

**Form F46 Application to vary a modern award**

Fair Work Act 2009, ss.157-160

FAIR WORK COMMISSION

Commission use only

Commission Matter No.:

**First Applicant**

<b>Name:</b>	Mitolo Group Pty Ltd				
	Title [if applicable] Mr [ ] Mrs [ ] Ms [ ] Other [ ] specify:				
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If the Applicant is a company or organisation:					
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**Second Applicant**

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If the Applicant is a company or organisation:					
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	Head of National Workplace Relations Policy				
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**First Applicant's representative (if any)**

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1. **What is the name of the modern award to which the application relates?**  
Horticulture Award 2010 [MA000028]
2. **What is the industry of the employer?**  
Horticulture

3. **Variation(s) sought:**  
The Applicants seek a variation to clauses 3.1, 4.2 and 4.3 of the Horticulture Award 2010 as set out in annexure 1, operative from 1 January 2010.
4. **Grounds:**
- 4.1 The Applicants seek to vary the *Horticulture Award 2010* (**Award**) pursuant to section 160 of the *Fair Work Act 2009* (Cth) (**FW Act**) in terms of annexure 1 to remove an ambiguity or uncertainty and/or to correct an error.
- 4.2 Given the exceptional circumstances relating to this application, the Applicants seek an operative date of 1 January 2010 pursuant to section 165(2) of the FW Act.
- 4.3 The Applicants are also seeking an order varying the Award in the same terms pursuant to section 156 of the FW Act in the Commission's four year review of modern awards (AM2014/231) in respect of the Award (**Modern Award Review proceeding**).
- 4.4 The proposed variation introduces new definitions of 'horticultural enterprise' and 'enterprise' in clause 3.1 of the Award and amends clause 4 to unambiguously provide that the Award covers an employer in respect of the performance of work comprising packing, storing, grading, forwarding, washing or treating of horticultural crops (**Relevant Work**) in connection with a horticultural enterprise without locational limitation on where the work is performed.
- 4.5 Clause 4 of the Award contains an ambiguity and/or uncertainty in that as presently worded:
- 4.5.1 the Applicants contend that on a proper interpretation of the words of clause 4, taken in contextual, historical and industrial context, the Award covers the Relevant Work regardless of the location at which that work is performed, to the exclusion of the *Storage Services and Wholesale Award 2010* (**SS&W Award**);
- 4.5.2 while it is the Applicants' contention that the above construction is to be preferred, that the clause is capable of being construed in a more limited way is apparent from the decision of the Full Bench of the Commission in *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 in the context of an application by the First Applicant for the approval of an enterprise agreement (on appeal from the decision of Bartel DP in *Mitolo Group Pty Ltd* [2014] FWC 7682). The Full Bench's construction of the clause was to the effect that the Award:
- (a) covers the Relevant Work only if it is carried out on land which is used for cultivation or farming such that it is an agricultural holding (or farm) or a flower or vegetable market garden; but
- (b) does not cover the Relevant Work where it is carried out on land used by and which forms part of a business in which horticultural products are cultivated, harvested and produced ready for sale, including on farms in the vicinity of the land in question.
- 4.6 Further or in the alternative to paragraph 4.5 above, clause 4 of the Award contains an error in that it inadvertently limits the coverage of the Award in respect of the Relevant Work to that which is undertaken on an agricultural holding (or farm) or a flower or vegetable market garden.

## Basis on which the Variation is sought

### Background: The First Applicant and the Mitolo Group Business

- 4.7 The First Applicant is part of the Mitolo Group of Companies (**Mitolo Group**) which carries on business as a large scale South Australian based potato and onion producer. The Mitolo Group:
- 4.7.1 produces and supplies potatoes and onions to major Australian wholesale markets and supermarkets such as Coles Supermarkets;
  - 4.7.2 comprises a number of corporate entities and trusts;
  - 4.7.3 operates as a single integrated business (with one management team and consolidated financial management and reporting); and
  - 4.7.4 is owned and operated by the Mitolo family.
- 4.8 The Mitolo Group's business involves, and the Mitolo Group employs persons to undertake work in connection with:
- 4.8.1 growing of potatoes and onions on land owned by the Mitolo Group at various locations in South Australia, including the Riverland, Pinnaroo and Virginia;
  - 4.8.2 the following operations:
    - a. seed propagation, development, growing and preparation;
    - b. preparation of land and planting on various horticultural land sites on a crop rotation basis;
    - c. growing and irrigating of planted crops;
    - d. initial bulk harvesting of crops;
    - e. service, repair and maintenance of plant and equipment;
    - f. transport of crops grown and harvested by the Mitolo Group to a centralised facility (situated at the Mitolo Group's Angle Vale Road site at Virginia in South Australia (**Angle Vale Site**)) at which the following tasks are undertaken:
      - (i) separation of waste material and unsaleable crops (which is returned to harvested land or used or sold as stock feed);
      - (ii) sorting/grading of the harvested crop;
      - (iii) washing, treating and packing of the harvested crop; and
      - (iv) forwarding of produce to customers.
- 4.9 As a large scale potato producer, Mitolo Group is required to grow crops on rotated land holdings for land health management reasons. It is impractical and uneconomical for Mitolo Group (consistent with common practice at other large scale modern farming operations) to operate a washing, packing, treatment, sorting and forwarding facility on each growing site, necessitating the performance of these functions at a centralised location.

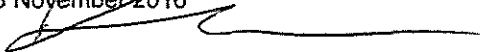
- 4.10 The First Applicant operates, as part of the Mitolo Group's business, the centralised facility at the Angle Vale Site and employs the staff who undertake the work referred to in paragraph 4.8.2f above. Only the Mitolo Group uses the Angle Vale Site.

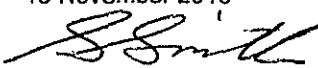
The Variation sought will remove Ambiguity and/or Uncertainty or Correct an Error

- 4.11 The Commission ought to vary clause 4 in the manner set out in annexure 1 and thereby remove the identified ambiguity and/or uncertainty or correct the identified error for the following reasons.
- 4.12 The Applicants contend that:
- 4.12.1 coverage is not (or ought not be) limited to work performed at a particular location and in particular "on" an agricultural holding or farm;
- 4.12.2 rather the Award is (or ought to be) an industry based award which accordingly covers (or ought to cover) employers which operate as part of a horticultural business or enterprise in the "horticulture industry" and their employees who undertake work within the classifications in the Award, rather than a location based award.
- 4.13 Clause 4.2(a) of the Award (by contrast to other modern awards) is not limited in terms to activities or work undertaken at or on a particular location.
- 4.14 The classifications listed in Schedule B of the Award are apt to include and are more aligned with the Relevant Work than the SS&W Award.
- 4.15 The Award incorporates flexible terms and conditions (not replicated in the SS&W Award) in order to accommodate the characteristics of the horticulture industry, which characteristics are applicable:
- 4.15.1 to the Relevant Work undertaken as part of a horticultural business or enterprise;
- 4.15.2 whether or not the Relevant Work is carried out:
- a. on a farm or agricultural holding;
- b. adjacent to or in the vicinity of such a location; or
- c. at a centralised location.
- 4.16 The historical development of the Award and the context in which it was made demonstrates that:
- 4.16.1 coverage of the Award is not (and was not intended to be) limited to Relevant Work carried out on an agricultural holding or farm;
- 4.16.2 where activities or functions come within the scope of the Award and the SS&W Award, the Award has (and was intended to have) primacy and covers that work;
- 4.16.3 the SS&W Award has (and was intended to have) no application to the Relevant Work undertaken as part of a vegetable produce business or enterprise such as the Mitolo Group business.
- 4.17 If the coverage of the Award is limited in the manner referred to in paragraph 4.5.2 above, Relevant Work undertaken by farming or horticulture businesses or enterprises would be covered by:

- 4.17.1 the Award if physically undertaken on a farm or agricultural holding;
- 4.17.2 the SS&W Award if undertaken at some other location, whether that be:
- a. a location near or immediately adjacent to a farm or agricultural holding; or
  - b. a centralised location located amongst or in the vicinity of farms or agricultural holdings used by the business or enterprise for growing crops.
- 4.18 There is no basis for the distinction which arises by limiting coverage of the Award in the manner referred to in paragraph 4.5.2 above.
- 4.19 The question of the appropriate award coverage in respect of the Relevant Work has significant flow on effects throughout the horticulture industry, particularly in relation to larger businesses with multiple farms (common in modern farming operations) which have centralised washing, grading and packing facilities.
- 4.20 Application of the SS&W Award rather than the Award to Relevant Work undertaken by businesses:
- 4.20.1 will reduce the necessary flexibility of affected businesses due to more restrictive working hours that do not accommodate the need for labour in line with harvest schedules and/or take into account the perishable nature of produce;
  - 4.20.2 will result in higher production costs due to increased wage costs;
  - 4.20.3 will reduce the competitiveness of affected businesses;
  - 4.20.4 may detrimentally affect Australian growers in export markets;
  - 4.20.5 will result in longstanding existing employment arrangements being disturbed.

Settled by: **JUSTIN L. BOURKE QC**  
**GILLIAN WALKER**

<b>Date:</b>	18 November 2016
<b>Signature:</b>	
<b>Name:</b>	Paul Neil Dugan
<b>Capacity/Position:</b>	DMAW Lawyers Pty Ltd, First Applicant's representative

<b>Date:</b>	18 November 2016
<b>Signature:</b>	
<b>Name:</b>	Stephen Thomas Smith
<b>Capacity/Position:</b>	Head of National Workplace Relations Policy, Australian Industry Group

#### Service requirements

The Applicant must seek directions from the Commission as to service of this application.

## Annexure 1

### Proposed variation to the *Horticulture Award 2010*

1. Deleting the definition of 'horticultural crops' in clause 3.1 and inserting in lieu:

**horticultural crops** includes all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, herbs or other specialised crops.
2. Inserting a new definition of 'enterprise' in clause 3.1 as follow:

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

  - (a) An employer that is engaged with others in a joint venture or common enterprise; or
  - (b) 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).
3. Inserting a new definition of 'horticultural enterprise' in clause 3.1 as follows:

**Horticultural enterprise** means an enterprise which as an important part of its enterprise engages in the raising of horticultural crops.
4. Deleting clause 4.2 and inserting in lieu:

**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).
5. Deleting clause 4.3 and inserting in lieu:

**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;
  - (e) plant nurseries; or
  - (f) a broadacre mixed farming enterprise which combines the growing of crops and the management, breeding, rearing or grazing of livestock.