

**4 YEARLY REVIEW OF MODERN AWARDS
AWARD STAGE – HORTICULTURE AWARD 2010
MATTER NO. AM2014/25**

SUBMISSION

NATIONAL FARMERS' FEDERATION

Date: 31 July 2017

NFF Application

1. The NFF has applied to vary the coverage terms of the *Horticulture Award 2010* (**the Horticulture Award**) pursuant to s. 156 of the *Fair Work Act 2009* (Cth) (**the FW Act**) to ensure that all employers and their employees operating in the horticulture industry are covered by the award.
2. In the alternative, the NFF submits that the Commission should make the variation the NFF is seeking to the Horticulture Award pursuant to s. 160 of the FW Act to remove an ambiguity or uncertainty or to correct an error.
3. The variation will ensure that the coverage is not limited by the particular land use of each property on which a farmer conducts his/her/its horticultural business. In particular, the variation will ensure that the Horticulture Award covers the “picking, washing, packing, storing, grading, forwarding or treating of horticultural crops” (**Packing Work**) irrespective of whether it is conducted within sheds which are located on land on which crops are planted, grown and harvested or land where crops are not are planted, grown and harvested (**Off-Site**).
4. The NFF’s proposed variation would achieve this outcome by:
 - a. inserting a new definition of “Enterprise” to reflect that term as it is defined in section 12 of the FW Act, and including a joint venture or common enterprise, related bodies corporate and associated entities;
 - b. inserting a new definition of ‘horticultural enterprise’, meaning
an enterprise which as an important part of its enterprise engages in the raising of horticultural crops; and

- c. replacing the current definition of ‘horticulture industry’ with the following definition:
 - (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. In support of its application the NFF has filed
- a. submissions dated 19 December 2016 and 17 May 2017 respectively; and
 - b. tendered witness statements of:
 - i. Philip Turnbull dated 19 December 2016;
 - ii. Brett Guthrey dated 12 December 2016;
 - iii. Derek Lightfoot dated 12 December 2016;
 - iv. Gavin Scurr dated 14 December 2016; and
 - v. Keith James Rice dated 8 December 2016;

Submissions

6. The crux of the NFF’s argument is that:
- a. horticultural farmers face unique challenges which the Horticulture Award was expressly designed to assist them to overcome;
 - b. those challenges extend to Packing Work irrespective of whether the work occurs on harvest land or at Off-Site packing sheds;
 - c. without the flexibility to address those challenges which is provided by the Horticulture Award, farm business would either struggle to find a suitable workforce and/or to remain in profit.
 - d. that would not be in accordance with the objectives of the award modernisation process

Horticulture Industry

7. In the NFF's submission, the evidence clearly proves that horticulture farms face challenges which are virtually unique to their industry. Those challenges are occasioned by factors including:
 - a. variances of weather events and temperatures;¹
 - b. inconsistency in crop volumes;²
 - c. variability of harvest times and the rate at which produce grows/matures;³ and
 - d. uncertainty of workforce availability.⁴
8. Furthermore, horticulture crops are highly perishable and therefore time-sensitive.⁵ The quality and therefore value of crops begins to deteriorate at essentially the moment they peak. They have a very short "shelf-life"; perhaps shorter than the product of any other industry. As a consequence, there is a significant risk of the product spoiling before it reaches a purchaser, compromising its price, and potentially rendering it worthless.
9. Taken as a whole, the challenge to the industry is to harvest produce and deliver it to market while it remains at its best. This means that the labor requirements of the horticulture farms are, whilst especially unpredictable and sporadic, on key occasions (such as harvest periods) highly intense. This is a problem which few, if any, other industries have to address as a central part of doing business.

Horticulture Award 2010 Modernisation

10. With the sole exception of the *Horticultural Industry (State) Award (NSW)*,⁶ historically the awards which applied to the horticultural industry covered Packing Work without limiting coverage to the specific place at which that work occurred.

¹ See, for example paragraph [4] of the statement made by Brett Guthrey on 17 December 2016.

² See for example paragraph [7] of the statement made by Phillip Turnbull on 19 December 2016.

³ See for paragraph [17] of the statement made by Derek Lightfoot on 12 December 2016 and paragraph [7] of the statement made by Phillip Turnbull on 19 December 2016.

⁴ See paragraph [8] of the statement made by Gavin Scurr on 14 December 2016.

⁵ See, for example, paragraph [16] of the statement made by Derek Lightfoot on 12 December 2016, paragraph [5] of the statement made by Gavin Scurr on 14 December 2016.

⁶ As to which see paragraph 16 of NFF submission dated 19 December 2016.

11. For example, the principal predecessor to, and source for, the Horticulture Award,⁷ the *Horticulture Industry (AWU) Award 2000* was expressed to cover a range of horticultural activities — including the “storing, packing, or forwarding of fruits or vegetables”⁸ — and did not limit its coverage by reference to a geographical site or location.
12. Those historical award were replaced by the modern Horticulture Award on 1 January 2010. It is the NFF’s submission that the modernization process was not (relevantly) intended to alter this historic position regarding coverage of Packing Work.⁹
13. As the Commission will be aware, the award modernisation process commenced with the request which the Minister for Employment and Workplace Relations (**the Minister**) issued to the President of the Australian Industrial Relations Commission (**the AIRC**) on 28 March 2008.¹⁰
14. The first version of Horticultural Award was made on 3 April 2009.¹¹
15. However, in light of the unique challenges which the horticulture industry faces, on 26 August 2009 the Minister informed the President of the AIRC that:

A further concern raised by the industry concerns the hours of work and related provisions for picking and packing of produce included in the award. A majority of the federal awards and NAPSAs applying in the industry currently allow for ordinary hours of work to be worked in a cycle, such as 152 hours over a four week period or 114 hours in a work cycle not exceeding 15 days in a 21 day period. The industry representatives have argued that this flexibility is needed given the seasonal nature of the industry (with more intensive work periods at harvest time) and because of restrictions on when work can be performed that result from weather conditions.

A further issue has been raised by the industry concerning the need to provide for additional flexibility on the hours that can be worked as ordinary hours in relation to those parts of the industry that have perishable produce, for example, produce that needs to be picked in the evening given its fragile nature and the climate of the region in which it is grown. The industry representatives have suggested, for example, that it

⁷ See *National Farmers' Federation and the Australian Industry Group; Horticulture Australia Council - re s.576H - Commission may vary modern awards - application to vary the Horticulture Award 2010* [2009] AIRCFB 966 at [6] and [13].

⁸ Indeed, it replaced *the Fruit and Vegetable Growing, Storing, Packing and Processing (AWU) Award 1999* (emphasis added).

⁹ Despite, in our submission, the fact that the AIRC confined the award “to agricultural production within the “farm gate.”” See below at paragraphs [30] to [36].

¹⁰ *Request under Section 576C(1) — Award Modernization*, Julia Gillard, Minister for Employment and Workplace Relations, made 28 March 2008.

¹¹ [2009] AIRCFB 345 and PR986369.

may be appropriate to provide for a shift arrangement to allow for picking into the evening for some parts of the industry.

16. Consequently, the Minister formed the view that the horticulture awards should allow more flexibility:

As a result, I have varied my award modernisation request to:

...

- *have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting hours of work provisions for employees who pick and pack such produce; and*
- *provide for roster arrangements and working hours in the horticulture industry that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.*

17. Notably, despite the fact that the Horticulture Award already extended to Packing Work, the Minister expressly referred to “employees who pick and pack” this produce” in her request for a variation to the Award.¹² This indicates that the Minister specifically recognized that the challenges she described extended to Packing Work.

18. The AIRC subsequently varied the Horticulture Award to allow horticulture considerable flexibility in managing its work force and meeting its labour needs.¹³ For example, as varied the award allowed for a maximum of 152 ordinary hours of work to be worked over a 4 week period and for ‘ordinary hours’ to include Saturdays without weekend penalties for full time and part time employees. The award also included piecework provisions, a partial-exemption to overtime entitlements during harvest periods for full time employees, and no overtime rates for casuals.

19. Nothing which has occurred between now and the date the Minister varied her request has alleviated the challenges which horticultural businesses must surmount or resulted in the industry no longer facing those challenges.

¹² The first bullet point to paragraph 51 of the Minister’s consolidated Request Under Section 576C(1) – Award Modernisation. Emphasis added.

¹³ [2009] AIRCFB 966.

Horticulture includes Packing Work

20. Horticulture is more than simply planting, tending to, and harvesting crops. It is the accepted position, historically, that it includes Packing Work.¹⁴ All parts of the market require farmers to wash, sort, grade, and pack their produce.¹⁵
21. This position has been reflected in the coverage provision of all awards. As noted above at [12], the pre-modern awards which applied to the horticulture industry covered Packing Work.¹⁶ Furthermore, since its introduction the Horticultural Award has covered Packing Work generally. There is no application to vary or evidence to support a variation to the Horticulture Award to exclude Packing Work from the award's operation.
22. Furthermore, it is self-evident that the prospect of crops spoiling and the challenge of ensuring produce reaches market at its best does not cease the moment the crops have been harvested. That is, the challenges described above extend in to the Packing Work.

Off-Site Packing Sheds

23. Farmers pack at Off-Site packing sheds — whether owned by that farmer or not — for a range of practical, legal and/or commercial reasons. Those reasons include: responding to financial pressures;¹⁷ optimizing the use and availability of land;¹⁸ enabling access to services and transport infrastructure;¹⁹ sharing expenses and pooling

¹⁴ See, paragraph 9 of the statement made by Brett Guthrey on 17 December 2016; see also paragraph [5] of the statement made by Phillip Turnbull on 19 December 2016; paragraph [37] of the statement made by Robin Anne Davis on 4 July 2017 and paragraph [12] and [13] of the statement made by Godfrey Mark Wynne Cody on 21 June 2017.

¹⁵ See paragraphs [5] and [6] of the statement made by Phillip Turnbull on 19 December 2016. See also paragraph [9] of the statement made by Brett Guthrey on 17 December 2016.

¹⁶ See paragraph 5 of the statement made by Keith on 8 December 2016.

¹⁷ See, for example, paragraph [17] of the statement made by Gavin Scurr on 14 December 2016.

¹⁸ See, for example, paragraph [3] of the statement made by Phillip Turnbull on 19 December 2016, paragraphs [12] and [17] of the statement made by Gavin Scurr on 14 December 2016, paragraphs [10] and [15] of the statement made by Keith Rice on 8 December 2016. See also paragraph [22] of the statement made by Bryan Robertson on 22 December 2016 and paragraphs [8] and [10] of the statement made by John Dollison on 23 December 2016.

¹⁹ See, for example, paragraph [3] of the statement made by Phillip Turnbull on 19 December 2016, and paragraph [17] of the statement made by Gavin Scurr on 14 December 2016.

of resources;²⁰ complying with regulations (taxation, health and safety);²¹ securing land for purposes of expansion;²² zoning and other local government restrictions.²³

24. Furthermore, the mere fact that a packing shed is not on Harvest Land does not change the nature of the Packing Work, and the work which is performed by employees at Off-Site packing sheds is identical to the Packing Work which is performed in sheds which are on Harvest Sites. As Gavin Scurr observed at paragraph [16] of his statement of 14 December 2016:

*Regardless of whether the packing facility is on-farm or off-farm, the work that is performed is of the same nature and consists of washing, sorting, and packing produce.*²⁴

There is no challenge to Mr. Scurr's statement in this regard or evidence to the contrary.

25. As noted above, the challenges which we have described at paragraphs [9] to [11] beset all activities within the horticultural industry, and extend not just to planting and harvesting, but to Packing Work. Horticultural farmers have to surmount the challenges irrespective of what other activities may or may not occur on the land and whether or not the land is also used to plant, grow and harvest crops. It is self-evident that crops do not cease to deteriorate, rot, or perish simply because they are taken Off-Site. Farmers' still face those challenges and the need for the flexibility which the Horticulture Award provides is not ameliorated.

The Mitolo Decision

26. Prior to April 2015 it was generally believed within the horticulture industry that the Horticultural Award applied to Off-Site packing sheds.²⁵ However, the award's

²⁰ See, for example, paragraphs [4] and [7] of the statement made by Phillip Turnbull on 19 December 2016, paragraphs [13] and [14] of the statement made by Gavin Scurr on 14 December 2016, paragraph [11] of the statement made by Keith Rice on 8 December 2016, paragraph [3] of the statement made by Derek Lightfoot on 12 December 2016, paragraph [8] of the statement made by Brett Guthrey on 12 December 2016. See also paragraph [10] of the statement made by John Dollison on 23 December 2016.

²¹ See paragraph [59.4] of the statement made by Lynn Tonsig on 20 December 2016.

²² See paragraph [22] of the statement made by Bryan Robertson on 22 December 2016. See also paragraph [8] of the statement made by John Dollison on 23 December 2016.

²³ For example, planning and development codes which prevent or discourage the building of large sheds on viable agricultural land. See paragraph [7] of the statement made by Derek Lightfoot on 12 December 2016 and paragraph [17] of the statement made by Gavin Scurr on 14 December 2016.

²⁴ See paragraph [16] of the statement made by Gavin Scurr on 14 December 2016.

²⁵ See paragraph [16] of the statement made by Keith Rice on 8 December 2016. See also paragraph [41] of the statement made by Lynn Tonsig on 20 December 2016.

definition of *Horticulture Industry* was interpreted by the Full Bench of the Fair Work Commission in *Mitolo Group Pty Ltd v National Union of Workers*²⁶ (**Mitolo Decision**) to exclude Packing Work which occurs at Off-Site sheds. The decision displaced the generally accepted position.

27. It is the NFF's submission that this interpretation unduly limits the operation of the Horticulture Award.
28. In the Mitolo decision²⁷ the Commission was particularly mindful of the observation of the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in its Award Modernisation decision of 3 April 2009 that:

[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."
29. However, it is the NFF's submission that the expression should not be taken literally to mean a physical or geographical division between land on which crops are grown (or livestock is reared) and other areas. We refer to the submissions made by Australian Industry Group on 23 December 2016 (and the evidence tendered in support of those submissions²⁸) in this regard, and submit that the expression "farm gate" is ordinarily used to distinguish the interests/activities of farmers and farming operations from the interests/activities of other bodies which have a role in the food supply chain such as processors and retailers.
30. Indeed, it may be noted that Full Bench of the AIRC used the expression "farm gate" in quotes in its Award Modernisation decision, suggesting that it is not to be taken literally. Furthermore, the transcripts of the proceedings during award modernisation suggest that the expression "farm gate" is used more loosely. The first use of the term in the transcript of the proceeding is as follows:

I think there is an issue that emerges and the AWU will obviously have to join with this soon, as to the extent to which processing, if you like, falls within the scope of this consultation or whether or not, without being precise about it, just as a very, very

²⁶ [2015] FWCFB 2524.

²⁷ Ibid at [46].

²⁸ See paragraph [44] to [49] of the statement of Bryan Robertson dated 22 December 2016.

general and sort of descriptive way for convenience, the *farm gate* versus the manufacturing or processing of agricultural or horticultural production.²⁹

Commissioner Lewin is expressly using the expression “farm gate” loosely to distinguish farming process from those “down-stream” industries dealing with produce such as manufacturing and processing. Although the meaning of the expression was not stable through the proceedings, it is our submission that this is more-or-less what the AIRC meant in confining the operation of the Horticultural Award to the “farm gate”. Indeed, the expression “farm gate” was next used in the proceedings by the representative of the NFF, Jenny Corkhill, to distinguish farming operations from cotton ginning irrespective of whether that ginning actually occurs on farming land or not.³⁰

31. It should also be noted that, irrespective of where it occurs, if the work which an employee does is not Packing Work³¹ then it would not fall within the award’s definition of *Horticulture Industry* or the notional coverage of the Horticulture Award.³² This is presently the case where a farmer employs a person to perform other non-horticultural duties (irrespective of whether those activities occur on harvest land or not); e.g. if a farmer engages an accounts manager then that employee’s employment will presumably be covered by the *Clerks—Private Sector Award 2010*. If an employee is not performing Packing Work³³ then the NFF would concede that another award could apply, and the operation of the Horticultural Award could be clarified to avoid it preventing the application of that other award³⁴.

32. All that being said, the modernisation process was focused on creating awards along industry rather than occupation lines. In her original request to the AIRC, the Minister stated that when

²⁹ Transcript of proceedings AM2008/14 on 27 November 2008 before Commissioner Lewin at [50].

³⁰ Ibid at [194]. Later, Ms. Corkhill made the point that the “NFF takes quite a strong view that ... another award shouldn't apply within the farm gate” (at [210]) while apparently cognizant that cotton ginning may occur on farming land and discouraging the AIRC from allowing the award to cover those (cotton gin) employees.

³¹ Or the “sowing, planting, raising, cultivation, harvesting, picking” of crops.

³² Whether or not the Commission grants our application to vary the award.

³³ Or the “sowing, planting, raising, cultivation, harvesting, picking” of crops.

³⁴ By, for example the operation of clause 4.9.

*modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate.*³⁵

Consistent with that focus the Horticulture Award should cover all activities within that industry, including packing, washing grading and sorting of crops.

Difficulties if Horticulture Award is not varied

33. If the NFF's application to vary to the Horticultural Award is not granted, it will have very significant impact on farmers.³⁶
34. The *Storage Service and Wholesale Award 2010 (the Storage Services Award)* is substantially less flexible than the Horticultural Award. It features more prescriptive engagement processes,³⁷ longer minimum periods of engagement,³⁸ does not allow for piecework agreements,³⁹ prevents lengthening (by agreement) of ordinary hours of work,⁴⁰ provides for higher and more frequent overtime and penalty rates, and increased pay rates generally.
35. Application of the Storage Services Award may result in additional labor costs where farmers are unable to adjust their operations to accommodate the inflexibility in the Storage Services Award. It will have a critical impact upon the farm's sustainability. For example, during the harvest season, a level 1 packing working who agrees to work 7 am to 5 pm on Monday to Friday and 9 am to 1 pm on Saturday and Sunday will work 48 hours of overtime under the Storage Service Award but no overtime under the Horticultural Award, resulting in an additional payment of approximately \$1,000.00 per worker.⁴¹

³⁵ Paragraph [4] of *Request under Section 576C(1) — Award Modernization*, Julia Gillard, Minister for Employment and Workplace Relations, made 28 March 2008.

³⁶ See paragraph [20] of the statement made by Gavin Scurr on 14 December 2016. See also paragraphs [22] to [23] of the statement made by John Dollison on 23 December 2016.

³⁷ For example, cl 11 of the Storage Services Award, which requires an employer to agree on regular patterns of work with the employee; compare cl 10 of the Horticultural Award which merely require the employer to inform the employee of the ordinary hours of work.

³⁸ Clause 11.4 of the Storage Services Award.

³⁹ Clause 15 of the Horticultural Award.

⁴⁰ Pursuant to clause 22 of the Horticultural Award the ordinary 152 hours over four weeks, which are ordinarily worker 8 hour days Monday to Friday between 6 am and 6 pm, can be worked 12 hour shifts Monday to Saturday with no set starting or finishing times. Clause 22.1 of the Storage Services Award is considerably more restrictive, providing that, by agreement the ordinary 38 hour week may be worked in 10 hour (rather than 8) shifts Monday to Friday.

⁴¹ Based on a weekly rate of \$736.40, 2 hours at time and a half and the remaining 46 hours at double time.

36. Irrespective of whether the packing sheds are owned by the farmer's business, by a related company, or owned wholly by or in cooperation⁴² with another(s), the costs increase will be felt by all farmers who use off-site packing sheds. Those increases will be particularly significant given that farmers are "price takers"⁴³ and most farmers are small⁴⁴ family run businesses⁴⁵ and so are less able to absorb the additional costs or pass them on to the market.
37. Furthermore, employees doing the Packing Work at Off-Site sheds will be covered by a different award to their co-workers at packing sheds on harvest land despite the fact they do the same work for the same employer.⁴⁶ That outcome is not only ludicrous, but the inconsistency will be difficult for farmers to administer, particularly where employees change work-sites during a shift. Terms and condition of employment, including rates of pay, could change mid-shift. Indeed, it may result in management problems where employees prefer to be covered by one award to another. It may even result in the absurd and artificial situation of farmers planting an orchard (even if unproductive) on land which is occupied by a packing shed and is otherwise Off-Site in an effort to convert it into harvest land and thereby trigger coverage of the Horticulture Award.
38. Finally, it may be noted that if Packing Shed Workers believe that their rates of pay under the Horticulture Award are inappropriate because they are too low, then it is open to them to apply to have the rate changed via the annual wage review process.

FW Act Provisions

39. Under s. 156 of the FW Act, the Commission must conduct a 4 yearly review of modern awards "to ensure that they maintain a relevant and fair minimum safety net

⁴² See for example paragraph [4] of the statement made by Phillip Turnbull on 19 December 2016.

⁴³ As accepted by the Full Bench of the Commission in its recent decision on the review of the Casual Employment and Part-time Employment Common Issues (AM2014/196 and AM2014/197); see [2017] FWCFB 3541 at [749(1)].

⁴⁴ 98% of Australian farmers have less than 19 employees: Australian Bureau of Statistics, 2016, Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016, cat. no. 8165.0, viewed 28 July 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202012%20to%20Jun%202016?OpenDocument> .

⁴⁵ See, for example, paragraph [2] of the statement made by Gavin Scurr on 14 December 2016 and paragraph [2] of the statement made by Brett Guthrey on 17 December 2016.

⁴⁶ See paragraph [13] of the statement made by John Dollison on 23 December 2016.

and continue to be relevant to the needs and expectations of the community.”⁴⁷ The modern awards objective applies to the review.⁴⁸

40. Pursuant to s. 157(1) of the FW Act the Commission may only vary an award if it is satisfied that the variation “is necessary to achieve the modern awards objective”. In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (SDA v NRA (No 2))* Tracey J considered the proper construction of s. 157(1). His Honour observed that “it may be accepted” that there is a distinction between what is necessary and what is desirable, but his Honour also noted that the power to vary an award is discretionary in nature and that “it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable.”⁴⁹
41. Section 134 of the FW Act contains the modern awards objective and provides that modern awards must provide a ‘fair and relevant minimum safety net of terms and conditions’ of employment, taking into account certain criteria. The NFF notes the following:
 - a. Pursuant to subsection 134(1)(f), the Commission should take into account “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”.
 - b. Pursuant to subsection 134(1)(g), the Commission should take into account “the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards”.
 - c. Pursuant to subsection 134(1)(h) the Commission should take into account “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy”.

In the NFF’s submission these objectives would not be met if Horticulture farmers and their employees were not covered by the Horticulture Award. As indicated above, the requirement to apply the another award, such as the Storage Services Award, to

⁴⁷ Ms Gillard Second Reading Speech on 25 November 2008.

⁴⁸ [2014] FWC 1788 at paragraph [60].

⁴⁹ [2012] FCA 480 at paragraph [46].

horticultural business would frustrate productivity and create unreasonably onerous employment costs given the needs for high volume labour within a relatively confined time frames. Farmers would not be able to afford to employ workers and/or their businesses would not be able to grow, stagnate or fail. In the NFF's submission this outcome would not be consistent with subs (1)(f) to (h) of the FW Act.

Ben Rogers

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