is not required to make a determination on the operation of s 524 of the FW Act.

10.11 The Full Bench has before it evidence of casual workers in the horticultural industry working shifts of less than 4 hours[18]. As developed by this evidence, the nature of the industry means that labour requirements are not scalable in the same way as manufacturing or service industries.

10.12 In our submission, the Full Bench cannot safely proceed on the evidence before it that a 4 hour minimum engagement is either practical or workable in the industry.

10.13 Given the above, it is apparent that the making of the Minimum Engagement Claim is not necessary to ensure that the Award satisfies the modern awards objective particularly in respect of:

(i) the relative living standards and the needs of the low paid;[19] and

(ii) the need to promote social inclusion through increased workforce participation;[20]

(iii) the need to promote flexible modern work practices and the efficient and

[17] See Decision Australian Workers Union Construction and Maintenance Award 1975 - A051 Mis 118/83 MD Print F2261

[18] See for example the statement of Richard Roberts at [30]-[34]

[19] Ibid section 134(1)(a)

[20] Ibid section 134(1)(c)

productive performance of work[21];

(iv) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden[22]; and

(v) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy[23].

10.14 In short, the nature of the industry is entirely inconsistent with the notion of guaranteed periods of casual engagement.

10.15 For all of the above reasons, the Minimum Engagement Claim should be dismissed.

## 11. ECONOMIC PERFORMANCE OF THE INDUSTRY

11.1 Other parties in these Proceedings will likely file comprehensive submissions in response to the ACTU's submissions in respect of the economic performance of the horticulture industry.

11.2 For the purposes of these submissions it is sufficient to note that, given the legislative framework outlined above, economic performance of an industry cannot be determinative of the adoption of a proposed variation in the 4 Yearly Review.

11.3 These Proceedings are not a bargaining negotiation. It is simply not sufficient to assert that "business is good" and therefore union claims should be granted. As extensively outlined in these and other 4 Yearly Review proceedings, the Review is directed to the creation of a fair and reasonable safety net. Proposed variations to that safety net must be supported by submissions and evidence directed to establishing that the variations sought will satisfy, only to the extent necessary, the modern awards objective.

11.4 Regardless of the economic performance of the industry (and as noted in evidence before the Full Bench, the ACTU overstates the security of the Australian horticultural industry), the ACTU is required to demonstrate that the adoption of its proposal will result in an Award which satisfies the modern award objective.

11.5 The ACTU has plainly failed to do this.

## 12. OTHER COMPONENTS OF THE CLAIMS

12.1 The Compliance Claim, Engagement Restriction Claim and Commencement Information Claim were not the subject of any union evidence, nor were they discussed in the ACTU July Submissions.

12.2 Accordingly it is sufficient to refer to the position outlined in our Primary Submissions in respect of these claims.

12.3 For the reasons outlined in those Primary Submissions, the claims outlined above at paragraph 12.1 should also be dismissed.

## 13. CONCLUSION

13.1 It is apparent that the claims made in these Proceedings by the ACTU;

(a) are not supported by probative evidence properly directed toward demonstrating

[21] Ibid section 134(1)(d)
[22] Ibid section 134(1)(f)
[23] Ibid section 134(1)(h)

the facts supporting the proposed variation[24] in respect of the Award, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;

(b) are not consistent with the modern awards objective as outlined in s 134 of the FW Act; and

(c) are not terms that the Full Bench is permitted to include, or required to include, only to the extent necessary to achieve the modern awards objective within the scope of s 138 of the FW Act.

13.2 For all the above reasons, Costa, ABI and NSWBC submit that the ACTU Claims should be dismissed.

[24] *Preliminary Issues Decision* at [23] and [60].