

## Form F48 Application for directions on procedure

*Fair Work Commission Rules 2013, Rule 7*

*This is an application to the Fair Work Commission for directions about procedure in relation to a matter in accordance with the Fair Work Act 2009.*

### The Applicant

**Title**  Mr  Mrs  Ms  Other please specify:

**First name(s)**

**Surname**

**Postal address** 1304 Angle Vale Road

**Suburb** Virginia

**State or territory** SA **Postcode** 5120

**Phone number** (08) 8282 9005 **Fax number** (08) 8282 9029

**Email address** paula.colquhoun@mitologroup.com.au

### If the Applicant is a company or organisation

If the Applicant is a company or organisation please also provide the following details

**Legal name of business** Mitolo Group Pty Ltd

**Trading name of business** Mitolo Group Pty Ltd

**ABN/ACN** 58 076 809 982

**Contact person** Paula Colquhoun

### Does the Applicant need an interpreter?

Yes—Specify language  
 No

### Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

Yes— Please specify the assistance required  
 No

### Does the Applicant have a representative?

Yes—Provide representative's details below  
 No

## Applicant's representative

**Name of person** Paul Dugan  
**Organisation** DMAW Lawyers Pty Ltd  
**Postal address** Level 3/80 King William Street  
**Suburb** Adelaide  
**State or territory** SA **Postcode** 5000  
**Phone number** (08) 8210 2222 **Fax number** (08) 8210 2233  
**Email address** [pdugan@dmawlawyers.com.au](mailto:pdugan@dmawlawyers.com.au)

## The other party

**Title**  Mr  Mrs  Ms  Other please specify:  
**First name(s)**  
**Surname**  
**Postal address**  
**Suburb**  
**State or territory** **Postcode**  
**Phone number** **Fax number**  
**Email address**

## If the other party is an organisation

If the other party is an organisation please also provide the following details

**Legal name of organisation**  
**Trading name of organisation**  
**ABN/ACN**  
**Contact person**

## 1. Preliminary

### 1.1 Are you seeking directions for an existing matter?

- Yes—Go to 1.2  
 No—Go to 1.3

### 1.2 What is the name and matter number for the matter?

### 1.3 What is the type of matter that you want to initiate?

Briefly, provide the details of the type of matter.

An application to vary a modern award (Horticulture Award 2010) pursuant to section 160 of the *Fair Work Act 2009* (Cth) was filed with the Fair Work Commission on 18 November 2016.

## 2. Reasons for seeking directions

### 2.1 Why are you applying to the Commission for directions?

The procedure is not prescribed by the FW Act, the Fair Work Commission Rules, the regulations or any other Act or regulations. Provide details below.

You are in doubt about the proper procedure to follow. Provide details below.

1. The Applicant has filed a Form 46 – Application to vary a modern award (**the Application**).
2. Pursuant to rule 49 of the *Fair Work Commission Rules 2013* (**the Rules**) the Applicant seeks directions regarding the procedure to be followed in relation to service of the Application on any other parties.
3. The Applicant seeks a direction that the matter, upon referral to the President of the Fair Work Commission, be dealt with as part of the Commission's four year review of modern awards (AM2014/231, AM2016/25) in respect of the *Horticulture Award 2010* (**Modern Award Review proceeding**).
4. The Applicant (together with several other employer parties) are also seeking a variation of the coverage clause of the Horticulture Award in the same terms in the Modern Award Review proceeding pursuant to section 157 of the *Fair Work Act 2009* (Cth).
5. On 21 October 2016, the Australian Industry Group filed a draft determination in the Modern Award Review proceeding in respect of clauses 3.1, 4.2 and 4.3 of the Horticulture Award. The Applicant supports the wording set out in that determination.
6. The Fair Work Commission has ordered the following timetable in respect of the Modern Award Review proceeding:
  - a. The employer parties are to file witness statements and written submissions by 19 December 2016;
  - b. The unions are to file reply evidence and submissions on a date to be determined in April 2017;
  - c. The proceeding will be listed for hearing before a Full Bench of the FWC on dates to be determined in mid-2017;
  - d. A directions hearing is listed on 21 November 2016. The employer parties are to advise the Commission of the likely number of witnesses, and the number of hearing days likely to be required on that occasion.
7. The Applicant considers that service should be directed to the following parties who may be affected by the Application (and who are each persons who have filed a submission or other correspondence in the Modern Award Review proceeding):

- a. Australian Industry Group;
  - b. Carter & Spencer Pty Ltd;
  - c. National Farmers' Federation;
  - d. Australian Business Industrial and the NSW Business Chamber;
  - e. Australian Federation of Employers and Industries;
  - f. Business SA;
  - g. The Australian Workers' Union;
  - h. Voice of Horticulture;
  - i. Australian Government, Fair Work Ombudsman;
  - j. Potatoes SA;
  - k. Hortex Alliance Incorporated;
  - l. AusVeg SA;
  - m. Horticultural Coalition of South Australia;
  - n. Apple & Pear Growers Association of SA Inc.
8. Pursuant to section 596 of the *Fair Work Act 2009* (Cth) the Applicant seeks permission to be legally represented by DMAW Lawyers Pty Ltd and counsel in respect of the Application on the ground that:
- a. the hearing of the Application will involve complex issues of fact and law such that legal representation would assist in the just and efficient resolution of the matter; and
  - b. the Applicant will be unfairly prejudiced if not legally represented.

### 3. Proposed directions.

Set out your proposed directions you are seeking, if any (optional).

1. The Applicant serve the Application on the following parties within 7 days of this direction being made:
  - a. Australian Industry Group;
  - b. Carter & Spencer Pty Ltd;
  - c. National Farmers' Federation;
  - d. Australian Business Industrial and the NSW Business Chamber;
  - e. Australian Federation of Employers and Industries;
  - f. Business SA;
  - g. The Australian Workers' Union;
  - h. Voice of Horticulture;
  - i. Australian Government, Fair Work Ombudsman;
  - j. Potatoes SA;
  - k. Hortex Alliance Incorporated;
  - l. AusVeg SA;
  - m. Horticultural Coalition of South Australia;
  - n. Apple & Pear Growers Association of SA Inc.
  
2. The Applicant have permission to be represented by solicitors and counsel pursuant to section 596(1) of the *Fair Work Act 2009* (Cth).

3. The Application be dealt with concurrently with the Commission's four year review of modern awards (AM2014/231, AM2016/25) in respect of the *Horticulture Award 2010* (in so far as relates to the coverage clause of the award the subject of the draft determination filed by Australian industrial Group in the Modern Award Review proceeding).

**SignaturePart**

**Signature**



**Name** Paul Dugan  
**Date** 21 November 2016  
**Capacity/Position** Principal, DMAW Lawyers Pty Ltd

**PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS**



# DRAFT DIRECTIONS

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards – Horticulture Award 2010** (AM2016/25)

VICE PRESIDENT CATANZARITI

SYDNEY, 23 NOVEMBER 2016

*4 yearly review of modern awards – Horticulture Award 2010 – substantive claims.*

The Commission directs as follows:

- [1] Mitolo Group Pty Ltd (**Mitolo**) is to serve its application dated 18 November 2016 (**Mitolo Section 160 Application**) on the following parties within 7 days:
  - a. Australian Industry Group;
  - b. Carter & Spencer Pty Ltd;
  - c. National Farmers' Federation;
  - d. Australian Business Industrial and the NSW Business Chamber;
  - e. Australian Federation of Employers and Industries;
  - f. Business SA;
  - g. The Australian Workers' Union;
  - h. Voice of Horticulture;
  - i. Australian Government, Fair Work Ombudsman;
  - j. Potatoes SA;
  - k. Hortex Alliance Incorporated;
  - l. AusVeg SA;
  - m. Horticultural Coalition of South Australia;
  - n. Apple & Pear Growers Association of SA Inc.
  
- [2] Mitolo has permission to be represented by solicitors and counsel pursuant to section 596(1) of the *Fair Work Act 2009* (Cth).
  
- [3] The Mitolo Section 160 Application is to be dealt with concurrently with the Commission's four year review of modern awards (AM2014/231, AM2016/25) in respect of the *Horticulture Award 2010* (in so far as relates to the coverage clause of the award the subject of the draft determination filed by Australian industrial Group in the Modern Award Review proceeding) (**Modern Award Review Proceeding**).

- [4] All evidence in the Modern Award Review Proceeding is to be treated as evidence in the Mitolo Section 160 Application and all evidence in the Mitolo Section 160 Application is to be treated as evidence in the Modern Award Review Proceeding.
- [5] Mitolo and any other interested party that supports the Mitolo Section 160 Application is to file comprehensive written submissions and evidence by close of business on **19 December 2016**.
- [6] Any interested party that opposes the Mitolo Section 160 Application is to file comprehensive written submissions and evidence in reply by close of business on **7 April 2017**.
- [7] Parties are granted liberty to apply to vary these directions.
- [8] All submissions and evidence are to be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

VICE PRESIDENT

# FAIR WORK COMMISSION

*Fair Work Act 2009* (Cth)

Section 160

Variation to the Horticulture Award 2010

## First Applicant

Mitolo Group Pty Ltd

## Second Applicant

Australian Industry Group

## FIRST APPLICANT'S OUTLINE OF SUBMISSIONS IN SUPPORT OF PERMISSION TO BE REPRESENTED BY A LAWYER

### Introduction

1. The applicants have filed an application pursuant to s. 160 of the *Fair Work Act 2009* (Cth) (**FW Act**) seeking orders to vary the Horticulture Award 2010 (**Award**) to remove an ambiguity and/or uncertainty or correct an error related to the coverage of the Award.
2. The applicants (together with several other employer parties) are also seeking a variation of the coverage clause of the Award in the same terms in the Fair Work Commission's four yearly review of modern awards (AM2016/25) (**modern award review proceeding**), and the First Applicant, Mitolo Group Pty Ltd (**Mitolo**), seeks a direction that the application brought under s. 160 of the FW Act be heard concurrently with the modern award review proceeding.
3. Mitolo seeks permission to be legally represented by DMAW Lawyers and Justin Bourke QC and Gillian Walker of counsel in respect of the s. 160 application and the modern award review proceeding. It relies upon the affidavit of Paula Colquhoun sworn on 22 November 2016 in support of this application

### Legal Principles

4. Section 596(1) of the FW Act provides that a party may be legally represented in a matter only with the permission of the Commission. Pursuant to s. 596(2) of the FW



Act, the Commission may, in its discretion, grant permission if:

- 4.1 doing so would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter: s. 596(2)(a);
- 4.2 it would be unfair not to allow the party to be represented because the party is unable to represent itself effectively: s. 596(2)(b); or
- 4.3 it would be unfair not to allow the party to be represented taking into account fairness between the party and other parties in the same matter: s. 596(2)(c).

### **Grounds in support of application for representation**

#### Complexity (s. 596(2)(a))

5. The proceedings will involve complex issues of fact and law such that legal representation would assist in the just and efficient resolution of the matter.
6. It will be necessary for Mitolo to, amongst other things:
  - 6.1 consider complex legal issues, including the proper construction and interpretation of modern award provisions, including by reference to historical case law and award history;
  - 6.2 prepare, and respond to, extensive amounts of evidence and detailed written submissions in relation to the subject matter of the proceedings;
  - 6.3 deal with a number of industry participants and organisations who are involved in the proceedings, including union groups and employer parties.
7. Mitolo, by being legally represented, will be better able to assist the Commissioner generally in light of the complexity of the matter. It will further enable it to more efficiently present its arguments, including by being able to identify any instances where it will be appropriate for Mitolo to adopt submissions made by other parties. As a result, it will take less time for the submissions of Mitolo to be presented to the Commission and the Commission will be better assisted in respect of any questions it may have in respect of Mitolo's submissions and evidence if Mitolo is legally represented.

Effectiveness (s. 596(2)(b))

8. Mitolo is unable to effectively represent itself for the following reasons:
  - 8.1 it has no employees with legal training or legal qualifications and no in-house qualified legal counsel or other person who can provide adequate legal representation: Colquhoun affidavit at [5];
  - 8.2 it does not have any employees who have significant experience or familiarity with the operation of the Fair Work Commission or the interpretation of Modern Awards: Colquhoun affidavit at [5];
  - 8.3 the Human Resources manager employed by Mitolo does not have the capacity, experience or training to provide adequate representation: Colquhoun affidavit at [4].
9. Mitolo (and other Mitolo Group entities) have previously had legal representation in similar matters involving complexity before the Commission<sup>1</sup> and before the Industrial Relations Court of South Australia<sup>2</sup>.
10. By reason of the matters above, it would be unfair not to allow Mitolo to be legally represented having regard to the absence of anyone employed by Mitolo's business who is capable of adequately representing it in these proceedings.

Fairness (s. 596(2)(c))

11. Mitolo submits that it would be unfair not to allow it to be legally represented having regard to the fact that many of the other parties to the proceedings comprise unions or employer organisations who are likely to employ personnel with legal qualifications and experience, or industrial advocates with significant experience in the interpretation of Modern Awards and operation of the Fair Work Commission.
12. Mitolo is not aware of any basis on which the other parties to the proceedings would be adversely affected if Mitolo was granted leave to be legally represented.

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<sup>1</sup> See *Mitolo Group Pty Ltd* [2014] FWC 7682, *Mitolo Group Pty Ltd* [2014] FWC 7981 and *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524.

<sup>2</sup> See *The National Union of Workers v Comit Farm Produce Pty Ltd* [1997] SAIRC 29 and *Perry v Maranello Trading Pty Ltd* [2013] SAIRC 53.

**Orders sought**

13. For the reasons stated above, it is submitted permission be granted to Mitolo to be legally represented in respect of the proceedings.

Dated: 22 November 2016

**Justin L Bourke QC**  
**Gillian Walker**

## FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

Section 160

Variation to the Horticulture Award 2010

### First Applicant

Mitolo Group Pty Ltd

### Second Applicant

Australian Industry Group

## AFFIDAVIT OF PAULA COLQUHOUN

I, Paula Colquhoun, of 1304 Angle Vale Road, Virginia SA 5120, Group Human Resource Manager for the Mitolo Group of Companies make oath and say:

### Introduction

1. I am employed by Mitolo Management Pty Ltd (ACN 121 218 031) as the Group Human Resources Manager for the Mitolo Group of Companies (**Mitolo Group**) and I have been employed in this role for 8 years. I am responsible for all HR related activities throughout the Mitolo Group, including but not limited to recruitment, industrial activity, policy development, agreements, workers compensation and strategy. I am a member of the Senior Management Team.
2. I swear this affidavit in support of the application by the First Applicant, Mitolo Group Pty Ltd, seeking permission to be legally represented by DMAW Lawyers and Justin Bourke QC and Gillian Walker of counsel in these proceedings.

### Representation

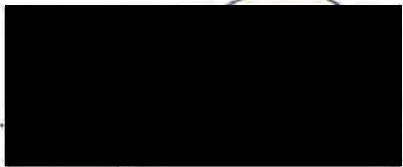
3. I am advised by my solicitors, DMAW Lawyers, that it is a requirement for an applicant seeking to be legally represented in proceedings before the Fair Work Commission to meet the considerations in section 596 of the *Fair Work Act 2009 (Cth)* (**FW Act**) and that one consideration is whether a party is unable to represent itself effectively.

- 4. I understand that the issues involved in these proceedings include consideration and interpretation of the coverage clause in the Horticulture Award 2010. I do not believe, having regard to my lack of formal legal training or qualifications, that I am capable of effectively representing the First Applicant in these proceedings, particularly given the complexity of the issues involved.
- 5. The Mitolo Group does not employ a qualified legal counsel or any other person with formal legal training, experience or qualifications, nor does it employ any person who has had significant experience or familiarity with the operation of the Fair Work Commission or the interpretation of Modern Awards.

**Conclusion**

- 6. I know the facts deposed to herein of my own knowledge except where otherwise appears.

SWORN by the abovenamed Deponent )  
 at ELIZABETH )  
 on the 22<sup>nd</sup> day of *November* 2016 )  
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Before me:

