

**IN THE FAIR WORK COMMISSION**

Matter No. AM2014/231 / AM2016/25

<b>MITOLO GROUP PTY LTD</b>	First Applicant
<b>AUSTRALIAN INDUSTRY GROUP</b>	Second Applicant
<b>MARANELLO TRADING PTY LTD</b>	Third Applicant

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**MITOLO PARTIES' SUBMISSION ON THE DRAFT DETERMINATION  
IN RESPONSE TO SUBMISSIONS OF THE NUW AND THE AWU  
DATED 7 DECEMBER 2017**

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## INTRODUCTION

1. On 16 November 2017, the Full Bench of the Fair Work Commission handed down its decision to vary the terms of the *Horticulture Award 2010* (**Award**) retrospectively from 1 January 2010 (**Decision**).
2. The Full Bench published a draft variation determination at paragraphs [172] to [173] of its Decision (**Draft Determination**) and invited interested parties to comment on the proposed wording.
3. The Mitolo Parties filed a short submission supporting the Draft Determination on 7 December 2017.
4. Subsequently, on 7 December 2017, submissions were filed on behalf of:
  - (a) the NUW (**NUW Submission**); and
  - (b) the AWU (**AWU Submission**).
5. On 8 December 2017, the Full Bench granted leave to interested parties to file submissions in response to the NUW and AWU Submissions.
6. This submission responds to the NUW and AWU Submissions pursuant to the leave granted by the Full Bench. For the reasons set out below, the Commission should make a determination in the form of the Draft Determination.

## LATENESS OF NUW AND AWU SUBMISSIONS

7. First, and significantly, the Mitolo Parties note that the Draft Determination is in the same terms as that filed by the Australian Industry Group (which the Mitolo Parties supported) on 21 October 2016. The scope of coverage of the Award was the very matter in issue in these proceedings. In so far as the AWU or NUW wished to raise any matters concerning the scope of the proposed varied coverage clause they had every opportunity to do so during the course of the proceedings. The submissions filed at the eleventh hour by the NUW and AWU should be viewed against this background.

8. Secondly, the matters now sought to be raised by the NUW and the AWU have already been ventilated.<sup>1</sup>
9. The Full Bench has already had the benefit of hearing submissions on these matters prior to publishing its Decision and must be taken to have already taken those submissions into account in deciding that the Draft Determination is appropriate.

## NUW SUBMISSIONS

### **Draft variation is consistent with Full Bench decision**

10. The NUW submits that the definition of “*horticulture industry*” in the proposed new sub-clause 4.2 would be inconsistent with the Decision.
11. In this regard it is said that the definition would lead to the Award applying beyond the “*first point of sale*” to workplaces currently appropriately covered by the *Storage Services and Wholesale Award 2010 (SS&W Award)*.
12. The concern is said to arise because under the proposed varied clause 4.2 a workplace will be covered by the Award if it had a “*connection with a horticultural enterprise*”. However, this mis-states the terms of the proposed varied clause. The relevant words are “*in connection with*” a horticultural enterprise. This is an entirely conventional phrase for denoting when work is covered by an award (as it currently appears in the Award). The relevant work will be covered by the Award only if it is carried out in connection with a horticultural enterprise and not otherwise.
13. The phrase “*in connection with*” is a commonly used expression which appears in a large number of awards in respect of coverage<sup>2</sup> (including the

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<sup>1</sup> See, for example, the submissions regarding the terms used in the proposed variation (Outline of closing submissions of the NUW dated 31 July 2017 at [63]-[68], PN1743-1746, PN1778, PN1787-1788, PN1798-1807); submissions regarding whether packing and processing work performed at a location situated some distance from a farm is more likely to be akin to packing and processing work done under the *Storage Services and Wholesale Award 2010* (PN1861-1862); submissions regarding the alleged differences between Mitolo Group’s Eastern Creek facility and its Angle Vale Road facility (Outline of closing submissions of the NUW dated 31 July 2017 at [79]); submissions regarding the impact of the proposed variation on packing, storage and distribution facilities located outside of agricultural areas (PN1882).

<sup>2</sup> The phrase “*in connection with*” appears in the coverage clause of 19 modern awards. See, for example, the *Aluminium Industry Award 2010*, the *Cleaning Services Award 2010*, the

current clause 4.2(a) of the Award) and throughout the *Fair Work Act 2009* (Cth) (**FW Act**).<sup>3</sup> There is no difficulty in the use of this phrase.

14. The NUW proposes<sup>4</sup> that clause 4.3 of the Award be amended by inserting a further exclusion from coverage in respect of work “... *performed for an employer that has received the horticultural crops from a producer who is not a related body corporate or associated entity of the employer ...*”
15. The amendment proposed by the NUW is unnecessary and misconceived.
16. It is unnecessary because the proposed variation already defines the scope of coverage by reference to a horticultural enterprise.
17. In any event, it is misconceived because it purports to exclude any employer from coverage unless that employer has received crops from a producer which is not a related body corporate or associated entity. This completely ignores the fact that the draft variation is intended to, and will, cover an employer which is engaged in a common enterprise or joint venture where the business is carried on by a corporate group or structure, where, like the Mitolo Parties, the members of the group are not necessarily related bodies corporate or associated entities.<sup>5</sup> The exclusion proposed by the NUW would exclude coverage of work clearly within the horticultural industry merely because the horticultural enterprise is not carried on by related bodies corporate or associated entities. This is clearly at odds with the evidence and the Decision.

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*Gardening and Landscaping Services Award 2010, the Silviculture Award 2010 and the Pastoral Award 2010.*

<sup>3</sup> See, for example, the definitions of “*connected with a Territory*” in s.12 and “*national system employer*” in s.14. See also s.123(3).

<sup>4</sup> At [9] of the NUW Submission.

<sup>5</sup> Exhibit 4 (Witness Statement of Paula Colquhoun dated 23 December 2016) at [14]; Mitolo Parties’ opening submissions dated 23 December 2016 (Tab 1 in Volume 1 of Exhibit 2) at [185]; Exhibit AIG4 (Witness Statement of Bryan Robertson dated 22 December 2016) at [26]-[27]; Exhibit AIG6 (Witness Statement of Robin Davis) at [38]-[40]; Exhibit VH1 (Witness Statement of John Dollisson dated 23 December 2016) at [12]; Exhibit AIG2 (Ai Group Submission dated 23 December 2016 at [132], [146]; Final Submission of Ai Group dated 31 July 2017 at [115]-[119]; Exhibit GP2 (Witness Statement of Lynn Tonsing dated 20 December 2016) at [24]; Exhibit NFF1 (Witness Statement of Keith Rice dated 8 December 2016) at [19].

### **Proposed variation not uncertain**

18. The NUW asserts that the proposed variation is complex, difficult to understand, ambiguous and uncertain. This is essentially a repeat of submissions made orally in closing.<sup>6</sup>
19. As noted above, the Commission has therefore had the benefit of this submission prior to publishing its Decision and must be taken to have already taken that submission into account in deciding that the Draft Determination is appropriate.
20. The submission, in any event, is misconceived.
21. As the Mitolo Parties noted in their submission of 23 December 2016,<sup>7</sup> each of the terms and concepts adopted in the proposed variation are conventional, commonly utilised in connection with defining the rights of employees under the FW Act and its predecessors and well-known to industrial tribunals.<sup>8</sup>
22. There is no substance to the NUW's submission that these terms would introduce uncertainty or ambiguity into the coverage clause of the Award.
23. If, in an extreme case, there is a dispute about whether a particular employer comes within the scope of the Award that will be susceptible to determination by the Commission or a court on the evidence in the usual way according to these well recognised concepts.

### **In connection with**

24. The NUW complain about the use of the words "*in connection with*". As noted above this is an entirely conventional phrase utilised in myriad awards<sup>9</sup>. There is no substance to the NUW's submission in this regard.

### **AWU SUBMISSION**

25. The AWU belatedly proposes a coverage clause which amends the existing clause 4.2(a) by inserting the words "*or in a rural area in close proximity*

<sup>6</sup> PN1778, PN1787-1788, PN1798-1807.

<sup>7</sup> Tab 1 of Exhibit 2 at [167]-[208].

<sup>8</sup> See, for example, the Mitolo Parties' opening submissions dated 23 December 2016 (Tab 1 in Volume 1 of Exhibit 2) at [167]-[208].

<sup>9</sup> The phrase "*in connection with*" appears in the coverage clause of 19 modern awards.

*to farms, orchards and/or plantations*".<sup>10</sup> In doing so, the AWU is proposing that the Commission define coverage of the Award by reference to a geographical limitation. With respect, this approach:

- (a) is contrary to the evidence in these proceedings;
- (b) is completely at odds with the findings and reasoning of the Full Bench in these proceedings; and
- (c) in any event, would introduce further uncertainty.

### **Proposed geographical limitation misconceived**

- 26. The AWU says that its primary concern arises in relation to employees working at facilities in metropolitan areas. The AWU makes the bare assertion, without reference to any evidence or reasoned submission, that packing facilities in metropolitan areas are not part of the agricultural industry and employees at such facilities should not have the same minimum conditions of employment as employees working on a farm.
- 27. Not only is this assertion unsupported by evidence or reasoned submission, it is completely contrary to the reasons and findings of the Full Bench in these proceedings.
- 28. Whilst it is true that the Full Bench made the observations noted at [12] of the AWU Submission, on any reading of the Decision, its reasoning was in no way dependent upon or limited to washing, grading and packing facilities being located in a rural area, in close proximity to or nearby a farm.
- 29. On the contrary, the Full Bench unequivocally accepted the submissions of the Mitolo Parties and the other employer parties and disavowed any kind of geographical limitation on the scope and application of the Award to those work activities. In doing so, the Full Bench clearly and correctly accepted that geographical location was irrelevant to determining whether the activities were carried out as part of the horticultural industry. The Full Bench concluded that the work fell within the horticultural industry and should be covered by the Award if it was carried out as part of the process

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<sup>10</sup> At [21] and Schedule A of the AWU Submission.

of rendering the produce fit for sale and prior to the first point of sale from the producer to customer.<sup>11</sup> If a washing, grading and packing facility satisfies those criteria, for the reasons submitted by the Mitolo Parties<sup>12</sup> and expressed by the Full Bench,<sup>13</sup> there is no reason to distinguish between:

- (a) a facility situated in a rural area, in close proximity to or nearby a farm on the one hand; and
- (b) a facility which is situated in a different location, whether that be, for example, a metropolitan or industrial area or convenient for transportation purposes.<sup>14</sup>

30. This is abundantly clear from the Full Bench's reasons.

31. The Full Bench found that the concept of the "farm gate" was a virtual rather than a literal or physical barrier. In that regard, the Full Bench observed:

- (a) *"it is abundantly clear that the 'farm gate' is the first point of sale from a producer to a customer";*<sup>15</sup>
- (b) *"All activities carried out by the producer up to the point at which the potatoes are sold to a retailer or sold to a food processing company are within the 'farm gate' and the work is carried out under the Horticulture Award";*<sup>16</sup>
- (c) *"the evidence in these proceedings demonstrated that the 'farm gate' is a well-known concept in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s. That is, the 'farm gate' concept is not determined by the location of work";*<sup>17</sup>

<sup>11</sup> [2017] FWCFB 6037 at [110], [157]-[159], [161].

<sup>12</sup> Mitolo Parties' closing submissions dated 31 July 2017 at [4], [30], [31], [33], [35], [60], [63]-[64], [79]-[80].

<sup>13</sup> [2017] FWCFB 6037 at [127], [166].

<sup>14</sup> See, for example, Exhibit 7 (Second Supplementary Witness Statement of Paula Colquhoun dated 3 July 2017) at [10], [23]-[25].

<sup>15</sup> [2017] FWCFB 6037 at [49].

<sup>16</sup> Ibid.

<sup>17</sup> Ibid at [50].

(d) *“If it had been the Award Modernisation Full Bench’s intention to introduce a locational limitation to coverage under the modern award, it would have set out its intention and reasons for doing so during the award modernisation process. Instead, the Full Bench used the expression ‘farm gate’ which has a well-understood meaning in the industry; a meaning which is not determined by the location where work is carried out.”*<sup>18</sup>

32. The Full Bench then clearly determined that washing, grading, packing and dispatching of crops before they are transported to market are part of the horticultural process regardless of the location at which that work is undertaken. In this respect, the Full Bench observed:<sup>19</sup>

*“[51] The producing of horticultural crops involves a number of integrated and interconnected processes that often take place across numerous physical locations, to ensure the most efficient use of resources, and to meet production needs and customer requirements.*

*[52] These include activities at the beginning of the process (such as sowing, planting and raising), in the middle of the process (such as harvesting and picking) and at the end of the process (such as washing, grading, packing and despatching) before the crops are transported to market.*

*[53] The fact that activities such as washing, grading, packing and despatching may be undertaken at different premises to where the crops are grown and harvested does not mean that these activities are ‘beyond the farm gate’.”*

33. The Full Bench accepted that there should not be any locational limitation on the coverage of the Award but rather producers should be able to undertake washing, grading and packing where it is most efficient and productive. The Full Bench observed:

(a) *“Defining the coverage of the Horticulture Award by reference to the virtual ‘farm gate’ concept promotes the efficient and productive performance of work by permitting and encouraging a business to determine where it is most efficient to locate its washing, grading*

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<sup>18</sup> Ibid at [56].

<sup>19</sup> Ibid at [51] to [53].



*and packing facility so that the produce can be dispatched to market in the most efficient and productive manner for the business”;*<sup>20</sup>

(b) *“By enabling and encouraging employers to utilise the most efficient and productive location to carry out the work required to make produce fit for consumption and ready to be sold to market, we are of the view that this promotes the notion of flexible modern work practices and the efficient and productive performance of work in s.134(1)(d)”;*<sup>21</sup>

(c) *“The construction of the coverage provisions in the Horticulture Award, as contended for by the NUW and AWU, in our view, does not encourage employers to utilise the best and most efficient location to carry out the work required to make produce fit for consumption and ready to be sold to market”.*<sup>22</sup>

34. The introduction of any locational element on the coverage of the Award (including that proposed by the AWU) would involve the imposition of an arbitrary and illogical limitation inhibiting the capacity of producers to organise their operations in the most efficient and productive way, and thus directly undermine the findings of the Full Bench in these proceedings. There is no more logical or industrial justification for the limitation now proposed by the AWU than coverage based on a physical farm gate (being the position which the AWU contended for throughout these proceedings and which was emphatically rejected by the Full Bench).
35. The passages referred to by the AWU were observations made in the context of specific evidence and submissions concerning the similarities between the Mitolo and Zerella operations which illustrated the absurdity of delineating coverage by reference to an arbitrary geographical location.

### **Evidence of the Eastern Creek facility**

36. The AWU asserts that the Mitolo Parties *“belatedly”* led evidence about its Eastern Creek facility<sup>23</sup> and implies that the Mitolo Parties did not lead

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<sup>20</sup> Ibid at [127].

<sup>21</sup> Ibid at [129].

<sup>22</sup> Ibid at [141].

<sup>23</sup> AWU Submissions at [15].

evidence about this facility because it was situated in an industrial area<sup>24</sup>. These submissions are without foundation, in any event irrelevant, and should be disregarded. This is particularly so when at no time was it put to Ms Colquhoun in cross-examination that the Mitolo Parties had deliberately sought to conceal or withhold evidence regarding Eastern Creek. Understandably, the Mitolo Parties' initial submissions and evidence centered upon its South Australian operations and, in particular, the Angle Vale site, which was the subject of the dispute and issues which precipitated the current proceedings. The Mitolo Parties disclosed from the outset the recent acquisition of assets in New South Wales.<sup>25</sup> The Eastern Creek facility was not leased by the Mitolo Group until November 2016.<sup>26</sup>

37. The AWU refers to the evidence of Ms Colquhoun regarding the fact that the employees at the Eastern Creek facility were currently being paid under the SS&W Award. However, the unchallenged evidence of Ms Colquhoun<sup>27</sup> was that:
- (a) this was as a result of the arrangements which the Mitolo Parties inherited from the previous owner of the facility (not based upon any acceptance or determination by the Mitolo Parties that the work at the facility fell outside the horticultural industry and the proper coverage of the Award); and
  - (b) the Mitolo Group considered that the Award covered employees at that facility.<sup>28</sup>
38. The Full Bench had the benefit of detailed evidence concerning the Eastern Creek facility on which the union parties elected not to cross-examine.<sup>29</sup> The AWU has not pointed to any additional matters that would have arisen

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<sup>24</sup> AWU Submissions at [20].

<sup>25</sup> Exhibit 4 (Witness Statement of Paula Colquhoun dated 23 December 2016) at [10].

<sup>26</sup> Exhibit 7 (Second Supplementary Witness Statement of Paula Colquhoun dated 3 July 2017) at [10].

<sup>27</sup> Exhibit 7 (Second Supplementary Witness Statement of Paula Colquhoun dated 3 July 2017) at [32] and [33].

<sup>28</sup> A view which, as detailed above, is consistent with the Full Bench decision in these proceedings.

<sup>29</sup> Exhibit 7 (Second Supplementary Witness Statement of Paula Colquhoun dated 3 July 2017).

out of any view of these premises which would have supported its submission.

**Proposed variation not complex or uncertain**

39. The AWU asserts that the proposed variation involves complicated definitions which are not easy to understand. As noted at [21] above, this is not a new submission and is without substance.

**Supermarkets will not be covered**

40. The AWU says that the draft variation “*could cover employees working at a Woolworths or Coles supermarket who pack, store and grade fruit and vegetables*”. On any view, this assertion is completely spurious and should be disregarded.
41. Employees carrying out those functions in a retail environment such as a supermarket are clearly covered by the *General Retail Industry Award 2010 (Retail Award)*.
42. The Retail Award covers employers “*in the general retail industry and their employees in the classifications listed in clause 16 – Classifications to the exclusion of any other modern award.*”
43. The Retail Award defines the general retail industry to mean:  
*“the sale or hire of goods or services to final consumers for personal, household or business consumption including:*  
 • *food retailing, supermarkets, grocery stores*  
 ...”
44. If an employer is covered by the Award as well as the Retail Award:  
*“an employee is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work”.*<sup>30</sup>
45. It cannot be seriously contended that an employee carrying out packing, storing and grading of fruit and vegetables in a supermarket will be covered by any award other than the Retail Award.

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<sup>30</sup> Clause 4.7 of the *General Retail Industry Award 2010* and clause 4.9 of the *Horticulture Award 2010*.

**AWU proposed clause would introduce additional uncertainty**

46. The variation now propounded by the AWU, far from creating certainty, would in fact introduce additional uncertainty in relation to determining coverage. For example, what is meant by the terms:
- (a) *“rural area”*;
  - (b) *“close proximity to farms ...”*.
47. The fact that no attempt has been made to explain how this would apply in practice further illustrates that the AWU’s proposal is ill-conceived and should be rejected.

**JUSTIN L. BOURKE QC**

**DATED:** 18 December 2017



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